



Ministry of  
**JUSTICE**

# **The Human Rights Act 1998: the Definition of “Public Authority”**

Government Response to the  
Joint Committee on Human Rights’  
Ninth Report of Session 2006-07

October 2009



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Government Response to the Joint Committee  
on Human Rights’ Ninth Report  
of Session 2006-07

Presented to Parliament

by the Lord Chancellor and Secretary of State for Justice  
by Command of Her Majesty

October 2009

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## The Human Rights Act 1998: the Definition of “Public Authority”

## Introduction

1. Section 6 of the Human Rights Act 1998 places a duty on public authorities not to act incompatibly with certain rights and freedoms drawn from the European Convention on Human Rights (ECHR). The Act does not define absolutely the words “public authority”. Since the Act came into force in 2000, there have been a number of judicial decisions about who is and is not a public authority for the purpose of this duty; some people think some of these decisions have been wrong, or contrary to the original intention of Parliament or the Government. Following the lead decision on the subject, the House of Lords’ judgment in *YL v Birmingham City Council and others*<sup>1</sup>, further legislation was used to clarify the definition in relation to the provision of publicly-arranged residential social care.
2. The Parliamentary Joint Committee on Human Rights has held two inquiries into this subject. This Paper responds to later of these, the Ninth Report of Session 2006-07 entitled *The Meaning of Public Authority under the Human Rights Act*<sup>2</sup>. The Joint Committee’s earlier report, their Seventh Report of Session 2003-04<sup>3</sup>, had the same title; to distinguish it, this earlier Report is described as “the 2004 Report” when mentioned in this Paper.
3. This Paper has four main sections. The first section explains in more depth the issue to which the Joint Committee’s Report and this Paper relate, and the second section notes some developments subsequent to the publication of the Joint Committee’s Report. The third section contains some general comments from the Government about the issue, and the final section responds in turn to each of the recommendations made by the Joint Committee in its Report. Two relevant legislative provisions are reproduced in an annex at the end of this Report.

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<sup>1</sup> [2007] UKHL 27; available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070620/birm-1.htm>

<sup>2</sup> <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/7702.htm>

<sup>3</sup> <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/3902.htm>

4. This Paper is not a formal consultation paper. However, if you would like to comment on or ask a question about an issue raised in this paper, the Human Rights Division of the Ministry of Justice may be able to help. Please note, however, that they are not able to give legal advice, nor advice about specific circumstances. To contact the Human Rights Division, you can:

- e-mail [humanrights@justice.gsi.gov.uk](mailto:humanrights@justice.gsi.gov.uk);
- leave a telephone message on 020 3334 3734; or
- write to

Human Rights Division  
Ministry of Justice  
5<sup>th</sup> Floor Area 5.16  
102 Petty France  
London SW1H 9AJ

## The Human Rights Act 1998 and “public authority”

5. The European Convention on Human Rights<sup>4</sup> (ECHR) is an international treaty under the auspices of the Council of Europe. The United Kingdom was one of the countries that drafted the Convention, and was one of the first countries to ratify it in 1951. The Convention came into force in 1953. Article 1 of the Convention requires States “to secure to everyone within their jurisdiction the rights and freedoms defined in... this Convention”. Those rights and freedoms include:
- the right to life;
  - the prohibition of torture and inhuman and degrading treatment;
  - the prohibition of slavery and forced labour
  - the right to liberty and security;
  - the right to a fair trial;
  - the prohibition of retrospective criminal penalties;
  - the right to private and family life;
  - the freedom of thought, conscience and religion;
  - the freedom of expression;
  - the freedom of assembly and association;
  - the right to marry;
  - the right to free enjoyment of property<sup>5</sup>;
  - the right to education<sup>5</sup>;
  - the right to free and fair elections<sup>5</sup>; and
  - the prohibition of discrimination in the protection of the other rights.

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<sup>4</sup> Available at <http://www.echr.coe.int> under “Basic Texts”

<sup>5</sup> These three rights are included in the First Protocol to the Convention. A protocol is a further treaty that augments the provisions of the original Convention, which States that have ratified the main Convention can choose whether or not also to ratify.



## The Human Rights Act 1998: the Definition of “Public Authority”

6. The Human Rights Act<sup>6</sup> was enacted in 1998, and came into force in October 2000. It gives further effect in United Kingdom law to certain rights and freedoms drawn from the ECHR, including all those listed above; these rights are called the Convention rights. The Act gives further effect to the Convention rights in three main ways.
7. First, under section 19 of the Act, the Minister in charge of a Government Bill must make a statement about the compatibility of the Bill with the Convention rights upon the introduction of the Bill into each House of Parliament.
8. Second, section 3 of the Act requires all courts and tribunals to interpret all legislation, so far as possible, in a way which is compatible with the Convention rights. The Human Rights Act does not allow the courts to “strike down” Acts of Parliament, thus respecting Parliamentary sovereignty. Certain higher courts can however indicate their view to Parliament that an Act of Parliament is incompatible with the Convention rights by means of a declaration of incompatibility (section 4 of the Act) but it remains for the Government to make proposals to Parliament to change the law.
9. Third, section 6 of the Act<sup>7</sup> makes it unlawful for a public authority to act in a way which is incompatible with a Convention right; an exception to this is if the public authority is giving effect to incompatible primary legislation, or if primary legislation does not allow the public authority to act differently. Proceedings may be brought under section 7 of the Act if a public authority acts, or proposes to act, in an incompatible manner. These proceedings may be brought by anyone who is, or would be, a victim of the action or proposed action.
10. The words “public authority” for the purposes of section 6 are defined in section 6(3) as including courts and tribunals, and “any person certain of whose functions are functions of a public nature”. The two Houses of Parliament are expressly excluded from being public authorities, as is any person exercising a function in connection with proceedings in Parliament.

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<sup>6</sup> <http://www.opsi.gov.uk/acts/acts1998/19980042.htm> ; for more information about the Act in general, see *A Guide to the Human Rights Act 1998* 3<sup>rd</sup> edition (October 2006) available at <http://www.justice.gov.uk/guidance/docs/act-studyguide.pdf>

<sup>7</sup> The text of section 6 is included as an annex to this Paper.

11. Section 6 has been interpreted as creating two categories of public authorities. “Core” public authorities are required to act compatibly with the Convention rights in all that they do. Examples of core public authorities include Government departments, local authorities, the police, the National Health Service, state schools, prisons and probation services.
12. Under section 6(3)(b), those who are not core public authorities can also be required to act compatibly with the Convention rights when they are exercising a “function of a public nature”; these are called “functional” public authorities<sup>8</sup>. Section 6(5) of the Act expressly provides that a person who is exercising a “function of a public nature” is not a public authority in relation to a particular act if the nature of that act is private. Thus, for example, a private security company can be subject to the act in relation to certain actions it takes in managing a private prison, but would not be subject to the act in respect of its human resources decisions (as the nature of the act is private) nor in respect of security work it undertakes on behalf of a private financial institution (as that is not a function of a public nature).
13. Section 6 was drafted in this way to reflect the changing nature of public service provision. At the time that the Act was drafted, privatisation and contracting-out had already increased the role of the private, charitable and voluntary sectors in delivering public services; this trend has continued since. Section 6 was therefore intended to reflect that, where certain public services were not directly provided by the State, the provider of the service would still be required to provide the service in a way that is compatible with the Convention rights.
14. It should be noted that section 6 does not however represent any departure from the fundamental principle that binding human rights obligations govern the relationship between the individual and the State; this is the principle that also underpins the ECHR. It is for this reason that purely private relationships – for example, a private contract between an individual and a company for the provision of a service – are not subject to the Human Rights Act, even where the service is one which the State can also provide.

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<sup>8</sup> They have also been called “hybrid” public authorities: the Government, like the previous Joint Committee, considers this description unhelpful, as it focuses on the nature of the body rather than the nature of the function.

### The influence of judicial review

15. Before the enactment of the Human Rights Act, the distinction between “public” and “private” had been encountered primarily in UK law in reference to the concepts of “public bodies” and “public functions” for the purposes of judicial review. Judicial review is the means by which individuals, businesses and others groups can challenge the lawfulness of decisions made by public bodies such as Government department and local authorities through the supervisory jurisdiction of the High Court in England, Wales and Northern Ireland, and the Court of Session in Scotland<sup>9</sup>.
16. Until relatively recently, only bodies that derived their power from statute or the Royal prerogative were considered to be public bodies amenable to judicial review. The ambit of judicial review was therefore largely confined to ‘obvious’ state bodies such as central and local Government, courts and tribunals, the police and prisons. In the last 20 years, however, it has been accepted that private bodies performing activities which could be described as “public functions” could be subject to judicial review, even if the source of the body’s powers did not derive from statute or prerogative. The development of the “public functions” test brought a number of private bodies within the scope of judicial review and significantly extended the parameters of what could be deemed “public” in this context.
17. Unfortunately, it is not always clear from the case law which are the relevant criteria to determine whether a particular body is performing public functions. While some judgments focus on the nature of the specific activity being carried out (a functional approach), other judgments have focussed on the characteristics of the decision-making body (an institutional or relational approach).

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<sup>9</sup> For more about judicial review, see e.g. *Judicial Review: a short guide to claims in the Administrative Court*, House of Commons Library Research Paper 06/44, 28 September 2006, available at <http://www.parliament.uk/commons/lib/research/rp2006/rp06-044.pdf>

18. However, even when a defendant is deemed to be performing public functions – and is therefore a “public body” for the purposes of judicial review – the courts still need to be satisfied that the complaint is a “public law” claim. If the source of a body’s power is contractual, or if there is a contractual relationship between the claimant and the public body, it is unlikely that the courts will consider that the function is sufficiently “public” to come within the scope of judicial review. As a result, when a public body contracts out its functions to a private body, it is difficult to establish a claim for judicial review against the private body in respect of the discharge of those functions.
  
19. Statements made at the time of the Bill’s passage through Parliament reflected the fact that the case law on amenability to judicial review had provided a template on which section 6 was modelled, from which the scope of the Human Rights Act would develop. The then-Home Secretary, Jack Straw, said:

“We wanted to ensure that, when courts were already saying that a body’s activities in a particular respect were a public function for the purposes of judicial review, other things being equal, that would be a basis for action under the Bill...

“As with the interpretation of any legislation... it will be for the courts to determine whether an organisation is a public authority. That will be obvious in some cases, and there will be no need to inquire further; in others, the courts will need to consider whether an organisation has public functions. In doing that, they should, among other things, sensibly look to the jurisprudence which has developed in respect of judicial review.”<sup>10</sup>
  
20. However, at no point was it envisaged that the scope of the Human Rights Act would be anchored to that of judicial review. On the contrary, ministerial statements made clear that they intended the meaning of public authority under section 6 to be interpreted broadly. The Lord Chancellor said in the House of Lords:

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<sup>10</sup> *Hansard*, HC Deb, 17 June 1998, col. 410

“In developing our proposals in Clause 6 we have opted for a wide-ranging definition of public authority. We have created a correspondingly wide liability. That is because we want to provide as much protection as possible for the rights of individuals against the misuse of power by the state within the framework of a Bill which preserves parliamentary sovereignty.”<sup>11</sup>

### **Judicial interpretation of functional public authorities**

21. As set out below, the courts have adopted an interpretation of the definition of public functions which draws heavily on the judicial review jurisprudence by focusing mainly on the nature and characteristics of the body undertaking the function. This is in contrast to the Government’s preferred approach, which would focus mainly on the nature and characteristics of the function being performed, so as to assess whether the function is a function of a public nature, and whether the nature of the specific act is private.

#### *Poplar Housing*

22. The first significant consideration of the meaning of a functional public authority came in 2002 with the Court of Appeal decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*<sup>12</sup>. The issue was whether a housing authority, which was a limited company and registered charity, was performing public functions when providing rented accommodation on behalf of the local authority.
23. The Court held that the housing authority was exercising public functions. However, in doing so, the Court rejected a functional test based solely on the nature of the activities the body was performing. Instead, the Court reasoned that private bodies which contract with central or local government to provide services are not ordinarily bound by the Human Rights Act. In the Court’s view, Parliament did not intend such businesses to be bound by the Act unless some other factor could be identified which imposes a public character or “stamp” on the activities of the body in question. The factors the Court identified were:

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<sup>11</sup> *Hansard*, HL Deb, 24 November 1997, col. 808

<sup>12</sup> [2002] QB 48

- Whether the body exercises statutory powers;
  - Whether the body has special responsibilities to the public; and
  - The proximity of the relationship between the private body and the delegating “core” public authority.
24. The Court concluded that the third factor above was decisive on the facts of the case: Poplar had been created by the local authority to take transfer of its housing stock, was subject to guidance by the local authority, and had several board members who were also members of the local authority. The Court therefore considered that Poplar was “enmeshed” and “closely assimilated” with the local authority.
25. It is important to note that, although the Court held that Poplar was subject to the Human Rights Act, it did so not on the basis of the functions it carried out – the provision of accommodation to the homeless – but rather because of its institutional relationship with the local authority. In this respect, the Court was strongly influenced by the approach taken in judicial review cases which, as explained above, focuses on the nature of the body and the proximity of its relationship with central or local government.

*Leonard Cheshire*

26. The Court of Appeal adopted essentially the same “institutional” approach in the case of *Leonard Cheshire*<sup>13</sup>. In this case, the issue was whether a charitable body which operated care homes for the elderly was performing public functions.

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<sup>13</sup> *Callin, Heather and Ward v Leonard Cheshire Foundation* [2002] EWCA Civ 366

27. Relying heavily on judicial review jurisprudence, the Court of Appeal reiterated that private bodies which perform services for a governmental body under contract would ordinarily not be subject to the Human Rights Act. However, unlike in *Poplar Housing*, in this case there were no special features in the relationship between the local authority and the charity: the charity had simply contracted with the local authority to perform services that the local authority needed to be performed. Furthermore, the charity did not have any wider public responsibilities, nor was it exercising statutory powers. As a result, the Court concluded that section 6(3)(b) did not apply to the managers of the care home.

*Partnerships in Care*

28. In *R(A) v Partnerships in Care*<sup>14</sup>, the issue was whether the managers of a private psychiatric hospital were performing public functions when providing mental health care. The claimant had been detained in the hospital under the Mental Health Act 1983 and required treatment for a severe personality disorder. The managers of the hospital decided to cease the treatment the claimant required; she challenged this decision as being a breach of her Convention rights.
29. The Court noted that the private hospital was providing mental health care under contractual arrangements with the local authority. However, it nevertheless concluded that the private hospital was performing public functions. In reaching this conclusion, the Court noted that the hospital managers were subject to direct statutory duties which governed both the running of the hospital and admissions to it. The Court also noted the strong public interest in ensuring that those who were detained under the Mental Health Act received proper care and treatment. Importantly, however, the Court placed particular emphasis on the fact that the hospital had “important statutory functions” when compulsorily detaining patients suffering from severe mental disorders. The fact that the private hospital was exercising these coercive statutory powers led the Court to conclude that the hospital was performing public functions, notwithstanding that it was doing so under contractual arrangements with the local authority.

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<sup>14</sup> [2002] 1 WLR 2610

*Aston Cantlow*

30. The House of Lords first considered the definition of a functional public authority in *Aston Cantlow*<sup>15</sup>. The case concerned an action by a Parochial Church Council<sup>16</sup> (PCC) against the freehold owners of former rectorial land to enforce a liability which attached to the land for repairing the local parish church. It was accepted that the defendants would be liable for the repairs unless they could establish that the PCC was a public authority and that the PCC's conduct was unlawful under the Human Rights Act.
31. In addition to holding that that the PCC was not a core public authority, the House of Lords went on to consider whether the PCC was performing public functions when it enforced the liability of the landowners to make repairs to the church. The Court concluded that it was not.
32. In considering this issue, Lord Nicholls emphasised that that a wide definition of “public functions” should be favoured, which would further the statutory aim of promoting human rights protection. In determining whether a body was a “functional public authority”, their Lordships also stated that there could be “no single test of universal application”, but stressed that it was the nature of the *function* being performed which was determinative of functional public authority status, rather than the nature of the body itself, or the body’s relationship with central or local government. Importantly, the House of Lords also differed from the previous Court of Appeal judgments in emphasising that while the domestic case law on amenability to judicial review could provide guidance, it should not be used as the touchstone to identify whether a body is performing public functions under the Human Rights Act.

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<sup>15</sup> *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37

<sup>16</sup> The executive body of a Church of England parish, which is not to be confused with the parish council of a civil parish



33. However, despite seeming to advocate a broad and flexible approach to the functional public authority test, a closer analysis of the reasoning of the majority<sup>17</sup> suggested an approach which was just as narrow as previous judgments. As the church was open to the public and run for the benefit of all parishioners, their Lordships accepted that there was a public element in the enforcement of the landowner’s liability to pay for repairs to the building.
34. However, their Lordships reasoned that, whatever the wider purposes and benefits, the “particular act” in question was a private act which was essentially no different from the enforcement of a civil or contractual debt<sup>18</sup>. For this reason, the House of Lords held that the PCC was not performing public functions. Importantly, by making the nature of the specific act paramount and determinative, and by divorcing the act from its wider context, the judgment seemed to suggest that a body would never come within section 6(3)(b) unless it were exercising special powers.

*Hampshire Farmers’ Markets Ltd.*

35. Notwithstanding the apparent inconsistencies of approach between the earlier decisions of the Court of Appeal and that of the House of Lords in *Aston Cantlow*, the cases which followed *Aston Cantlow* did not display any significant departure from the conclusions or, in essence, the reasoning in *Poplar* and *Leonard Cheshire*. Indeed, it is noteworthy that *Aston Cantlow* did not mention the previous Court of Appeal decisions, thus leaving a degree of uncertainty about their status.

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<sup>17</sup> Lord Scott dissenting

<sup>18</sup> per Lord Nicholls at paragraph 16; per Lord Hope at paragraphs 63-64; per Lord Hobhouse at paragraph 89; per Lord Rodger at paragraph 172

36. For instance, in *R (Beer, trading as Hammer Trout Farm) v Hampshire Farmers' Markets Ltd*<sup>19</sup>, the question was whether a company set up by a local authority to run farmers' markets was exercising functions of a public nature when considering a licence application from a potential stallholder. The Court of Appeal held that it was. Importantly, and in seemingly in contrast to the views expressed in *Aston Cantlow*, Dyson LJ noted that the test for amenability to judicial review and the test for functional public authority status under the Human Rights Act would be the same, unless Strasbourg case law required a different approach.

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<sup>19</sup> [2003] EWCA Civ. 1056.

## Recent developments

37. The cases discussed above were the subject of wide and sustained criticism.<sup>20</sup> The thrust of the criticism was that the courts should have adopted a broad “functional” test under section 6(3)(b) of the Human Rights Act, which was capable of encompassing bodies which were performing important public services under contract. Instead, the courts had instead adopted a restrictive “institutional” test, thereby wrongly narrowing the scope of the Human Rights Act.
38. In their 2004 Report, the previous Joint Committee concluded that the combined effects of the decisions of the courts on section 6(3)(b) and the changing nature of private and voluntary sector involvement in public services meant that:
- “a central provision of the Act has been compromised in the way which reduces the protection it was intended to give to people at some of the most vulnerable moments in their lives”<sup>21</sup>
39. The Committee concluded however that it was premature to seek to amend the Act, which would potentially restrict its flexibility to adapt to the changing structure of public service delivery. Instead, it urged the Government to intervene in future cases to press upon the courts the need for a broad functional approach.

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<sup>20</sup> See, for example: Paul Craig, *Contracting Out, the Human Rights Act and the scope of Judicial Review* (2002) 118 LQR 551; E. Palmer, *Should public health be a private concern? Developing a public service paradigm in English Law* (2002) OJLS 663; K. Markus, *Leonard Cheshire Foundation: What is a public function?* [2003] EHRLR 92.

<sup>21</sup> Note 3 at page 3

### YL v Birmingham City Council

40. The Government took the opportunity to act in accordance with the Joint Committee’s recommendation in *YL v Birmingham City Council and others*<sup>22</sup>. The claimant was an elderly lady who required residential care, which the Council was under a statutory duty to arrange under the National Assistance Act 1948. The Council had entered into a contract with a private sector provider, Southern Cross Healthcare Ltd, and placed the claimant in one of Southern Cross’ care homes. When Southern Cross decided to terminate the claimant’s residency, she argued that the private care home was a functional public authority and that the eviction would breach her Convention rights. The House of Lords was therefore dealing with a similar set of issues to those the Court of Appeal had addressed in *Leonard Cheshire*.
41. Opinions in the House of Lords as to whether the care home was a functional public authority were sharply divided, and the case was decided by a margin of three to two. The majority held that it was not, and in doing so reaffirmed the earlier line of cases, including *Leonard Cheshire*, which established a narrow interpretation of section 6(3)(b). The majority gave several broad reasons why the private care home was not a functional public authority:
- The provision, as opposed to the arrangement, of care and accommodation for those who are unable to arrange it for themselves is not an inherently governmental function.
  - The care home was a company carrying out its activities for profit, pursuant to private law contracts.
  - The care home received no public funding, and enjoyed no special statutory or coercive powers.
  - The care home was at liberty to accept or reject residents as it saw fit, and could fix its fees in accordance with its commercial judgment.
42. When it comes to defining the current ambit of section 6(3)(b), it is noteworthy that the judgments of the majority contain three significant strands of reasoning:

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<sup>22</sup> See note 1, above

- A clear reluctance to allow public law values to impinge on private law contractual rights and the commercial interests of a private company<sup>23</sup>;
  - An emphasis on the nature of the private care home as an institution (“a private, profit making company”<sup>24</sup>); and
  - An emphasis on the institution’s motivation for performing the functions in question (a commercial, profit making motivation<sup>25</sup>).
43. Their Lordships acknowledged criticisms of earlier decisions, which focused too closely on the character of the body in question (an institutional test), rather than on nature of the functions being performed (a functional approach). However, the reasoning of the majority, outlined above, strongly suggests that the current ambit of section 6(3)(b) is still very much delimited by institutional and motivational factors which are influenced by judicial review jurisprudence and which have little to do with the nature of the function being performed.

#### **Section 145 of the Health and Social Care 2008**

44. The Government reversed the immediate consequences of the decision in *YL* in the Health and Social Care Act 2008. Section 145 of this Act<sup>26</sup> states that the provision of care and accommodation which is publicly arranged under the National Assistance Act 1948 (or similar provision in Scottish and Northern Irish legislation) is subject to the Human Rights Act 1998 as if it were a function of a public nature within the meaning of section 6(3)(b).

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<sup>23</sup> The majority were heavily influenced by the case law on judicial review which, as set out above, has exhibited a marked reluctance to allow public law obligations to encroach on private contractual arrangements.

<sup>24</sup> per Lord Mance at paragraph 116

<sup>25</sup> per Lord Scott at paragraph 31

<sup>26</sup> The text of section 145 is included as an annex to this Paper.

45. By virtue of the wording of subsection (1) of section 145, specifically the phrase “is to be taken for the purposes of”, the clause is what may be termed a “deeming provision”. The effect of this is that it does not have any wider impact on the interpretation of the words “function of a public nature” either in the Human Rights Act or in other statutory provisions in respect of which a similar formulation has been adopted. This means, with the exception of the specific functions to which the amendment refers, the principles derived from the speeches of the majority in *YL* remain binding case law for all other purposes when lower courts are considering the scope of section 6(3)(b) of the Human Rights Act.

## General comments

46. This section contains some general remarks by the Government about the Human Rights Act and the issue of its scope. The Government also comments about the nature and timing of this Paper and Joint Committee’s Report.

### The Human Rights Act and its scope

47. As noted previously, the purpose of the Human Rights Act was to “bring rights home” by allowing people to rely on their Convention rights before courts and tribunals in this country, and further to foster a culture of respect for human rights in public service delivery. The Government remains committed to the Human Rights Act, and is proud of its considerable successes in the nine years since it came into force.
48. In particular, section 6 of the Act has on the whole worked well. The nature of core public authorities is well understood, and human rights are increasingly being integrated into the work of public authorities. Section 6 represented a deliberately open approach to the scope of the Act, which allowed flexibility for development by the courts in the light of the changing contours of the public sector and public service delivery.
49. In the vast majority of cases the Human Rights Act has been applied where it was intended to apply, and it has effectively provided protection to some of the most vulnerable people in our society for over nine years. While the problems with the precise definition of “public authority” are frustrating, they should be allowed neither to detract from the overall success of the Act nor to give the impression that the scope of its protection has been significantly truncated: the problem with section 6 arises at the margins of the category of functional public authorities, and affects neither core public authorities nor many public functions.

50. In this context, there was a serious misconception about the extent of the effect of the *YL* judgment. Many people receiving publicly-arranged social care were under the impression that, as a result of *YL*, they had “lost their human rights”. Even before the legislative response to that judgment came into force, this was an incorrect assessment of the position. The rights of every person in the United Kingdom are secured by the European Convention on Human Rights, and every person may bring proceedings under the Human Rights Act. The issue addressed in *YL* was only whether those proceedings could be brought directly against the service provider in question.
51. The practical impact of the *YL* decision and its wider implications were nonetheless important, which is why the Government moved so quickly to respond legislatively to the judgment. The Government continues to consider the practical impact of the judgment in other sectors, and whether and how it should respond more broadly to ensure that the ability to bring proceedings under the Human Rights Act operates in the manner it intended.

#### **The Joint Committee’s Report and this Paper**

52. The Joint Committee’s Report was published in March 2007. As acknowledged in the Report and further discussed below, the Report was published while proceedings were ongoing in the House of Lords in the *YL* case, in which the Government had intervened as recommended in the 2004 Joint Committee Report.
53. It is now the usual practice of the Government to respond to Select Committee Reports within two months of their publication. In May 2007, Baroness Ashton of Upholland, then Minister for Human Rights, wrote to the Chairman of the Joint Committee with a preliminary response to the Report. In that letter, she acknowledged the Joint Committee’s views, including its change of view on the merits of a litigation-based approach to the issue, but considered that it was neither appropriate nor desirable for the Government to respond in detail to the Committee’s views while the judgment of the House of Lords was awaited. A similar indication was given to the Chairman of the Committee during the debate on the Second Reading of his Private Member’s Bill on the subject which took place the week before the *YL* judgment.



54. A period of intense engagement on this issue followed the *YL* judgment. Michael Wills, the Minister for Human Rights, wrote to the Joint Committee on the subject in August 2007, and discussed the subject and the Committee’s views at length in oral evidence before the Committee in November 2007. The Joint Committee followed up this evidence session by organising a “mini-conference” on the subject to discuss its Report.
55. Further to Mr Wills’ commitment at that mini-conference to consider whether a targeted legislative response could be brought forward by the Government to the *YL* judgment, an amendment was moved by the Government to the Health and Social Care Bill in the House of Lords. This amendment became section 145, which is discussed in the previous section of this Paper.
56. Given the number of occasions upon which the issues raised in the Joint Committee’s Report have been discussed with the Committee and debated with its members, and in light of the *YL* judgment and the Government’s legislative response, it is the Government’s view that it has already responded to most parts of the Joint Committee’s Report that remain relevant. The remaining part of the Report, which considers the case for wider legislative action, is a subject on which the Government remains committed to consulting in due course. Nevertheless, the Chairman of the Joint Committee has continued to press strongly for a consolidated response to the recommendations made in the Joint Committee’s Report. In light of this, the next section of the Report responds in turn to each of those recommendations.
57. The Government would in general take issue with the overall approach of the Joint Committee’s Report. As previously noted, the Government accepted and gave effect to the recommendations made by the previous Joint Committee in its 2004 Report, the foremost of which was that the Government should intervene in a suitable case before the higher courts to argue for a more functional approach to the interpretation of “public authority”. The final stage of proceedings in the *YL* case was pending at the time of the Joint Committee’s Report. While that intervention was ultimately unsuccessful, albeit by the narrowest possible margin, the Government continues to agree with the previous Joint Committee that it was the right approach to take.

58. The present Joint Committee in its Report indicated its scepticism that the approach recommended by its predecessors would be effective. It otherwise suggests in its Report that the Government lacked commitment to addressing the issue of the scope of the Human Rights Act, and had taken an inconsistent approach to the subject. While the present Joint Committee is of course entitled to disagree with the recommendations of its predecessors, it was not reasonable for the Joint Committee to criticise the Government for having worked to give effect to those recommendations.

## Responses to Joint Committee recommendations

59. In this section, the Government responds to the recommendations made by the Joint Committee in its Report<sup>27</sup>, grouped into broad thematic sections. Extracts from the Joint Committee’s Report are enclosed in boxes and, unless otherwise specified, paragraph references are to that Report. Although some recommendations from the Report are no longer relevant in light of subsequent events, these recommendations have been included and annotated accordingly.

### The development and state of the law

60. The Joint Committee in its Report set out its view about the intended and actual effects of section 6 of the Human Rights Act (HRA); this built upon a more developed account in its 2004 Report<sup>28</sup> of the case law at that time. The Government’s analysis of section 6 is set out in the first section of this Paper. The Joint Committee later in its Report expressed a range of concerns about how it perceived the state of the law.

*The JCHR said:*

We consider that [our predecessor Committee's] previous recommendations were capable of resulting in an effective solution. However, during the last three years, there has been little evidence of progress towards an approach that gives effect to what we consider to have been Parliament's original intention to bring rights home for everyone, including those who receive public services delivered by private bodies. In view of the continuing trend towards the outsourcing of public services and the continuing failure to fill the gap in human rights protection, we consider that it has now become a matter of some urgency to consider what action is necessary to bring about a solution.

*(Paragraph 11)*

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<sup>27</sup> See note 2, above

<sup>28</sup> See note 3, above

While we welcome the steps taken by the Government to persuade the courts to adopt a more functional interpretation of the meaning of public authority, we note that this strategy has so far proved unsuccessful: both the High Court and the Court of Appeal have refused to depart from the analysis in *Leonard Cheshire* without further guidance from the House of Lords. A significant number of submissions to our inquiry expressed their concern at the continuing state of uncertainty in our law. For example, Help the Aged has called the results of the Government's interventions thus far "deeply disappointing". We are similarly disappointed that the more institutional approach taken by the Court of Appeal in *Leonard Cheshire* continues to dominate the public function test for the purposes of Article 6(3)(b) HRA. (Paragraph 22)

61. The principal recommendation in the 2004 Report was that the Government should intervene in a suitable case before the higher courts to argue for a more functional approach to the interpretation of “public authority”. In fulfilment of this recommendation, the Government intervened in proceedings before the Administrative Court, Court of Appeal and the House of Lords; given that the final stage of these proceedings was pending at the time that the Joint Committee published its Report, the Committee’s disappointment was perhaps somewhat premature.
62. Nevertheless, as noted in the first section of this Paper, the House of Lords in the *YL* case declined by a narrow margin to accept the Government’s arguments. Given the time and effort devoted to this litigation, the Government was of course disappointed that this litigation did not resolve the issue in the way it hoped. Following this setback, however, the Government within a year identified a suitable legislative vehicle in which to reverse the main effect of the *YL* judgment; this legislative amendment came into force on 1 December 2008.

*The JCHR said:*

We find it increasingly unsatisfactory to rely on the Government's view of whether a particular body is a "public authority" when there is a real risk that their views will not be reflected in the decisions of the courts. We consider that, in the preparation of legislation that provides for the delegation of public functions, or contracting-out of public services, 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 the relevant services, and whether it is desirable to make it clear on the face of a Bill that a body is a public authority for the purposes of the HRA. While this uncertainty continues, we will continue to scrutinize closely the Government's assessment of the law and the human rights implications of any legislative provision for contracting-out. We will consider on a case by case basis whether to draw the attention of both Houses to any significant risk that the Convention rights of vulnerable people may be endangered as a result of the use of private providers to discharge public functions. (*Paragraph 66*)

63. As previously noted, the Joint Committee published its Report while proceedings were pending before the House of Lords in the *YL* case. That decision, and the Government's subsequent legislative response to it, has increased the clarity of the legal position, even if that legal position remains one which the Government finds somewhat disappointing. The Government notes, indeed, the limited number of occasions upon which the Joint Committee, in performing its legislative scrutiny work, has found any cause to raise the issue of the status of a contracted-out function.

*The JCHR said:*

It is unacceptable that service providers and commissioning authorities should continue to enter into contracts for the provision of essential public services without any clarity as to the legal position of the service provider under the HRA. (*Paragraph 67*)

64. As illustrated by the paucity of litigation on the subject, service providers and commissioning authorities are usually clear as the position of the function in question under section 6 of the Human Rights Act 1998.

*The JCHR said:*

We believe this ongoing uncertainty has a "chilling" effect and inhibits the development of a proactive approach to the mainstreaming of human rights standards in policy development and service delivery. It is unacceptable that providers of public services should remain uncertain about the scope of their responsibilities and obligations under the HRA, and that the HRA obligations required of contractors should be dependent on the willingness of a contractor to accept a particular degree of detail. We are deeply concerned that service users and their advocates may be inhibited in their use of human rights arguments in their dealing with private and other providers as a result of the continuing uncertainty in the law. (*Paragraph 69*)

65. The application of the Human Rights Act in most circumstances is clear, especially following the *YL* judgment. The Government therefore does not share the Joint Committee's negativity on this point.

*The JCHR said:*

In the light of developments in the case-law on the meaning of public authority, we are not reassured by the Government's confidence that the Courts would treat bodies exercising compulsory powers automatically as public authorities. We would be deeply concerned if any organisation exercising compulsory powers, such as powers of detention or powers involving the use of force, were not considered subject to the s.6 duty to act in Convention compatible way. (*Paragraph 72*)

66. No judicial decision has ever departed from the principle that the exercise of compulsory powers in the performance of a function strongly indicates that the function is one of a public nature for the purposes of the Human Rights Act. The Government therefore considers the Joint Committee's scepticism unfounded.

*The JCHR said:*

The current test adopted by the Court of Appeal means that in the case of most private providers, service users must invest significant time and effort to secure their Convention rights, with no guarantee of success. This is unrealistic in sectors that serve some of the most vulnerable persons in our society: the very young, the very old and those who lack mental capacity. This narrow approach seriously undermines the intention of Government - and, we believe, Parliament - that the HRA should provide an "ethical bottom line" for public authorities and should offer a framework for the resolution of problems and the improvement in the quality of services without resort to legal action.

*(Paragraph 76)*

67. The Court of Appeal test was of course superseded shortly after the Joint Committee's report by the decision of the House of Lords in *YL* which, as noted above, has increased the clarity of the legal position. Furthermore, the Government has legislated to clarify the position in respect of the provision of residential social care. This demonstrates the Government's commitment to furthering a human rights culture in public service delivery.

*The JCHR said:*

The cumulative effect is that even a resident who is capable of making a complaint that their Convention rights have been breached is likely to be without an effective remedy in domestic law. This gives rise to a significant risk of incompatibility with Article 13 ECHR, which guarantees access to an effective remedy for violations of Convention rights. For the service user, it means that only the European Court of Human Rights may be able to properly determine their complaint. We believe this is entirely at odds with the aim of the HRA to "bring rights home". *(Paragraph 81)*

We consider that the practical implications of the current case law on the meaning of public authority are such that some service users are deprived of a right to an effective remedy for any violation of their Convention rights, with a significant risk of incompatibility with the United Kingdom's responsibilities under Article 1<sup>29</sup> and Article 13 ECHR. We consider that the practical implications of the current case law for vulnerable service users are particularly stark. In the absence of any compelling evidence that the public services market would be undermined by the application of the HRA, we consider there is an urgent need for action to ensure that the HRA is applied as in our view it was intended by Parliament. (*Paragraph 83*)

68. While the Government is of the view that the decision in *YL* is less than ideal, the Joint Committee significantly exaggerates its implications. In particular, the Joint Committee has failed to consider the availability of any remedy other than a judicial remedy under the Human Rights Act, especially the extensive regulation of many of the sectors to which it refers, all of which needs to be taken into account when applying Article 13 of the European Convention on Human Rights<sup>30</sup>. Furthermore, the Joint Committee's view predated the Government's amendment to the scope of the Human Rights Act by means of the Health and Social Care Act 2008.

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<sup>29</sup> See paragraph 5, above

<sup>30</sup> Article 13 reads: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.



### Information about the law for the general public

69. The Ministry of Justice publishes a range of information and guidance about the Human Rights Act. For the general public, the key publication is the *Guide to the Human Rights Act 1998*<sup>31</sup>, of which the third edition was published in October 2006. This publication is updated approximately every four to five years to reflect changes in the law, and will be updated again in due course; the next edition will of course reflect the position as set out in the first section of this Paper. Given that the proceedings described above were ongoing at the time that the third edition was published, the explanation of section 6 noted that this area of the law was still developing, which the Joint Committee in its Report considered was “an accurate statement of the position in law”<sup>32</sup>.

*The JCHR said:*

We are concerned that, as the law stands, the only guidance that can be given on the important issue of whether a body should be considered a functional public authority for the purposes of the HRA is to seek further “specialist legal advice”. It is currently impossible for the Government, or any other body, to provide comprehensive and accessible advice on the application of the Human Rights Act. We consider that this represents a serious failure to achieve the aspiration of a human rights culture in which Convention rights are secured for individuals without the need for formal legal proceedings or the involvement of legal advisers. (*Paragraph 27*)

70. The *Guide*, in common with publications produced by other organisations, set out the broad principles of section 6 in a manner that would provide enough information for the majority of general readers, and that would cover most situations. Given the open drafting of section 6, and the extent of judicial guidance on its interpretation, it would be inappropriate for the Government to attempt to provide comprehensive information intended to obviate the need for legal advice tailored to individual circumstances.

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<sup>31</sup> <http://www.justice.gov.uk/guidance/docs/act-studyguide.pdf>

<sup>32</sup> At paragraph 25

*The JCHR said:*

We agree with our predecessor Committee that general guidance from Government on the meaning of public authority has very little potential to reduce the gap in human rights protection caused by the interpretation of "public authority" adopted by our domestic courts. However, we are concerned that inconsistent statements from central Government on the intended application of the HRA may create further uncertainty for service providers and others. Notably, we reiterate the view set out in our Report on the DCA and Home Office Reviews of the HRA, that the recent concerns expressed by the Lord Chancellor and DCLG about the effect of the application of the HRA on the social housing market represent a serious dilution of the original intention of Parliament when passing the HRA and the Government's view, more generally expressed, that providers of services which a public authority would otherwise provide are performing a public function and should therefore be bound by the obligation to act compatibly with Convention rights in s.6 HRA. (Paragraph 31)

71. The Joint Committee asserts that Parliament originally intended that all services that could be provided by a core public authority should be considered functions of a public nature for the purposes of the Human Rights Act even if provided by a private, charitable or voluntary organisation. There is no evidence in the Parliamentary debates to support this assertion, and it was not then, nor is it now, the Government's intention. While there are indeed certain functions that, in the Government's view, remain public in nature even when performed by a private, charitable or voluntary organisation, the assessment of the nature of a function needs to take into account more than just the question whether it is a function that a core public authority would otherwise provide. Indeed, the logical conclusion of the view attributed to the Government by the Joint Committee is absurd, and would include many functions that the Government clearly stated that it intended not to be subject to the duty under section 6.

72. There is no evidence that Parliament gave any considered view during the passage of the Human Rights Bill as to whether the provision of social housing is a function of a public nature. The Government’s view at this time is that the provision of housing by a landlord is not inherently a function of a public nature, even though a local authority can also arrange for the provision of housing. One needs instead to consider in the round the features of the function of providing social housing. On this basis, the Government’s view is that the balance of these features indicate that it is not a function of a public nature. To reach this conclusion based on this reasoning is not at all incompatible with the position that the Government has consistently taken on the interpretation of section 6 of the Human Rights Act, including before the House of Lords in the *YL* case.

The JCHR said:

We note the most recent statements of the Prime Minister and other senior Ministers that appear to confirm that the Government considers that the HRA should apply more broadly to those providing a public service. However, the Government’s inconsistency on this issue seems entirely at odds with its recent campaign for the HRA, “Common Values, Common Sense”, which makes a commitment to making the operation of the HRA accessible and straightforward and to making a positive case for the public’s engagement with the HRA. (*Paragraph 32*)

73. As explained above, the inconsistency perceived by the Joint Committee did not and does not exist. The Government’s position was therefore entirely compatible with the “Common Values, Common Sense” campaign.

### Guidance about section 6 for public authorities

74. In May 2004, the former Office of the Deputy Prime Minister (ODPM)<sup>33</sup>, with the assistance of the former Department for Constitutional Affairs (DCA)<sup>34</sup>, issued to local authorities the *Guidance on contracting for Services in the light of the Human Rights Act 1998*<sup>35</sup>. This guidance was directed at those officials in local authorities engaged in the procurement from the private, charitable and voluntary sectors of public services, particularly social care services. The dissemination of this guidance fulfilled a further recommendation given by the previous Joint Committee in its 2004 Report; however, the present Joint Committee in its Report took issue with this guidance.
75. Following the amendment of the law by section 145 of the Health and Social Care Act 2008, this guidance no longer applies to the procurement of residential social care by local authorities, as this function has been prescribed as being a function to which section 6 of the Human Rights Act applies.

*The JCHR said:*

We are concerned that the Guidance on contracting for services in the light of the HRA takes a very negative approach to the difficulties facing the use of contracts to secure better the protection of human rights. It appears to have been drafted very much from the perspective of securing maximum flexibility for public procurement, by securing the best price or by ensuring that providers, including small and medium sized businesses, stay in the public services market. This approach dissuades procurement officers from taking a positive approach to the protection of human rights.

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<sup>33</sup> These responsibilities now fall to Communities and Local Government (CLG).

<sup>34</sup> Upon the dissolution of DCA in May 2007, its responsibility for the Human Rights Act was taken over by the Ministry of Justice.

<sup>35</sup> <http://www.communities.gov.uk/documents/localgovernment/pdf/142577.pdf> , as republished in November 2004

Furthermore, we are concerned that the Guidance suggests that HRA obligations required of contractors are dependent on the willingness of the contractor to accept a particular degree of detail, that no model process is recommended and that no guidance is given on how to identify whether a particular service is likely to engage the HRA. (*Paragraphs 45-46*)

76. Officials responsible for public procurement have a range of considerations to take into account when negotiating for the provision of services, including achieving value for money and reaching an agreement with the intended provider of services. In addition, it is important that small- and medium-sized businesses, as well as charitable and voluntary sector organisations where appropriate, are able to compete for contracts to provide public services. These officials, or the lawyers assisting them, will be familiar with the statutory framework, including the Human Rights Act, relevant to the contractual negotiation in question. The guidance, which was directed towards this specialised audience, took these important considerations into account.

*The JCHR said:*

We consider the Guidance to be badly written, difficult to follow, and to have suffered from a lack of publicity. (*Paragraph 48*)

We are concerned that the Guidance prepared by the Government on contracting and the HRA lacks accessibility and is difficult to understand. The Guidance is written in highly technical language. It is hard to find, hard to follow and does not give any practical examples of how purchasing authorities can engage with contractors to protect human rights. (*Paragraph 49*)

77. As noted previously, the guidance was aimed at a specialised audience for a specific purpose; it was not intended to be accessible to a general audience, for whom the Government produces other publications. As the Joint Committee itself noted, “service providers and their representatives told us that the Guidance represents a ‘satisfactory approach’”<sup>36</sup>.

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<sup>36</sup> At paragraph 47

*The JCHR said:*

The Guidance on contracting and human rights is now over a year old. It does not appear that there are any mechanisms in place to monitor whether the Guidance has any impact on procurement practice. We are concerned that early indications show that local authorities are generally unaware of the Guidance and that the Guidance has had little or no influence on their procurement policy. (*Paragraph 53*)

78. Given the range of considerations that procurement officers must take into account when contracting for services, it would be difficult to separate out the impact of this from other guidance without an extensive study.
79. The “early indications” on which the Joint Committee relies were, as noted in its Report, “an informal survey of senior staff in six local authorities”<sup>37</sup>, presumably in relation only to social care services. Five of those six senior staff were aware of the need at that time to take into account human rights in contracting for services. However, as the Joint Committee is aware, the Government has since then continued to provide wide-ranging guidance about human rights to public authorities<sup>38</sup>. Furthermore, in respect of the provision of residential social care, the need for any specific contractual provision has now been obviated by the provision noted above in the Health and Social Care Act 2008.

*The JCHR said:*

Without the use of model, or standard, contract terms, we consider that any Guidance on contracting will not produce a more consistent approach to public services commissioning and human rights. (*Paragraph 56*)

80. Given the detailed processes by which public services are commissioned, the Government remains unconvinced that a model contract term would have significantly assisted the target audience of this guidance.

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<sup>37</sup> At paragraph 51

<sup>38</sup> See, in particular, *Human Rights: Human Lives*, available at <http://www.justice.gov.uk/guidance/docs/hr-handbook-public-authorities.pdf>

*The JCHR said:*

We are concerned that major Government initiatives on human rights and on procurement for the provision of public services continue without reference to the implications of the HRA for private sector bodies performing public functions. We do not consider that any Guidance on contracting for public services and human rights can have any significant positive impact on the protection of human rights if it is not mainstreamed. (*Paragraph 58*)

81. As noted above, no contract specification is now required in respect of the commissioning of residential social care. In other contexts, the Government would expect officials responsible for procurement to be aware and take note of the range of guidance provided to them.

*The JCHR said:*

We consider that without further significant joint efforts on the part of the Department for Constitutional Affairs and the Department for Communities and Local Government, this Guidance will continue to fail to have any significant impact on the protection of human rights. (*Paragraph 59*)

82. The Government is satisfied that the guidance has fulfilled the purpose for which it was prepared. As noted, it is no longer of relevance in a significant field of public procurement, but it remains available as a source of information for officials engaged in public procurement. The Government therefore finds the Joint Committee's negativity about its predecessors' recommendation surprising, and does not share the present Committee's view.

*The JCHR said:*

We reiterate the conclusions of the first MPA report. Human rights cannot be fully and effectively protected through the use of contractual terms. While Guidance may be useful as a "stop-gap" to reduce the adverse impact of the narrow interpretation of the meaning of public authority on service recipients, this Guidance cannot be a substitute for the direct application of the HRA to service providers. In any event such Guidance cannot provide any valuable protection to service users if it is not based on a clear commitment to mainstreaming human rights, written in accessible language and accompanied by practical guidance to commissioning authorities. (*Paragraph 60*)

83. The Government entirely agrees that, where the Human Rights Act should apply directly to the performance of a certain function, the protection of human rights by means of the procurement contract is a poor second-best; in issuing the guidance on this subject, it was nevertheless following the recommendation of the previous Joint Committee. As previously noted, the Government has in the field of residential social care taken legislative action to ensure that its provision on behalf of a local authority is considered a function of a public nature for the purposes of the Human Rights Act. On the Joint Committee’s repetition of its other criticisms, the Government reiterates its rejection of them for the reasons given above.

*The JCHR said:*

We recommend that the relevant Government Departments, in particular the Department for Constitutional Affairs and the Department for Communities and Local Government, work together to conduct an urgent review of the impact of the existing Guidance. We recommend that urgent attention be given to revising the existing Guidance to incorporate practical, accessible advice to all commissioning bodies. (Paragraph 119)

84. For the reasons given in the preceding paragraphs, the Government rejects the Joint Committee’s recommendation.

*The JCHR said:*

The principal and most easily remedied criticism of the existing Guidance concerns its inaccessibility and complexity. We recommend that any new Guidance is prepared in consultation with relevant NGOs, including representatives of service providers and service users, and the Local Government Association. It should be accessible and should provide practical examples of how human rights may be engaged during the delivery of public services, how the protection of human rights during the procurement and commissioning stages can benefit service users and service delivery and should be accompanied by adequate training for commissioning authorities. (Paragraph 120)

85. As noted above, the guidance was written in terms that would be understood by its specialist audience. The Government has no plans to rewrite it for a more general audience.



*The JCHR said:*

We recommend that the relevant Government departments take into account the research completed by the Office of the Third Sector on the use of template social clauses to assist and focus their use in contracts for public services with voluntary and not for profit bodies. We recommend that urgent attention be given to the development of similar template clauses for the purpose of supplementing any future guidance on human rights and contracting for public services. (*Paragraph 122*)

86. For the reasons given above, and especially the diversity of services which may be procured, the Government does not consider that a model clause would be of any great assistance in this particular context.

*The JCHR said:*

We stress that these measures will not be an effective substitute for the direct application of the HRA as Parliament intended and should not be treated as such. (*Paragraph 123*)

87. The Government notes the Joint Committee’s repetition of this view.

### **The position of service providers**

88. A number of service providers from the private, charitable and voluntary sectors, and their representative organisations, gave evidence to the Joint Committee about their concerns if they were in future to be considered to be providing a function of a public nature for the purposes of section 6 of the Human Rights Act. Some of these providers indicated that they may consider ceasing to provide a public service were the Human Rights Act to apply to the provision of that service. The Joint Committee summarised these concerns as including:

the risk of increased litigation, increased administrative burdens and the risk that providers with a particular religious ethos might be required to act in a manner incompatible with their beliefs and freedoms guaranteed by Article 9 ECHR<sup>39</sup>.

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<sup>39</sup> The freedom of thought, conscience and religion

89. Having specifically asked for information about these concerns, the Joint Committee in its Report dismissed them all. The Government agrees that some of these concerns are exaggerated and overstated. However, the Government must also take into account the need to maintain a functioning market for the provision of public services, and hence appreciates the importance of providing reassurance to current or potential service providers.

*The JCHR said:*

We do not accept the argument that application of the HRA to the delivery of public services by the private sector would add little to the protection of human rights of vulnerable service users. On the contrary, we consider that the direct application of the HRA to private service providers would improve the protection of the human rights of service users by placing a direct duty on such service providers to act in a Convention compatible way. While regulatory and inspection regimes clearly play a very important role in ensuring the rights of service users and the quality of public services, they cannot be treated as a substitute for directly enforceable Convention rights under Sections 6 and 7 of the HRA. (Paragraph 95)

90. The Government agrees with the Joint Committee that regulatory and inspection regimes are not a substitute for direct enforceability of the Convention rights where the Convention rights are intended to apply directly. However, the detail and extent of regulation and the nature of the service provided in many sectors means that a judicial remedy under the Human Rights Act should be a last resort only in exceptional cases. In particular, the regulatory regime in any given sector will reflect in its standards the principal practical applications of the Convention rights.

*The JCHR said:*

We are concerned that service providers are unaware of the operational benefits offered by adherence to Convention rights. A significant proportion of the evidence that we received on this issue from service providers and their representatives focused on the perceived administrative burdens and the risk associated with the application of the HRA to their activities. We are also concerned that the Government's recent change in approach to this issue has encouraged these fears in the private sector. (Paragraph 97)

91. The Joint Committee’s call for evidence specifically asked “whether private providers would leave the market if they were ‘public authorities’ for the purposes of the Human Rights Act 1998”. It is therefore unsurprising that the evidence received by the Joint Committee focussed on the risks rather than the benefits of the application of the Human Rights Act. As previously noted, the Government’s position on this issue, properly understood, has remained entirely consistent.

*The JCHR said:*

We re-iterate that the right to manifest a religious belief- in contrast with the freedom of conscience to hold a religious belief - is not absolute, and must be weighed against the individual rights of service users. Proportionate interferences are in principle possible to protect the rights of others. Any exemption from recognition as a functional public authority for religious providers would need to be justified as necessary to meet the more narrow right of religious organisations to freedom of conscience. (*Paragraph 101*)

92. The Government agrees with the Joint Committee.

*The JCHR said:*

We note that service providers are concerned that they would be precluded from relying on their own Convention rights as functional public authorities. We consider that this concern is not well founded and should not affect any assessment of whether service providers would be motivated to leave the market should they be identified as "functional public authorities". (*Paragraph 102*)

93. In assessing this argument, the Joint Committee failed to consider the extensive *obiter* comments in support of it made by Lord Justice Buxton in the Court of Appeal judgment in *YL v Birmingham City Council and others*<sup>40</sup>. The Government respectfully disagrees with Lord Justice Buxton’s view: while it is not possible for a person or organisation to be subject to the duty under section 6(1) and to rely at the same time on their Convention rights, in practice the provision in section 6(5) that disapplies the duty in section 6(1) in respect of an act that is private in nature would prevent any such conflict occurring. Given the judicial arguments underpinning the service providers’ arguments, it is however unfair for the Joint Committee to dismiss this concern peremptorily as “not well founded”.

*The JCHR said:*

After giving it careful consideration, we find that the evidence from service providers and their representatives does not support the conclusion that a significant number of providers would leave the market if they were considered "functional" public authorities. We note that none of the service providers or their representatives told us that, should they be subject to the s.6 duty to comply with the Convention rights, they would definitely leave the market.  
(Paragraph 103)

94. Given the nature and extent of the concerns expressed by service providers, the Government considers it important to engage with them to assuage their concerns.

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<sup>40</sup> See note 1, above

*The JCHR said:*

We have not seen any convincing evidence that providers would leave the public services market if they were subject to the duty to act compatibly with Convention rights. We are deeply concerned that the Government continues to encourage trepidation about the application of the HRA amongst private providers by expressing premature and unsupported concerns about market flight. General statements by Government departments on the risk posed by the application of the HRA to the provision of public services are entirely at odds with the aim of the Government's campaign to educate public authorities and the public in the benefits of the Act. We encourage the Government, in the course of their current work on the implementation of the HRA, to take steps to educate and inform all service providers about the service delivery benefits of the application of the Act, not only those which are "pure" public authorities.

*(Paragraph 105)*

95. The Government has never encouraged trepidation about the effect of the application of the Human Rights Act, and sets out in its various publications the benefits for service delivery of the application of a human rights-based approach, whether or not a legal duty applies. However, the Government is aware of the concerns of service providers and considers it important to engage with them to assuage those concerns. The Government therefore entirely refutes the Joint Committee's allegations.

#### **Other relevant Government action**

96. On the basis of the views expressed by a small number of witnesses, the Joint Committee expressed its opinion on the relationship of the issue of the scope of the Human Rights Act to the Discrimination Law Review and the “Common Values, Common Sense” campaign. The former was the precursor of the Equality Bill currently before Parliament, and the latter formed part of the Government's ongoing promotion of a human rights culture in public service delivery.

*The JCHR said:*

We consider that the timing of the Discrimination Law Review strengthens the need for urgent and clear action by the Government to reverse the narrow interpretation of "public authority" adopted by the courts in Leonard Cheshire. If Parliament is soon to be asked to consider the definition of a "functional public authority" in the context of positive duties in a new Single Equality Act, we consider that it is vital that the uncertainty surrounding the meaning of public authority for the purposes of the Human Rights Act is settled. (Paragraph 108)

97. The Equality Bill adopts an approach to the concept of a "public authority" appropriate to the obligations in question. The Joint Committee's recommendation has otherwise been overtaken by subsequent events.

*The JCHR said:*

We welcome the Government's new Common Values, Common Sense campaign for the HRA and their renewed commitment, following the recent DCA and Home Office reviews, to the development of a "human rights culture" within the UK. We reiterate our view that the protection of individual human rights will be best attained by the creation of a mature, considered culture of respect for human rights within our society. By this "culture" we mean a society in which human rights principles are central not just to the design of policy and legislation but to the delivery of public services. Respect for basic concepts such as a right to respect for private life, family and the home and to freedom of religion, thought and belief should not be limited to those with access to legal advisers, but should be accessible to everyone. Human rights principles should provide an ethical framework within which all public authorities, whether "pure" or "functional", should operate. (Paragraph 109)

98. The Government agrees.

*The JCHR said:*

We consider that the Government's campaign to educate public authorities in their responsibilities under the HRA will be of limited value if it can only direct its efforts towards "pure" public authorities. We consider that the current approach of the courts to the meaning of public authority will inhibit the development of a positive human rights culture in the United Kingdom. In so far as it prevents the direct application of the HRA to significant numbers of vulnerable people, such as the residents of privately-run care homes, this approach helps to perpetuate the myth that the HRA creates no real benefits for "ordinary people" in their day to day lives. (*Paragraph 110*)

99. The Government disagrees. Applying the Human Rights Act to entirely private relationships, such as between a private care home and its residents who have arranged and pay for their own care, would be to apply the Act to situations for which it was not designed, and would confuse rather than clarify the public understanding of the Act's purpose.

#### **Further legislative amendment**

100. The Government intended to consult on the scope of the Human Rights Act 1998, as presently defined by “public authority” in section 6, as part of the Green Paper published as *Rights and Responsibilities: developing our constitutional framework*<sup>41</sup>. However, the Green Paper developed in such a way that the inclusion of a discussion about the Human Rights Act, to which the Government remains committed, was not appropriate. Furthermore, the Government is considering the recent judgment of the Court of Appeal in *R (Weaver) v London & Quadrant Housing Trust*<sup>42</sup>, which may be heard in due course by the Supreme Court. The Government nevertheless remains firmly committed to consulting on this issue. Many of the matters considered in the following recommendations of the Joint Committee are issues that will need to be taken up in that consultation, hence they will not be evaluated in depth at this time. It would therefore be inappropriate to pre-empt the consultation with detailed Government responses at this time.

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<sup>41</sup> <http://www.justice.gov.uk/publications/rights-responsibilities.htm>

<sup>42</sup> [2009] EWCA Civ 587

*The JCHR said:*

There is nothing in the evidence that we have seen which diminishes our support for the need for further action to ensure that the application of the HRA extends as far as Parliament in our view intended when it passed the HRA. On the contrary, the evidence which we have seen reinforces our predecessor Committee's conclusion that the disparities in human rights protection that arise from the case law on the meaning of public authority are unjust and without basis in human rights principles. (*Paragraph 111*)

101. The Joint Committee's conclusion of course predated significant changes in case law and legislation. Nevertheless, the Government agrees that, while the Human Rights Act has been a very effective piece of legislation, the duty under section 6 has not been applied precisely in the way that was intended.

*The JCHR said:*

We consider that the current situation is unsatisfactory and unfair and continues to frustrate the intention of Parliament. It creates the potential for significant inconsistencies in the application of the HRA and denies the protection of the rights it guarantees to those who most need its protection. In view of the continuing trend towards the contracting out of public functions, there is now a need for urgent action to secure a solution and to reinstate the application of the HRA in accordance with Parliament's intentions when it passed the HRA. (*Paragraph 112*)

102. While the Government has already noted its broad agreement with the Joint Committee, it should be noted that in the vast majority of cases the Human Rights Act has been applied where it was intended to apply. It has now effectively provided protection to some of the most vulnerable people in our society for over nine years. While the problems with the precise definition of “public authority” are frustrating, they should be allowed neither to detract from the overall success of the Act nor to give the impression that the scope of its protection has been significantly truncated: the problem with section 6 arises at the margins of the category of functional public authorities, and affects neither core public authorities nor many public functions.



*The JCHR said:*

We are concerned that whatever decision is reached in the House of Lords, it is unlikely to lead to an enduring and effective solution to the interpretative problems associated with the meaning of public authority. Waiting for a solution to arise from the evolution of the law in this area through judicial interpretation may mean that uncertainty surrounding the application of the HRA will continue for many years. It could lead to a serious risk of discrepancies across public service delivery. We consider that this is unacceptable. (*Paragraph 127*)

103. As previously noted, the strategy of intervening in cases to influence the definition of “public authority” was specifically recommended by the Joint Committee’s predecessors; it was only by the narrowest possible margin before the House of Lords that this strategy did not succeed in resolving this issue. Given the time and effort expended by the Government in the years between the 2004 Joint Committee Report and this Report on finding and intervening in a suitable case, it was disappointing that the Joint Committee changed its mind as to the effectiveness of this approach so late on.

*The JCHR said:*

We consider that the Department for Constitutional Affairs together with other relevant Departments (including the Department for Communities and Local Government, who have responsibility for the Government’s Discrimination Law Review) should now bring forward alternative legislative solutions for consideration by Parliament shortly after the decision of the House of Lords. (*Paragraph 132*)

104. The Government responded to the House of Lords judgment in *YL* within the year with the provision in the Health and Social Care Act.

*The JCHR said:*

We recommend that any consultation period should be short and limited to the format and text of legislative proposals intended to give effect to the principles for the identification of a functional public authority which were identified by our predecessors in the first MPA Report. (*Paragraph 133*)

105. The Joint Committee's views as to the principles for the identification of a functional public authority were not shared even by a majority of the organisations that responded to the Committee's call for evidence, illustrating the complexity of issues on which consultation is needed.

*The JCHR said:*

We consider that the starting point for any debate should be the meaning of public authority as intended by Parliament during the passage of the HRA and as reflected in the general principles identified by our predecessor Committee. With this in mind, we consider that the timetable for a legislative solution must be identified as soon as possible. (Paragraph 134)

106. The intention of Parliament during the passage of the Human Rights Act is not always clear. In any case, the nature of public service delivery has continued to develop in the decade since, and it is therefore appropriate to consider in light of current circumstances the appropriate scope of the Human Rights Act.

*The JCHR said:*

...most of our witnesses who recognised that the current position in law was unsatisfactory either recommended some form of legislative solution, or agreed that the time for a legislative solution was very near. In our view the time has now come to bring forward a legislative solution. We now consider the different forms such a solution might take. (Paragraph 136)

107. The Government notes the Joint Committee's view. It is worth noting that many of the Joint Committee's witnesses were however satisfied with the current position in law, indicating again the complexity of issues in this context.

*The JCHR said:*

We would strongly resist the amendment of the HRA to identify individual types or categories of "public authority" as either "pure" or "functional" public authorities. (Paragraph 137)

We consider that a sector-by-sector approach, taken alone, could lead to inconsistency in the application of the HRA. There is a risk that taking this approach might lead to the courts questioning whether any other functions were intended to be subject to the application of the HRA. (Paragraph 140)

108. The Government notes the Joint Committee's views.

*The JCHR said:*

If the Government continues to pursue its strategy based on litigation in the long term without a more general legislative solution in place, we recommend that urgent consideration should be given to the amendment of existing statutes to identify clearly that the sectors most seriously affected by the narrow interpretation of "public function" are subject to the application of the HRA. This should include an amendment to clarify that private care home providers providing care further to s26 National Assistance Act 1948 should be considered "functional public authorities". (*Paragraph 142*)

109. Following the *YL* judgment, the Government's has already legislated to ensure that the provision of publicly-arranged residential social care, whether provided further to the National Assistance Act 1948 or similar provision in Scottish or Northern Irish legislation, is considered a function of a public nature. This provision came into force on 1 December 2008.

*The JCHR said:*

We consider that unless a more general solution is achieved in the short term, it will be necessary for any Bill which provides for the contracting-out or delegation of public functions to identify clearly that the body which performs those functions will be a public authority for the purposes of the Human Rights Act. (*Paragraph 143*)

110. The Government disagrees with this conclusion, which also appears to be inconsistent with the Joint Committee's earlier recommendation at paragraph 137.

*The JCHR said:*

We consider that the direct amendment of the non-exhaustive definition of "public authority" in s. 6 of the HRA should be considered only as a matter of last resort. However, in light of the pressing need for a solution, we think there is a strong case for a separate, supplementary and interpretative statute, specifically directed to clarifying the interpretation of "functions of a public nature" in s. 6(3)(b) HRA. This interpretative statute could provide, for example: "For the purposes of s. 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function." (*Paragraph 150*)

111. The Government notes the Joint Committee’s view. As the Government has explained previously in relation to a Private Member’s Bill in these terms proposed by the Joint Committee’s Chairman, the proposed formulation above is circular: it seeks to define a “function of a public nature” by reference to “public authority”, which in turn is defined in part by reference to “functions of a public nature”. Furthermore, this formulation would include every function provided under contract to, for example, a local authority, including functions such as cleaning and gardening that would not otherwise ordinarily be considered inherently public in nature. This illustrates why an approach that seeks to clarify the definition of “public authority” by reference to a single factor is unlikely to be successful.

*The JCHR said:*

This statute could also aid the statutory definition for any statutory gateway based on the performance of a public function, for example, in the Environmental Information Regulations 2004. Section 6(3)(b) HRA clearly would need to be identified in the interpretative statute. However, it could be left open to the Secretary of State to designate, by affirmative resolution, other statutory references to "public function" which would also be subject to the interpretative provisions of the supplementary statute. We consider that this approach would provide a solution to the problem whilst avoiding the constitutional implications of amending the HRA itself. (*Paragraph 151*)

112. Not all statutory references to “public authority” or “public function” are defined or interpreted in the same manner. For example, the Freedom of Information Act 2000 adopts an entirely list-based approach. Care must therefore be taken in reading across the interpretation of section 6 of the Human Rights Act to other contexts.

## **Annex: legislative provisions**

### **Section 6 of the Human Rights Act 1998**

#### **Acts of public authorities**

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
  - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
  - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes—
  - (a) a court or tribunal, and
  - (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
- (4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.
- (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
- (6) “An act” includes a failure to act but does not include a failure to—
  - (a) introduce in, or lay before, Parliament a proposal for legislation; or
  - (b) make any primary legislation or remedial order.

## Section 145 of the Health and Social Care Act 2008

### Human Rights Act 1998: provision of certain social care to be public function

- (1) A person (“P”) who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions is to be taken for the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998 (c. 42) (acts of public authorities) to be exercising a function of a public nature in doing so.
- (2) The “relevant statutory provisions” are—
  - (a) in relation to England and Wales, sections 21(1)(a) and 26 of the National Assistance Act 1948 (c. 29),
  - (b) in relation to Scotland, section 12 or 13A of the Social Work (Scotland) Act 1968 (c. 49), and
  - (c) in relation to Northern Ireland, Articles 15 and 36 of the Health and Personal Social Services (Northern Ireland) Order 1972 (S.I. 1972/1265 (N.I. 14)).
- (3) In subsection (1) “care home”—
  - (a) in relation to England and Wales, has the same meaning as in the Care Standards Act 2000 (c. 14), and
  - (b) in relation to Northern Ireland, means a residential care home as defined by Article 10 of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (S.I. 2003/431 (N.I. 9)) or a nursing home as defined by Article 11 of that Order.
- (4) In relation to Scotland, the reference in subsection (1) to the provision of accommodation, together with nursing or personal care, in a care home is to be read as a reference to the provision of accommodation, together with nursing, personal care or personal support, as a care home service as defined by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8).
- (5) Subsection (1) does not apply to acts (within the meaning of section 6 of the Human Rights Act 1998 (c. 42)) taking place before the coming into force of this section.



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