



House of Lords
House of Commons
Joint Committee on
Human Rights

The Meaning of Public Authority under the Human Rights Act

Seventh Report of Session 2003–04



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appendices*

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Summary

The Human Rights Act makes it unlawful for public authorities in this country to act in breach of the fundamental rights and freedoms set out in the European Convention on Human Rights. It allows those who believe their rights have not been respected by public authorities to seek vindication and redress in the courts of the United Kingdom.

This protection was intended to be comprehensive, and the obligation to act compatibly with the Convention was to apply to all those discharging the public functions of the State. This report considers a possible flaw in the design of the Human Rights Act, which undermines the protection it was intended to offer to everyone within the jurisdiction of the UK.

As a result of the combined effects of a restrictive judicial interpretation of one particular subsection of the Act on the one hand, and the changing nature of private and voluntary sector involvement in public services on the other, a central provision of the Act has been compromised in a way which reduces the protection it was intended to give to people at some of the most vulnerable moments in their lives.

The concern addressed by this report is that a narrow judicial view of the meaning of “public authority” in section 6 of the Human Rights Act means that many private and voluntary sector providers of public services are considered to fall outside the scope of the Act, with no obligation to comply with the rights and freedoms it incorporated into domestic law.

Section 6 of the Act defines two types of “public authority” to which those obligations apply—“pure” public authorities, which must act compatibly in all they do, and those authorities which come under this obligation only when discharging a “public function”. This report examines the case law that has so far developed in respect of the interpretation of public function under section 6(3)(b) of the Act, and concludes that the courts are failing to give effect to the intention of Parliament that the protection offered by the Act should be comprehensive.

The report examines the potential consequences of this failure, and finds them sufficiently serious to warrant early action to remedy this defect.

It considers alternative approaches to closing the gap in protection which has been opened, and to reducing the potential for further loss of protection. It concludes that most options for amending the provisions of the Act in an effort to reassert Parliament’s original intention carry too many risks of further unintended consequences.

It also concludes that although the use of contractual terms to remedy the defect holds out some promise, it is likely to result in further unjustifiable discrepancies in the protection afforded under the Act to different people and classes of people.

The Committee concludes that there is a fundamental problem not with the design of the law, but with its inconsistent and restrictive application by the courts. The Committee notes the judgement of the House of Lords in the only case it has so far determined on this matter, which balances a narrow category of “pure” public authority against a generously wide and flexible category of “functional” public authority. This diverges from the approach adopted by the lower courts in other cases. The Committee welcomes the approach adopted by the House of Lords, and concludes that the courts should be adopting a clear “functional” approach to the interpretation of section 6(3)(b) of the Act.

Introduction

Bringing rights home

1. The Human Rights Act 1998 (the “HRA”) was intended to make the exercise of public power more fully accountable against standards of fundamental human rights and to provide effective remedies in UK courts for breaches of human rights. The UK Government had long had obligations to comply with the European Convention on Human Rights (ECHR) and with the judgments of the European Court of Human Rights (ECtHR): but where previously a person’s human rights could be vindicated only by a relatively inaccessible international court, the Human Rights Act set out to “bring rights home” and to make the rights imported from the Convention an intrinsic part of national law.

2. Section 6 of the Act¹ made it unlawful for public authorities in this country to act in breach of the fundamental rights and freedoms set out in the European Convention on Human Rights, and section 7 created a new mechanism for individuals to vindicate their rights by bringing an action in the United Kingdom courts. Alongside creating that statutory accountability, it was hoped that the Act would also help to make those standards intrinsic to the way central government and other public services were delivered, by laying the foundations for the establishment of a “culture of respect for human rights”.²

Two types of public authority

3. The intention of Parliament was that a wide range of bodies performing public functions would fall within the obligation under section 6 to act in a manner compatible with the “Convention rights” established under the Act.

4. However, while the Convention had been designed to protect the individual from abuse of power by the State, the Human Rights Act was enacted at a time when the map of the public sector had been redrawn, as privatisation and contracting-out had, over several decades, increased the role of the private and voluntary sectors in the provision of public services. This development was acknowledged and considered by those who drafted and debated the Act. In particular, it was clearly envisaged that the Act would apply beyond activities undertaken by purely State bodies, to those functions performed on behalf of the State by private or voluntary sector bodies, acting under either statute or under contract. The Act was therefore designed to apply human rights guarantees beyond the obvious governmental bodies. Section 6 identified two distinct categories of “public authorities” which would have a duty to comply with the Convention rights.

5. First, under section 6(3)(a), “pure” public authorities (such as government departments, local authorities, or the police) are required to comply with Convention rights in all their activities, both when discharging intrinsically public functions and also when performing functions which could be done by any private body. So, for example, a local authority must

1 See annex p. 56.

2 See for example our Sixth Report of Session 2002-03, *The Case for a Human Rights Commission*, HL Paper 67-I/HC 489-I, Summary, pp 5-7 and pp 15-21.

as a pure public authority comply with the non-discrimination standards imposed by Article 14 of the Convention not only in its provision of public housing but also in its dealings with building contractors.³

6. Second, under section 6(3)(b), those who exercise some public functions but are not “pure” public authorities are required to comply with Convention human rights when they are exercising a “function of a public nature” but not when doing something where the nature of the act is private (section 6(5)). So, for example, a private security firm would be required to comply with Convention rights in its running of a prison, but not in its provision of security to a supermarket. These bodies to which section 6(3)(b) applies have been termed “hybrid” or “functional” public authorities.

7. The term “hybrid” public authority is unhelpful—it is not the *intrinsic* nature of these bodies which brings them within the ambit of the Act, it is the nature of the *functions* they perform which is determinative. A body could be liable under the Act one day while delivering functions under contract to a “pure” public authority; the next day, if the contract had ended, it might become again a purely private body without any alteration to its intrinsic nature. In the remainder of this report we will use the term “functional public authority” to refer to a body to which section 6(3)(b) of the Act might apply.

The problem

8. Only those bodies which fall within either of these categories (“pure” or “functional” public authorities) have a *direct* obligation under the Act to comply with Convention rights.⁴ The meaning of “public authority” is therefore crucial to securing comprehensive human rights protection.

9. The Act was intended to be comprehensive in providing effective protection of the rights of individuals and effective redress for those whose rights had been breached. But, since the Act came into force in October 2000, a number of court decisions have applied a restrictive definition of public authority under section 6(3)(b) of the Act, which would exclude many service providers from the provision of section 6(1) which makes it “unlawful for a public authority to act in a way which is incompatible with a Convention right”. The consequence would be to exclude many of those receiving those services from the Act’s protection. The problem is not one that matters solely in relation to litigation—we have also found evidence of a lack of understanding on the part of some public authorities of their status, and their concomitant obligations and responsibilities.

10. The law on the meaning of public authority continues to be the subject of judicial development. Nevertheless, we are convinced that the problems disclosed by the judicial application of the Act to date are sufficiently significant to need serious and urgent attention, not only by the courts, but also by both government and Parliament.

11. In this report, we examine the development of the law on the meaning of “public authority” under section 6 of the Human Rights Act, consider how it may affect protection

3 Courts and tribunals are specifically stated to be public authorities (in all their activities) under section 6(3)(a).

4 We discuss the extent of indirect obligations later in this report; see paragraphs 86–88.

of human rights within the UK, and assess the measures that might be taken to address the problems we identify.

Acknowledgements

12. We received written evidence from a wide range of organisations and individuals, representing both the providers and the recipients of public services, as well as from lawyers and academics with an interest in the development of human rights law. It is published with this report.⁵ We also heard oral evidence from the Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton.⁶ We are grateful to all those who helped us in our deliberations.

5 See list of written evidence, p. 58.

6 See Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-i.

1 The developing law

Summary

13. In this section, we examine how the law on the meaning of public authority has developed since 2 October 2000, when the Human Rights Act came into force. We begin by considering the extent to which the ECHR and the jurisprudence of the Strasbourg Court allow the UK to be held to account under the Convention for the actions of non-State bodies performing public functions. We examine, in the light of these considerations, how the promoters and supporters of the Human Rights Bill envisaged the scope of the category of public authority when what became section 6 of the Act was being debated in Parliament. We then examine each of the key cases in which the higher courts have so far interpreted and applied the public authority provisions of the Act, and analyse the resulting state of the law. We conclude that it is unsatisfactory.

Public authorities and international human rights obligations

14. Our starting point is the international human rights obligations which the Act is designed to “bring home”. Two provisions of the Convention are not included in the Human Rights Act for the reason that the Act as a whole is designed to protect them. These are: the State’s obligation to secure the Convention rights and freedoms to everyone within its jurisdiction, under Article 1; and the obligation to ensure an effective remedy for breaches of Convention rights, under Article 13. These two Articles taken together require a State to have mechanisms in place to ensure that everyone’s Convention rights are actively protected, and that anyone can obtain redress where those rights are breached. In the debates on the Bill, the then Home Secretary stated—

The principle of bringing rights home suggested that liability in domestic proceedings should lie with bodies in respect of whose actions the UK Government were responsible in Strasbourg.⁷

15. It is well established in the Strasbourg jurisprudence (to which the UK courts are required, under section 3 of the Act, to have regard) that the State cannot evade its responsibility to safeguard Convention rights by delegation to private bodies or individuals.⁸ Where the State relies on private organisations to perform essential public functions, in particular those necessary for the protection of Convention rights (such as provision of legal aid⁹ or of primary education¹⁰), it retains responsibility for any breach of the Convention that arises from the actions of those private organisations.¹¹ This principle

7 HC Deb, 17 June 1998, col 406.

8 *Van der Musselle v Belgium* (1983) 6 EHRR 163; *Costello-Roberts v UK* (1993) 19 EHRR 112.

9 *Van der Musselle v Belgium*, *op cit*.

10 *Costello-Roberts v UK*, *op cit*.

11 The State is also responsible for violations of Convention rights by private parties as a result of the inadequacy of domestic legislation: *Young James and Webster v UK* (2000) 29 EHRR 38, where the ECtHR found it unnecessary to decide whether the activities of British Rail engaged the responsibility of the State; similarly in *Hilton v UK* 57 DR 108 the Commission of Human Rights found it unnecessary to decide whether the BBC engaged State responsibility.

is also established under other international human rights instruments to which the UK is party, including the International Covenant on Civil and Political Rights (ICCPR).¹²

16. The doctrine of positive obligations is a central principle of ECHR law, which also forms part of the international context in which the meaning of public authority is to be considered. Positive obligations go beyond a duty not to interfere with Convention rights, and require that, in some circumstances, the state must take active steps to protect people's rights against interference by others. This principle arises in part from Article 1 of the ECHR, and its requirement that states "secure" the Convention rights to all within their jurisdiction. For example, under Article 2, the right to life, the State is required to take reasonable steps to protect the life of those whom they know or ought to know are at risk.¹³ This is relevant, for example, in healthcare or care home settings.

17. The right to non-discrimination in the enjoyment of Convention rights, protected by Article 14, is also relevant. Article 14 protects against unjustifiable discrimination in relation to the other Convention rights, whatever the grounds of that discrimination. Where, for example, there was found to be unjustifiable discrimination in the guarantee of Article 8 rights to respect for private life as between different local authority areas, Article 14 would be breached.

Public authorities under the Human Rights Act: the parliamentary debates

18. Ministerial statements during debates on the Human Rights Bill indicated that the purpose of the "public function" test under section 6(3)(b) was to make the Act comprehensive rather than restrictive in its application, in accordance with the principle that delegation did not absolve the State of responsibility. The then Lord Chancellor, Lord Irvine of Lairg, noted that the drafting of the relevant provisions was designed to "provide as much protection as possible for the rights of the individual against the misuse of power by the State".¹⁴ There was a deliberate and considered decision to reject a more prescriptive approach and list those bodies subject to responsibilities under the Act.¹⁵ Such an approach was recognised as potentially limiting the access to remedy of the citizen in ways which might be incompatible with Article 13.

19. Statements by the then Home Secretary and the then Lord Chancellor in the parliamentary debates in both Houses made it clear that privatised or contracted-out public services were intended to be brought within the scope of the Act by the "public function" provision. It was also made clear that the Government intended the provisions of

¹² See for example the concluding observations of the UN Human Rights Committee on the fourth report of the United Kingdom, 27/07/95, CCPR/C/79/Add.55:

"The Committee is concerned that the practice of the State party in contracting out to the private commercial sector core State activities which involve the use of force and the detention of persons weakens the protection of rights under the Covenant. The Committee stresses that the State party remains responsible in all circumstances for adherence to all articles of the Covenant."

¹³ *Osman v UK* (2001) 29 EHRR 245.

¹⁴ HL Deb, 24 November 1997, col 808.

¹⁵ In contrast, for example, to the approach taken in the Race Relations (Amendment) Act 2000, the Freedom of Information Act 2000, and the equality provisions in the Northern Ireland Act 1998 (see further paragraphs 99–105 below).

the Act to be adaptable to the changing structures of public realm, and to changes in the distribution of power and responsibility for factors affecting individual rights—

The Government have a direct responsibility for core bodies, such as central Government and the police, but they also have a responsibility for other public authorities, in so far as the actions of such authorities impinge on private individuals. The Bill had to have a definition ... that went at least as wide and took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies and charities, have come to exercise public functions that were previously exercised by public authorities.¹⁶

Railtrack acts privately in its functions as a commercial property developer. We were anxious that we should not catch the commercial activities of Railtrack or, for example, of the water companies, which were nothing whatever to do with its exercise of public functions. Private security firms contract to run prisons: what Group 4, for example, does as a plc contracting with other bodies is nothing whatever to do with the state, but, plainly where it runs a prison, it may be acting in the shoes of the state.¹⁷

A private security company would be exercising public functions in relation to the management of a contracted-out prison but would be acting privately when, for example, guarding commercial premises. Doctors in general practice would be public authorities in relation to their National Health Service functions, but not in relation to their private patients.¹⁸

For example, charities that operate ... in the area of homelessness, no doubt do exercise public functions. The NSPCC, for example, exercises statutory functions which are of a public nature, although it is a charity.¹⁹

20. It was left to the courts to interpret the legislation to determine exactly where the lines between public and private functions should be drawn. It is quite clear that Parliament envisaged that the scope of section 6(3)(b) should be based primarily on the nature of the function being performed by a private body, rather than the intrinsic nature of the body itself. In a key statement the Home Secretary explained—

As we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality.²⁰

Public authorities under the Human Rights Act: interpretation in the Courts

21. We now summarise the relevant case law in decisions made by the courts on the application of the provisions of section 6 to “pure” and “functional” public authorities.

16 Home Secretary, HC Deb, 16 February 1998, col 773.

17 Home Secretary, HC Deb, 17 June 1998, cols 409-410.

18 Lord Chancellor, HL Deb, 24 November 1997, col 811.

19 Lord Chancellor, HL Deb, 24 November 1997, col 800.

20 Home Secretary, HC Deb, 17 June 1998, col 433.

“Pure” public authorities

22. The classification of “pure” public authorities has been discussed in detail in only one case to date: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*.²¹ The House of Lords held that a parochial church council was not a pure public authority.²² The PCC’s basis in legislation²³ and the fact that it was capable of exercising statutory powers were not sufficient to ensure it pure public authority status. It was also significant that, in practice, the function of the PCC was not governmental; it was concerned with the administration of church affairs. Neither was the PCC’s forming part of the established church determinative: it was held that, despite the particular recognition which establishment afforded, the Church of England remained an essentially religious rather than governmental organisation. It was also relevant that the PCC received no public funding, and that its statutory powers were enforceable only against a very specific category of persons.

23. The House of Lords’ judgement stressed that, in accordance with the European Convention on Human Rights, the purpose of placing responsibility on public authorities under section 6 was to secure Convention rights to everyone within the jurisdiction and to provide an effective remedy where they were breached.²⁴ In interpreting the category of pure public authority, the House of Lords also considered it relevant that, in Strasbourg, public authorities could not enforce their own Convention rights under Article 34, since only individuals and “non-governmental organisations” could bring a claim for breach of their rights.²⁵ We doubt whether this is right as a matter of principle and would hope that Strasbourg jurisprudence will come to recognise that there are circumstances in which public authorities have Convention rights. However, in the House of Lords’ view, were organisations of the Church of England to be considered as public authorities for all purposes (pure public authorities) this would lead to the anomalous consequence that they could not enforce their Article 9 rights to freedom of belief, despite the special protection given to the Article 9 rights of religious organisations in section 13 of the Human Rights Act.²⁶ They held therefore that the category of pure public authority should be interpreted so as to ensure that victims’ ability to enforce their Convention rights was not restricted.

“Functional” public authorities

24. Defining limits to the category of “functional” public authorities, which are required to comply with Convention rights under section 6(3)(b) where they are exercising “public functions” has proved more difficult and controversial. Having first rejected the argument that the PCC was a pure public authority, the House of Lords in the *Aston Cantlow*²⁷ case

21 In this case, a Parochial Church Council was seeking to enforce its statutory powers to require the lay owners of former parish property to repair the parish church. The defendants, the owners of the property, alleged an infringement of their property rights under the Human Rights Act (Article 1, Protocol 1 EHCR).

22 Appellate Committee of the House of Lords [2003] UKHL 37, overturning a decision of the Court of Appeal [2001] ECA Civ 713.

23 The Parochial Church Councils (Powers) Measure 1956.

24 Appellate Committee of the House of Lords [2003] UKHL 37, Lord Hope para.44 [of the HL judgment] referring to the State’s obligations under Articles 1 and 13 ECHR.

25 *The Holy Monasteries v Greece*, (1995) 20 EHRR 1; *Hautaniemi v Sweden*, Application No. 24019/94, 11 April 1996..

26 Ev 57.

27 Appellate Committee of the House of Lords [2003] UKHL 37.

rejected the argument that a Parochial Church Council enforcing a statutory obligation to repair the chancel of a parish church was performing a public function under section 6(3)(b). It held that, in enforcing its statutory powers in this case, the PCC was essentially acting as a private party enforcing a civil liability.

25. However, the House of Lords stressed that it was the nature of the *function* being performed that should determine whether a body was a functional public authority.²⁸ Lord Nicholls of Birkenhead considered that there should be a “generously wide” interpretation of “public function” so as to further the statutory aim of promoting human rights protection, whilst still allowing functional bodies to rely on the Convention rights themselves where they acted privately.²⁹ In determining what was a “public function”, there could be “no single test of universal application ... given the diverse nature of governmental functions and the variety of means by which these functions are discharged today”.³⁰ Lord Hope of Craighead noted that, in contrast to the category of “pure” public authority, the section 6(3)(b) category of “functional” public authority—

... has a much wider reach, and is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is, for the purposes of the case, a “hybrid” public authority.³¹

The obligation under Article 13 ECHR to secure Convention rights to everyone in the territory was, in Lord Hope’s view, “crucial” to the interpretation of the meaning of public authority under section 6.³²

26. The House of Lords, therefore, favoured a relatively narrow test for “pure” public authority status, but balanced this against a correspondingly wide and flexible category of “functional” public authority. In contrast to this decision, as well as to the tenor of the debates in Parliament and the clearly expressed expectation of Ministers, the broad, functional approach to public authority responsibility under the Human Rights Act has not so far found favour in the lower courts. In the relatively few decided cases, the courts have, in their application of section 6, taken as their starting point the amenability to judicial review of a body discharging a function, and have looked to the identity of the body, and its links with the State, as well as to the nature of the function performed.

27. This is particularly the case as regards application of the definition to private sector providers of public services. The fully privatised public utilities such as the water companies are established in the case law as “functional” public authorities, performing public functions in their delivery of services.³³ By contrast, the application of section 6(3)(b) to smaller private or charitable organisations, often providing services under contract from local authorities, has been less clear-cut. The case law has considered the

28 *ibid.*, Lord Hope, para. 41.

29 *ibid.*, Lord Nicholls, para. 11.

30 *ibid.*, para. 12.

31 *ibid.*, Lord Hope, para. 41.

32 *ibid.*, para. 44.

33 *Marcic v Thames Water* [2002] EWCA Civ 65.

public authority status of organisations including housing associations,³⁴ care homes,³⁵ mental health care facilities³⁶ and organisations managing public markets.³⁷

Poplar Housing

28. The first case to consider in detail the application of the functional public authority definition was *Poplar Housing and Regeneration Community Association v Donoghue*.³⁸ In this judgement a housing authority providing rented accommodation on behalf of a local authority was held in performing that function to fall within the ambit of section 6(3)(b) of the Human Rights Act.

29. However, in *Poplar Housing* the court rejected a functional approach to the application of section 6(3)(b) and set down the general principle that “the fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function”. It found a number of other factors to be relevant to reaching the conclusion that the Human Rights Act applied, including:

- statutory authority;
- control by the State; and
- proximity of the relationship between the private body and the delegating public authority.

30. It was the third factor which was decisive in the case. On the facts, the Court found that the Housing Association was so “enmeshed” in the activities of the local authority—members of the local authority sat on its governing board for example, and it was subject to guidance issued by the local authority—that it was a functional public authority with responsibilities under section 6(3)(b).

Leonard Cheshire Foundation

31. In the second case to deal with section 6(3)(b), *Callin, Heather and Ward v Leonard Cheshire Foundation*,³⁹ residents of a care home wished to challenge the decision to close the home and disperse the residents elsewhere. The home was run by a private charitable organisation, but the claimants’ places there were funded by their local authority, under the National Assistance Act 1948, as amended. It was argued that the decision to close the

34 *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA Civ 595, Jill Morgan, ‘The Alchemists’ Search for the Philosophers’ Stone: The Status of Registered Social Landlords under the Human Rights Act’ (2003) 66 MLR 700–725.

35 *Callin and Others v Leonard Cheshire Foundation*, [2002] EWCA Civ 595.

36 *R(A) v Partnerships in Care Ltd* [2002] 1 WLR 2610.

37 *R v Hampshire Farmers’ Market, ex parte Beer* [2003] EWCA Civ 1056. See also *R (Haggerty) v St Helen’s Council*, [2003] EWHC 803 (Admin), where Silber J assumed, without however finding it necessary to decide the issue, that the defendant council was liable for any breach of Convention rights resulting from contractual negotiations with a private care home which resulted in the home’s closure; and *Rubython v Federation Internationale de L’Automobile*, 6 March 2003, where Gray J considered that the defendant governing sports body was not a pure public authority, and that it was not exercising a public function in deciding on grants of press accreditation at a sports event.

38 [2001] EWCA Civ 595.

39 [2002] EWCA Civ 366.

home breached the claimants' right to respect for the home under Article 8, but the case turned on whether the care home was a functional public authority under section 6(3)(b).

32. The Court of Appeal held that section 6(3)(b) did not apply to the managers of the care home. It noted that there was no material distinction between the services the care home provided for residents funded by the local authority and those it provided to residents funded privately. Furthermore, although the Foundation was performing functions delegated under statutory authority, it was not itself exercising statutory powers. The Foundation was therefore held not to be "enmeshed" in the activities of the local authority in the same way that Poplar Homes had been.

33. The Court did suggest that contractual arrangements between the delegating public authority and the private service provider could include requirements to comply with Convention rights, and that these provisions could be relied upon by the local authority and, it was suggested, possibly by clients of the private service provider. The Court also considered that the local authority retained its obligation under Article 8, regardless of its delegation to the Foundation.⁴⁰

Partnerships in Care Ltd

34. A private provider of mental health care was held to be a functional public authority, performing public functions within the meaning of section 6(3)(b), in *R (A) v Partnerships in Care Ltd*.⁴¹ The claimant required treatment for a severe personality disorder. She was cared for in a privately run hospital where her care (and that of all the other patients on her ward) was financed by her health authority. The hospital where she was accommodated decided that they would no longer provide the specialist psychiatric services the defendant required. She was not provided with an alternative placement, and she claimed a breach of her Convention rights.

35. In this case the court emphasised the public nature of the function being performed, noting that Health Authorities had statutory power to contract out their health service provision functions to private bodies.⁴² The hospital was authorised under the Mental Health Act 1983 to receive patients, like the claimant, ordered to be detained under the Act. Admission to and treatment at the hospital were governed by this statutory regime. The court attached particular significance to the element of compulsion involved in the detention powers, and the importance of the statutory function which had devolved on the defendants, in reaching a determination of the meaning of "public function". Neither the absence of "enmeshing" with a State body, nor the absence of direct statutory authority, prevented the hospital from being considered a functional public authority when it was performing these important public functions.

40 The liability of the delegating authority is further considered in section 3 below, and the protection that could be offered through contractual arrangements is considered in section 6 of this report.

41 [2002] 1 WLR 2610.

42 Under the National Health Service Act 1977, as amended.

Hampshire Farmers Market

36. These decisions preceded the House of Lords decision in *Aston Cantlow*. That decision was, however, considered in *R v Hampshire Farmers Market ex parte Beer*,⁴³ where the Court of Appeal appeared to restrict the “generous” functional approach of *Aston Cantlow* perhaps in part because, as Dyson J noted in his judgment, the House of Lords in *Aston Cantlow* had not expressly overruled the *Poplar* and *Leonard Cheshire* cases.⁴⁴

37. In *Hampshire Farmer’s Market*, a farmers’ market had initially been established by Hampshire County Council, which had then set up a private company, HMFL, to run the market. County Council staff had provided assistance in the establishment and development of HMFL, and one of the County Council managers was appointed a director. Proceedings were brought in judicial review and under the Human Rights Act by a farmer who had been excluded from participation in the market.

38. The Court of Appeal held that the company was both amenable to judicial review, and a functional public authority performing a public function under the Human Rights Act. Dyson J suggested that these two issues would march hand in hand, except where Strasbourg case law required a departure from the test of amenability to judicial review. The Court considered that Hampshire Farmers’ Market was a functional public authority for two broad reasons. The first related to function: the power to control the right of access to a public market had a “public element or flavour”.⁴⁵ The second related to the institutional relationship with Hampshire County Council. The fact that HMFL owed its existence to the County Council, that it performed functions that had formerly been discharged by the Council, and that HMFL had been assisted in its work by the County Council, reinforced the conclusion that it was performing a public function.

Summary of the current state of the law

39. It seems therefore that the courts are likely to interpret the category of “pure” public authority (all of the actions of which would be required to be compatible with the Convention rights) narrowly. In particular, the courts consider that they must exclude bodies capable of enforcing their Convention rights. But when it comes to interpreting the definition of a “functional” public authority, which can be held to account under the Human Rights Act only in respect of its “public” functions, it is not clear that the approach of the House of Lords in *Aston Cantlow*, which stressed the importance of analysing the character of the function concerned rather than the character of the institutional arrangements of the body performing the function, is being applied in the lower courts. This may be because the clear principles set out by the House of Lords were stated without reference to, and without express disapproval or overruling of, the earlier cases—including *Poplar Homes* and *Leonard Cheshire*, which took a predominantly “institutional” rather than “functional” approach to the question.

43 [2003] EWCA Civ 1056.

44 *ibid.*, para. 15.

45 [2003] EWCA Civ 1056, para. 30.

40. The consequence is that, as the law presently stands, a private body is likely to be held to be a public authority performing public functions (a “functional” public authority) under section 6(3)(b) if:

- its structures and work are closely linked with the delegating or contracting out State body; or
- it is exercising powers of a public nature directly assigned to it by statute; or
- it is exercising coercive powers devolved from the State.

Beyond these categories, whether the courts will find that a body falls within section 6(3)(b) remains extremely uncertain. Factors such as:

- the fact of delegation from a State body,
- the fact of supervision by a State regulatory body,
- public funding,
- the public interest in the functions being performed, or
- motivation of serving the public interest, rather than profit,

are not in themselves likely to establish public authority status, though they may have some cumulative effect, indicating that the function performed has a “public flavour”. But the courts are reluctant to rely on a vague notion of public-ness alone. Where there are no direct statutory powers, therefore, or where the functions exercised are not within a narrow range of incontrovertibly governmental powers (such as powers of detention), institutional connection with government will be likely to be the indication of section 6(3)(b) status found to be most significant.

A gap in human rights protection?

41. The tests being applied by the courts to determine whether a function is a “public function” within the meaning of section 6(3)(b) of the Human Rights Act are, in human rights terms, highly problematic. Their application results in many instances where an organisation “stands in the shoes of the State” and yet does not have responsibilities under the Human Rights Act. It means that the protection of human rights is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body’s administrative links with institutions of the State. The European Convention on Human Rights provides no basis for such a limitation, which calls into question the capacity of the Human Rights Act to bring rights home to the full extent envisaged by those who designed, debated and agreed the Act.

42. In our view, the principles set out by Lord Hope of Craighead in *Aston Cantlow* (cited in paragraph 25 above) would provide an effective basis for protection of the Convention rights. Although the House of Lords in that case did not expressly overrule the decisions in *Poplar* and in *Leonard Cheshire*, it appears that the principles set out by Lord Hope in *Aston Cantlow* are at odds with those earlier decisions of the lower courts. In our view, the approach in *Aston Cantlow* is to be preferred.

43. We asked the Secretary of State for Constitutional Affairs whether he considered the current legal position to be unsatisfactory. He expressed some concern at the way the law was developing but noted—

It is early days. I can fully understand why some people believe that the words “public authority” have been drawn too narrowly, compared with what was said at the time. All I can say at this stage is that I shall keep this concern under close review, and will pay particular attention to the need to intervene in future cases on the meaning of section 6(3)(b).⁴⁶

We welcome the undertaking to pay attention to the need to intervene in future cases, but in our view the Secretary of State’s approach to this problem is too phlegmatic. **A serious gap has opened in the protection which the Human Rights Act was intended to offer, and a more vigorous approach to re-establishing the proper ambit of the Act needs to be pursued.**

44. **This is not just a theoretical legal problem. The development of the case law has significant and immediate practical implications.** In the next chapter, we consider what this may mean in practice.

46 Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-i, Q 99.

2 Why does the meaning of “public authority” matter?

Uncertain rights and responsibilities

45. Why does this uncertainty about the application of the Human Rights Act matter to anyone except lawyers? The meaning of “public authority” matters because, given the limitations on and uncertainty as to the scope of the category of “functional” public authorities, much of the new accountability the Human Rights Act brings to the delivery of public services may be undermined almost from its inception.

46. The implications of the meaning accorded to “public authority” by the courts under the Human Rights Act are not confined to public services. It is important to churches and religious groups in respect of their freedoms under Article 9 of the Convention.⁴⁷ Regulators, or organisations holding or processing sensitive data, to take a few examples, may also have an uncertain status under section 6, with significant practical consequences for those whose Convention rights are affected by their activity. Whether or in what circumstances arbitrators or adjudicators may be considered to be public authorities has significant consequences for their work.⁴⁸

47. However, it is the problem, created by the case law, of lack of certainty for both providers and recipients of public services as to their respective rights and obligations under the Human Rights Act, that most concerns us in this report. This problem was highlighted in the evidence of both the British Institute of Human Rights⁴⁹ and the Charity Commission,⁵⁰ the latter stressing the difficulties for charities in assessing whether and when their work was affected by the Human Rights Act. It is clearly unsatisfactory that private and voluntary sector organisations should enter into contracts to provide essential public services without knowledge or consideration of whether they are responsible for protecting fundamental human rights. Equally unsatisfactory is uncertainty amongst delegating state bodies as to the responsibilities they themselves retain where a contracted out service breaches Convention rights.

48. It is not, therefore, just the damage done to the enforcement and redress mechanisms of the Human Rights Act that matters. It is also the confusion about where responsibility lies for actively securing and promoting the underlying standards of human rights. As we have said elsewhere,⁵¹ the key to the effective protection of rights lies in creating a culture in public life in which these principles are seen as fundamental not just to the design of policy and legislation but also to the delivery public services. They provide an ethical and legal framework within which public authorities work. Shortly after the Act had been passed, the then Home Secretary expressed his belief that—

47 Ev 57.

48 *Austin Hall Building Ltd v Buckland Securities*, Technology and Construction Court, 11 /4/2001.

49 Ev 36.

50 Ev 17.

51 Joint Committee on Human Rights, Sixth Report of Session 2002-03, *The Case for a Human Rights Commission*, HL Paper 67-I, HC 489-I.

The Act points to an ethical bottom line for public authorities ... This ... should help build greater public confidence in our public authorities ...⁵²

The then Cabinet Secretary reflected that—

... initial thinking about the Human Rights Act has tended to concentrate on legal questions about compliance ... Though it is clearly right that all public authorities should not act incompatibly with the Convention rights, the Act was intended to do more than merely avoid direct violations of human rights ... It offers a framework for policy-making, for the resolution of problems across all branches of government and for improving the quality of public services.⁵³

49. The uncertainty created by the current state of the law undermines one of the key aims of the Human Rights Act—to “bring home” a culture of human rights to government and administration in the UK.⁵⁴ The Act, intended to be flexible and open-ended in an area where the enunciation and application of general principles is difficult and precision is likely to be arbitrary, has instead become confused in its application by the development of case law. **Those providing important public services, whether from the State or private sectors, should not be left uncertain about their responsibilities to protect fundamental human rights.** Our inquiry has indicated the significant practical impact of a restrictive public authority definition, in particular for the human rights protection available to vulnerable people.

The role of the “private” sector in delivering public services

50. The implications of this uncertainty are likely to be particularly significant for public services given the increased reliance on “private” bodies (from both the commercial and not-for-profit sectors) to provide services previously delivered by “public” bodies within central or local government.

51. In highlighting this issue, we do not seek to question or endorse the legitimacy of a policy of encouraging contracting-out of services. Under a broad definition of public authority, increased private sector involvement would have no consequences for the level of human rights protection available to the beneficiaries of public services. It is not reliance on the private or voluntary sector which risks undermining the individual’s recently-won human rights protection, but the failure of the law to adapt to the reality of the involvement of those sectors in the delivery of public services.

52 *Building on a Human Rights Culture*, Home Secretary Jack Straw address to Civil Service College, 9 December 1999.

53 See Minutes of evidence taken before the Committee on 21 March 2002, HL Paper (2001–02) 103-I, HC (2001–02) 719-i, Ev 5.

54 See for example the written evidence of the Office of the Rail Regulator to our inquiry into the case for a human rights commission: after an exchange of letters he wrote, “You are aware that I am concerned principally with the regulation of Railtrack’s stewardship of the national rail network. In this respect, Railtrack is not a public authority but a limited company, albeit currently in railway administration. However, I understand that while you consider that Railtrack is not a public authority when conducting private business with the train operating companies, you are inclined to think that it is a limited purpose public authority for the purpose of section 6 of the Human Rights Act 1998. You also say that when it is securing a safe rail network, it is discharging a statutory duty and may be bound by the positive obligations arising under article 2 of the European Convention on Human Rights ... Your letter is a timely reminder as to how we should proceed in the future. We shall be reviewing our processes in regard to the inclusion of human rights, particularly in terms of our licensing conditions and in the application of the Competition Act 1998.”, Twenty-second Report, Session 2001-02, *The Case for a Human Rights Commission: Interim Report*, HL Paper 160/HC 1142, pp. 243–4.

52. Although we have not engaged in any systematic research to assess the extent of the private sector's involvement in public service delivery, evidence to the inquiry emphasised the high level of reliance on the private sector in certain areas of service provision, in particular housing and social care. In relation to the housing sector, the Deputy Prime Minister noted that 200 tenant management organisations currently manage 84,000 local authority homes in England; and 337,000 English local authority owned homes are managed by Arms Length Management Organisations.⁵⁵ Over 1.7 million properties are owned or managed by Registered Social Landlords.⁵⁶ Shelter reported that nearly 50% of social housing is now out of LHA control, and suggested that this figure would continue to increase.⁵⁷ In relation to social care, the Department of Health noted that the independent sector provided 92% of care homes and 64% of contact hours of home care.⁵⁸ DIAL UK pointed to the large numbers of supported residents with mental health problems cared for in independent nursing homes (1600 in 2000).⁵⁹

53. The Department of Health also outlined the rather less dominant role of the private sector in children's services: it estimated that 15% of foster placements are arranged by private agencies, and that 20% of adoption placements are arranged by Voluntary Adoption Agencies. Evidence also noted that many hospices are also privately run (many by charitable organisations) and publicly funded and that, in the education sector, 100% publicly funded but privately run "city academies" are now being established.⁶⁰ In more than one local authority area private sector companies have taken over the functions of the local education authority. In the NHS, greater private sector involvement in healthcare provision seems likely. Other private sector organisations providing public services include Network Rail and the National Air Traffic Services.⁶¹

54. The arrangements for involvement of the private and voluntary sectors vary widely.⁶² Much private sector involvement takes place under specific statutory regimes; and some of it predates these regimes. For example, the involvement of Housing Associations in the provision of social housing dates back to the nineteenth century.⁶³ However the role of the private and voluntary sector in public housing has become increasingly significant since the 1980s,⁶⁴ backed up by a developing statutory scheme⁶⁵ that facilitated local authority delegation to Housing Associations, including full delegation of a local authority's housing

55 Ev 1.

56 Ibid.

57 Ev 29.

58 Ev 2.

59 Ev 18.

60 Ev 32.

61 Paul Maltby, *In the public interest? Assessing the potential for Public Interest Companies?* IPPR Report 2003.

62 Within central government, the Office of the Deputy Prime Minister co-ordinates and advises on PPP projects. In Local Government, an agency sponsored by the LGA, 4Ps, has been established to assist Local Authorities in developing PPP schemes. In addition, a body which is itself a PPP, Partnerships UK, established in 2001, works with government to develop policy on PPP, and provides financial, policy and management support to PPPs (Written evidence of Partnerships UK, Ev 13).

63 The Peabody Housing Trust was founded in 1862.

64 Paul Maltby, *op cit*.

65 Section 27 Housing Act 1985 as amended by the Regulatory Reform (Housing Management Agreements) Order 2003 governs arrangements between a local authority and an outside body for the management of housing. See Ev 1.

management functions by way of a Large Scale Voluntary Stock Transfer, and the establishment of Arms Length Management Organisations.⁶⁶

55. For some time, older people have been placed in private care homes: either by the social services authority, under the National Assistance Act 1948, part funded by the social services authority; or under section 3 of the National Health Service Act 1977, fully funded by the NHS; or to meet after care needs following mental health detention,⁶⁷ fully funded by the NHS.⁶⁸

56. Some services, such as water services, have been fully privatised. A more recent development, however, is the increased reliance on public-private partnerships (PPPs) to deliver public services of almost any kind. The broad notion of public-private partnership (PPP) includes the Private Finance Initiative (PFI), which principally involves private sector provision and maintenance of the physical assets (school and hospital buildings, etc) necessary for public services. In “Joint Venture PPPs” both the public authority and the private company may have a role in the governance of the joint venture company. This might involve representation on the board of the company and active participation in the business and key decisions relating to it. In arrangements under the Private Finance Initiative (PFIs), the “project agreement” with the public authority may specify only the outputs or levels of service by the private body but will not specify how this service is to be carried out; so that delivery of the service is effectively delegated, and the public authority retains no governance role.

57. In this report we are not principally concerned with PFI contracts, which tend to concern activities such as building construction which would not be considered public functions. The PPPs with which we are primarily concerned have been termed “Public Interest Companies” or “Not-for-profits”: non-shareholder private sector organisations of which the aim is to deliver public services. This term may encompass organisations including limited companies and trusts, ranging from housing associations to Network Rail.

58. The institutional arrangements for private sector involvement are therefore complex and varied, but the result for the individual user of public services is an increased reliance on non-State bodies for the delivery of services. **Given the range of private and voluntary sector involvement in public service provision, the extent of public authority responsibilities under the Human Rights Act is profoundly significant both to the providers and the recipients of these services.** Below we consider the practical consequences of wider or narrower descriptions of “public authority” under the Act.

Concerns of service providers

59. Some evidence from providers of public services raised concerns about the overlap between the problems raised by uncertainty over the application of the Human Rights Act in relation to the shifting nature of the public/private divide, and problems arising from public/private definitional issues seemingly unrelated to the application of the Act.

66 Paul Maltby, *op cit*.

67 Under section 117 Mental Health Act 1983.

68 Ev 24.

Independence from government

60. A number of submissions expressed concern that a wider meaning of public authority would jeopardise both the perceived and the actual status of organisations, such as housing associations, as independent of the government. In particular, they emphasised the need to preserve the administrative and financial independence of these non-governmental organisations. The Housing Corporation in its evidence asserted that—

... the sector is independent of the state in its origin, is responsible for its own performance and management, and ... the sector's effective operation and delivery of its purposes is contingent on preservation and promotion of its independence from the State.⁶⁹

61. Similarly the National Housing Federation feared that a wider definition of public authority would jeopardise the perception of Registered Social Landlords (RSLs) as independent bodies; and would endanger the contribution they could make to the implementation of government housing policy.⁷⁰ The Chartered Institute of Housing argued that bringing housing associations within the Human Rights Act would restrict their ability to make executive decisions.⁷¹

62. **We do not believe that identification as a functional public authority, that is, a private sector body that is performing a public function for the purposes of section 6 of the Human Rights Act, would jeopardise the independence from the state of a non-governmental body.** Functional public authority status should not imply that an organisation is institutionally connected with the State, nor need it require that the State exercise control over its management or operation. Rather, it acknowledges that the function being performed, or the service being provided, is public in nature, irrespective of the public or private status of the organisation involved.

63. We appreciate that the duty to comply with Convention human rights imposes restraints on the delivery of services by private sector providers. Those restraints are necessary and desirable, and are consistent with good practice in service delivery. However, compliance with these responsibilities may also impose a financial burden. The burden should not be excessive: where the application of the Act is established, the Convention rights themselves contain, to varying degrees, balances between essential public policy considerations and the rights of the individual, and the concept of proportionality is fundamental to the jurisprudence on rights. Within the application of this principled framework, considerations of the efficient working of essential services should be taken into account. Such concerns about the potential financial consequences are not grounds for the wholesale exclusion from the application of the Act of large categories of voluntary sector service providers who discharge public functions. Nevertheless, **in our view, the financial burden, responsibility and possible conflict with other duties, for example, under charity law, that public authority status may impose on a voluntary sector organisation needs to be taken into account by State bodies when they contract-out public functions.**

69 Ev 6.

70 Ev 10.

71 Ev 4.

Public sector borrowing and the private sector

64. There was particular concern amongst some private sector service providers that identification as a “public authority” under the Human Rights Act would, by redefining the organisations as public bodies in general terms, prevent them from raising money outside Treasury controls. Private finance raised by organisations such as housing associations is not counted as public sector borrowing.⁷² The success of Registered Social Landlords was seen as dependent on their ability to raise finance outside Treasury constraints, and the Chartered Institute of Housing argued that bodies such as housing associations “rely on private sector freedoms for their effectiveness”.

65. This line of argument seems to us wholly misconceived and without basis in law or public policy. Nonetheless, we put this concern to the Secretary of State for Constitutional Affairs, who agreed that it was highly unlikely that Human Rights Act public authority status should affect an organisation’s capacity to raise private finance.⁷³ In supplementary written evidence he confirmed this view.⁷⁴ Undoubtedly, were the allocation of functional public authority responsibility under the Human Rights Act to jeopardise capacity to raise private finance it would be a serious matter for the effectiveness of many organisations. However, there is no reason to deduce that recognising that an organisation in some of its activities fell within the ambit of section 6(3)(b) of the Act would have that consequence. The function in question might represent only a small part of an organisation’s wider activity, or it might be its main purpose. In either case, the application of section 6(3)(b) does not have any affect on the private law nature of other functions of the body. The organisation, irrespective of the proportion of its work that amounted to a public function, would remain essentially a private organisation. **In our view, it is irrelevant to deciding the application of the Act whether an organisation performing a public function is deemed to be within or without the public sector for wider, including financial, purposes.**

Consequences for individuals: the impact on vulnerable people

66. Given the significant role of the private and voluntary sector in public service provision, the extent of the ambit of public authority responsibilities under the Human Rights Act is likely to have significant impact across areas including housing, healthcare, care provision to the elderly and to people with disabilities, mental healthcare and children’s services. Provision of services in all of these areas regularly engages rights under Article 8 ECHR, including rights to respect for private life, family life and housing; the right to a fair hearing in the determination of civil rights and obligations under Article 6.1; freedom from discrimination in the enjoyment of other Convention rights under Article 14; and, in extreme cases, the right to freedom from inhuman and degrading treatment under Article 3. In some of these areas the right to life (Article 2), the right to liberty (Article 5) and the right to peaceful enjoyment of possessions (Article 1, Protocol 1) will also be engaged. Educational services also of course engage education rights under Article 2

72 Chartered Institute of Housing, Ev 4; Housing Corporation, Ev 6.

73 Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-I, Q 111.

74 Ev 3.

of Protocol 1. Research carried out by the British Institute of Human Rights, and discussed extensively in our report of March 2003 on *The Case for a Human Rights Commission*, also suggests that breaches of Convention human rights regularly occur in key areas of social service provision.⁷⁵

67. That research is supported by other evidence. DIAL stressed that disabled people in private care homes were vulnerable to breaches of their rights under Articles 2, 3, 8 and 14, all rights in respect of which they might have lesser protection under a narrow definition of public authority. Age Concern pointed to the serious consequences for older people unable to obtain human rights redress for private care home closures, and Help the Aged identified potential breaches of the Convention rights of older people in private care homes through inadequate medical care, home closures, physical and sexual abuse, and neglect, and the use of restraints. They argued that—

... the exclusion of private and voluntary sector care homes from the scope of the HRA will entirely preclude the possibility of recourse to the courts in relation to home closures and make it considerably more difficult and, in practice, impossible for many residents [in relation to the other problems identified].⁷⁶

68. Shelter pointed to the human rights issues that arose in the ordinary course of the management of social housing, in relation to housing allocation, transfers and evictions. It also pointed to the increasingly public nature of the private and voluntary housing sector's role in relation to crime and "anti-social behaviour": in particular the power of Housing Associations and Registered Social Landlords to issue ASBOs to their tenants.⁷⁷ It also drew attention to the provision under the new Anti-social Behaviour Act to require Registered Social Landlords to play a role in tackling anti-social behaviour, and to allow them extended powers in this regard, including powers to apply for injunctions, and remove the security of tenure of "anti-social" tenants. As we noted in our Report on the Anti-social Behaviour Bill,⁷⁸ these provisions would engage the right to a fair hearing in the determination of civil rights and obligations (Article 6.1); the right to respect for the home and private life (Article 8) and the right to peaceful enjoyment of possessions (Article 1, Protocol 1).

69. As the case law currently stands, whether human rights breaches by private and voluntary sector providers of public services will give rise to accountability under the Human Rights Act is likely to depend on a number of relatively arbitrary criteria.

70. For example, whether a resident of a care home can hold the home liable for breach of his Article 3 or Article 8 rights is likely to depend on the following factors:

75 *Something for Everyone: The impact of the Human Rights Act and the need for a human rights commission*, British Institute of Human Rights, 10 December 2002. See also Joint Committee on Human Rights, Sixth Report, Session 2002–03, op cit.

76 Ev 14.

77 ASBOs were found not to be per se in breach Convention rights in *R v Manchester Crown Court, ex parte McCann* [2002] UKHL 39, but the imposition of individual ASBOs would still raise issues under Article 6.1 and Article 8 ECHR, and potentially under Article 14.

78 Joint Committee on Human Rights, Thirteenth Report, Session 2002–2003, *Anti-social Behaviour Bill*, HL Paper 120, HC 766, para.12.

- whether the local authority concerned has a policy of providing services directly, or a policy of contracting out some or all services;
- within a local authority area where there is mixed provision, whether the resident has been allocated a place in a local authority or a private sector care home;
- whether the private sector home in question has sufficiently close institutional or administrative connections with the local authority to bring it within section 6(3)(b).

71. If no liability attaches under the above criteria, there may nevertheless be some human rights recourse against the home, dependent on:

- whether the local authority included human rights provisions in its contract with the care home, requiring that the care home respected Convention human rights in its work; or
- whether there is a contract between the care home and the resident which includes similar human rights clauses.

72. Similar anomalies likely to arise in the housing sector were indicated by Shelter, which points out that, since it is established that Registered Social Landlords are not subject to judicial review, then—

In the absence of Human Rights Act protection, tenants of RSLs and HAs have little protection against indiscriminate, unreasonable or disproportionate actions by their landlords.⁷⁹

Shelter draws particular attention to the importance of Human Rights Act protection in evictions under probationary tenancies granted by a Registered Social Landlord; and in relation to evictions for rent arrears of those with assured tenancies.⁸⁰ Human Rights Act protection for tenants may depend on the following:

- whether the local authority has exercised its statutory discretion to discharge its duties under the Housing Act through contracts with Registered Social Landlords (RSLs), or directly;
- whether a local authority has chosen to make a partial Large Scale Voluntary Transfer (LSVT) of housing stock to the private or voluntary sectors;
- where there has been such a transfer, whether the tenant was allocated housing before or after the transfer.

⁷⁹ Ev 29.

⁸⁰ Under Schedule 2 of the Housing Act 1988.

Conclusion

73. Disparities in human rights protection as between different local authority areas, or different recipients of services in the same local authority area, may raise issues under Article 14 ECHR, (freedom from discrimination) considered in conjunction with other Convention rights, including in conjunction with the right to an effective remedy under Article 13.⁸¹ **The gaps and inconsistencies in human rights protection arising from this situation are likely to mean that the UK falls short of its international obligations (under Articles 1 and 13 ECHR) to secure the effective protection of Convention rights and to provide an effective remedy for their breach.** In this situation, it is likely to be unclear to users of public services whether they can rely on Convention rights under the Human Rights Act, in some cases depriving them of the redress which was intended to be provided by the Act. It is also likely to be unclear to providers of public services whether they are under an obligation to uphold and secure Convention rights. Not only is the mechanism of redress provided by the Act being thwarted, the foundations on which a culture of respect for human rights should be being built are being undermined.

74. **The disparities in human rights protection that arise from the current case law on the meaning of public authority are unjust and without basis in human rights principles. Unless other avenues of redress can be found, this situation is likely to deprive individuals of redress for breaches of their substantive Convention rights incorporated under the Human Rights Act. The situation created by the current state of the law is unsatisfactory, unfair, and inconsistent with the intention of Parliament.**

81 Article 13, as noted above, is not incorporated in the HRA but binds the UK before the Strasbourg court.

3 Is the category of “functional public authority” necessary?

Summary

75. Before we turn to the potential solutions to the deficit in protection that we have identified, we examine two lines of argument suggesting that, even without the appropriate application of the provisions of section 6(3)(b) of the Human Rights Act, there are sufficient avenues for redress open to those who are victims of breaches of their rights by public authorities.

76. The first is that sufficient Convention rights protection already exists where services are contracted out, because the contracting public authority retains responsibility, as a pure public authority, for any violations of rights which occur in the exercise of the contracted-out functions by the private body it contracts with.

77. The second is that a narrow application of the functional public authority provisions of the Human Rights Act could be compensated for by the potential of other aspects of the Act to apply human rights to the private sector. It is considered how far the duty of the courts to interpret legislation compatibly with Convention rights under section 3 of the Act, and their duty under section 6 to act in accordance with Convention rights, have the potential to protect Convention rights even where a private organisation is found not to be directly accountable under the Human Rights Act.

Accountability of the delegating public authority?

78. Where a public authority contracts out functions which it would otherwise discharge itself,⁸² it is arguable that the public authority itself remains liable under the Human Rights Act for any breach of Convention rights that results. This argument is relied on by the Department of Health: it argued that, where social services are contracted out—

The local authority does not “delegate” its functions. It exercises its functions by entering into contracts for the provision of services. It remains accountable for those functions. It continues to be responsible for providing the services needed by the person and for reviewing his needs. Therefore we believe that people’s rights are adequately protected by the existing legislative structure.⁸³

79. The Deputy Prime Minister takes a similar view in relation to the role of private sector organisations in the housing sector. He points out that, under section 27 of the Housing Act 1985 as amended by the Regulatory Reform (Housing Management Agreements) Order 2003, where there is an agreement for private sector organisations to provide housing management services for a local authority, the local authority remains responsible for anything done, or not done, by the private sector organisation.⁸⁴

82 As for example in the *Poplar* and *Leonard Cheshire* cases.

83 Ev 3.

84 Also supported in the evidence of the Charity Commission, Ev 17; the Chartered Institute of Housing, Ev 4.

80. In his oral evidence, however, the Secretary of State for Constitutional Affairs took a more cautious view. Asked whether a contracting-out body would retain responsibility for violations of Convention rights in the delivery of the contracted-out services, he observed that—

... it would depend upon the facts of the individual case, but if the public body contracts out to a private organisation and that private organisation is not held to be a public authority a question could then arise about the public authority's liability. That would depend on all of the circumstances, including what arrangements were made between the public and private body, and what was known to the public body at the relevant time.⁸⁵

81. It has been suggested by the courts, though it has not yet been clearly decided, that where a public body contracts out its functions it retains responsibility for any action by the private body in performing those functions in breach of Convention rights. In *Poplar Housing*, the Court of Appeal relied on *Costello Roberts v United Kingdom*⁸⁶ to support a retention of human rights liability by a contracting-out public body—

The European Court made it clear that the State cannot absolve itself of its Convention obligations by delegating the fulfilment of such obligations to private bodies or individuals, including the headmaster of an independent school. However, if a local authority, in order to fulfil its duties, sent a child to a private school, the fact that it did this would not mean that the private school was performing public functions. The school would not be a hybrid body. It would remain a private body. The local authority would, however, not escape its duties by delegating the performance to the private school. If there were a breach of the Convention, then the responsibility would be that of the local authority and not that of the school.⁸⁷

This view was restated by the Court of Appeal in *Leonard Cheshire*,⁸⁸ the Court adding that—

... if the arrangements which the local authorities made with LCF had been made after the HRA came into force, then it would arguably be possible for a resident to require the local authority to enter into a contract with its provider which fully protected the residents' Article 8 rights ...⁸⁹

82. We acknowledge these *dicta*, and we discuss the use of contracts to ensure protection in section 7 below. But it should not in our view be taken for granted that a public authority that contracts out services remains liable in domestic law for *any* breach of Convention rights by the contracted-to body. This issue has not as yet been given full consideration by the UK courts. Undoubtedly the State retains liability before the Strasbourg Court for any breach of Convention rights arising from a contracted-out public service.⁹⁰ But the international law which the Strasbourg Court enforces, based on a system of State liability, should be distinguished from the domestic system for complying with the State's

85 Q 101.

86 [1993] 19 EHRR 112.

87 [2001] EWCA Civ 595, para. 60.

88 [2002] EWCA Civ 366, para. 33.

89 *Ibid.*, para 34.

90 see above paras.14–15.

obligations. As the parliamentary debates show,⁹¹ the Human Rights Act as a whole was designed to provide protection equivalent to the UK's obligations in Strasbourg. This was, however, to be effected by designing into the Act the direct liability of "pure" public authorities for breaches of Convention rights alongside direct liability, under section 6(3)(b), of private organisations performing public functions for breaches of Convention rights directly attributable to them.

83. In our view, therefore, a contracting-out public body would be liable for the actions of the contracted-to public body in breach of Convention rights only where it could be shown that the public body had a positive obligation to protect rights in the circumstances at issue. This would in general require that, where the State (in the form of a "pure" public authority) knows, or ought to know, of a real and immediate risk to the Convention rights of a particular individual or group, there is an obligation on it to take reasonable steps to prevent that breach.⁹² So, for example, where a local authority contracts-out provision of residential care to a private organisation, and it knows or ought to know that conditions at the care home would be in breach of Article 3 (the prohibition on inhuman and degrading treatment), then it would be likely to be in breach of its positive obligation to prevent breach of the residents' rights. However, where reasonable steps have been taken to ensure that services are contracted out to organisations that will not breach Convention rights, no positive obligation would arise. In those circumstances, in our view, there is no reason why the contracting-out public body would be liable under section 7 of the Human Rights Act for a breach of Convention rights by a contracted-to service provider.

84. In some cases, because of the nature of the breach at issue, the contracting-out public authority would simply not be in a position to afford effective redress. This, for example, was the position in the *Leonard Cheshire* case, where the claimants wished to use Article 8 of the ECHR to prevent the closure of their care home and their transfer elsewhere. The local authority, which had contracted with *Leonard Cheshire* for the applicant's care, could not itself have prevented this. The Law Society argues that there will be many cases—

... where a pure public authority cannot practically be made liable for the default of a notional hybrid [or "functional"] authority. Persons in this position might be termed "stranded victims", that is persons for whom the State has Convention responsibilities (under Article 1 ECHR) but where the Convention violation has been inflicted by a non-public body.⁹³

85. In our view, accountability of the contracting-out body for compliance with Convention rights by contractors (where and to the extent that it is available) is not an adequate substitute for direct accountability of the service provider under section 6. Reliance on the contracting-out party's responsibility will provide only partial protection. It is also undesirable that the body directly providing a service to individuals should be able

91 See the comments of the then Home Secretary Jack Straw MP cited at para.14 above.

92 *Osman v UK*(2000) 29 EHRR 245. Other aspects of a State's positive obligations under the Convention include the duty to provide resources necessary for the realisation of Convention rights (*Airey v UK*(1979-1980) 2 EHRR 277); to ensure that there is an effective legal framework for the protection of Convention rights (*X and Y v Netherlands* (1986) 8 EHRR 235); to provide information to individuals to allow them to ascertain whether their Convention rights are being breached, for example information on dangerous levels of environmental pollution (*Guerra v Italy* (1998) 26 EHRR 357); to investigate grave breaches of Convention rights, particularly breaches of Articles 2 and 3 (*Aydin v Turkey* (1998) 25 EHRR 251).

93 Ev 48.

to shift responsibility for human rights compliance elsewhere. **If a human rights culture is to be developed in our public administration and public services, this will not be promoted by removing from those delivering sensitive services the responsibility for compliance with, and the liability for breaches of, those human rights standards.**

Horizontal application: the protection of rights in the private sphere?

86. Although the Human Rights Act imposes direct obligations to protect Convention rights only on public authorities, the Act does allow the Convention rights to have some impact on the development of the law in the private sphere. The Act's limited horizontal effect arises from two provisions. First, under section 6, the courts as public authorities have a duty to protect Convention rights and therefore to apply the law, in all cases before them, in a way that complies with these rights. Second, the duty to interpret legislation compatibly with Convention rights "so far as is possible to do so", under section 3, also applies in all cases, including those involving purely private bodies.

87. The extent of the "horizontal" application of the Human Rights Act as between private parties has been the subject of extended academic debate,⁹⁴ but it is generally accepted that these provisions fall far short of full horizontal effect, which would apply the obligation to comply with Convention rights to both private and public persons on an equal basis. Nevertheless, it is arguable that in cases involving private sector service providers falling outside a narrow definition of public authority, there would be a sufficient level of human rights protection arising from the obligation of the courts to comply with Convention rights, and their obligation to interpret legislation in accordance with Convention rights. Private sector service providers are of course subject to the criminal law and to the full panoply of private law actions, including actions in tort or contract: this, interpreted in accordance with Convention rights by the courts, provides some protection for the rights of service users. Additionally, sectors such as housing and healthcare are regulated by legislation which has to be interpreted in accordance with Convention rights under section 3, so far as is possible to do so.

88. The principal difficulty with making this mechanism stand as a proxy for direct accountability is that even the limited "horizontal" applications of the Act are not free-standing. They depend on there being an existing cause of action to get the matter into court. Doughty Street Chambers note that indirect application under section 3 and section 6 is—

... of little practical benefit where a body performing privatised functions is neither a public authority nor amenable to judicial review ... the jurisdiction of the court will depend on there being some other cause of action upon which the court's role as a public authority can bite.⁹⁵

94 Murray Hunt, *The Horizontal Effect of the Human Rights Act*, [1998] Public Law 423; Sir William Wade, *Horizons of Horizontality* [2000] 116 LQR 217; Dawn Oliver, *The Human Rights Act and the public law / private law divide* [2000] EHRLR 343; Tom Raphael, *The problem of horizontal effect* [2000] EHRLR 393.

95 Kate Marcus, *What is Public Power: The Courts' Approach to the Public Authority Definition under the Human Rights Act*, in Jowell and Cooper, eds., *Delivering Rights: How the Human Rights Act is Working*, Hart Publishing, 2003. See also evidence of Liberty/Oxford Public Interest Lawyers, Ev 51.

In our view, the lack of a cause of action to bring a case to court would mean that in many cases “horizontal” application of Convention rights would be of little assistance to victims of a breach of Convention rights by a provider of a public service which was not a public authority. Section 6 of the Human Rights Act is the only legal mechanism available which ensures full responsibility for the protection of, and direct accountability for breaches of, Convention rights.

4 Potential Solutions: a summary

89. How then can the gap in human rights protection which we have identified best be addressed, and Parliament's original intentions be realised? In our call for evidence, we invited those who considered the current definition of public authority or its interpretation by the courts to be inadequate to suggest measures to address the problem. There are a number of options, which are considered in detail in the remainder of this report.

Amending the Act

90. Most radically, legislation could be introduced, either to amend or to supplement section 6 of the Human Rights Act, making clear that a range of organisations or functions, including functions in the provision of key public services, or organisations involved in the delivery of those services, have a responsibility to protect Convention rights. There are a number of possible models for such legislation, each of which we consider in detail below in section 5. Our conclusion is that such amending legislation would risk creating as many problems as it solves.

Contract

91. Second, it has been suggested, most notably by the Court of Appeal in the *Leonard Cheshire* case, that human rights could be protected under contract. Such terms could be inserted either in a contract between a State body and a private organisation for the provision of services, or in a contract between the private organisation and individual recipient of services. We examine how this might work in section 6 of this report below.

Guidance

92. Third, authoritative guidance as to law and best practice in assessing when an organisation is likely to be a public authority could assist both public authorities and the courts in clarifying responsibilities and improving human rights protection. Although there are significant drawbacks to reliance on contract alone, it could be useful to develop standard contractual terms to protect Convention rights. Whilst we welcome such guidance as has been already issued, and would welcome further guidance, we conclude in section 7 that it cannot provide a full or enduring solution to the problem we have identified.

Interpretation by the courts

93. Finally, the case law on the interpretation of "public authority" under section 6 of the Human Rights Act may develop along lines that provide for consistent human rights protection in the delivery of public services, especially when further cases are decided by the House of Lords.

94. There are two broad approaches to resolving the problem. The first three options above attempt to bring precision and exhaustiveness to defining the application of the Human Rights Act in any foreseeable circumstances. The alternative is to hold to the present

architecture of the Act, and to seek to ensure that it is applied creatively but consistently with the underlying principles which inform the whole idea of the Act, and which we believe were wholeheartedly endorsed by Parliament.

95. Our conclusion in sections 8 and 9 of this report is that section 6 of the Act is capable of such development, and that the case law is not inconsistent with this aim. However, we wish to urge this process along. We suggest principles which, in our view, could best govern the application by the courts of the meaning of “public authority”. We urge the government to use its right of intervention in the courts in the public interest to endeavour to hasten this process of development.

5 Potential solutions: legislation

96. The most radical approach to closing the gap in protection would be amendment of the Human Rights Act to rewrite the section 6 definition of public authority. It would also be possible to supplement the existing definition by scheduling or otherwise listing bodies or functions to which it applied. We now examine these alternatives.

Redefining public functions

97. Amending legislation could be introduced to re-word the general test of public authority status under section 6. Amongst others who support such an approach, the Law Society suggests that the Human Rights Act should be amended to expand the definition of public authority and that—

... any new definition should make clear that when a public body delegates functions that would otherwise be the responsibility of that public body to a private entity, those functions and the private body delivering them, are considered public for the purposes of the HRA.⁹⁶

98. However, formulating a comprehensive test of public authority status, of general and wide application, would be a very difficult task, and such a test would remain subject to judicial interpretation. The original formulation was very carefully considered, and thoroughly debated. It is possible, indeed in our view likely, that any expanded definition would bring a new set of unintended consequences when the courts came to apply it, and that a new set of anomalies would begin to emerge. **We are not convinced that any amendment to the wording of section 6(3)(b) could be devised which would be certain of achieving a more satisfactory application of Convention rights and duties than the current wording.**

Scheduling “public authorities”

99. A second possibility would be to amend the Human Rights Act to schedule a list of public authorities to the Act. Such an approach was adopted for the Freedom of Information Act 2000 (supplemented by a power of Ministerial designation by subordinate legislation, and by the definition of all publicly owned companies as public authorities). The Race Relations (Amendment) Act 2000 also schedules a list of public authorities subject to the general duty to promote race equality: similar provision is also made in the Northern Ireland Act 1998 in relation to the duty of public authorities to promote equality.

100. It is also argued that if a schedule listing individual bodies were considered to be too limiting, classes of organisations could be scheduled. Schedule 1 to the Race Relations (Amendment) Act 2000 includes a number of general categories of organisations subject to the general statutory duty to promote race equality. In relation to education, for example, it includes the following—

46. Governing bodies of—

- (a) educational establishments maintained by local education authorities;
- (b) institutions within the further education sector (within the meaning of section 91(3) of the Further and Higher Education Act 1992); or
- (c) institutions within the higher education sector (within the meaning of section 91(5) of the Act of 1992).

47. The managers of a grant-aided school (within the meaning of section 135 of the Education (Scotland) Act 1980).

48. The managers of a central institution (within the meaning of section 135 of the Act of 1980).

49. The board of management of a self-governing school (within the meaning of the Self-Governing Schools etc. (Scotland) Act 1989).

50. The board of management of a college of further education (within the meaning of section 36(1) of the Further and Higher Education (Scotland) Act 1992).

51. The governing body of an institution within the higher education sector (within the meaning of Part II of the Further and Higher Education (Scotland) Act 1992).

101. Our main objection to this approach is that it runs contrary to the whole scheme of the Act, a scheme whose generosity and flexibility we have emphasised again and again in this report. The application of section 6(3)(b) is about whether a function is or is not public. It is not about whether the body performing that function is itself in some way “public” in character. In many cases it will not be. The Human Rights Act identifies both pure and functional types of public authority. Scheduling organisations as “functional” public authorities under section 6(3)(b) of the Human Rights Act would leave open the question of which of the body’s functions were to be considered public, and would therefore bring little advance in certainty in the application of Convention rights.

102. This problem of identifying functions rather than bodies for a statutory purpose is not an issue in relation to the design of the Freedom of Information Act, the Race Relations Act (as amended) or the Northern Ireland Act. The scheme of those Acts does not appear to us to be transferable to solving the problem of the meaning of public authority under the Human Rights Act.

103. An additional though subordinate disadvantage of this approach is that although its purpose would be intended to introduce greater certainty in identifying which bodies came within the terms of section 6(3)(b) of the Human Rights Act, a schedule of public authorities would, on its own, risk inflexibility and omission. The likelihood would be that bodies not specified would be presumed by the courts to fall outside of section 6.⁹⁷ This might possibly be remedied by employing a schedule alongside the current general provision on public authority, or alongside a power of ministerial designation (see below),

⁹⁷ A concern expressed to the JCHR by Lord Falconer, see Joint Committee on Human Rights, Eleventh Report of Session 2002–03, *Criminal Justice Bill: Further Report*, HL Paper 118, HC 724, Ev 20.

but we have been presented with no plausible means of combining the two approaches in this way. It would be likely to result in a conceptual muddle.

104. We do not favour the idea of scheduling a list of “functional” public authorities to the Human Rights Act.

Designating “public authorities”

105. A related idea is that amending legislation could provide for organisations to be designated as public authorities in secondary legislation. A model for this approach is section 5(1) of the Freedom of Information Act, which provides for the Secretary of State to designate a body as a public authority for the purposes of that Act by order where it—

- a) appears to the Secretary of State to exercise functions of a public nature, or
- b) is providing under a contract made with a public authority any service whose provision is a function of that authority

106. This approach seems more promising, though it is open to the same objections on grounds of exclusivity as those we have outlined above in relation to a schedule of functional public authorities. However, even if reservations about the transferability of the scheme of the Freedom of Information Act to the Human Rights Act were set aside, it seems to us highly questionable whether, in the special area of the protection and vindication of rights, replacing judicial decision with executive decision would be appropriate. **For these reasons we do not favour amending the Human Rights Act to allow designation by Ministers in subordinate legislation of particular bodies as public authorities for the purposes of the Act.**

Designating “public functions”

107. A further option would be to provide either for the ministerial designation of particular functions as public for the purposes of section 6 of the Act, or to legislate separately to designate certain functions as those that are, or may be, public. For example, Shelter proposed that there should be legislation to state that registered social landlords or housing associations are independent bodies, but that certain of their functions are public functions. These functions, Shelter proposed, would include the management of housing developed with public subsidy or previously owned by a local authority, and the provision of services that discharge functions of a local authority or social services authority.

108. BIHR suggested in its evidence that, for example, functions pursuant to an arrangement under section 21 and 26 of the National Assistance Act 1948, could be designated as public functions. Legislation (or amending legislation) in other areas such as health or social care could likewise make clear that particular functions that the legislation allows to be contracted-out are to be considered as public functions for the purposes of the Human Rights Act.

109. This option for legislation would be workable in theory, although it would yet again carry the risk of the implication of exclusivity—the risk that those functions not so specified would not be considered by the courts to be public, even if section 6(3)(b) of the Human Rights Act remained unchanged. Although we consider that the designation of public functions in legislation is a plausible approach to closing the gap in protection that has been opened by the decisions of the courts so far, we are not convinced of its desirability in practice.

6 Potential solutions: contract

Using contracts to secure protection of Convention rights

110. As we noted above, it was suggested by the Court of Appeal in *Leonard Cheshire* that, where a service was provided by a private rather than a public organisation, Convention rights could be protected by the inclusion of contractual terms for the protection of those rights.

111. We received a considerable quantity of evidence responding to the suggestion of the Court of Appeal, and a number of responses supported the use of contractual terms to close the gap in protection.⁹⁸

112. The Charity Commission suggested that the current uncertainty as to the meaning of public authority was already leading to charities inserting contractual terms which state that, in all respects with regard to the contract, the charity is to act as if it were a functional public authority under the Human Rights Act. However, in relation to contracts between public bodies and private service providers, the recent report of the Audit Commission found that 61% of local government, health and criminal justice bodies had not taken any action to ensure that their contractors complied with the Human Rights Act.⁹⁹ Although the Audit Commission found that across local government there were “some examples of tendering and contracting processes being revised to comply with human rights legislation”, it expressed concern that “this continues to be a major area of weakness for public bodies”.¹⁰⁰ But the evidence we have received suggests that even if human rights terms were routinely inserted in public service contracts, there are potential pitfalls in the contractual route. Below, we consider how contractual protection of Convention human rights might work.

113. In the delivery of public services, it is common for any contractual arrangement to be solely between the public body and the private service provider. Some submissions noted that, for example, where a local authority purchases care services from an independent provider, the residents affected would not generally be a party to these arrangements unless they had been specially joined to a tripartite contract. In some cases there may be two concurrent contracts, one with the resident and one with the local authority.¹⁰¹

114. There are therefore two ways in which contracts might be used to ensure protection of the human rights of those receiving privately-delivered public services. The first is through the terms of a contract between a “pure” public authority and a private person or body for the delivery of services for which the public authority has a statutory responsibility. The second is through the terms of a contract between the private person or body delivering a “public” service and the user of the service. Each of these approaches raises particular issues which we now consider.

98 Charity Commission, Ev 17; the Housing Corporation, Ev 6; and the National Housing Federation, Ev 10.

99 Audit Commission, *Human Rights: Improving Public Service Delivery*, September 2003, para. 24, Exhibit 4.

100 *Ibid.*, para 24.

101 Ev 18.

Contracts between a public body and a private organisation

115. Protection of Convention rights through contracts between the public body and the private service provider raise difficulties both of enforceability and of consistency. Although they would be enforceable at the suit of the public authority, they might not always be enforceable at the suit of users, who will not themselves be parties to the contracts.¹⁰² We asked the Secretary of State for Constitutional Affairs whether he believed contractual terms could provide effective protection for human rights. In a supplementary written answer he concluded—

Contractual terms will not, of course, provide the level of protection offered by sections 6 and 7 of the Human Rights Act 1998, but we believe that a contracting authority could design terms to impose obligations on the contractor which achieves a similar effect.¹⁰³

We agree that contract may provide some measure of protection. But contractual terms which are not enforceable by those whose rights they seek to protect are clearly not a substitute for direct protection of Convention rights under sections 6 and 7 of the Human Rights Act.

116. Protection of Convention rights through contracts between public bodies and private service providers also raises difficulties of consistency, in two respects.

117. First, contracts entered into before the coming into force of the Human Rights Act, or indeed before the possibility of human rights contractual terms had been raised by the Court of Appeal, would leave Convention rights unprotected without revision of the contracts. As the Secretary of State for Constitutional Affairs commented—

Unilateral imposition of contractual terms post hoc is problematic and it would be inappropriate for public authorities to re-negotiate all the contracts to which they are committed.¹⁰⁴

There is therefore likely to be persistent inequality between users of the same service, depending on when they entered into their contracts.¹⁰⁵

118. Second, there is the possibility that contractual terms would vary, for example between different local authority areas.¹⁰⁶ This could be mitigated by standard contractual terms devised centrally, but contracts will nevertheless be subject to individual negotiation. As the Secretary of State for Constitutional Affairs again remarked—

¹⁰² This problem may be alleviated by the Contracts (Rights of Third Parties) Act 1999 which relaxes the common law rule that third parties cannot enforce the terms of a contract. However, enforcement by third parties under the Act is both conditional and not straightforward: the Act is only applicable if the contract expressly provides for third party enforcement (section 1(1)(a)) and where it purports to confer a benefit on the third party (section 1(1)(b)). The Act would not apply if on a proper construction of the contract it appeared that the parties did not intend the term to be enforceable by the third party (section 1(2)). It was pointed out in evidence that there could well be complicated and costly private law proceedings simply to establish, as a preliminary issue, that the third party could enforce any contract rights. Furthermore, the Act applies only to contracts concluded after 11 May 2000; contracts entered into before this date would not be enforceable by third parties. Written Evidence of DIAL UK, Ev 18.

¹⁰³ Ev 3.

¹⁰⁴ Ev 3.

¹⁰⁵ DIAL UK, Ev 18 and Kate Marcus, *op cit*.

¹⁰⁶ Ev 29.

I do not think that it would be possible to require public authorities to insert contractual terms.¹⁰⁷

There cannot be any assurance that contractual terms will lead to Convention rights being applied as consistently as they would be where there is a statutory duty under the Human Rights Act. Contractors might not always be content to accept human rights obligations, and a local authority faced with financial constraints, or with a limited number of potential contractors in its area, might well have no option but to negotiate on the extent of the protection proposed in the contract, or may choose not to pursue this approach. **Although it may be possible for a public body to include human rights protections in its contracts with service providers, there is no legal obligation on it to do so. There is nothing in the case law of the European Court of Human Rights, or in the UK case law under the Human Rights Act, which would impose a positive obligation on a public body routinely to protect Convention rights through contract.**

119. One possible advantage of protection being embodied in contracts between a public body and a private sector service provider would be that such terms could provide evidence that the parties to the contract intended that the private contractor should have human rights responsibilities equivalent to those of a public authority. It might be that the terms of a contract would influence a court in its decision as to whether a body was a functional public authority, in a borderline case. Such terms could also be taken to create a legitimate expectation on the part of the service user that human rights would be complied with in the provision of the service. Conversely, such a development would again raise the danger that the absence of contractual terms would be taken to imply the absence of an intention to accept the need for protection of Convention rights.

120. We have stressed in previous reports that human rights protection is not only concerned with access to court and the enforcement of human rights standards through litigation: it is also achieved through good practice, and the development of an organisational culture of respect for human rights. Furthermore, users of public service would not be parties to the contract, and would have no role in its negotiation. **Although terms relating to human rights in contracts between a service provider and the contracting-out public body could form the basis for developing a culture of human rights within the private sector service provider, litigation or the threat of litigation is not the best way in which such a culture might be fostered. That will be better promoted by awareness of the obligations arising from direct responsibilities under section 6 of the Act.**

Contracts between the service provider and the service user

121. Were clauses for the protection of Convention rights to be included in contracts between the private sector service provider and the individual service user (in circumstances where this was practicable), it would avoid the risk of service users lacking legally enforceable rights under the contract. However, the risks of inconsistency we have identified above would remain, and indeed would be exacerbated.

122. If uniform contracts cannot be imposed centrally, then there must also be concern about potential inequality of bargaining power in the negotiation of contracts between private service providers and individual users. People are likely to enter into contracts with public service providers at particularly vulnerable moments in their lives. Care home residents, for example, are likely to be in a weak negotiating position on their admission,¹⁰⁸ and there is also likely to be unequal bargaining power between registered social landlords and their tenants.¹⁰⁹ Many individuals will not have access to legal advice; and many will be unlikely to be aware of the significance of human rights terms in the contract.¹¹⁰

123. This imbalance applies equally to enforcement. Many users of public services are not (to say the least) well informed about the terms of their contracts with service providers.¹¹¹ Research by the Office of Fair Trading¹¹² found that only about one third of the elderly care home residents surveyed were aware of being a signatory to a contract,¹¹³ and over two-thirds either did not know or could not remember what sort of areas were covered by their agreement with the home.¹¹⁴

124. These difficulties call into question the potential effectiveness of contractual clauses to provide protection equal to that offered by direct protection of rights under the Human Rights Act. Other anomalies were also cited in evidence to us. Liberty and Oxford Public Interest Lawyers argue that applicants may be disadvantaged by not having their claims heard in the Administrative Court—

Contract actions and judicial review actions are heard by different courts. Whilst the courts share the same obligations as public authorities under the Human Rights Act, the balance of judicial experience and expertise in human rights lies with the high court judges sitting in the Administrative Court. The same is true of the lawyers who practice there.¹¹⁵

Although any such difficulties might be overcome, there is no doubt that different time limits,¹¹⁶ as well as different defences, would apply to those enforcing their Convention rights by way of contract,¹¹⁷ and different standards would creep in. It is not obvious that this would lead to an improvement on the current state of affairs.

108 Ev 18.

109 Ev 29.

110 Kate Marcus, *op cit*.

111 *ibid.*, Age Concern, Ev 14; JUSTICE, Ev 40; DIAL UK, Ev 18.

112 Office of Fair Trading Report into Older People as Consumers in Care Homes (October 1998).

113 *Ibid.* p. 48. 18% of respondents said that they had signed a contract; 18% said that a relative or friend had signed a contract; the remainder either had not signed a contract or were unaware of whether a contract existed.

114 *Ibid.*, p. 49.

115 Ev 55, para. 21.

116 Under section 7(5)(a) of the HRA, proceedings against a public authority under the Act must be brought one year following the act complained of. This is subject to any other more restrictive time limit applicable in the proceedings and may also be extended by the court where it is equitable to do so. The limitation period for proceedings in breach of contract is 6 years, under the Limitation Act 1980.

117 Ev 55.

Conclusion

125. It appears to us that access to redress for human rights violations will be considerably more complex and, it is likely, less effective under the private law contractual model than as a product of the more direct public law provision of the Human Rights Act. It is likely to create inequalities between local authority areas. Even within a single local authority area, where services are in part provided directly by the local authority and in part under contract by the private sector, there are also likely to be inconsistencies, in the absence of rigorously enforced standard contractual terms, in the contractual terms negotiated. **We are unconvinced that the inclusion of contractual terms for human rights protection could provide fully comprehensive, consistent and equal human rights protection for the recipients of public services on an equal basis with statutory responsibility under section 6 Human Rights Act.**

126. We consider the question of guidance in the development of standard contractual terms in the next section.

7 Potential solutions: guidance

Standard contractual terms

127. We asked in our call for evidence whether any standard contractual terms for human rights protection had been prepared. Although none were disclosed by the evidence, it is anticipated that the Improvement and Development Agency (IDeA) will develop standard contractual terms for procurement to include terms on human rights protection.¹¹⁸ One very welcome recent development has been the Audit Commission report *Human Rights: Improving Public Service Delivery* (September 2003) which includes a checklist for public authorities contracting out services, designed to ensure that human rights considerations have been taken fully into account in the contractual arrangement.

128. Although contractual terms may not be capable of providing a fully comprehensive solution, we do see some potential, as we described in the preceding section, in the development of standard contractual terms that would be required to be applied consistently wherever public services were contracted out, even if only as a stop-gap measure. We asked Lord Falconer whether the DCA had given any consideration to the development of standard contractual terms. In supplementary written evidence we were told—

The Deputy Prime Minister's letter of the 30 April to you, made it clear that we consider it good practice when drawing up contracts to take account of any Human Rights Act implications that may apply. My department is in discussion with his about how best to take this forward.¹¹⁹

129. We recommend that the relevant government departments, in particular the Department for Constitutional Affairs and the Office of the Deputy Prime Minister, should give urgent attention to the development of guidance on the protection of human rights through contract, taking account of the potential problems we have identified in section 6 of this report.

130. In requesting written evidence from representative groups for private sector service providers, we asked them as well whether they had produced any guidance on the meaning of public authority under the Human Rights Act. Although none had then been issued, the Audit Commission's recent report, *Human Rights: Improving Public Service Delivery* (September 2003) includes guidance on the responsibilities of contracting-out public authorities. It advises that—

When a public body contracts out services to a private or voluntary sector provider, it cannot assume that the service provider will be liable for any breach of the human rights of service users ... The complexity and difficulty experienced by public bodies in ensuring that contractors comply with the Act cannot be underestimated. This is also compounded by emerging case law as to what can be defined as a public body under the Act. Following the decision of the Court of Appeal in *R (Heather) v Leonard Cheshire*, most private organisations that contract with public bodies to provide

¹¹⁸ As part of the Strategic Programme on Procurement developed in conjunction with ODPM and the LGA.

¹¹⁹ Ev 3.

services do not constitute public bodies for the purposes of the Human Rights Act, despite the public nature of the work in which they engage. Unless the public body exerts a significant degree of operational control over the service provider, it is likely that the courts will consider the service provider to be outside the scope of the Human Rights Act. The courts have made it clear that individuals may bring an action against the public body that entered into the contract rather than the supplier for failing to protect adequately their human rights.¹²⁰

The Commission goes on to suggest that—

In order to minimise breaches of human rights by service providers, public bodies should, when negotiating contracts, require the service provider to undertake to protect the human rights of service users. This will bind service providers to the Act. If an individual's human rights are breached by a service provider who has entered into a contract that guarantees service users' rights, an individual may bring a claim directly against the service provider using the Act. If a public body enters into contracts in this way it will have endeavoured to protect the rights of service users.¹²¹

131. We welcome this guidance as providing constructive advice in light of the current law. We retain some doubt, however as to the liability of contracting-out public bodies, as we explained above in section 6 of this report.

132. The Charity Commission also told us that it is in the process of reviewing its operational guidance on the implications of the Human Rights Act for charities, including the meaning of a public authority.

Guidance from the Government on the meaning of “public authority”

133. Some submissions to the inquiry suggested that there should be an authoritative government statement on the meaning of public authority, or the public authority status of particular classes of bodies. This could take the form of ministerial guidance or a clear statement from the Secretary of State.¹²² As a first step, the government could itself adopt a clear commitment to a broad definition of “public function” as a means of promoting a human rights culture.¹²³ However, there are few signs that it is willing to do so. We asked the Department what it had done, or what plans it had, in relation to issuing such guidance. We were told that it had—

... no current plans to issue specific guidance on the emerging case law on the meaning of public authority. However we are revising our popular study guide to the Act (prepared in partnership with the Bar Council) and will update regarding the position in that, which is for publication before Easter.¹²⁴

134. It would not help the case we are advancing, of course, if the Government were to issue guidance on “the emerging case law” on the meaning of public authority in a way which appeared to endorse it—as this report makes clear, we do not think the emerging

120 Audit Commission, *Human Rights: Improving Public Services Delivery*, September 2003, pp. 11–12.

121 *Ibid.*, p. 12.

122 Ev 31.

123 Ev 40.

124 Ev 3.

case law is satisfactory. Official guidance from the Government would be helpful in indicating to public authorities means of ensuring that the protection of the Human Rights Act could be preserved. Were it to attempt to be prescriptive about public functions, it is not obvious that it would be persuasive in matters of dispute, and it might also be open to the objections we raised above both against the risks of appearing to be exclusive and against the desirability of substituting executive fiat for judicial interpretation. **On the whole, we do not consider that government guidance on the generality of the meaning of “public authority” under the Human Rights Act has the potential to reduce greatly the gap in protection we have identified.**

8 A solution: principles of interpretation

135. We now put forward our view on certain general principles for the interpretation of section 6(3)(b) of the Human Rights Act which we believe are fundamental to the effective operation of the “public authority” responsibilities under the Act, and therefore to the effectiveness of the Act as a whole in protecting Convention rights. We would particularly stress that these principles are appropriate to the intention of Parliament in enacting the Human Rights Act, an intention evidenced by the Parliamentary debates referred to in the first section of this report.¹²⁵ We believe that these principles would allow an application of section 6 that more fully satisfies the UK’s international obligations under Articles 1 and 13 of the Human Rights Act and give true effect to the intention of Parliament to “bring rights home”, by addressing the practical gaps in human rights protection which we have identified in this report.

Functional and institutional tests

136. It is important that the test that should be applied under section 6(3)(b) is functional rather than institutional. It is clear, under the terms of section 6, that “functional” public authorities fall to be identified by very different criteria from pure public authorities. Whilst the latter attain their public authority status because of the type of organisation they are—by the place of the organisation within or very close to the machinery of government—the status of the latter is to be assessed without reference to the nature of the organisation itself. Section 6(3)(b) makes clear that functional public authority status may attach to “any person certain of whose functions are functions of a public nature.” Under section 6(5), such a body is not for all purposes a public authority and will not be so “if the nature of the act is private”.

137. The difficulties in defining two key terms—“public” and “function”—have led to confusion in the application of section 6 through reliance on criteria, including statutory basis and institutional proximity to the State, which are not warranted either by the language of the Act or by the ECHR.

Public functions and government programmes

138. **In our view, a function is a public one when government has taken responsibility for it.** Very few services or acts are in themselves inherently public. There is no doubt that caring for the sick, or educating children, do not involve acts that are inherently public. Health and education services can be and are provided by the State; they can equally well be provided by commercial enterprises, or charitable organisations, or families. To limit the meaning of public functions to those functions which can only (legally) be carried out by the State would be to confine its meaning to a narrow category hardly extending beyond coercive powers. This would leave the Human Rights Act far short of fulfilling the UK’s obligation to protect and secure Convention rights effectively, forcing the victims of violations to rely on the Strasbourg court for redress.

¹²⁵ Although we think it neither necessary or appropriate to rely on statements made in those debates for the purpose of interpreting section 6.

139. The range of functions which are generally considered to be public, in that they are generally expected to be performed directly or indirectly by the State, varies over time. The State has in the past used direct delivery by government-owned or controlled bodies to effect the enlargement of the scope of its activities, but in the last 25 years or so has moved significantly in the direction of indirect delivery of many of these same functions, and some new ones.

140. The key test of whether a function is public is whether it is one for which the government has taken responsibility in the public interest. For example, although the various activities involved in care for the sick may be performed by anyone, the State has chosen, through a comprehensive social programme, to provide healthcare to those who wish to receive healthcare from the State rather than privately. This programme is undertaken in the public interest to provide what the government considers to be an important social service. In our view, discharge of duties necessary for provision of the government programme of healthcare is a public function. Discharge of healthcare services, in itself, is not. It is the doing of this work as part of a government programme which denotes a public function, rather than the provision of healthcare in itself. In performing duties as part of the State programme of healthcare, a private organisation is assisting in performing what the State itself has identified as the State's responsibilities.

141. Similarly, provision of services for the elderly could equally well be a private function, if provided to private patients in a private home, or by relatives of the elderly person. The provision of the care is a public function where it is undertaken as part of a government programme of State provision of such care. The function being assumed by the private organisation is the function of providing care which the State has taken on the responsibility to provide. This makes the function public.

Public functions and statute

142. **On the principles set out above, for a body to discharge a public function, it does not need to do so under direct statutory authority. A State programme or policy, with a basis in statute or otherwise, may delegate its powers or duties through contractual arrangements without changing the public nature of those powers or duties. Under section 6 of the Human Rights Act, there should be no distinction between a body providing housing because it itself is required to do so by statute, and a body providing housing because it has contracted with a local authority which is required by statute to provide the service. The loss of a single step in proximity to the statutory duty does not change the nature of the function, nor the nature of its capacity to interfere with Convention rights.**

Public functions and public institutions

143. **Institutional links with a public body are not necessary to identifying a public function** (although by contrast they are relevant to assessing whether a body as a whole is a “pure public authority” under section 6, and to whether a body is amenable to judicial review). Although institutional proximity to the State may supply evidence that the organisation is delivering on a public or governmental programme, and is therefore performing a public function, it does not, in itself, determine the nature of the function being performed. An organisation could be closely administratively connected with a State authority, whilst performing only private functions, for example the recruitment of staff. Furthermore, the criterion of enmeshment or connection with a State authority has no basis in the jurisprudence of the European Court of Human Rights.¹²⁶ In human rights terms, it is a purely arbitrary criterion, and leaves open the possibility that protection under the Human Rights Act could fail to meet the State’s obligations under Articles 1 and 13 ECHR.

Public functions and public power

144. It is uncontroversial that the coercive powers of the State, even when exercised by private bodies, remain public in nature. Into this category, for example, fall the exercise of powers of detention enjoyed by privately run prisons, and under authority of the Mental Health Acts.¹²⁷ But to confine “public function” to such activities would, it appears to us, risk improperly identifying a public function with the exercise of public powers

145. Governmental control may also engage the State’s responsibility where it is monopolistic, in its regulation of private activity or its provision of a service. This type of function is public at least in part because individuals are exclusively dependent on the body exercising it, and exclusively dependent on it to realise their Convention rights.¹²⁸

146. Exclusive control by a service provider, and exclusive dependence on it by an individual, can also exist where there is exclusive control of an individual situation, though perhaps not monopoly of an entire sector. If, as in the *Leonard Cheshire* case, the issue is whether Article 8 rights can be realised by the continued operation of a particular care home, the decision to allow that, and the consequent protection of Article 8 rights, is exclusively within the gift of the administrators of the care home. The administrators of the care home may not exclusively provide care services within the area concerned, but they exclusively provide the particular service necessary (in the claimant’s arguments) to uphold their Convention rights.

¹²⁶ Para 41 above.

¹²⁷ *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 Admin

¹²⁸ See for example the *Hampshire Farmers’ Market* case, in particular the judgment of the Divisional Court, [2002] EWHC 2539 Admin; [2003] EWCA Civ 1056.

147. The attribution of public authority responsibilities to private sector bodies is justified on the basis that the private body operating to discharge a government programme is likely to exercise a degree of power and control (which in the absence of delegation would be State power and control) over the realisation of the individual's Convention rights.

9 Conclusion

148. We have concluded that the application of the functional public authority provision in section 6(3)(b) of the Human Rights Act leaves real gaps and inadequacies in human rights protection in the UK, including gaps that affect people who are particularly vulnerable to ill-treatment. We consider that this deficit in protection may well leave the UK in breach of its international obligations to protect the Convention rights of all those in the jurisdiction and to provide mechanisms for redress where those rights are breached.

149. We have taken the view, however, that it would be undesirable to amend section 6, for a number of reasons. As well as being too early in the experience of the Act's implementation, it would be likely to sacrifice the flexibility of the Act and to inhibit its capacity to adapt to changing social circumstances and thereby ensure comprehensive and consistent human rights protection. It would be difficult to devise a magic formula to provide a comprehensive and precise definition of public authority, and any attempt to do so would, in our view, be likely to create as many problems as it solves.

150. We have considered whether the gap in protection could be closed by specifying the bodies whose activities fall within the ambit of the Act. We conclude that this is both impractical and undesirable. It would risk restricting the category of bodies in ways that would exclude those which should be held responsible under the Act. It would also be based on a misconception of the Act's scheme – it is not particular bodies which fall within the ambit of section 6(3)(b), it is particular functions.

151. An attempt to define public functions in statute would be a more promising route to resolving the problem, but it would still be open to many of the objections which we identify to attempting to list public bodies. Nor have we been able to discover any convincing formulation of how to do so.

152. We have considered other possible solutions. We do not consider that the “horizontal” application of the Act's provisions, through the duty on the courts to act compatibly with Convention rights and to interpret the law so far as possible in compliance with those principles, will sufficiently address the problem of determining whether individuals can seek redress against the State. Nor do we consider that the possibility that public authorities remain responsible for the actions of those to whom they delegate the discharge of their functions will provide sufficient redress.

153. We have considered whether the gap could be closed through the inclusion of terms guaranteeing human rights protection in contracts between private or voluntary bodies delivering public services and the contracting authority or individual user. While this may provide some measure of protection, we conclude that the result is likely to be partial, inconsistent and unequal protection of rights.

154. We have considered whether the gap could be closed by the imposition or encouragement of best practice, particularly in the formulation of contracts, effected through guidance from the government or other responsible bodies. We have concluded that although such guidance would be helpful, and indeed is urgently required in the current confused situation, it cannot provide a complete or enduring solution.

155. The problem with the meaning of public authority appears to us not to be intrinsic to the wording of section 6; nor is it a necessary consequence of the shifting roles of the public and private sectors. It arises principally from an institutional rather than a functional focus in the application of the provision by most of the courts which have had to decide whether a body is a functional public authority. **In our view, it would be unsatisfactory to leave this matter to the present state of the case law. In his oral evidence, the Secretary of State told us that he would keep the matter of the interpretation of the meaning of “public authority” by the courts “under close review” and would “pay particular attention to the need to intervene in future cases on the meaning of section 6(3)(b)”.**¹²⁹ **We urge the Government to intervene in the public interest as a third party in cases where it can press the case for a broad, functional interpretation of the meaning of public authority under the Human Rights Act. In the interests of the full protection of Convention human rights which the Human Rights Act was designed to achieve, what is needed is a careful application of the current section 6 test so as to prevent any diminution in human rights protection arising from the contracting out of public services.** This would ensure compliance with the UK’s international obligations to protect Convention rights. We consider that this can be achieved, on the application of principles of ECHR law and the terms of section 6.

156. We have set out the principles of interpretation which we believe would, if adopted by the courts, do much to close the gap in the protection offered under the Human Rights Act which has opened up as a consequence of some early decisions on the application of the “public function” test. Such principles would, in our view, be consistent with the approach of the House of Lords to the interpretation of section 6 in the *Aston Cantlow* case, which provides the only decision so far of the highest court on the meaning of section 6(3)(b). The House of Lords in that case took the view that, in order to best achieve the statutory purpose of the Human Rights Act, a narrow category of “pure” public authorities should be complemented by a wide category of “functional” public authorities identified on the basis of public function. Interpretation of section 6 in accordance with the principles we suggest would also ensure that the Human Rights Act fully satisfies the UK’s international obligations under Articles 1 and 13 ECHR, as was the intention of the legislature.

157. We conclude that, as a matter of broad principle, a body is a functional public authority performing a public function under section 6(3)(b) of the Human Rights Act where it exercises a function that has its origin in governmental responsibilities, as explained in paragraph 134 above, in such a way as to compel individuals to rely on that body for realisation of their Convention human rights.

¹²⁹ Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-I, Q 99.

Conclusions and recommendations

A gap in human rights protection

1. The tests being applied by the courts to determine whether a function is a “public function” within the meaning of section 6(3)(b) of the Human Rights Act are, in human rights terms, highly problematic. Their application results in many instances where an organisation “stands in the shoes of the State” and yet does not have responsibilities under the Human Rights Act. It means that the protection of human rights is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body’s administrative links with institutions of the State. The European Convention on Human Rights provides no basis for such a limitation, which calls into question the capacity of the Human Rights Act to bring rights home to the full extent envisaged by those who designed, debated and agreed the Act. (Paragraph 41)
2. In our view, the principles set out by Lord Hope of Craighead in *Aston Cantlow* would provide an effective basis for protection of the Convention rights. Although the House of Lords in that case did not expressly overrule the decisions in *Poplar* and in *Leonard Cheshire*, it appears that the principles set out by Lord Hope in *Aston Cantlow* are at odds with those earlier decisions of the lower courts. In our view, the approach in *Aston Cantlow* is to be preferred. (Paragraph 42)
3. A serious gap has opened in the protection which the Human Rights Act was intended to offer, and a more vigorous approach to re-establishing the proper ambit of the Act needs to be pursued. This is not just a theoretical legal problem. The development of the case law has significant and immediate practical implications. (Paragraphs 43 and 44)

Why does the meaning of “public authority” matter?

4. Those providing important public services, whether from the State or private sectors, should not be left uncertain about their responsibilities to protect fundamental human rights. (Paragraph 49)
5. Given the range of private and voluntary sector involvement in public service provision, the extent of public authority responsibilities under the Human Rights Act is profoundly significant to both the providers and the recipients of these services. (Paragraph 58)
6. As the case law currently stands, whether human rights breaches by private and voluntary sector providers of public services will give rise to accountability under the Human Rights Act is likely to depend on a number of relatively arbitrary criteria. (Paragraph 69)

7. The gaps and inconsistencies in human rights protection arising from this situation are likely to mean that the UK falls short of its international obligations (under Articles 1 and 13 ECHR) to secure the effective protection of Convention rights and to provide an effective remedy for their breach. (Paragraph 73)
8. The disparities in human rights protection that arise from the current case law on the meaning of public authority are unjust and without basis in human rights principles. Unless other avenues of redress can be found, this situation is likely to deprive individuals of redress for breaches of their substantive Convention rights incorporated under the Human Rights Act. The situation created by the current state of the law is unsatisfactory, unfair, and inconsistent with the intention of Parliament. (Paragraph 74)

Concerns of service providers and users

9. Identification as a functional public authority, that is, a private sector body that is performing a public function for the purposes of section 6 of the Human Rights Act, would not jeopardise the independence from the state of a non-governmental body. (Paragraph 62)
10. The financial burden, responsibility and possible conflict with other duties, for example, under charity law, that public authority status may impose on a voluntary sector organisation needs to be taken into account by State bodies when they contract-out public functions. (Paragraph 63)
11. It is irrelevant to deciding the application of the Act whether an organisation performing a public function is deemed to be within or without the public sector for wider, including financial, purposes. (Paragraph 65)

Is the category of “functional public authority” necessary?

12. Accountability of the contracting-out body for compliance with Convention rights by contractors (where and to the extent that it is available) is not an adequate substitute for direct accountability of the service provider under section 6. If a human rights culture is to be developed in our public administration and public services, this will not be promoted by removing from those delivering sensitive services the responsibility for compliance with, and the liability for breaches of, those human rights standards. (Paragraph 85)
13. The lack of a cause of action to bring a case to court would mean that in many cases “horizontal” application of Convention rights would be of little assistance to victims of a breach of Convention rights by a provider of a public service which was not a public authority. Section 6 of the Human Rights Act is the only legal mechanism available which ensures full responsibility for the protection of, and direct accountability for breaches of, Convention rights. (Paragraph 88)

Potential solutions: amending or supplementing the Act

14. We are not convinced that any amendment to the wording of section 6(3)(b) could be devised which would be certain of achieving a more satisfactory application of Convention rights and duties than the current wording. (Paragraph 98)
15. Our main objection to the idea of scheduling a list of public authorities to the Act is that it runs contrary to the whole scheme of the Act, a scheme whose generosity and flexibility we have emphasised again and again in this report. The application of section 6(3)(b) is about whether a function is or is not public. It is not about whether the body performing that function is itself in some way “public” in character. In many cases it will not be. The Human Rights Act identifies both pure and functional types of public authority. Scheduling organisations as “functional” public authorities under section 6(3)(b) of the Human Rights Act would leave open the question of which of the body’s functions were to be considered public, and would therefore bring little advance in certainty in the application of Convention rights. We do not favour the idea of scheduling a list of “functional” public authorities to the Human Rights Act. (Paragraphs 101 and 104)
16. We do not favour amending the Human Rights Act to allow designation by Ministers in subordinate legislation of particular bodies as public authorities for the purposes of the Act. (Paragraph 106)
17. Although we consider that the designation of public functions in legislation is a plausible approach to closing the gap in protection that has been opened by the decisions of the courts so far, we are not convinced of its desirability in practice. (Paragraph 109)

Potential solutions: contract

18. Contract may provide some measure of protection for the rights of service users. But contractual terms which are not enforceable by those whose rights they seek to protect are clearly not a substitute for direct protection of Convention rights under sections 6 and 7 of the Human Rights Act. (Paragraph 115)
19. Although it may be possible for a public body to include human rights protections in its contracts with service providers, there is no legal obligation on it to do so. There is nothing in the case law of the European Court of Human Rights, or in the UK case law under the Human Rights Act, which would impose a positive obligation on a public body routinely to protect Convention rights through contract. (Paragraph 118)
20. Although terms relating to human rights in contracts between a service provider and the contracting-out public body could form the basis for developing a culture of human rights within the private sector service provider, litigation or the threat of litigation is not the best way in which such a culture might be fostered. That will be better promoted by awareness of the obligations arising from direct responsibilities under section 6 of the Act. (Paragraph 120)

21. We are unconvinced that the inclusion of contractual terms for human rights protection could provide fully comprehensive, consistent and equal human rights protection for the recipients of public services on an equal basis with statutory responsibility under section 6 Human Rights Act. (Paragraph 125)

Potential solutions: guidance

22. We recommend that the relevant government departments, in particular the Department for Constitutional Affairs and the Office of the Deputy Prime Minister, should give urgent attention to the development of guidance on the protection of human rights through contract, taking account of the potential problems we have identified in section 6 of this report. (Paragraph 129)
23. We welcome the guidance given by the Audit Commission to local authorities as providing constructive advice in light of the current law. We retain some doubt, however, as to the liability of contracting-out public bodies, as we explained in section 6 of this report. (Paragraph 131)
24. We do not consider that government guidance on the generality of the meaning of “public authority” under the Human Rights Act has the potential to reduce greatly the gap in protection we have identified. (Paragraph 134)

A solution: principles of interpretation

25. The difficulties in defining two key terms—“public” and “function”—have led to confusion in the application of section 6 through reliance on criteria, including statutory basis and institutional proximity to the State, which are not warranted either by the language of the Act or by the ECHR. A function is a public one when government has taken responsibility for it. (Paragraphs 137 and 138)
26. On the principles we have set out, for a body to discharge a public function, it does not need to do so under direct statutory authority. A State programme or policy, with a basis in statute or otherwise, may delegate its powers or duties through contractual arrangements without changing the public nature of those powers or duties. Under section 6 of the Human Rights Act, there should be no distinction between a body providing housing because it itself is required to do so by statute, and a body providing housing because it has contracted with a local authority which is required by statute to provide the service. The loss of a single step in proximity to the statutory duty does not change the nature of the function, nor the nature of its capacity to interfere with Convention rights. (Paragraph 142)
27. Institutional links with a public body are not necessary to identifying a public function. (Paragraph 143)
28. The attribution of public authority responsibilities to private sector bodies is justified on the basis that the private body operating to discharge a government programme is likely to exercise a degree of power and control (which in the absence of delegation would be State power and control) over the realisation of the individual’s Convention rights. (Paragraph 147)

Conclusion

29. The application of the functional public authority provision in section 6(3)(b) of the Human Rights Act leaves real gaps and inadequacies in human rights protection in the UK, including gaps that affect people who are particularly vulnerable to ill-treatment. We consider that this deficit in protection may well leave the UK in breach of its international obligations to protect the Convention rights of all those in the jurisdiction and to provide mechanisms for redress where those rights are breached. (Paragraph 148)
30. It would be unsatisfactory to leave this matter to the present state of the case law. In his oral evidence, the Secretary of State for Constitutional Affairs told us that he would keep the matter of the interpretation of the meaning of “public authority” by the courts “under close review” and would “pay particular attention to the need to intervene in future cases on the meaning of section 6(3)(b)”. We urge the Government to intervene in the public interest as a third party in cases where it can press the case for a broad, functional interpretation of the meaning of public authority under the Human Rights Act. In the interests of the full protection of Convention human rights which the Human Rights Act was designed to achieve, what is needed is a careful application of the current section 6 test so as to prevent any diminution in human rights protection arising from the contracting out of public services. (Paragraph 155)
31. As a matter of broad principle, a body is a functional public authority performing a public function under section 6(3)(b) of the Human Rights Act where it exercises a function that has its origin in governmental responsibilities, in such a way as to compel individuals to rely on that body for realisation of their Convention human rights. (Paragraph 157)

Annex: Section 6 of the Human Rights Act 1998

Public Authorities

Acts of public authorities

6.—(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 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.

Formal Minutes

Monday 23 February 2004

Members Present:

Jean Corston MP, in the Chair

Lord Bowness	Mr David Chidgey MP
Lord Campbell of Alloway	Mr Kevin McNamara MP
Lord Judd	Mr Paul Stinchcombe MP
Lord Lester of Herne Hill	
Lord Plant of Highfield	
Baroness Prashar	

The Committee deliberated.

* * * * *

Draft Report [The Meaning of Public Authority under the Human Rights Act], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 157 read and agreed to.

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

Ordered, That certain papers be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and that Baroness Prashar do make the Report to the House of Lords.

[Adjourned till Monday 1 March a quarter past Four o'clock.]

List of Written Evidence

Government

1. Office of the Deputy Prime Minister	Ev	1
2. Department of Health	Ev	2
3. Department for Constitutional Affairs	Ev	3

Housing

4. Chartered Institute of Housing	Ev	4
5. Housing Corporation	Ev	6
6. Local Government Association	Ev	9
7. National Housing Federation	Ev	10
8. Partnerships UK	Ev	13

Organisations

9. Age Concern England	Ev	14
10. Charity Commission	Ev	17
11. DIAL UK	Ev	18
12. Help the Aged	Ev	24
13. Shelter	Ev	29
14. British Humanist Association	Ev	32
15. British Institute of Human Rights	Ev	36
16. British Irish Rights Watch	Ev	38
17. Children's Rights Alliance for England	Ev	39
18. JUSTICE	Ev	40
19. Law Society	Ev	48
20. Liberty and the Oxford Public Interest Lawyers	Ev	51

Individuals

21. Norman Doe, Mark Hill, Frank Cranmer, Javier Oliva and Christiana Cianitto, Centre for Law and Religion of the Cardiff Law School	Ev	57
22. Dr Augur Pearce, Lecturer at the Cardiff Law School	Ev	71
23. Philip Plowden, Associate Dean and Kevin Kerrigan, Principal Lecturer, Centre for Human Rights Practice, Northumbria University	Ev	76
24. Morag McDermont, University of the West of England	Ev	81

The following submission has not been printed:

Forthcoming article by Professor Dawn Oliver, University College London, *Functions of a Public Nature under the Human Rights Act*

Reports from the Joint Committee on Human Rights since 2001

The following reports have been produced

Session 2003–04

First Report	Deaths in Custody: Interim Report	HL Paper 12/HC 134
Second Report	The Government's Response to the Committee's Ninth Report of Session 2002-03 on the Case for a Children's Commissioner for England	HL Paper 13/HC 135
Third Report	Scrutiny of Bills: Progress Report	HL Paper 23/HC 252
Fourth Report	Scrutiny of Bills: Second Progress Report	HL Paper 34/HC 303
Fifth Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HL Paper 35/HC 304
Sixth Report	Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4	HL Paper 38/HC 381

Session 2002–03

First Report	Scrutiny of Bills: Progress Report	HL Paper 24/HC 191
Second Report	Criminal Justice Bill	HL Paper 40/HC 374
Third Report	Scrutiny of Bills: Further Progress Report	HL Paper 41/HC 375
Fourth Report	Scrutiny of Bills: Further Progress Report	HL Paper 50/HC 397
Fifth Report	Continuance in force of sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 59/HC 462
Sixth Report	The Case for a Human Rights Commission: Volume I Report	HL Paper 67-I HC 489-I
Seventh Report	Scrutiny of Bills: Further Progress Report	HL Paper 74/HC 547
Eighth Report	Scrutiny of Bills: Further Progress Report	HL Paper 90/HC 634
Ninth Report	The Case for a Children's Commissioner for England	HL Paper 96/HC 666
Tenth Report	United Nations Convention on the Rights of the Child	HL Paper 117/HC 81
Eleventh Report	Criminal Justice Bill: Further Report	HL Paper 118/HC 724
Twelfth Report	Scrutiny of Bills: Further Progress Report	HL Paper 119/HC 765
Thirteenth Report	Anti-social Behaviour Bill	HL Paper 120/HC 766

Fourteenth Report	Work of the Northern Ireland Human Rights Commission	HL Paper 132/HC 142
Fifteenth Report	Scrutiny of Bills and Draft Bills: Further Progress Report	HL Paper 149/HC 1005
Sixteenth Report	Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 181/HC 1272
Seventeenth Report	Scrutiny of Bills: Final Progress Report	HL Paper 186/HC 1278
Eighteenth Report	The Government's Response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child	HL Paper 187/HC 1279
Nineteenth Report	Draft Gender Recognition Bill Vol I: Report	HL Paper 188-I/HC 1276-I
Nineteenth Report	Draft Gender Recognition Bill Vol II: Evidence	HL Paper 188-II/HC 1276-II

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First Report	Homelessness Bill	HL Paper 30/HC 314
Second Report	Anti-terrorism, Crime and Security Bill	HL Paper 37/HC 372
Third Report	Proceeds of Crime Bill	HL Paper 43/HC 405
Fourth Report	Sex Discrimination (Election Candidates) Bill	HL Paper 44/HC 406
Fifth Report	Anti-terrorism, Crime and Security Bill: Further Report	HL Paper 51/HC 420
Sixth Report	The Mental Health Act 1983 (Remedial) Order 2001	HL Paper 57/HC 472
Seventh Report	Making of Remedial Orders	HL Paper 58/HC 473
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Ninth Report	Scrutiny of Bills: Progress Report	HL Paper 60/HC 475
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Fifteenth Report	Police Reform Bill: Further Report	HL Paper 98/HC 706
Sixteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 113/ HC 805
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Eighteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 133/ HC 962
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Twenty-fourth Report	Adoption and children Bill: As amended by the House of Lords on Report	HL Paper 177/ HC 979
Twenty-fifth Report	Draft Mental Health Bill	HL Paper 181/ HC 1294
Twenty-sixth Report	Scrutiny of Bills: Final Progress Report	HL Paper 182/ HC 1295