House of Lords
House of Commons
Joint Committee on Human Rights

The Meaning of Public Authority under the Human Rights Act

Ninth Report of Session 2006–07

Report, together with formal minutes, minutes of evidence and appendices

Ordered by The House of Commons to be printed
19 March 2007

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Joint Committee on Human Rights

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

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Judy Wilson (Inquiry Manager), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and James Clarke (Senior Office Clerk).

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Summary

Section 6 of the Human Rights Act makes it unlawful for public authorities to act in breach of Convention rights. In a series of cases relating to delivery of public services by private suppliers, notably the Leonard Cheshire case, the UK courts have adopted a restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people, such as those placed by local authorities in long term care in private care homes or living in accommodation rented from registered social landlords, from the human rights protection afforded by the HRA.

The previous Joint Committee on Human Rights considered this matter in its Seventh Report of Session 2003-04, and made a number of recommendations for addressing the problem. In this Report the current Committee expresses its agreement with its predecessors’ analysis of the issue, and reviews developments since publication of their Report. The Committee says that there has been little evidence of progress in the last three years to close the gap in human rights protection arising from the narrow interpretation of meaning of public authority, and makes further recommendations to bring about a solution, which it says is now a matter of some urgency. (paragraph 11)

In Chapter 2 of the Report, the Committee examines developments in case-law since 2004 and, while welcoming interventions by the Government in cases in order to seek to persuade the courts to adopt a more functional interpretation of the meaning of public authority, concludes that this strategy has so far proved unsuccessful, expressing disappointment that the approach taken by the Court of Appeal in the Leonard Cheshire case continues to dominate. (paragraph 22)

The Committee also considers the effectiveness of the Guidance on contracting for services in the light of the Human Rights Act which was published by the Government in November 2005 in response to a recommendation from the previous JCHR. The Committee considers that the Guidance takes a very negative approach to the difficulties facing the use of contracts to secure better the protection of human rights (paragraph 45), and expresses concern that the Guidance lacks accessibility and is difficult to understand (paragraph 49), and has little or no influence on the procurement policies of local authorities (paragraph 53). The Committee concludes that without further significant joint efforts by the Department for Constitutional Affairs and the Department for Communities and Local Government the Guidance will continue to fail to have any significant impact on the protection of human rights (paragraph 59). The Committee also agrees with its predecessors that human rights cannot be fully and effectively protected through the use of contractual terms, and that the guidance cannot be a substitute for the direct application of the HRA to service providers. (paragraph 60)

In Chapter 3, the Committee considers the case for further action to overcome the problems arising from a narrow interpretation of public authority. The Committee notes that in its scrutiny of legislation it regularly finds it necessary to raise with the Government the question of whether a private or voluntary body will be considered to be a public authority for the purposes of the HRA, and says that it finds it increasingly unsatisfactory to rely on the Government’s view of the matter when there is a real risk that this will not be reflected in the decisions of the courts (paragraph 66). In addition the Committee says it is unacceptable
that contracts for the provision of essential public services are entered into without any clarity as to the position of the service provider under the HRA (paragraph 67), and that the ongoing uncertainty inhibits the development of a proactive approach to the mainstreaming of human rights standards in policy development and service delivery (paragraph 69). The Committee concludes that the practical implications of the current case law are such that some service users are deprived of a right to an effective remedy for any violation of their Convention rights (paragraph 83).

The Committee also considers the likelihood of service providers leaving the market if a wider interpretation were given to the meaning of public authority. The Committee expresses its concern that service providers are unaware of the operational benefits offered by adherence to Convention rights (paragraph 97). In addition, the Committee considers that a concern raised in evidence, that if private providers were treated as public authorities under the HRA they could not be considered to be a “victim” for the purposes of the Act and would therefore be precluded from relying on their own Convention rights, is not well founded (paragraph 102).

The Committee concludes that it has not seen any convincing evidence that providers would leave the public services market if they were subject to the duty to act compatibly with Convention rights, and expresses its deep concern that the Government continues to encourage trepidation about the application of the HRA amongst private providers by expressing premature and unsupported concerns about market flight (paragraph 105).

Welcoming the Government’s new Common Sense, Commons Values campaign in support of the HRA and renewed commitment to the development of a “human rights culture” within the UK, the Committee points out that the campaign will be of limited value if it can only be directed to “pure” public authorities (paragraph 110). The Committee concludes, in view of the continuing trend towards the contracting out of public functions, that there is now a need for urgent action to secure a solution to the problem of the meaning of public authority in order to reinstate the application of the HRA in accordance with Parliament’s intention when it passed the Act (paragraph 112).

In Chapter 4 of the Report the Committee considers steps which could be taken to resolve the problems identified by it and the previous JCHR.

In relation to guidance on contracting for public services and human rights, the Committee recommends that urgent attention be given to revising the existing Guidance to incorporate practical, accessible advice to all commissioning bodies (paragraph 119). The Committee recommends that this Guidance should be prepared in consultation with relevant NGOs and the Local Government Association (paragraph 120), and that template contract clauses should be developed to supplement the Guidance (paragraph 122).

In relation to use of further litigation, the Committee is concerned that it is unlikely to lead to an enduring and effective solution to the interpretative problems associated with the meaning of public authority. The Committee considers it to be unacceptable to wait for a solution to arise from the evolution of the law in this area through judicial interpretation (paragraph 127).

The Committee notes that the previous JCHR thought that it would be undesirable to consider a legislative solution to the problem, partly because they felt it was at that time too
early in the implementation of the HRA to consider amending the Act. However, in the light of the continuation of the problem and of the evidence it has received, the Committee concludes that the time has now come to bring forward a legislative solution (paragraph 136).

The Committee examines several possible legislative solutions. It says it would strongly resist the amendment of the HRA to identify individual types or categories of “public authority” (paragraph 137), and it does not think that extension of the application of the HRA by service sector would lead to an enduring solution (paragraph 139). In the absence of a more general legislative solution, however, the Committee recommends that urgent consideration should be given to amendment of existing statutes to identify clearly that sectors most seriously affected by the narrow interpretation of public authority are subject to the HRA (paragraph 142), and without such a solution the Committee also considers that it will be necessary for Bills providing for the contracting-out or delegation of public functions to identify clearly that the body performing the functions will be a public authority for the purposes of the HRA (paragraph 143).

Finally, the Committee considers use of legislation to clarify the meaning of public authority in section 6 HRA. Arguing that the direct amendment of the Act should be considered only as a last resort, because of its status as a significant and important constitutional measure, the Committee concludes that there is a strong case for a separate, supplementary and interpretative statute, specifically directed to clarifying the interpretation of “functions of a public nature” in s.6(3)(b) HRA, and provides a possible form of wording (paragraph 150). The committee considers that this approach would provide a solution to the problem while avoiding the constitutional implications of amending the HRA itself (paragraph 151).
1 Introduction

Bringing rights home for everyone: the problem

1. The Human Rights Act 1998 (“HRA”) was intended to make the rights set out on the European Convention on Human Rights (“ECHR”) enforceable more swiftly and directly, within the UK. The HRA was intended to bring the rights guaranteed by the ECHR “home” for everyone and provide effective domestic remedies for violations of ECHR rights and freedoms.

2. The HRA makes it unlawful for “public authorities” to act in breach of Convention rights.1 The HRA does not define “public authority” but the duty to act in a Convention compatible way applies to “pure” public authorities, such as central government departments and local authorities, and to “any person certain of whose functions are functions of a public nature”.2 In this Report we refer to such a person as a “functional public authority”. The HRA does not define “public function” but it was the intention of Parliament that a wide range of bodies performing public functions, including the delivery of public services, would fall within the obligation under s.6 to act in a manner compatible with the Convention rights protected by the Act. In the course of parliamentary debates on the passage of the HRA, statements by the then Home Secretary and the then Lord Chancellor made it clear that persons or bodies delivering privatised or contracted-out public services were intended to be brought within the scope of the Act by the “public function” provision.3 In a series of cases, however, our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people, such as those placed by local authorities in long term care in private care homes or living in accommodation rented from registered social landlords, from the human rights protection afforded by the HRA. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the HRA would help to establish a widespread and deeply rooted culture of human rights in the UK.

3. In their 2004 report, The Meaning of Public Authority under the Human Rights Act (hereafter “the first MPA Report”), our predecessor Committee concluded that the interpretation of “public function” adopted by our courts was “highly problematic”.4 Their concern at the development in case-law on this issue was such that they concluded that it had led to a “serious gap” in the protection which the Act was intended to offer which would be likely to lead to deprivation of avenues of redress for individuals whose Convention rights were breached.

4. This gap is not just a theoretical legal problem but has significant and immediate practical implications. In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out

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1 Section 6(1) HRA 1998.
2 Section 6(3)(b) HRA.
3 See for example: HC Deb, 16 February 1998, col 773 (Home Secretary); HC Deb, 17 June 1998, cols 409-410, 433 (Home Secretary), HL Deb, 24 November 1997, col 800, 811 (Lord Chancellor).
of step with reality. The implications of the narrow interpretation of the meaning of public authority are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children’s services provided by private or voluntary sector bodies.5

5. Our predecessors considered several potential solutions to the problem created by the interpretation of s6(3)(b) by the courts. These were:

- Amendment of the HRA, in one of a number of possible ways, to clarify the responsibility of organisations to protect human rights when carrying out public functions;

- Protection of human rights through the terms of contracts between public authorities and private providers of public services, and the publication of authoritative guidance on when an organisation is likely to be a public authority for the purposes of the HRA; and

- Development of the case-law on the meaning of public authority along lines providing for a more consistent and comprehensive protection of human rights.

6. Our predecessors concluded that:

- Amendment of the HRA would be likely to create as many problems as it solved, and would be too early in the experience of the Act’s implementation.

- Guidance from the Government on the formulation of contracts and other best practice would be helpful, but could not provide a complete or an enduring solution.

- The Government should intervene in the public interest as a third party in cases where it could press for a broad functional interpretation of public authority.6

7. The first MPA Report identified a number of principles of interpretation, key to a functional approach to the meaning of “public authority”.7 In summary, these were that functional public authorities should be identified without reference to the nature of the organisation itself. The key test for “public function” should be whether the relevant “function” is one for which the Government has assumed responsibility in the public interest. Whether an organisation performs those functions under direct statutory authority, or under contract, should not lead to a distinction in the application of the HRA. A private body operating to discharge a Government programme is likely to exercise a degree of power and control over the realisation of an individual’s Convention rights which, in the absence of delegation, would be exercised directly by the State. We adopt the interpretative principles key to the identification of a “public function” set out by our predecessor Committee and consider that any other interpretation would lead to the perpetuation of gaps in the human rights protection intended by Parliament during the passage of the HRA.

5 ibid, paras 66 – 68.
6 ibid, paras 89 – 95.
7 ibid, paras 135 – 147.
8. Since the publication of the first MPA Report, there have been a number of significant developments:

- In February 2005, the Government accepted our predecessor Committee’s principal recommendations. The then Minister for State at the Department for Constitutional Affairs (DCA) indicated his Department’s readiness to intervene in any case at Court of Appeal level in which the meaning of public authority was in issue. He also indicated that the Office for the Deputy Prime Minister (ODPM) would produce suitable guidance on the protection of human rights in contracts with private service providers by March 2005;\(^8\)

- In November 2005, the ODPM published guidance to local authorities on contracting for services in light of the HRA (“the Guidance”). Responsibility for the administration of this Guidance has since passed to the Department for Communities and Local Government (“DCLG”).\(^9\)

- During the Lords Report stage of the Equality Bill, in October 2005, Baroness Greengross introduced an amendment to that Bill which would have provided that all care standards agencies covered by sections 1 to 4 of the Care Standards Act 2000 would be considered public authorities for the purpose of the HRA. Although she withdrew this amendment, the Government accepted that it would be possible for the Government to look “more closely and carefully at whether they might do more to address the immediacy of the problem”.\(^10\)

- In 2006, the Government announced a review of the operation of equality law in the United Kingdom, with a view to introducing a Single Equality Act. The Discrimination Law Review will consider the wider implications of the application of positive equality duties linked to the performance of “public functions”.\(^11\)

- In January 2007, our Chairman, Mr Andrew Dismore MP, introduced a Private Member’s Bill in the House of Commons on this issue. His Bill has the support of a number of our members in the House of Commons. In his speech on the ten minute rule motion seeking leave to bring in that Bill, he said “my Bill is in my name, not that of the JCHR, though its supporters include Commons JCHR members from all three parties represented on the Committee. I believe that the case for addressing the issue through legislation is stronger now than ever”.\(^12\) That Bill, which is not yet printed, is listed for second reading on Friday 15 June 2007. We hope that our recommendations, below, will assist members of the House of Commons during the Second Reading debate on this Bill.

- In early 2007, the Court of Appeal considered two further cases raising this issue. The Government intervened in both with the aim of ensuring that the meaning of public

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\(^10\) HL Deb, 19 October 2005, Col 876 (Baroness Ashton of Upholland).


\(^12\) HC Deb, 9 January 2007, col 152.
authority is given a wide interpretation. In both cases, the Government argued that “functional” public authorities under s6(3)(b) should include private providers providing care to the elderly on behalf of a local authority. In both of these cases, the Court of Appeal refused to adopt a wider interpretation of public authority, or “public function” without further guidance from the House of Lords. These cases are listed for appeal in the House of Lords, and therefore fall within the sub-judice resolutions of both Houses of Parliament. We are therefore unable to comment on these cases in this Report.

9. Three years have passed since the publication of the first MPA Report on this issue and the tenth anniversary of the enactment of the HRA is fast approaching. Since the first MPA Report, we have repeatedly commented on the practical and other implications of this gap in the protection offered by the HRA. Indeed, as contracting out of the performance of public functions has continued apace, we have frequently found it necessary in our legislative scrutiny work to ask the Government to make clear whether it considers bodies performing such functions to be public authorities for the purposes of the HRA. In November 2006 we called for written evidence on the subject, including, in particular, on:

- the effectiveness of Government guidance on local authority contracts and the HRA;
- the implications of developments in case-law;
- any practical implications of the restrictive meaning given to “public authority” in addition to those identified by our predecessor Committee; and
- whether private providers would leave the market if they were “public authorities” for the purpose of the HRA.

10. We specifically asked for views on potential means of addressing the problem, including by means of primary legislation.

11. The purpose of this inquiry is to build upon the valuable work of our predecessor Committee and to assess whether any recent developments in law or practice have alleviated this serious problem. We adopt our predecessor Committee’s assessment of the law and the implications of the gap in human rights protection created by the narrow interpretation of the meaning of “public authority” in s.6 of the Human Rights Act. We consider that their previous recommendations were capable of resulting in an effective solution. However, during the last three years, there has been little evidence of progress towards an approach that gives effect to what we consider to have been Parliament’s original intention to bring rights home for everyone, including those who receive public services delivered by private bodies. In view of the continuing trend towards the outsourcing of public services and the continuing failure to fill the gap in human rights protection, we consider that it has now become a matter of some urgency to consider what action is necessary to bring about a solution.

13 Johnson and others v London Borough of Havering [2007] EWCA Civ 26; YL v (1) Birmingham City Council (2) Southern Cross Healthcare and others [2007] EWCA Civ 27.


15 ibid.
Acknowledgements

12. We received written evidence from a wide range of organisations and individuals, representing both the providers and recipients of public services, as well as from NGOs and Government. We are grateful to all those who helped us in our deliberations.
2 The Developing Law: Closing the Gap?

Background

13. Our predecessor Committee conducted a thorough review of the relevant legal background to this issue. What follows is a summary of their analysis.

14. The starting point for the consideration of this issue is the international human rights obligations which the Act is designed to “bring home”, the rights guaranteed by the ECHR. Article 1 ECHR requires the UK to secure the benefit of each of the Convention rights for everyone in its jurisdiction. Article 13 ECHR obliges the State to provide access to an effective remedy for any alleged breach of Convention rights. It is well established that the State cannot evade its responsibility to safeguard Convention rights by delegation to private bodies and that, in some circumstances, the State must take active steps to protect an individual’s rights from interference by others. In our view it is clear that Parliament envisaged that the scope of s.6(3)(b), and the test for identifying a “functional public authority” should be based primarily on the nature of the function being performed by the private body, rather than the intrinsic nature of the body itself.

15. Unfortunately, the consequences of the judicial interpretation of the law, and specifically, the restrictive interpretation adopted by the Court of Appeal in the Leonard Cheshire case, is that, as the law stands, a private body is likely to be considered a “functional public authority” 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.

16. Beyond these categories, whether a body falls within s6(3)(b) remains extremely uncertain. Factors such as delegation from, or supervision by, a State body, public funding, the public interest in the relevant function or service being provided and the pursuit of the public interest as opposed to a pure commercial interest in profit are not in themselves likely to establish public authority status.

17. In Aston Cantlow v Wallbank, the leading authority on “pure” public authorities, 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. Lord Nicholls of Birkenhead considered that there should be a “generously wide” interpretation of public function so as

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16 First MPA Report, paras 14 – 17.
17 ibid, paras 18-20.
18 [2002] EWCA Civ 366. This case involved the challenge by residents of the closure of a private care home run by a charitable organisation. The Court of Appeal held that the organisation, Leonard Cheshire, was not sufficiently “ensmeshed” in the activities of the Local Authority commissioning its services to be considered a public authority for the purposes of the HRA. A further summary of this case and the relevant legal background is provided in the First MPA Report, paras 31 – 33 and 39 – 40.
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.\textsuperscript{20} We consider that the approach of the House of Lords in this case would provide an effective basis for the protection of Convention rights. The analysis in this case is, we believe, preferable to that of the Court of Appeal in \textit{Leonard Cheshire}.\textsuperscript{21}

18. The tests applied by the courts to determine whether a function is a “public function” within the meaning of section 6(3)(b) of the HRA have been, in human rights terms, highly problematic. Their approach results in many instances where an organisation provides a public service on behalf of a local authority, yet does not have responsibilities to the recipients of the service under the HRA. Effectively, 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 criterion of the body’s administrative links with institutions of State.\textsuperscript{22}

19. In the first MPA Report, our predecessors considered whether it was arguable that the reach of the HRA, as interpreted by the courts was adequate as any delegating public authority would, itself, remain liable under the HRA for any breach of Convention rights that results from the actions of a private service provider. Our predecessors concluded that 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 s. 6. It would provide only partial protection and it would be undesirable for the body directly providing services for which the Government had assumed responsibility to be able to shift responsibility for human rights compliance elsewhere.\textsuperscript{23}

\textbf{Interpretation by the Courts: Closing the Gap?}

20. As noted, in paragraph 8, above, two cases in which the Government intervened are currently subject to appeal to the House of Lords. On the current state of the law, however, we conclude, with some significant concern, that there have been no developments during the past three years which have contributed towards filling the gap in human rights protection created by the narrow interpretation adopted by our Courts.

21. When we called for evidence in this inquiry these two cases were not \textit{sub judice} and some evidence submitted to us refers to them. As the cases are now \textit{sub judice} we cannot publish evidence referring to them in detail.

22. While we welcome the steps taken by the Government to persuade the courts to adopt a more functional interpretation of the meaning of public authority, we note that this strategy has so far proved unsuccessful: both the High Court and the Court of Appeal have refused to depart from the analysis in \textit{Leonard Cheshire} without further guidance from the House of Lords. A significant number of submissions to our inquiry

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\textsuperscript{20} [2003] 3 WLR 283. In this case, the Court held that a parochial church council was not a “pure” public authority.
\textsuperscript{21} We adopt the conclusion of our predecessor Committee. First MPA Report, para 42.
\textsuperscript{22} \textit{Ibid}, para 41.
\textsuperscript{23} \textit{Ibid}, paras 78 – 85.
\end{flushright}
expressed their concern at the continuing state of uncertainty in our law.\textsuperscript{24} For example, Help the Aged has called the results of the Government’s interventions thus far “deeply disappointing”.\textsuperscript{25} We are similarly disappointed that the more institutional approach taken by the Court of Appeal in Leonard Cheshire continues to dominate the public function test for the purposes of Article 6(3)(b) HRA.

23. We consider the likely effectiveness of continuing to pursue a resolution of this problem through further litigation in Chapter 4, below.

**Public authorities and the Human Rights Act: Guidance**

24. Our predecessor Committee considered two categories of guidance relevant to this issue: general guidance from Government on the meaning of public authority and specific guidance on the use of contracts to secure better protection of human rights in the delivery of public services in the private sector.\textsuperscript{26} We consider each of these in turn, below.

**Guidance on the Meaning of Public Authority**

25. In evidence to our predecessor Committee, the Lord Chancellor indicated that guidance on this issue would be considered in the course of the revision of the Government’s Human Rights Study Guide.\textsuperscript{27} The Third Edition of the Human Rights Study Guide was published in October 2006. It gives examples of cases in which the courts have decided whether a particular type of body should be considered a public authority and notes that this is a “developing area”. If people are concerned that a body has breached their Convention rights, the Study Guide suggests that they should take “specialist legal advice”. Although this is an accurate statement of the position in law, it gives far from useful guidance to service users or would-be public authorities about their status. A study guide such as the booklet prepared by the DCA should reflect the legal position accurately. However, the advice that the booklet gives illustrates clearly the uncertainty caused by the judicial interpretation of the HRA.

26. The Gender Equality Code of Practice gives advice on the meaning of public authority for the purposes of the general gender equality duty in the Sex Discrimination Act 1975.\textsuperscript{28} This duty, which comes into force in April 2007, is imposed on all public authorities and includes functional public authorities on the same basis as the HRA. We welcome the advice offered by that Code of Practice that authorities who may be carrying out functions of a public nature should safeguard their position by assuming that they are functional public authorities, and complying with the Gender Equality Duty. However, ultimately, that Code of Practice can only recommend that it is “advisable” to seek legal advice on this issue.

\textsuperscript{24} See for example, Appendix 9 (Help the Aged), paras 11 – 12; Appendix 2 (Mayor of London), paras 2 – 3; Appendix 6 (Baroness Greengross).

\textsuperscript{25} Appendix 9, para 12.

\textsuperscript{26} First MPA Report, paras 110 – 134 (Sections 6 – 7).

\textsuperscript{27} \textit{ibid}, para 133.

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

28. In response to the first MPA Report, the Government committed itself to taking steps to “persuade the Courts to adopt a wider definition of public authority than exists at the moment (i.e. to take Lord Hope’s line in Aston Cantlow rather than the Court of Appeal in Leonard Cheshire)". We therefore noted with concern, the view expressed in the recent DCA Review of the HRA that a wider interpretation of “public authority” could increase burdens on private landlords, divert resources from this sector and deter property owners from entering into the market to provide temporary and longer term accommodation to those owed a duty by the local authority under housing legislation.

This argument is repeated in the evidence submitted by DCLG to this inquiry. The Lord Chancellor also told us that widening the definition of public authority might drive a whole range of private providers out of a particular market, for example, residential care, so making it harder to provide residential care for people. He distinguished between those authorities that should “obviously” be considered functional public authorities and others which were “more difficult”. This was the first time that the Government had clearly articulated this reservation, and it did not offer any evidence in support of it.

29. The Government response to our Report on the recent DCA and Home Office Reviews of the HRA stressed that the Government’s position on this issue had “not changed”:

The Government believes that the duty under section 6 of the Human Rights Act should apply to anyone performing a function of a public nature. The current interpretation of this test in case law is, in the Government’s opinion, narrower than that which Parliament originally intended.

30. Most recently, the Prime Minister has confirmed that, in relation to the application of the HRA and contracting-out of public services:

The way to deal with it is to make sure that public and private bodies are treated the same when they are providing a public service.
31. It is difficult to ascertain from this series of Government statements what circumstances the Government consider will make it “obvious” that a service provider should be considered a “functional public authority”. We agree with our predecessor Committee that general guidance from Government on the meaning of public authority has very little potential to reduce the gap in human rights protection caused by the interpretation of “public authority” adopted by our domestic courts. However, we are concerned that inconsistent statements from central Government on the intended application of the HRA may create further uncertainty for service providers and others. Notably, we reiterate the view set out in our Report on the DCA and Home Office Reviews of the HRA, that the recent concerns expressed by the Lord Chancellor and DCLG about the effect of the application of the HRA on the social housing market represent a serious dilution of the original intention of Parliament when passing the HRA and the Government’s view, more generally expressed, that providers of services which a public authority would otherwise provide are performing a public function and should therefore be bound by the obligation to act compatibly with Convention rights in s.6 HRA.

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

**Guidance, Contracts and Human Rights**

33. Our predecessor Committee recognised that contract terms could not provide a substitute for the direct protection of Convention rights offered by sections 6 and 7 of the HRA. They recognised, however, that there might be some benefit in examining whether references to human rights responsibilities in public procurement contracts could be beneficial:

> Although contractual terms may not be capable of providing a fully comprehensive solution, we do see some potential, as 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.\(^{36}\)

34. They recommended that both DCA and ODPM give urgent attention to the development of guidance on the protection of human rights through contract, taking into account the potential problems identified in their Report.\(^{37}\) These problems included the limited potential for the recipient of services to enforce a contract between a local authority and a private provider, the limited effect of guidance on existing contracts and the difficulty

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\(^{36}\) First MPA Report, para 128.

\(^{37}\) *ibid*, para 129.
of achieving consistency across contracts and between different local authority areas and the financial and other constraints imposed by the market.\textsuperscript{38}

35. We note that the Government remains committed to partnerships with the private and voluntary sectors as a means of delivering public services on a contracted-out basis. We consider the continued involvement of the private sector in the provision of public services at paragraph 63, below.

36. The ODPM published their Guidance on contracting for services in light of the HRA (“the Guidance”) in November 2005.\textsuperscript{39} Its purpose is to meet the recommendations of our predecessor Committee. The Guidance explains that where a “provider that is not a public authority provides a service to the public under contract to a public authority, that service needs to be provided in a way that takes account of the content of the Human Rights Act 1998, relevant to that contract”. So, the Guidance begins from the assumption that it is relevant only to contracts with bodies which are not public authorities. It provides no further advice to commissioning public authorities on when the Guidance is relevant.

37. The Guidance identifies some of the problems analysed by our predecessors in their Report, including “consistency, enforceability and enforcement” issues and the commercial difficulties of negotiating contractual terms with uncertain implications (i.e. higher bid costs). These are treated as barriers to the incorporation of clauses based on human rights into contracts with service providers. So, for example, considering the “creative use of the Contracts (Rights of Third Parties) Act 1999”, the Guidance does not suggest how, or whether, a purchasing authority should seek to secure rights for the beneficiaries of the contract. However, it notes that the supplier market will often be resistant to the use of that Act to confer rights on third parties (noting all of the likely objections).

38. We note that the Gender Equality Code of Practice, which advises public authorities on the implications of the general gender equality duty for contracting and procurement, takes a less ambiguous and more positive approach. It gives advice to commissioning bodies on steps they are recommended to take to achieve this and suggests some model contractual terms. It advises public authorities clearly that they:

[W]ill need to build gender equality considerations into the procurement process, to ensure that all the public authority’s functions meet the requirements of the statutory duty, regardless of who is carrying them out.

39. The Guidance does not recommend that contracts should routinely include an obligation, for example, to comply with the HRA as though the supplier were a public authority. It reasons that these clauses would be “likely to be resisted”. Nor does it identify any useful standard or model contract terms. It explains:

[S]ince the HRA deals with a number of concepts whose application in particular circumstances could be a matter of legitimately differing views, suppliers may object

\textsuperscript{38} Ibid, Section 6. Our predecessors were concerned about the inability of the beneficiaries of services to enforce contractual terms and obligations agreed between private providers and local authorities or central government, see para 115. The first MPA Report considered the implications of the Contracts (Rights of Third Parties) Act 1999, but concluded that this Act would not resolve the difficulties of enforcement of human rights by contract, nor would it allow contractual obligations in respect of human rights to act as a substitute for the direct application of the HRA.

\textsuperscript{39} http://www.communities.gov.uk/index.asp?id=1161370.
that they cannot fully ascertain the nature of the obligations that they are being asked to undertake.

40. The Guidance explains that this uncertainty would be likely to result in higher bid costs and might lead to an increased unwillingness on the part of suppliers to bid for public service contracts, “since suppliers might feel unable to price risk”.

41. The Government, in the Guidance, advises that the “most fruitful” way for public authorities to proceed when “attempting to contract to secure the protection of human rights for service users” is by the specification of services and outcomes which are most likely to protect service users’ rights. This means identifying the human rights implications of any contract and the services that would need to be specified, including any “output specifications”, in order best to secure the protection of the relevant rights. Although the Guidance argues that “it is critical to get the specification right”, it acknowledges that detailed specifications will vary from contract to contract according to the service being provided and according to the willingness of the contractor to accept a particular degree of detail. It provides no examples of types of contract specification, or how a contract specification might practically be used to secure human rights protection.

42. The Guidance adds, “where a significant degree of certainty is provided to suppliers as to the scope of their obligation, they may be more willing to accept some residual contractual powers of direction from public authorities in ‘grey areas’ at the margins.” It does not explain what these ‘grey areas’ are, but indicates that if public authorities are able to secure residual powers of direction in their contracts, a public authority’s ability to “ensure that service delivery reflects the public authority’s view as to what is necessary to secure compliance with the HRA will be increased.” The Guidance does not give examples of how local authorities might use powers of direction to secure the protection of human rights.

43. As part of the Government’s specification-based approach, local authorities are advised to develop a pre-tender “checklist and sign-off” procedure to consider whether the delivery of a particular service is likely to engage the HRA, what steps are needed to ensure that the relevant rights are respected and to identify contract monitoring and enforcement mechanisms that are likely to be necessary. No model process is recommended and no guidance is given on how to identify whether a particular service is likely to engage the HRA.

44. The Guidance does not explain that it was the intention of Parliament that any body performing a “public function” should themselves be subject to the duties and obligations of the HRA. Nor does the Guidance explain when and how the HRA may be relevant to a specific contract. Instead, it explains that “providing a service in a manner which” takes account of the HRA will “assist in the provision of an optimised service”. It does not however provide any concrete examples of the service delivery benefits of securing human rights protection through contracts.

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

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

47. Service providers and their representatives told us that the Guidance represents a “satisfactory approach”.

48. We consider the Guidance to be badly written, difficult to follow, and to have suffered from a lack of publicity. BIHR told us that although the Guidance is published on the DCA and DCLG websites, it was “not otherwise proactively publicised”. We note that the principal means of distributing the Guidance remains through the DCLG website. The Charities Commission is concerned that the guidance is designed primarily for “public authorities” without any clear expression of view on whether a court will consider a relevant service provider a functional public authority. They note that the Guidance “assumes knowledge of the Human Rights Act and is written in quite complex language”. This clearly casts doubt on the usefulness of the document from the perspective of service providers seeking to understand the priorities of those commissioning services.

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

40 Appendix 7, para 40.

41 Appendix 5, paras 3.1 – 3.6, Appendix 9, paras 4 – 10, Appendix 12, paras 33 – 36, Appendix 14, paras 15 – 18, Appendix 17, paras 6 – 9, Appendix 22, page 3.

42 Appendix 17, para 9.

43 Ibid.


45 Appendix 22.
50. There is little qualitative or quantitative evidence available on the awareness of this Guidance and its application by “pure” public authorities. A number of witnesses indicated that in their experience awareness of the Guidance was rare, even among local authority legal staff. For example, the BIHR told us that:

To the best of BIHR’s knowledge, no research has been conducted into awareness of this Guidance amongst public authorities or the extent to which it has been used in practice. Nor has research been conducted into its impact when it has been used. For this reason it is difficult to assess its effectiveness to date. However, anecdotal evidence from BIHR’s capacity building work with the public sector suggests that awareness of the Guidance is very low, even amongst in-house lawyers with responsibility for contracting. For example, BIHR has recently worked with two public sector organisations exploring the use of human rights based approaches in the context of contracting for services, and neither had heard of, or used the Guidance.

51. This view is supported by Help the Aged, who undertook an informal survey of senior staff in six local authorities for the purpose of this inquiry:

This produced a mixed response. Only one local authority said that it intended to rewrite its contract in light of the ODPM advice in order to include a reference to the HRA, however it had not yet done so. One other made no reference to the HRA and was unaware of the ODPM guidance. Four did make reference to the HRA and sent the relevant clause in two cases.

52. In those two cases, the clauses concerned would not have operated to extend the application of the HRA to the service providers, nor did they follow the approach suggested by the Guidance. This suggests that even commissioning authorities are unaware of the Guidance, or that the Guidance has had very little impact upon local authority practice.

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

**Effectiveness of the Guidance**

54. A number of witnesses doubted the ability of the Guidance to provide a valuable “stop-gap” measure for the protection of human rights through individual contracts, as envisaged by the first MPA Report. JUSTICE told us that they consider the specification-based approach of the guidance “questionable”:

[W]hen looked at closely, the guidance seems to us to provide little practical guidance to public bodies other than eschewing ‘conceptual’ provisions in favour of

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46 ibid.

47 Appendix 17, para 7.

48 Appendix 9, paras 4-10.
those which specify particular steps, procedures to be taken by private providers, and the possible use of output measurements. In and of themselves, recommendations of signing off procedures and checklists seem sensible instances of good practice. However, this emphasis on greater specificity seems only to beg our earlier question: if private providers fear public liability, why is it reasonable to believe that they will be more prepared to assume the same obligations (e.g. towards individual recipients of community care) by way of private agreement? 49

55. BIHR told us that a contract specification was incompatible with the effective protection of human rights and the creation of a positive human rights based approach within individual service providers:

The successful implementation of contract specifications requires the public authority to identify whether the delivery of the particular service engages human rights issues and the steps that need to be taken to ensure the relevant rights are respected. Whether this is even possible is debatable, since human rights questions arise in a multitude of different potential situations some of which cannot be predicted. It is not possible in our view to take such a prescriptive approach to human rights protection. In any event, to have the chance of protecting human rights in this way, even partially successfully, the public authority would need to have a very good understanding of human rights issues […] In the vast majority of public bodies, human rights have remained in the domain of legal services or human resources. In light of this, it seems difficult to understand how an approach based on contract specification could be effective in protecting the human rights of service users. 50

56. Although, for reasons we explain below, we do not think that human rights can be effectively protected through the use of contractual terms, we consider that, in principle, advice on check-lists and procedures to ensure that human rights are considered during the tender and procurement process could help those responsible for commissioning services to take their duties under the HRA seriously. Unfortunately, as drafted, we consider that the ODPM guidance does not give clear guidance to commissioning authorities on how to identify when human rights are relevant, or how to design contract specifications to meet human rights needs. Whilst a specification based approach could secure some protection for human rights, it is unlikely to have any impact without clear and practical guidance on the types of specification that may be valuable. The principal failing of this approach is the lack of encouragement to greater consistency in public service procurement. Without the use of model, or standard, contract terms, we consider that any Guidance on contracting will not produce a more consistent approach to public services commissioning and human rights.

**Procurement and Human Rights: An Integrated Approach?**

57. References to the Guidance and to human rights in general have notably been omitted in other Government documents on public services and procurement. For example, BIHR notes that there is no mention of the Guidance in the Care Services Improvement

49 Appendix 14, paras 16-17. See also Appendix 5, para 3.2 (Age Concern).
50 Appendix 17, para 9.
Partnership Guide to Fairer Contracting, for local authorities and joint commissioning bodies on care placements and care services. The Charities Commission referred us to the written Compact between Government and the voluntary sector on procurement. The Compact Code of Practice on Funding and Procurement makes no reference to this issue, to the ODPM Guidance or to human rights. We note that there is no reference to public procurement and Human Rights in the new “handbook” for Public Authorities, Human Rights, Human Lives, nor is there any cross reference to the DCLG Guidance. There is no reference to human rights in the Treasury vision for public procurement Transforming Public Procurement, or in the Guidance Note on Social Issues in purchasing, issued by the Office of Government Commerce. Similarly, there is no reference to human rights or the implications of the judgment in Leonard Cheshire in the recent Government Action Plan for Third Sector Involvement in Public Services, Partnership in Public Services, which aims to simplify processes which apply to the commissioning and procurement of services from the voluntary and not-for-profit sectors. We note that a proposed model contract developed by the Department of Health’s Third Sector Commissioning Task Force, which proposes a standard model for use across health and social care commissioning, does not refer to the ODPM Guidance, to human rights or the responsibilities of the contracting parties under the HRA.

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

**Conclusions**

59. We consider that, as drafted, it is highly unlikely that the Guidance issued by the Government will enhance the protection offered to the human rights of service users when public services are contracted out. We are disappointed that the Guidance fails to grapple with the issue of standard or model contract terms. We recognise that the Guidance tries to balance the public interest in securing best value services and ensuring, in accordance with the intention of Parliament, that those providing public services under contract respect the

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51 Appendix 17, para 7. See also Appendix 5, para 3.1 (Age Concern).

52 Appendix 22. This Code applies in England to all central Government Departments, Next Steps Agencies, Non-Departmental Public Bodies, Government Offices for the Regions, Regional Development Agencies; National Lottery Distributors; and agencies contracted to distribute Government funds to the voluntary and community sector. Local government and local public sector bodies are expected to take appropriate notice of the principles of the Code as recommended best practice in their work. http://www.thecompact.org.uk/C2B/document_tree/ViewACategory.asp?CategoryID=44.


54 http://www.hm-treasury.gov.uk/media/4EA/89/government_procurement_pu147.pdf.


Convention rights of service users. Unfortunately, the Guidance appears to be based on the assumption that the public interest is principally served by ensuring that service providers remain willing to contract at a competitive price, with any agreed measures for the protection of human rights being an additional bonus. **We consider that without further significant joint efforts on the part of the Department for Constitutional Affairs and the Department for Communities and Local Government, this Guidance will continue to fail to have any significant impact on the protection of human rights.**

60. In a recent debate on the Government’s *Common Values, Common Sense* campaign for the HRA, the Parliamentary Under-Secretary of State for Constitutional Affairs, Vera Baird MP, told the House of Commons that the Government recognised that the protection of human rights through contract was a “poor substitute” for the direct application of the HRA to functional public authorities, as intended by Parliament. However, she stressed that the Government consider that there is “little doubt” that human rights can be enforced in this way.**58** We reiterate the conclusions of the first MPA report. Human rights cannot be fully and effectively protected through the use of contractual terms. While Guidance may be useful as a “stop-gap” to reduce the adverse impact of the narrow interpretation of the meaning of public authority on service recipients, this Guidance cannot be a substitute for the direct application of the HRA to service providers. In any event such Guidance cannot provide any valuable protection to service users if it is not based on a clear commitment to mainstreaming human rights, written in accessible language and accompanied by practical guidance to commissioning authorities.

61. We consider the potential for further Government guidance on procurement to alleviate the practical implications of the current gap in the law, in Chapter 4, below.

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58 HC Deb, 19 February 2007, col 118.
3 The case for further action

62. In this section, we review the practical implications of the meaning of “public authority” in the HRA and the concerns of service providers and users, in addition to those identified by the first MPA Report. Specifically, we consider whether service providers’ concerns are likely to lead to an exodus of private providers from the public services market and whether the failure to address this issue has any wider implications for the creation of a positive human rights culture in the UK. In this context we assess the strength and urgency of the case for further change.

The “Private Sector” and Public Services

63. We stress that we do not endorse any particular policy view on the involvement of the private sector (including both commercial and not-for profit bodies) in the provision of public services.59 As our predecessor Committee highlighted, it is not reliance on the private or voluntary sector that risks undermining the human rights protection offered by the HRA, but the failure of the law, as interpreted by the courts, to adapt to the reality of the involvement of those sectors in public service delivery.60

64. A number of witnesses highlighted the growth of private sector involvement in public service provision and the performance of public functions since the publication of the first MPA Report. For example, Liberty told us that expanded private sector involvement has been “particularly visible” in the context of law and order and anti-social behaviour functions.61 Similarly, the Commission for Racial Equality (“CRE”) highlighted the involvement of the private sector in prisons, the detention of asylum seekers and private hospitals.62

65. In our work on the scrutiny of legislation, we regularly find it necessary to raise with the Government the question of whether a private or voluntary sector body is considered by the Government to be a public authority for the purposes of the HRA.63 We recently raised the question, for example, in the context of our scrutiny of the Offender Management Bill, currently before Parliament, which proposes to contract out many functions previously performed by the probation service.64 In the course of our Report on that Bill we expressed our serious concern that the Government could not advise Parliament with any degree of certainty on the likely effect of legislation which provided for delegation of public functions or contracting-out of public services, but could only provide “expressions of hope” that its statements on status might assist the courts.65

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59 As in the first MPA Report, for the purposes of this Report, we will refer to both the voluntary and not-for profit sectors (or the Third Sector), taken together with commercial operators, as the “private” sector. This definition therefore includes religious organisations which provide public services.

60 First MPA Report, para 51.

61 Appendix 11, para 7.

62 Appendix 19, paras 3.1 – 3.4.


65 ibid, para 3.10.
66. We find it increasingly unsatisfactory to rely on the Government’s view of whether a particular body is a “public authority” when there is a real risk that their views will not be reflected in the decisions of the courts. We consider that, in the preparation of legislation that provides for the delegation of public functions, or contracting-out of public services, the Government should be prepared to acknowledge that the position in law is currently uncertain. This uncertainty should inform parliamentary debate on whether delegation or contracting out is an appropriate means of dealing with the provision of the relevant services, and whether it is desirable to make it clear on the face of a Bill that a body is a public authority for the purposes of the HRA. While this uncertainty continues, we will continue to scrutinize closely the Government’s assessment of the law and the human rights implications of any legislative provision for contracting-out. We will consider on a case by case basis whether to draw the attention of both Houses to any significant risk that the Convention rights of vulnerable people may be endangered as a result of the use of private providers to discharge public functions.

Continuing uncertainty for service providers and service users

67. Both service users and private providers continue to be disadvantaged by the uncertainty the current position creates about the status of individual service providers for HRA purposes. The Charity Commission continues to call for clear guidance to be issued on this issue for those in the charity and voluntary sector delivering services under arrangements with “pure” public authorities to help them to understand their responsibilities and the legal duties on the commissioning authority. Lack of certainty for both providers and recipients of public services – created by the case law and identified by the first MPA Report – continues to lead to significant difficulties. It is unacceptable that service providers and commissioning authorities should continue to enter into contracts for the provision of essential public services without any clarity as to the legal position of the service provider under the HRA.

68. Uncertainty about the application of the law has a detrimental effect on the development of a positive human rights culture where respect for individual rights plays a fundamental role in the delivery of public services. Advocates for vulnerable people may be discouraged from raising human rights based concerns or arguments with any body other than a “pure” functional authority as a result of confusion over the proper application of the HRA. BIHR told us that in their experience, training individuals and organisations about the application of the Act was, under the current case law, “extremely challenging”. They explained that a lack of confidence in their legal status affected service providers as well as service users:

[A]dvocates who assist potential victims are unable to raise Convention rights issues with any confidence when negotiating on behalf of their clients. In addition where a body is unsure whether or not the Human Rights Act applies to it at all, it is more likely to ignore or resist any arguments based on human rights. As a result, vulnerable…individuals have not benefited from the protection which the Human

66 Appendix 22.
Rights Act was intended to offer, and the agenda to foster a human rights culture has been severely frustrated.\footnote{Appendix 17, para 14.}

69. It is almost a decade since the passage of the HRA. We are seriously concerned that even now, the proper scope of its application remains unclear. \textbf{We believe this ongoing uncertainty has a “chilling” effect and inhibits the development of a proactive approach to the mainstreaming of human rights standards in policy development and service delivery.} It is unacceptable that providers of public services should remain uncertain about the scope of their responsibilities and obligations under the HRA, and that the HRA obligations required of contractors should be dependent on the willingness of a contractor to accept a particular degree of detail. We are deeply concerned that service users and their advocates may be inhibited in their use of human rights arguments in their dealing with private and other providers as a result of the continuing uncertainty in the law.

\section*{Impact on Service Users}

70. In our call for evidence, we specifically asked for updated evidence of the impact of the narrow interpretation of the meaning of public authority on vulnerable people. Our predecessor Committee highlighted the public service areas most likely to be affected and the relevant human rights standards likely to be engaged.\footnote{First MPA Report, para 66.}

71. Given the increasing use of delegated powers and contracting-out, the restricted ambit of the Act is most likely to have an impact in social housing, healthcare provision to the elderly and to mental healthcare provision and children’s services.\footnote{\textit{ibid}, para 66.}

72. We also note that there is an increasing trend towards the provision of detention and other compulsory powers, usually reserved for “pure” public authorities, to those providing services under contract. For example, in immigration removal centres and in private prisons. Parliament has been repeatedly assured by the Government that it is their view that bodies exercising such compulsory powers would, in their view, be considered public authorities for the purposes of the HRA. We consider that, on the state of the current law, that it is unlikely that these service providers would not be considered public bodies for the purposes of the HRA. However, the status of these individual bodies, and the nature of their powers, are still to be assessed by the Courts. This will take place on a case by case basis. \textbf{In the light of developments in the case-law on the meaning of public authority, we are not reassured by the Government’s confidence that the Courts would treat bodies exercising compulsory powers automatically as public authorities.} We would be deeply concerned if any organisation exercising compulsory powers, such as powers of detention or powers involving the use of force, were not considered subject to the s.6 duty to act in Convention compatible way.

73. It is clear that the provision of services in all of these areas regularly engages rights under Article 8 ECHR, including rights to respect for private life and home; the right to a fair hearing in the determination of civil rights and obligations under Article 6(1) ECHR;
freedom from discrimination in the enjoyment of Convention rights under Article 14 ECHR and, in extreme cases, the right to freedom from inhuman and degrading treatment under Article 3. In some areas, the right to life (Article 2 ECHR), the right to liberty (Article 5 ECHR) and the right to the peaceful enjoyment of possessions (Article 1, Protocol 1 ECHR) may also be engaged. Our predecessors identified disparities and anomalies arising from the application of the case law in some sectors and stressed the vulnerability of the recipients of public services to breaches of Convention rights.70

74. We are concerned that these disparities appear to continue unchecked and may have a significant practical impact.71 For many seeking to access public services, there will be no realistic alternative but to access those services through a private sector operator.72 For example, ECCA told us that the “vast majority” of care homes are in the independent sector.73 It is extremely unlikely that a recipient of services will be able to resist the transfer of a service from public to private provision based on arguments about the uncertainty of the application of the HRA to the private sector.

75. We agree with the assessment of the BIHR that the present situation sends a negative signal to front line providers about their crucial role in stimulating a culture in which human rights considerations are considered proactively rather than reactively.74

76. To raise a Convention complaint, a user of privately provided public services will need to incur the expense and anxiety involved in seeking legal advice about the status of his or her service provider. They will need to be prepared to pursue long and complex legal proceedings with a significant chance of failure. Against this background it is unsurprising that so few relevant legal challenges have arisen since the first MPA Report. The unfortunate question for many service users must be whether human rights are really worth the time, effort and expense involved in the process dictated by the current case-law on s.6(3)(b) HRA. This is entirely at odds with one of the intended aims of the HRA, to remove human rights from the province of lawyers and the courtroom and embed human rights principles in everyday service delivery. The current test adopted by the Court of Appeal means that in the case of most private providers, service users must invest significant time and effort to secure their Convention rights, with no guarantee of success. This is unrealistic in sectors that serve some of the most vulnerable persons in our society: the very young, the very old and those who lack mental capacity. This narrow approach seriously undermines the intention of Government – and, we believe, Parliament - that the HRA should provide an “ethical bottom line” for public authorities and should offer a framework for the resolution of problems and the improvement in the quality of services without resort to legal action.75

77. The majority of cases that have been considered by the courts, including Leonard Cheshire, have involved residential care homes. A significant number of our witnesses referred to the problems faced by those in residential care and how those problems might

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70 ibid, paras 69 – 74.
71 See for example, Appendix 5, para 5.1 – 5.6 (Age Concern); Appendix 15 (DRC), Appendix 17, para 14 (BIHR).
72 Appendix 14, paras 6 – 7.
73 Appendix 3.
74 Appendix 17, para 5.
75 First MPA Report, para 48 – 49. See Appendix 17, para 14.
be compounded if residents were unable to rely directly upon the provisions of the Human Rights Act for the protection of their rights.\footnote{See for example, Appendix 5 (Age Concern), Appendix 9 (Help the Aged), Appendix 11 (Liberty), Appendix 15 (Disability Rights Commission “DRC”).}

78. Given the extreme vulnerability of residents in a care home, the potential for abuse and violation of their Convention rights is particularly acute.\footnote{Appendix 9, paras 24 – 29 (Help the Aged); Appendix 15, pages 5 – 13 (DRC).} For example, Age Concern told us that the imbalance of power between residents in residential care and providers “means that people who have a grievance or complaint are unlikely to pursue it for fear of losing their home”.\footnote{Appendix 5, paras 5.1- 5.3.} Recent research shows that 62\% of all care home residents are cognitively impaired.\footnote{Appendix 9, para 16.} Help the Aged told us that many people entering residential care homes, particularly those with dementia are unable to consent but do not resist care. They consider that there is a disparity between the detention of patients in private hospitals under the Mental Health Act 1983 – who benefit from the automatic application of the HRA - and the treatment of older persons with dementia in a private residential home – who would not.\footnote{Appendix 9, para 17.} They question this distinction:

[T]he practical reality is that there is something more akin to a continuum from statutory compulsion at one end of the scale to a resident who makes a free and informed choice at the other.

79. This vulnerability highlights the need for an easily understood and accessible framework for the protection of human rights, where the principal responsibility for the protection of Convention rights is on the provider, not the user.

80. A resident in a care setting who is concerned about abuse, a breach of his or her dignity or a breach of the ECHR faces a number of challenges. First, the resident or their family must be capable of making a complaint to their service provider, the CSCI or the relevant local authority. Under the current law, it is difficult for both residents and the relevant public bodies to identify who, if anyone, should take responsibility for a complaint based upon the Convention. As Help the Aged told us:

A recurrent problem that we come across in our contact with care home residents and their families is the lack of any effective remedy. There is no clear or accessible mechanism for raising issues of concern, including potential interference with Convention rights. Notwithstanding the requirement for local authorities to keep care plans under review, one of the impacts of resource and staffing pressures is that home residents have minimal contact with social work professionals once they are accommodated…contact with the authority currently charged with the protection of rights is minimal or non-existent.

Typically, a resident or family member who makes a complaint to the care home has effectively nowhere to go if that complaint is not resolved at the level of the home. There are instances where a complaint can lead to the eviction of a care home resident so the implication can be very serious indeed. The majority of cases we
come across then attempt to complain to the regulator, the Commission for Social Care and Inspection (“CSCI”). A complaint to CSCI may trigger an inspection of the home, but the complaint itself will not be investigated; CSCI refers complaints to the local authority.81

81. It is extremely uncertain, as our predecessors explained, whether a local authority will remain liable in domestic law for the actions of a contractor that lead to a breach of Convention rights.82 The cumulative effect is that even a resident who is capable of making a complaint that their Convention rights have been breached is likely to be without an effective remedy in domestic law. This gives rise to a significant risk of incompatibility with Article 13 ECHR, which guarantees access to an effective remedy for violations of Convention rights. For the service user, it means that only the European Court of Human Rights may be able to properly determine their complaint. We believe this is entirely at odds with the aim of the HRA to “bring rights home”.

82. We note that the BIHR believes that many voluntary and private sector providers take seriously their commitments to their clients and seek to apply human rights standards irrespective of whether or not they are considered a “public authority” for the purposes of the HRA.83 However, we consider that the implications of the current gap in human rights protection, both for individual service users and for the development of an embedded human rights culture across both local authority and private providers of public services, are too serious to leave entirely to the discretion of individual service providers.

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

Concerns of service providers: leaving the market

84. Service providers and their representatives told us that there was no need for “reform” or “extension” of the meaning of public authority.84 Their support for the status quo was supported in some cases by claims that identification of private service providers as public authorities could force providers to leave the market for public services.85 The Government supported this point of view in their evidence to our recent inquiry on the DCA and Home Office Reviews of the HRA and in the evidence of the Department for Communities and Local Government (“DCLG”).86 For example, DCLG have told us that they are concerned

81 Appendix 9, paras 25 – 29.
82 First MPA Report, para 83.
83 See for example, Appendix 17, para 16.
84 See for example, MPA 1 (Evangelical Alliance); MPA 8 (Archbishops Council).
86 Appendix 20; See also DCA Review of the Implementation of the HRA, July 2006, page 28.
about any increase in the administrative burdens placed on Registered Social Landlords. They consider that any such burdens would “be likely to have an effect upon the availability of affordable housing for some of the most disadvantaged in society”. The application of the HRA to social housing providers would create a disincentive for other private housing providers to enter the social sector.87

85. In the light of the Government’s concerns, we specifically asked for evidence on the likelihood that service providers would leave the market if they were required to comply with the s.6 HRA duty to act in a manner compatible with Convention rights.

86. A number of reasons were identified as justification for the likelihood of market flight, including the risk of increased litigation, increased administrative burdens and the risk that providers with a particular religious ethos might be required to act in a manner incompatible with their beliefs and their freedoms guaranteed by Article 9 ECHR.88 Some of these concerns are considered below.

87. The DCLG consider that the risk of litigation under the HRA may deter providers from remaining in the public service market.89 However, there have been relatively few cases against “pure” public authorities in the context of the provision of services based on the HRA since it came into force.90 There have been very few cases involving local authority care homes.91 It is likely that many private providers responsible for the delivery of public services which engage Convention rights will already be subject to significant and close regulation and a significant risk of litigation or rebuke as a result of a failure to comply with relevant regulatory standards. For example, care home providers will be subject to the provisions of the Care Standards Act 2000 and the inspection powers of the Commission for Social Care and Inspection. ECCA and others suggest that good quality service providers will, without the express application of the HRA, operate in a way that effectively protects the Convention rights of service users.92

88. We are aware that threats to leave the market have followed a number of regulatory and consumer protection measures in other sectors.93 On the other hand, we heard from the Mayor of London that the implementation of their recent Group Sustainable Procurement Policy and the use of equality standards by Transport for London as contract conditions have not led to a significant flight of private providers from the market.94 It also appears that there has been no significant decline in those sectors where “functional” public

87 Appendix 20, paras 9 – 12. See also para 16 – 18 (on the provision of temporary housing by the private sector) and paras 25 – 27 (on the new deal for Communities).
88 Appendix 1 (Evangelical Alliance).
89 Appendix 20, para 18.
91 Appendix 5, para 6.1 (Age Concern).
92 See for example Appendix 3.
93 See for example, the evidence of Legal Services Providers and their representatives on the draft Legal Services Bill (Joint Committee on the Draft Legal Services Bill Report, Volume II: Evidence HC 1154-I, HL Paper 232-I).
94 Appendix 2, para 7.
authority status clearly applies to private providers, for example, independent hospital care (following the decision of *Partnerships in Care*).95

89. We accept that some smaller businesses or organisations may be concerned about the application of additional “administrative burdens”96 and some religious bodies may refuse to provide services as a matter of principle.97 It is however significant that none of the major service providers who gave evidence to this inquiry told us that they themselves would definitely be forced to leave the market if the HRA applied directly to them. We note that the National Care Forum, which represents not for profit residential care providers (their membership includes most of the large scale voluntary sector providers) believe that although a small number of private providers might leave the market if they were subject to the application of the HRA, “there would be no significant impact in care home provision and … the number of beds lost as a result would be negligible.” They consider that the ECHR would provide a “useful baseline for ensuring that residents are treated with dignity and respect.”98

90. A number of additional concerns were raised by service providers which were considered by the first MPA Report.99 We consider two of these concerns below: whether application of the HRA is necessary and whether application of the HRA to private providers will be unlawful, as it will prevent individual businesses or organisations relying upon their own ECHR rights.

**Application of the HRA is “unnecessary”**

91. ECCA told us that there were two reasons that the application of the HRA to private care homes was unnecessary. First, adequate regulation in their sector meant that the rights guaranteed by the Convention were already protected. Secondly, residents and their relatives were not aware of the HRA and were not interested in human rights, but “quality of care” and cost.100

92. ECCA told us that “the principles enshrined in the European Convention (fairness, respect, equality and dignity) and the objectives of the Human Rights Act are complied with and delivered in adhering to the National Minimum Standards”, which are applied by the Commission for Social Care Inspection (“CSCI”) in their inspections.101 The Government recently expressed a similar view.102 This is at odds with the evidence of the

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95 [2002] 1 WLR 2610. See First MPA Report, paras 34 – 35. In this case, the Court considered that a private hospital exercising powers under the Mental Health Act 1983 to detain patients, was a functional public authority.

96 Appendix 3, Appendix 9, para 31.

97 See for example, Appendix 1, Appendix 9, paras 23-24, 33, Appendix 8.

98 Appendix 9, para 31.

99 For example, MHA told us that they were concerned that identification as a “functional public authority” would compromise their independence from Government. The First MPA Report deals with this issue at paragraphs 60 – 63.

100 Appendix 3.

101 Appendix 3.

102 During a debate on abuse in Care Homes, Lord Hunt of Kings Heath was asked what the Government intended to do to ensure the application of the HRA to privately run care homes. He confirmed that if there were gaps in the legislation, that “needs to be looked at”. However, he told the House that, more generally, in order to avoid abuse, the Government “very much rely on the Commission for Social Care Inspection inspecting standards.” HL Deb, 22 February 2007, Col 1170 (Lord Hunt of King’s Heath).
CSCI that they themselves would welcome the extension of the provisions of the HRA to independent sector providers. They explain:

Whilst the Commission’s inspection work can go a considerable way in ensuring that people who use social care services are afforded dignity, respect and privacy, we are aware that the “Leonard Cheshire” judgment places some restrictions on the ability of CSCI to apply HRA principles in the majority of services that we regulate.103

93. ECCA consider that the real issue is “not about human rights, but about “tackling equality of access and quality in care”. They explain:

It is not our belief that residents, nor relatives, will be given more confidence in the system by extending the Human Rights Act. It is our opinion that the Human Rights Act is little understood and I have no evidence that it is a great concern for the majority of residents or their carers.104

94. We accept that in a number of areas the protection offered by existing regulatory frameworks may provide some protection for human rights. However, without the application of the HRA, the protection offered to the Convention rights of public service users in the independent sector will continue to be a diminished version of that offered to service users using services provided directly by State bodies. This may lead to a significant risk of incompatibility with Articles 1 and 13 ECHR, which require the United Kingdom to secure the Convention rights of every person within its jurisdiction and to provide access to an effective remedy for any breach. We note that ECCA consider that many residents are not aware of their Convention rights and the benefits of the HRA. We consider this unsurprising given the current judicial interpretation of the law. As the law stands, the HRA has no immediate relevance to residents in the independent sector, or their relatives. Similarly, until aware of the implications of the ECHR for their daily lives, individual service users may not be aware that the protection of their rights may overlap significantly with “quality of care” issues. We welcome the helpful examples provided by BIHR, and others, of the practical benefits which the application of the HRA may give to service users and advocates arguing for better service standards on the ground once they have been trained in the use of human rights dialogue.105

95. In their Report, Rights for Real, Age Concern conclude that “when exposed to the themes of the HRA, people could see ways in which it might help them, their family or their friends. However, prior to being exposed to the HRA, the tenor of the discussion had been very hostile to ‘human rights”’.106 We do not accept the argument that application of the HRA to the delivery of public services by the private sector would add little to the protection of human rights of vulnerable service users. On the contrary, we consider that the direct application of the HRA to private service providers would improve the protection of the human rights of service users by placing a direct duty on such service providers to act in a Convention compatible way. While regulatory and inspection regimes clearly play a very important role in ensuring the rights of service users and the

103 Appendix 13.
104 ibid.
105 Appendix 17, para 5.
quality of public services, they cannot be treated as a substitute for directly enforceable Convention rights under Sections 6 and 7 of the HRA.

96. The benefits of the application of the HRA to the public services sector are not limited to service users. In their review of the HRA, the DCA acknowledged that the operation of the HRA had a beneficial impact on policy and decision-making. In a similar sense, we consider that the application of the HRA to functional public authorities could lead to positive benefits for service providers in relation to the efficiency and effectiveness of their operating and decision making processes.

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

The Convention Rights of Service Providers

98. In Aston Cantlow, the courts considered the question of how the application of the HRA to private service providers would affect the ECHR rights of private service providers themselves. Similar concerns have been raised on behalf of service providers and their representatives and, particularly, by service providers who provide services on behalf of religious organisations. For example, the Archbishops Council argue that:

[T]o the extent that a private body was treated as a public authority under the Human Rights Act, it would not be a ‘victim’ for the purposes of the Act and would therefore not be entitled to the protection of the Convention articles itself. This would be a highly unsatisfactory situation. It would, for example, put in doubt a charity’s right to bring a claim to secure the peaceful enjoyment of its property under Article 1 of the First Protocol in the event of a threatened compulsory purchase...And a religious charity, to the extent that it was treated as a public authority, would not have the right to freedom of religion under Article 9, Article 14 rights protecting it from discrimination on the ground of religion in the enjoyment of its Convention rights more generally.

99. We do not consider that these arguments carry much weight. First, it is unlikely that domestic courts would prevent “functional” public authorities from relying upon their Convention rights. In Aston Cantlow, for example, Lord Hope indicated that “pure” public authorities might be considered “governmental organisations” with no standing in international law to bring a case under the Convention in the European Court of Human Rights at Strasbourg. Lord Nicholls also stressed that “functional public authorities”

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107 Appendix 5 para 6.2 (Age Concern); Appendix 17, para 15 (BIHR).
108 DCA Review, Chapter 3.
109 Appendix 5, para 6.2 (Age Concern).
110 Aston Cantlow [2003] 3 WLR, paras 46 – 47.
111 Appendix 7, paras 32 – 33; See also Appendix 1 (Evangelical Alliance) and Appendix 8 (Salvation Army).
112 [2003] 3 WLR, para 47.
would not be deprived of their rights to rely upon their Convention rights.\textsuperscript{113} Importantly, both Lord Nicholls and Lord Hope clearly recognised that the meaning of “non-governmental” or “governmental” body for the purposes of bringing a claim under the ECHR (i.e. the victim test in Article 34 ECHR) has its own autonomous meaning and should not be equated with the test for a “public authority” of either type, “pure” or “functional”.\textsuperscript{114}

100. Second, identification in domestic law as a “public authority” for the purposes of the HRA (or any other domestic public law purpose) will not necessarily prevent the relevant provider from being capable of consideration as a “victim” for the purposes of bringing a claim under the ECHR (or under s6 – 7 of the HRA). The first “test” is a statutory one laid down by Parliament to determine the scope of application of the HRA, a domestic statute designed to ensure that the United Kingdom complies with its obligations in Article 1 and Article 13 ECHR. The second “victim” test is a test primarily based in international law to determine the breadth of a right of individual petition accepted by the State. This distinction is clearly recognised by the analysis of Lord Hope in \textit{Aston Cantlow}, where he compares the position in the German Constitution, which provides that individuals should have a right of action against any public authority, including either of the two main churches, where their rights are violated by that public authority. Lord Hope notes that these churches remain “non-governmental organisations”, capable of relying on their own Convention rights despite their public status in domestic law and compares them to “functional public authorities” for the purposes of the HRA.\textsuperscript{115} The two tests have different purposes, are not mutually exclusive and both should be given a broad and purposive reading.

101. We received a significant amount of evidence based upon the implications for the Convention rights of service providers under Article 9 ECHR and Article 14 ECHR. We have recently reported on the implications of the Sexual Orientation Regulations for service provision in light of the right to manifest a religious belief.\textsuperscript{116} These matters are of relevance for public policy in the light of the increasing interest in delivery of services by faith-based voluntary organisations. We re-iterate that the right to manifest a religious belief— in contrast with the freedom of conscience to hold a religious belief— is not absolute, and must be weighed against the individual rights of service users. Proportionate interferences are in principle possible to protect the rights of others. Any exemption from recognition as a functional public authority for religious providers would need to be justified as necessary to meet the more narrow right of religious organisations to freedom of conscience.

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

\textsuperscript{113} \textit{ibid}, para 9 –12.

\textsuperscript{114} \textit{ibid}, paras 12 and 51 – 52.

\textsuperscript{115} \textit{ibid}, paras 62 – 63.

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

104. Some of our witnesses argued that, even if providers do not leave the public services market, the additional burdens involved in the application of the HRA would divert resources from the provision of good quality services. The Archbishops’ Council told us that the “imposition” of functional public authority status on voluntary bodies “would be likely to expose them to considerable challenge in their work, diverting resources away from the provision of vital services to those who most need them”.117 These concerns appear to treat the applicability of the HRA and the achievement of high standards as mutually exclusive. We consider that this is entirely at odds with the view expressed by the Government during the passage of the HRA and the experience of a number of NGOs that application of the HRA at the ground level can significantly improve service provision.118

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

The meaning of public authority: wider impact

106. A number of witnesses drew our attention to the wider impact of the interpretation of the meaning of public authority in the HRA. We consider these broader issues below. Firstly, we consider whether there may be a need for a consistent approach to the interpretation of “public authority” for the purposes of the Government’s Discrimination Law Review and its use in any future Single Equality Act. Secondly, we consider the potential of the narrow interpretation of the meaning of public authority to undermine the creation of a positive human rights culture in the United Kingdom.

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117 Appendix 7, para 26.
118 See for example, First MPA Report, para 48.
**Discrimination Law Review**

107. A number of existing anti-discrimination and equality provisions are based upon the definition of public authority used in s.6(3)(b) HRA\(^{119}\). The Discrimination Law Review is currently considering the meaning of public authority for the purposes of imposing both positive and negative duties in equalities law. The Discrimination Law Review is expected to report shortly; a Green Paper on a Single Equality Bill is expected early in 2007. The CRE noted that these provisions apply positive equality duties based on the “public function” test and that it is of great concern if a private body potentially exercising public functions and subject to a positive duty in respect of disability or gender might be unaware of its status.\(^{120}\) The CRE understands that it is likely that the Discrimination Law Review, in respect of the equality duties of public authorities, will recommend a single general equality duty which will apply to all six strands of equality law. It is likely that this will mirror the test in s.6(3)(b) HRA (following the existing general disability and gender duties in the Equality Act 2006).\(^{121}\) We note that this is the approach recommended by the Report of the Equalities Review.\(^{122}\)

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

**Creating a “Human Rights Culture”**

109. We welcome the Government’s new Common Values, Common Sense campaign for the HRA and their renewed commitment, following the recent DCA and Home Office reviews, to the development of a “human rights culture” within the UK. We reiterate our view that the protection of individual human rights will be best attained by the creation of a mature, considered culture of respect for human rights within our society. By this “culture” we mean a society in which human rights principles are central not just to the design of policy and legislation but to the delivery of public services. Respect for basic concepts such as a right to respect for private life, family and the home and to freedom of religion, thought and belief should not be limited to those with access to legal advisers, but should be accessible to everyone. Human rights principles should provide an ethical framework within which all public authorities, whether “pure” or “functional”, should operate.\(^{123}\)

110. As we have commented above, there are many reasons why the current interpretation of the meaning of public authority undermines efforts to create a positive and enduring

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\(^{119}\) See Appendix 19, para 4.2 (CRE). For examples see section 49B Disability Discrimination Act 2005, section 76A Sex Discrimination Act 1975.

\(^{120}\) Appendix 19, para 4.2.

\(^{121}\) *ibid*.


\(^{123}\) First MPA Report, para 48.
human rights culture within the United Kingdom. We agree with the assessment of the BIHR that the current approach compounds uncertainty for public service providers and users alike and adds to confusion about the implications of the HRA for people in their own lives.\footnote{124 Appendix 17 para 5.} We consider that the Government’s campaign to educate public authorities in their responsibilities under the HRA will be of limited value if it can only direct its efforts towards “pure” public authorities. We consider that the current approach of the courts to the meaning of public authority will inhibit the development of a positive human rights culture in the United Kingdom. In so far as it prevents the direct application of the HRA to significant numbers of vulnerable people, such as the residents of privately-run care homes, this approach helps to perpetuate the myth that the HRA creates no real benefits for “ordinary people” in their day to day lives.

**The case for further action: conclusions**

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

112. The continuing adoption of a narrow, institutional approach to the meaning of public authority has created a situation where some vulnerable persons may be denied the full benefits of the HRA as a result of a decision by a local authority, or the Secretary of State, to utilise the resources of the private sector to fulfil the responsibilities which Parliament has imposed upon them. We consider that the current situation is unsatisfactory and unfair and continues to frustrate the intention of Parliament. It creates the potential for significant inconsistencies in the application of the HRA and denies the protection of the rights it guarantees to those who most need its protection. In view of the continuing trend towards the contracting out of public functions, there is now a need for urgent action to secure a solution and to reinstate the application of the HRA in accordance with Parliament’s intentions when it passed the HRA.
4 The Way Forward

Summary

113. In our call for evidence, we asked for evidence on the effectiveness of the Government’s guidance on contracts and procurement, and for views on the potential means of addressing this problem. We invited anyone who thought that legislation was necessary, to tell us precisely how they thought this would best be achieved.

114. There are a number of options that emerge. These are considered in detail in the remainder of this Report.

115. Firstly, steps could be taken to improve the effectiveness of the Guidance issued by the Government on the use of contract terms to protect human rights (as recommended by the Court of Appeal in the Leonard Cheshire case). The existing Guidance could be given additional time and work to improve its effectiveness or new Guidance could be issued. We conclude that Guidance from central Government can never on its own provide a full or enduring solution.

116. Secondly, the Government could be encouraged to continue with their efforts to persuade domestic courts to revisit their interpretation of the meaning of public authority. Our predecessor Committee concluded that the process of judicial interpretation would be the most attractive and effective means of resolving this problem. We consider below whether further litigation is likely to lead to an enduring solution within a reasonable timeframe. We conclude that while this option for change remains the most constitutionally attractive option, the Government must have a very short timeframe in mind after which it will commit itself to seeking an alternative, legislative solution, in light of the timing of the Discrimination Law Review, and the House of Lords decision expected in the current litigation.

117. Third, primary legislation could be enacted either amending or supplementing the HRA definition of public authority or functions of a public nature.

Contracts: Further Guidance?

118. We consider that the existing Guidance on contracts for public services and human rights is unhelpful, for the reasons we outlined in Chapter 2, above. However, we also consider that well constructed, practical guidance could offer valuable interim protection for individual human rights while the application of the HRA remains uncertain.

119. Although the existing Guidance eschews general guidance to local authorities on the substance of their contracts, we consider that there is some potential in the development of effective Guidance and standard contractual terms for local authorities to draw upon in contracting for services that may engage human rights. We recommend that the relevant Government Departments, in particular the Department for Constitutional Affairs and the Department for Communities and Local Government, work together to conduct an urgent review of the impact of the existing Guidance. We recommend that urgent
attention be given to revising the existing Guidance to incorporate practical, accessible advice to all commissioning bodies.

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

121. We note that the existing Guidance rules out the use of model or standard contract terms for the purposes of advising local authorities on procurement and human rights. This appears to be in direct contrast to the approach taken to social clauses permitted by the EU Directive on Public Sector Procurement. The recent Government Action Plan for Third Sector Involvement: Partnership in Public Services explains:

> [T]he EU Directive on public sector procurement implemented into UK law in January 2006, clarifies the ability to take account of social issues in procurement, and the Local Government Act 2000 provides local authorities with powers to maximise social, environmental and economic well-being through their spending.

Across national and local settings, commissioners are best placed to decide how to factor broader social effects into funding arrangements. However, in doing so, they face a number of barriers. The complexity of social clauses and related approaches makes them difficult for commissioners to tackle in isolation.

122. The Office of the Third Sector within the Cabinet Office has agreed to consult partners on how to tackle these barriers and intends to develop a “small number of template social clauses for key social outcomes as tools to assist and focus their use”. It is expected that draft templates will be available in summer 2007. We find it difficult to understand why a similar approach is not possible in relation to the adoption of standard, or model, contract clauses for the purposes of providing protection for human rights in the procurement process as a stop-gap measure (as recommended by our predecessor Committee). We recommend that the relevant Government departments take into account the research completed by the Office of the Third Sector on the use of template social clauses to assist and focus their use in contracts for public services with voluntary and not for profit bodies. We recommend that urgent attention be given to the development of similar template clauses for the purpose of supplementing any future guidance on human rights and contracting for public services.

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

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125 As implemented by the Public Contracts Regulations 2006, S.I. 2006 No. 5, Regulations 38 and 39.
Further litigation

124. It is unfortunate, but not surprising, that during the past three years, the test for the identification of "functional public authority" has arisen in very few cases. The level of legal uncertainty in this area is likely to contribute to the low number of potential “test” cases. As we note above, individual applicants may be unwilling to undertake the stressful exercise of litigation where there is no real prospect of success. Potential applicants are likely to be vulnerable people. They may be unaware of Convention rights or their abuse. They or their relatives may not be willing to complain lest they risk their relationship with the service provider.

125. Some witnesses considered that the risks associated with a legislative solution to clarify the meaning of public authority were significant enough to justify continued efforts to resolve this issue through further litigation.126 Liberty told us that:

[T]he question of whether a body is a Functional Public Authority will have to be determined by the courts on a case-by-case basis. The only thing that section 6 of the Act should provide is an indication of the appropriate questions for the courts to ask.”127

126. BIHR stressed that this is a genuinely complex issue, but accepted that a solution must be found. They recommended that if a resolution was not achieved through current litigation, that the Government should consult on the way forward with a view to putting in place an enduring solution.128 A number of other witnesses supported this approach. The Northern Ireland Human Rights Commission explained:

The key to the interpretation of the meaning of “public authority” under the Act should be the intention of Parliament and the Government at the time of the enacting of the HRA. The legislative intention may need to be underwritten by change to the HRA should there not emerge, in the near future, a more extensive judicial interpretation of the definition of “public authority”. Given the imperative, from Article 1 of the European Convention, of securing the ECHR rights to everyone within the State’s jurisdiction, any policy or action of Government which tends to diminish its direct accountability in this area should see a corresponding widening of the coverage of the HRA to those to whom the State devolves its responsibilities. Unless the impending appeal in Johnson makes it clear that contracting-out neither requires nor excuses any erosion of Convention protections, a consultation on legislation should follow.

127. It is entirely possible that the House of Lords may reject the narrow approach of the Court of Appeal and close or narrow the protection gap that currently exists. They may however follow the decision of the Court of Appeal in Leonard Cheshire. In either case, the House of Lords may decide to restrict its analysis to the particular facts in the cases concerned, rather than clarifying the issue as a matter of principle. We welcome the steps taken by the Government to intervene in the cases which have arisen since the first MPA Report. It is in our view, however, likely that the law in this area may yet take considerably

126 Appendix 11, para 15; See also Appendix 17, para 17.
127 Appendix 11, para 15.
128 ibid.
more time to evolve into a satisfactory state. Even if the issue is resolved in respect of the residential care sector, further complex litigation is likely to arise in other sectors. The Government’s position on the status of private providers in other public service areas is no longer as clear cut as it appeared to be to Parliament during the passage of the HRA, or even as it appeared to be to us during our last inquiry into this subject. In future, the Government could choose to intervene only in those sectors which it considers “obviously” should attract public authority status, but not others which Parliament was led to believe would be subject to the application of the HRA. We consider that this could seriously frustrate the intention of Parliament in enacting the HRA. We are concerned that whatever decision is reached in the House of Lords, it is unlikely to lead to an enduring and effective solution to the interpretative problems associated with the meaning of public authority. Waiting for a solution to arise from the evolution of the law in this area through judicial interpretation may mean that uncertainty surrounding the application of the HRA will continue for many years. It could lead to a serious risk of discrepancies across public service delivery. We consider that this is unacceptable.

128. Before permission to appeal was granted in the cases currently before the House of Lords, the Lord Chancellor told us that his preferred approach was to seek to intervene in another appropriate case rather than consider introducing primary legislation to attempt to clarify the law.129 Similarly, Baroness Ashton told us that she believed that intervention in those cases presented the “best opportunity for clarifying the definition of “public authority” after Leonard Cheshire”.130

129. She added that should the Government’s current strategy “ultimately prove unsuccessful”, that the Government would “consider all available options when assessing how to proceed”.131 No deadline has been identified when the Government will consider that their strategy has proved “unsuccessful”.

130. While the current interpretation of the meaning of public authority remains in place and the involvement of the private sector in the delivery of public services continues to grow, the gap in the protection of human rights offered by the HRA continues to widen.

131. We are unaware of the precise costs involved in individual cases, but the cost to the public purse involved in attempting to resolve this issue through litigation is likely to be substantial.

132. At the time of the first MPA Report, our predecessor Committee considered that the most attractive option for the resolution of this issue was through the interpretative intervention of our courts. However, bearing in mind the slow, ineffective and costly results of intervention over the past three years, we conclude that the Government must now consider the alternatives to continuing litigation beyond the decision of the House of Lords in the current litigation. As we have highlighted above, the vulnerability of those service users most likely to be affected by the current gap in human rights protection lends significant urgency to the need for an effective and enduring solution. We consider that the Department for Constitutional Affairs together with other relevant Departments

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129 Appendix 18.
130 Appendix 18.
(including the Department for Communities and Local Government, who have responsibility for the Government’s Discrimination Law Review) should now bring forward alternative legislative solutions for consideration by Parliament shortly after the decision of the House of Lords.

133. We note that a number of our witnesses, including BIHR and the NIHRC would prefer a consultation period before a legislative solution is considered. While we consider that a short period of consultation with interested stakeholders would be desirable, we are concerned that this should not provide any opportunity to re-open wider debates which took place during the passage of the HRA. **We recommend that any consultation period should be short and limited to the format and text of legislative proposals intended to give effect to the principles for the identification of a functional public authority which were identified by our predecessors in the first MPA Report.**

134. A number of witnesses have highlighted the need to coordinate the approach to the “meaning of public authority” in equality law, as currently being considered by the Discrimination Law Review, with the broader application of that test in the HRA. Specifically, a number of witnesses argued that any legislative solution should be incorporated in a Single Equality Act. At this stage, we reach no conclusion on the issue of whether or not the test to identify a “functional public authority” should be the same for the purposes of the HRA and the general equality duty in any Single Equality Act. However, we consider that it would be extremely unfortunate if the results of the Discrimination Law Review were permitted to lead the debate on the meaning of public authority. **We consider that the starting point for any debate should be the meaning of public authority as intended by Parliament during the passage of the HRA and as reflected in the general principles identified by our predecessor Committee. With this in mind, we consider that the timetable for a legislative solution must be identified as soon as possible.**

**A Legislative Solution?**

135. Our predecessor Committee concluded that it would be undesirable to consider a legislative solution to this problem for a number of reasons. At the time of their Report, they felt that it was too early in the experience of the implementation of the HRA to consider its amendment; amendment could sacrifice the flexibility of the Act and could inhibit its capacity to adapt to changing social circumstances. In any event, they considered that it would be difficult to devise a “magic formula” in legislation to provide a more comprehensive and precise definition of public authority than that in s.6 HRA.

136. In our recent report on the DCA and Home Office Reviews of the HRA, we indicated that, while we did not wish to discourage the Government from pursuing its strategy of intervening in an appropriate case, failure of that strategy to date and the growing urgency of the problem meant that it was time to give serious consideration to whether or not to introduce legislation to reverse the effect of the Leonard Cheshire decision. We asked for

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132 Appendix 17, para 17 (BIHR), Appendix 19, paras 2, 4.2, 5 (CRE).
133 See for example, Appendix 9, para 38, Appendix 5, para 8.5.
134 Appendix 19, para 4.2 (CRE).
evidence on this issue and although no clear consensus emerged, **most of our witnesses who recognised that the current position in law was unsatisfactory either recommended some form of legislative solution, or agreed that the time for a legislative solution was very near. In our view the time has now come to bring forward a legislative solution. We now consider the different forms such a solution might take.**

**Scheduling “public authorities”**

137. The first MPA Report considered that the creation of a “schedule” of identified public authorities for the purposes of the HRA would reduce the Act’s flexibility and could lead to discrepancies and omissions. No witnesses suggested that this would provide an appropriate solution. In our view this approach runs contrary to the scheme of the Act. We are concerned that it continues to place additional emphasis on the character of the relevant body, rather than the function which it performs. Providing a list of public authorities, or amending the HRA to refer to a specific list of public authorities could lead to inconsistency and confusion as to whether “unlisted” or “unspecified” public authorities should be considered subject to the application of the HRA. This could result in a narrower application of the HRA than that currently required by the courts’ interpretation in *Leonard Cheshire*. **We would strongly resist the amendment of the HRA to identify individual types or categories of “public authority” as either “pure” or “functional” public authorities.**

**Extending the application of the HRA by sector**

138. A number of witnesses recommended expressly extending the application of the HRA by sector. For example, Help the Aged and Age Concern argued that amendment of either the HRA, the Community Care Act 2000 or the National Assistance Act 1948 was necessary to secure the application of the HRA to all care homes in the private sector, regardless of whether they were providing services to persons funded by a local authority, or to privately paying residents.136

139. While we are highly sympathetic to the argument that this is the sector which is most seriously affected by the implications of the gap in human rights protection, we consider that a sector by sector approach to this problem would not lead to an enduring solution. It would reduce the impetus to find a general solution and would compound uncertainty in relation to the application of the law in other sectors. It would not resolve the question of how to ensure that the definition of “public authority” in the HRA was broad enough to ensure its application to the delivery of public services in other sectors or that the definition remained flexible enough to adapt to changes in the market.

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

141. Liberty have proposed amendments to both the Police and Justice Act 2006 and the National Assistance Act 1948 as an interim solution, pending the adoption of a broader

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136 Appendix 5, paras 8.4 – 8.5; Appendix 9, paras 37 – 39.
interpretation of s6 HRA by our courts. They consider that there is nothing to prevent the amendment of other existing legislative provisions for contracting out in order to ensure that any body operating under such arrangements is considered a public authority for the purpose of the HRA.\textsuperscript{137} They recommend amendments which follow this model:

(1) Any person with whom arrangements are made under or by virtue of [insert contracting-out/delegating powers here] shall, in the discharge of those functions, be treated as a public authority for the purposes of the Human Rights Act 1998 (c.42)

(2) For the avoidance of doubt it is hereby declared that nothing in this section affects the meaning of public authority in section 6 of the Human Rights Act 1998 (c.42) or the determination of whether functions, other than those referred to in subsection (1) above, are functions of a public nature for the purposes of section 6.

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

143. Recently we have recommended that, where contracting-out may diminish the protection of individual rights, statutes should clearly identify that the person to whom the relevant functions are contracted should be treated as a “public authority” for the purposes of the Human Rights Act.\textsuperscript{138} We consider that unless a more general solution is achieved in the short term, it will be necessary for any Bill which provides for the contracting-out or delegation of public functions to identify clearly that the body which performs those functions will be a public authority for the purposes of the Human Rights Act.

Clarifying the meaning of “functions of a public nature”

144. Some witnesses expressly suggested that the time had come to consider whether a new, amended definition in s.6 HRA might be appropriate. The first MPA Report considered that this would be the most radical approach. The Mayor of London calls for amendment to ensure that the definition of “public authority” is “adequate and broad” and includes “bodies such as residential homes to which public authorities may delegate their responsibilities”.\textsuperscript{139} The National Secular Society suggests that the definition be amended to include:

When a public body delegates functions that would otherwise be the response [sic] of that body, those functions and the private body delivering them are considered public for the purpose of the Human Rights Act.\textsuperscript{140}

\textsuperscript{137} Appendix 11, paras 16 – 20.
\textsuperscript{138} See for example Appendix 4, para 4.4 (British Humanist Society).
\textsuperscript{139} Appendix 2.
\textsuperscript{140} Appendix 12, para 31.
145. This proposal adopts the approach of the Law Society, suggested to our predecessor Committee.\textsuperscript{141}

146. One objection to this approach is based on the fact that the definition in s6(3)(b) HRA was carefully considered and thoroughly debated. Yet, despite this, we note that confusion has still ensued. We recognise that any expanded definition would remain subject to judicial interpretation and could give rise to a significant number of new anomalies. However, we consider it is unlikely that, with the aid of additional broad direction from Parliament, clearly indicating that public functions include circumstances where Government functions, duties and responsibilities are delegated, contracted out, or given effect by private service providers, the court would continue to follow the institutional approach adopted in \textit{Leonard Cheshire}.

147. Another more fundamental objection is raised to amendment of the HRA, an important constitutional measure. Liberty told us:

\begin{quote}
Given the profound constitutional importance of the Act amendments should only be considered when this is absolutely necessary for a pressing reason of constitutional importance. In addition we fear that in the current political climate if any Bill were introduced to amend the HRA this would be likely to lead to a reduction in the level of human rights protection that is currently afforded by the Act.\textsuperscript{142}
\end{quote}

148. Our predecessors considered that providing ministerial discretion to identify particular public functions or legislation specifically to designate particular public functions would be a “plausible approach” to closing the gap in protection that has been opened by the interpretation of the courts so far. Their concern was that this approach would lead to difficulties of definition and exclusivity, even if combined with a general definition of “public function”, such as s.6(3)(b). Our predecessors were not persuaded of the desirability of this approach in practice.

149. In our recent Report on the DCA and Home Office Reviews of the Human Rights Act, we concluded that there were no insuperable obstacles to drafting a suitable statutory formula which makes clear that any person or body providing goods, services or facilities to the public pursuant to a contract is itself a public authority for the purposes of the HRA. We note for example, that in order to identify those religious organisations which do not benefit from the exemption from the application of the law on non-discrimination on the ground of the sexual orientation in the provision of goods, services and facilities, the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 use a formula which excludes organisations who make provision of a specified kind “on behalf of a public authority under the terms of a contract for provision of that kind”. The specified kinds of functions are generally:

a) any form of social security;

b) healthcare;

\begin{footnotes}
\textsuperscript{141} ibid.
\textsuperscript{142} Appendix 10, para 15.
\end{footnotes}
c) any other form of social protection; or

d) any form of social advantage;¹⁴³

150. We share the view that the HRA is a significant and important constitutional measure. However, in light of the narrow interpretation adopted by the courts of the meaning of public authority, that measure does not seem destined to have the broad effect intended by Parliament during its passage. **We consider that the direct amendment of the non-exhaustive definition of “public authority” in s. 6 of the HRA should be considered only as a matter of last resort.** However, in light of the pressing need for a solution, we think there is a strong case for a separate, supplementary and interpretative statute, specifically directed to clarifying the interpretation of “functions of a public nature” in s. 6(3)(b) HRA. This interpretative statute could provide, for example:

“For the purposes of s. 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function.”

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

Introduction

1. We adopt our predecessor Committee’s assessment of the law and the implications of the gap in human rights protection created by the narrow interpretation of the meaning of “public authority” in s.6 of the Human Rights Act. We consider that their previous recommendations were capable of resulting in an effective solution. However, during the last three years, there has been little evidence of progress towards an approach that gives effect to what we consider to have been Parliament’s original intention to bring rights home for everyone, including those who receive public services delivered by private bodies. In view of the continuing trend towards the outsourcing of public services and the continuing failure to fill the gap in human rights protection, we consider that it has now become a matter of some urgency to consider what action is necessary to bring about a solution. (Paragraph 11)

The Developing Law: Closing the Gap?

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

Guidance on the meaning of public authority

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

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

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

**Guidance on contracting for services in the light of the HRA**

6. We are concerned that the Guidance on contracting for services in the light of the HRA takes a very negative approach to the difficulties facing the use of contracts to secure better the protection of human rights. It appears to have been drafted very much from the perspective of securing maximum flexibility for public procurement, by securing the best price or by ensuring that providers, including small and medium sized businesses, stay in the public services market. This approach dissuades procurement officers from taking a positive approach to the protection of human rights. (Paragraph 45)

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

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

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

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

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

**Procurement and human rights**

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

**Guidance: conclusions**

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

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

**The “Private Sector” and Public Services**

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

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

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

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

19. The current test adopted by the Court of Appeal means that in the case of most private providers, service users must invest significant time and effort to secure their Convention rights, with no guarantee of success. This is unrealistic in sectors that serve some of the most vulnerable persons in our society: the very young, the very old and those who lack mental capacity. This narrow approach seriously undermines the intention of Government – and, we believe, Parliament - that the HRA should provide an “ethical bottom line” for public authorities and should offer a framework for the resolution of problems and the improvement in the quality of services without resort to legal action. (Paragraph 76)

20. For the service user, it means that only the European Court of Human Rights may be able to properly determine their complaint. We believe this is entirely at odds with the aim of the HRA to “bring rights home”. (Paragraph 81)

21. We consider that the practical implications of the current case law on the meaning of public authority are such that some service users are deprived of a right to an effective remedy for any violation of their Convention rights, with a significant risk of incompatibility with the United Kingdom’s responsibilities under Article 1 and Article 13 ECHR. We consider that the practical implications of the current case law for vulnerable service users are particularly stark. In the absence of any compelling evidence that the public services market would be undermined by the application of the HRA, we consider there is an urgent need for action to ensure that the HRA is applied as in our view it was intended by Parliament. (Paragraph 83)
22. We do not accept the argument that application of the HRA to the delivery of public services by the private sector would add little to the protection of human rights of vulnerable service users. On the contrary, we consider that the direct application of the HRA to private service providers would improve the protection of the human rights of service users by placing a direct duty on such service providers to act in a Convention compatible way. While regulatory and inspection regimes clearly play a very important role in ensuring the rights of service users and the quality of public services, they cannot be treated as a substitute for directly enforceable Convention rights under Sections 6 and 7 of the HRA. (Paragraph 95)

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

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

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

26. After giving it careful consideration, we find that the evidence from service providers and their representatives does not support the conclusion that a significant number of providers would leave the market if they were considered “functional” public authorities. (Paragraph 103)

27. We have not seen any convincing evidence that providers would leave the public services market if they were subject to the duty to act compatibly with Convention rights. We are deeply concerned that the Government continues to encourage trepidation about the application of the HRA amongst private providers by expressing premature and unsupported concerns about market flight. General statements by Government departments on the risk posed by the application of the HRA to the provision of public services are entirely at odds with the aim of the Government’s campaign to educate public authorities and the public in the benefits of the Act. We encourage the Government, in the course of their current work on the implementation of the HRA, to take steps to educate and inform all service providers about the service delivery benefits of the application of the Act, not only those which are “pure” public authorities. (Paragraph 105)
Discrimination Law Review

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

Creating a “Human Rights Culture”

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

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

The case for further action: conclusions

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

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

Contracts: Further Guidance?

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

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

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

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

Further litigation and legislative solutions

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

38. We consider that the Department for Constitutional Affairs together with other relevant Departments (including the Department for Communities and Local Government, who have responsibility for the Government’s Discrimination Law Review) should now bring forward alternative legislative solutions for consideration by Parliament shortly after the decision of the House of Lords. (Paragraph 132)
39. We recommend that any consultation period should be short and limited to the format and text of legislative proposals intended to give effect to the principles for the identification of a functional public authority which were identified by our predecessors in the first MPA Report. (Paragraph 133)

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

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

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

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

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

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

46. We consider that the direct amendment of the non-exhaustive definition of “public authority” in s. 6 of the HRA should be considered only as a matter of last resort. However, in light of the pressing need for a solution, we think there is a strong case for a separate, supplementary and interpretative statute, specifically directed to clarifying the interpretation of “functions of a public nature” in s. 6(3)(b) HRA. This interpretative statute could provide, for example: “For the purposes of s. 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function.” (Paragraph 150)
47. This statute could also aid the statutory definition for any statutory gateway based on the performance of a public function, for example, in the Environmental Information Regulations 2004. Section 6(3)(b) HRA clearly would need to be identified in the interpretative statute. However, it could be left open to the Secretary of State to designate, by affirmative resolution, other statutory references to “public function” which would also be subject to the interpretative provisions of the supplementary statute. We consider that this approach would provide a solution to the problem whilst avoiding the constitutional implications of amending the HRA itself. (Paragraph 151)
Formal Minutes

Monday 19 March 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd
The Earl of Onslow
Baroness Stern

Mr Douglas Carswell MP
Nia Griffith MP
Dr Evan Harris MP
Mark Tami MP

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 151 read and agreed to.

Summary read and agreed to.

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

Several Papers were ordered to be appended to the Report.

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

[Adjourned till Thursday 22 March at 3.00pm.]
# Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

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23. Letter from Marie Robson, dated 12 March 2007 (MPA 24)
Written evidence

Our call for evidence in this inquiry was issued at a time when the cases of Johnson v Havering and YL v Birmingham City Council were not covered by the sub judice resolutions of both Houses. The cases are now sub judice, being subject to appeal in the House of Lords. We have therefore redacted evidence not already in the public domain which refers in detail to these cases. Such redactions are indicated thus: * * * *

1. Memorandum from The Evangelical Alliance

INTRODUCTION

The Evangelical Alliance, founded in 1846, and born out of the fight for civil liberties, is the umbrella body that brings together a majority of Britain’s 1.3 million Evangelicals. In 2005 40% of the church going public was Evangelical1 Furthermore, 2005 statistics showed that 26% of Angli cans, 87% of Baptists, 79% of Independents, 32% of Methodists, 93% of Pentecostals, 26% of URC members, and 69% of other churches identified themselves as Evangelicals2. The Alliance exists to promote unity and truth amongst these churches, individuals and evangelical organisations, and to represent their concerns to the wider Church, State and society. Amongst the many member organisations of the Evangelical Alliance are well known historic names such as the Salvation Army, CARE, the Shaftesbury Society, the Bible Society, Tearfund, etc.

SUMMARY

The Evangelical Alliance considers that it would be preferable for the definition of “public authority” not to include third sector organisations who receive government funding. This is because we would not want “public authority” status extended either to organisations in receipt of public funds to deliver public services, nor if it was limited to the services for which public funds were received. As a matter of political policy such an extension would move the state dramatically into the whole area of civil society and charitable work—it could well be in conflict with charities’ charitable purposes. It is a matter also of concern to business. The issues of standards and requirements are much better addressed at the appropriate level by local contracts which take account both of the needs to be met and the requirements of the charity.

GENERAL RESPONSE

The Alliance believes that crucially important exceptions to public status are necessary for faith groups and other private service providers to enable them to continue to function in the provision of services which may involve some element of public funding. If this does not occur, we believe there is a real prospect of the risk of actions for potential human rights violations, eg, over legitimate versus illegitimate discrimination, which in turn will inevitably lead to a progressive withdrawal of voluntary services from the market. It is our experience from a faith perspective that when faith motivation for voluntary activity is compromised the future of the service itself is undermined as in the case, for example, of the Church of England Children’s Society a few years ago.3 And the sheer threat of potential legal action inevitably produces a chilling effect on motivated voluntary initiative—including religious motivation. The British Government is clear in its stated wish to remove red tape from the voluntary sector and encourage it to expand community welfare service delivery. In our view, imposing public status will produce the opposite effect.

The question of public status and the case for exemption of religious groups and charities engaged in private or publicly funded voluntary work is a major issue that we had understood was to be further considered under the Government’s Discrimination Law Review. We discussed this aspect at length with the Home Office in conjunction with Part 2 of the Equality Act from which it was remitted. We disagree strongly with the Government’s stated intentions to legislate in this area and were hoping for detailed consultations on the subject. The issue is of crucial importance for society as a whole with profound implications. It is possible, for example, that the UK could be faced with the prospect of large scale reduction of voluntary community provision, services and social support if religious groups considered they were being coerced into endorsing what they perceive to be false religious practice or immoral conduct. Enforced “equality” will inevitably prove counter-productive and self-defeating, especially where faith motivation ends up being undermined. Well known examples of this have already occurred with

3 We acknowledge in this response the use of legal briefing material prepared by the Church of England in joint discussions on the Equality Bill.
serious consequences for needy beneficiaries, and vulnerable people and society as a whole are worse off as a result. Attention should rather be given in this area to celebrating diversity. Whilst religious groups do not usually wish to discriminate in the actual provision of services, such groups—and not least their financial supporters—will inevitably insist for their continuance on preserving their independent, religious, motivating policy, staffing and governing ethos. It should be remembered that at least 40% of the nation’s volunteer services are estimated to be provided by religious groups who often act as crucial instruments of Government social policy. The North-West Development Agency’s report, *Faith in England North-West*, found that faith communities are strongest where the social need is highest, and are key to delivering agents of care in their local communities. As such, they stimulate, encourage and sustain volunteering—often the greatest challenge—and play a vital role in regeneration. Further recent research shows that evangelical Christians give nine times more to charities than the average householder and are much more likely to volunteer.\(^4\) It remains our view that nothing should be done to undermine such motivations aimed at the common good.

If legislation were to be considered in this area, we would urge full prior consultation with faith groups as well as extensive investigation regarding whether public status should be applied to charitable organisations in conjunction with the Charities Commission. Rather than the direct imposition of public status, which we believe the Government should avoid at all costs, local authorities and other public grant making bodies should more appropriately shoulder the responsibility of deciding whether projects fall into public categories thereby potentially requiring restrictions relating to which, out of a range of possible service providers, some might be disqualified. Obligations could be required on a contractual basis, though of course disqualification of religious group service providers from being awarded public contracts could well be challenged as effectively contracts to discriminate, if necessary, in the European Court of Human Rights.

**Some Legal Considerations**

Debate on the issue of private service providers and public status often appear to involve ambiguities. For example:

(i) Will public authorities, if they are to discharge duties not to discriminate, be required impose a contractual duty on those who undertake functions on their behalf, so that those bodies are also required not to discriminate? Or will legislation impose such duties directly?

(ii) Or, as the general law now stands, will bodies which undertake functions under contract on a public authority’s behalf be seen as public authorities in their own right, so that the duty imposed on public authorities under the regulations will apply to them automatically?

(iii) Or, is it the intention that legislation should expressly impose ‘public authority’ status on bodies which undertake functions on a public authority’s behalf, so that they become subject to the duty in their own right?

Whichever of these is intended, it appears that important and difficult issues will arise similar to those that emerged during the passage of Part 2 of the Equality Bill in relation to proposals that a duty should be imposed on public authorities not to discriminate on grounds of religion or belief, and presumably in due course with regard to Sexual Orientation in respect of Part 3. With others, the Evangelical Alliance strongly opposed that proposal. We do not believe that, as the law now stands, bodies exercising functions on behalf of a public authority will normally be seen as public authorities in their own right\(^5\), and we believe it to be very undesirable to impose what are essentially governmental obligations on the voluntary sector. We were therefore grateful that the proposed provision was removed from the Equality Bill and that the issue of the position of voluntary bodies as public authorities was remitted to the Discrimination Law Review for further consideration.

A significant number of charities and voluntary bodies receive public funding to enable them to provide the services with which they are concerned and understandably this may give rise to a legitimate interest on the part of the funding body that such funding is employed in a non-discriminatory manner. In such circumstances, we believe it is preferable for the relevant funding body to stipulate contractually as to matters concerning discrimination where that body considered it appropriate to do so.

**‘Public authority’ status and the Human Rights Act**

We believe there are major disadvantages in imposing a duty on charities providing services to comply with convention rights, in terms of the extent to which that would open up their day-to-day decisions to challenge (with consequent expense and difficulty). Whilst it will be argued that in principle it would be wrong for service users to lose out on the protection they would have if the service were provided directly by a governmental body, we do not consider that this necessarily should have to be the case. A governmental body providing funding means in practice that it is in a position, if it wishes, to require charitable service providers to behave in a particular way. However, there are advantages in achieving

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\(^5\) See the decisions of the Court of Appeal in *Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] 4 All ER 604* and *R (on the application of Heather and others) v Leonard Cheshire Foundation [2002] 2 All ER 936*. 
this through contracts freely negotiated at arms length rather than through the imposition of an abstract legal status (possibly imposed without any knowledge on the charitable service provider’s part). There may be concerns that in adopting the contractual route the service user may be left without any effective remedy against the charitable service provider in the event that the latter failed to honour its agreement with the funder. However, it is now possible under English law for an agreement to provide for a third party to enforce it against one of the parties to it—a possibility which was actually mentioned in a previous Report of the Joint Committee on Human Rights.

**‘Public authority’ status and the Equality Bill**

We expressed our concerns during the Equality Bill about the potential impact of imposing “public status” on faith-based service providing charities if the concept of ‘public authority’ were extended in the way being contemplated by Government so as to bring at least some such service providing charities within its scope. There were particular concerns relating to the question of harassment and the display of religious symbols and proselytism, with Government opinions varying with regard to the extent to which this was likely to be a significant problem in practice. We were not reassured by such discussions and felt that proposals then being considered by Government were likely to give rise to inappropriate potential challenges to the activities of faith-based service providers, which in turn would discourage the activities themselves. We urged Government to introduce appropriate protection for charities. In particular, we wished to see robust protection for the display or manifestation of religious practices and artefacts (including literature) against any possible claim for unintended harassment. Of course, we have enduring concerns relating to the Equality Act in connection with the definition and scope of harassment which remains a major source of debate. We are of the view that in relation to both Parts 2 and 3 of the Equality Act harassment must be either left out or seriously limited in its scope so as to avoid deleterious consequences for service providers and religious charities.

During the Equality Act debate we supported the proposed Church of England amendment which involved insertion of a clause designed to ensure that the manifestation of beliefs or practices, or the display of symbols or artefacts, on grounds of religion or belief is not classed as harassment.

It is noteworthy that during Committee Stage of the Equality Bill Lord Lester—not a natural supporter of faith-based groups—moved an amendment to the definition of harassment which would have restricted the meaning of “violating B’s dignity” by adding at the end the words “by violating B’s right to respect for private life or subjecting B to inhuman or degrading treatment or punishment”. (See Amendment 172 and columns 1117–1122 of Lords Hansard for 13 July, 2006.) Explaining that the expression worried him “because it is such a broad concept that it is capable of covering an enormous range of conduct which few sensible people think should be covered”, Lord Lester said that the purpose of his amendment was to give the concept some meaning—to avoid creating a civil wrong of a very vague kind. He was not convinced by the Minister’s justification of the provision by reference to its origin in the Employment Directive, pointing out that what might be appropriate in the employment field was not necessarily desirable in the context of the provision of goods, services and facilities to the public. We have much sympathy with Lord Lester’s views in this regard.

We look forward to detailed discussions of the implications of any attempts to impose ‘public authority’ criteria on private service providers.

*Dr D G Horrocks*

Head of Public Affairs

*December 2006*

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2. Memorandum from the Mayor of London

1. This submission concerns the gap in human rights protection that has been caused by the judicial interpretation of the phrase “public authority”.

2. The Mayor is seriously concerned about the anomalies that have been created by current judicial interpretation of the phrase “public authority”, and in particular the negative impact it has had on those who find themselves being cared for in homes for elderly and/or disabled people. It is of concern to the Mayor that effective protection of Convention rights is eroded in practice as a result of local authorities delegating their responsibilities to the private sector.

3. The Mayor believes that all service users should be treated in the same manner and that the current distinction in treatment, which result from the service being provided directly from a local authority or indirectly from the private sector, is unsatisfactory.

4. The Mayor is of the view that if a state decides to discharge its obligations under the Convention through a private body that private body should have the same responsibilities, as the public body would have incurred had it discharged the obligation itself. More importantly the Mayor believes that the Human
Rights Act (HRA) provides for this and that recent judicial interpretations are wrong. Statutory commissions such as the Disability Rights Commission along with major equality organisations, at the time of passage of the HRA, clearly shared the understanding that private residential homes and services provided under contract with a public authority would be covered by the Human Rights Act (see for example, The Impact of the Human Rights Act on Disabled People, The Royal National Institute for Deaf and Hard of Hearing People (RNID) and Disability Rights Commission (DRC), September 2000).

5. The Mayor is in favour therefore of a broad, and functional definition of what constitutes a public function under section 6 (3)(b) of the Human Rights Act 1998. The Mayor believes that the section should be given a broad interpretation that is protective and designed to ensure that the UK discharges its obligations under Article 1 and 13 of the European Convention of Human Rights (ECHR). The Mayor notes that this was the intention of ministers, as highlighted by the Joint Committee on Human Rights (JCHR) in its press notice on the call for evidence (23 November), which explained that “ministerial statements during the passage of the Human Rights Bill indicated that the purpose of the section 6(3)(b) test was to make the Act comprehensive rather than restrictive in its application”. The JCHR further notes that the Government did intervene, though unsuccessfully, in “the case of R (on the application of Johnson and others) v London Borough of Havering with the aim of ensuring that the meaning of ‘public authority’ covers elderly and vulnerable people receiving care from a private provider on behalf of a public authority”.

6. The Mayor further notes that the previous JCHR also considered “various possible ways of amending the HRA to address the matter, but did not recommend any of them be taken up.” The Mayor is in favour of an amendment, through such primary legislation as is necessary, to ensure an adequate and broad definition of the term “public authority”. Specifically, to ensure that the definition in the Act that “public authority” includes “any person certain of whose functions are functions of a public nature” therefore includes bodies such as residential homes to which public authorities may delegate their responsibilities. The aim must be to ensure the same standard of care and rights to those receiving services directly from a public authority or through a private provider contracted by a public authority to provide the service. The Mayor believes this would be consistent with the Convention, the stated intention of ministers in passing the Human Rights Act and the rightful expectations of the public. The Mayor urges the JCHR to revisit its previously reached options for amendment of the HRA and make a firm proposal on doing so, and remove any room for confusion as to interpretation.

7. The Mayor does not agree that private providers would leave the market if they were “public authorities” for the purposes of the Human Rights Act 1998. In this respect, experience in London with regard to the procurement process can be drawn upon as a parallel. The Mayor agreed a Greater London Authority (GLA) Group Sustainable Procurement Policy in March 2006 and contracts by Transport for London embeds equality standards as contract conditions, which must be agreed before prospective contractors can proceed to bid. This policy has led to no significant flight of private providers from the market. The Mayor therefore believes that, while the human rights argument is compelling in its own regard, and the recent interpretation of the Human Rights Act are wrong and overly narrow, that there is not any compelling evidence of market flight either. It would be therefore wrong to suggest this as an argument against action to clarify the Act, removing room for doubt and respecting the intentions behind the Act and expectations vested in it.


dated 13 December 2006

3. Memorandum from the English Community Care Association

The English Community Care Association (ECCA) is the leading representative body for independent care homes in England. Members provide a wide range of services in residential and nursing settings for adults. Member care homes are small individual concerns and large corporate organisations both charitable and commercial. ECCA campaigns to ensure the optimum environment exists for care homes to provide high quality care for those who wish and need it.

ECCA welcomes the opportunity to comment on the Joint Committee on Human Rights’ enquiry into the meaning of public authority.

The vast majority of care homes are within the independent sector and approximately 75% of residents are funded by the state. ECCA does not believe that it is necessary to extend the Human Rights Act to encompass independent providers. Care providers deliver care within the context of the Care Standards Act 2000. The principles enshrined in the European Convention (fairness, respect, equality and dignity) and the objectives of the Human Rights Act are complied with and delivered in adhering to the National Minimum Standards.
It is not our belief that residents, nor relatives, will be given more confidence in the system by extending the Human Rights Act. It is our opinion that the Human Rights Act is little understood and I have no evidence that is it a great concern for the majority of residents or their carers. I am absolutely clear that priorities for residents include issues of choice, care quality and fees. Of these issues the Committee may be particularly interested in fees where owing to significant shortfalls in the funding from local authorities, self-funding residents subsidise publicly funded residents.

The real issue here is not about human rights, but about tackling the problems of equality of access and quality in care. This is the responsibility of providers who deliver care services, commissioners who pay for them and those who are designed to regulate them. If all these things work together there will be no need for the Human Rights Act. Though it is interesting to note that local authorities often refuse to follow the Choice of Accommodation Directive which can be used to ensure older people maintain a family life.

Local authorities constantly flout the right of older people to maintain a family life by ignoring the provisions of the Choice of Accommodation Directive which will enable them to choose a care home near to their family and networks. In this instance, good practice could reach the same objectives as legislation in a much less bureaucratic and easier way.

It is our view that if the Human Rights Act is to be applied to the independent care home sector, thus putting the sector on the same level as local authorities, this approach should also be applied to other aspects particularly funding. Public authorities have a range of protections and higher levels of funding than the independent care sector. It follows that if every part of the sector has to be part of this approach they should have the same rights and responsibilities.

Many care providers are delivering high quality and sensitive care and the Commission for Social Care Inspection is doing a good job in regulating the sector. It is ECCA’s view that there is no need for yet another legislative framework to be overlaid on already administratively burdened care homes. As a sector we do not want to see unnecessary legislation brought in, particularly as it will create extra burdens that afford no extra protection.

Martin Green
Chief Executive
12 December 2006

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4. Memorandum from the British Humanist Association (BHA)

The BHA submitted evidence to the committee’s 2003 inquiry and we have little to add to the substance of that submission. However, in light of the failure of the Government’s intervention in the case of R v London Borough of Havering, and our fear that the will of Government in pushing for the meaning of ‘public authority’ intended by parliament to be recognised by the courts may fail, we now hope that the JCHR may recommend primary legislation to clarify the meaning of ‘public authority’ under the Human Rights Act.

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1. The British Humanist Association

1.1 The British Humanist Association is the principal organisation representing the interests of the large and growing population of ethically concerned but non-religious people living in the UK. It exists to support and represent people who seek to live good and responsible lives without religious or superstitious beliefs. It is committed to human rights and democracy, and has a long history of active engagement in work for an open and inclusive society.

1.2 The BHA’s policies are informed by its members, who include eminent authorities in many fields, and by other specialists and experts who share humanist values and concerns. The BHA itself is deeply committed to human rights and advocates an open and inclusive society in which individual freedom of belief and speech are supported by a policy of disinterested impartiality on the part of the government and official bodies towards the many groups within society so long as they conform to the minimum conventions of the society.
2. The courts’ interpretation of the meaning of Public Authority under the Human Rights Act

2.1 We see it as highly regrettable that the courts have chosen to ignore not only the explicit intent of Parliament as to the interpretation to be given to the phrase “public authority” in section 6 of the Human Rights Act but also the clear wish that the exposition given by Ministers in the debates should be taken into account by the courts.

2.2 It appears to us that the courts have made a false analogy with the law on eligibility for judicial review, which has led them to adopt a far narrower definition of the phrase than was intended, much to the detriment of the furtherance of human rights intended by the Government and Parliament. They have put an unwarranted roadblock across the intended shortcut to enforcement of rights that otherwise requires resort to expensive, drawn out and usually impractical litigation all the way to Strasbourg.

2.3 At some time in the past it might perhaps have been a simple matter to determine what was and was not a public authority. Today, with executive agencies, public corporations, public/private partnerships, privatised utilities, statutory standards and compliance organisations (Ofcom, Ofler, Ofsted, BBFC etc) exercising delegated policy-making roles, foundation hospital “companies” (potentially), contracted-out services, bought-in services, delegation of functions, 100% public funding of certain independent schools (“Academies”), and fulfilment of statutory obligations or exercise of discretionary powers through charities and other agencies, the position is far from clear.

2.4 The legal structure of an organisation is plainly relevant but insufficient—even Government departments have private, internal business. Funding is also important—but not every agency in receipt of public funding is a public authority (think of regional development grants). The key criterion is function—is the act or omission in question related to a public or a private function? As the Home Secretary said in Parliament: “the test must relate to the substance and nature of the act, not to the form and legal personality.” The statement is easy, but its application is far from being so.

2.5 It has even been authoritatively (but privately) suggested to us that the BBC may not be a public authority for the purpose of the Human Rights Act. We find this alarming. Admittedly there is a multiplicity of broadcasters, but the BBC owes its existence to a royal charter, its members are appointed by the government, it is largely funded by a tax, it has duties imposed by its charter and by the Communications Act 2003. Moreover, it was cited by the Government as an example of a public authority during the passage of the Human Rights Act.

3. The impact of the definition of Public Authority applied by the courts for the protection of Human Rights

3.1 The British Humanist Association is particularly concerned about the impact of the courts’ definition of Public Authority in the area of “religion or belief”, so our examples are based largely on this concern. However, this should not be interpreted as implying that this is the only area in which the BHA has concerns.

3.2 “Religion or belief” in Article 9 encompasses Humanism and other non-religious lifestyles (world-views, philosophies of life, or convictions—the latter is a better translation than “belief” of the Convention’s French conviction or German Weltanschauung, both of which suggest deep or ultimate beliefs, parallel to those of a religion).

3.3 Our concern is justified because many aspects of law and practice in the UK still offer a privileged position to the Church of England, to Christianity or to religion overall, without extending equal treatment to non-religious ethical traditions such as Humanism.

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This reads in part: “It is unlawful for a public authority to act in a way which is incompatible with a Convention right... ‘public authority’ includes... any person certain of whose functions are functions of a public nature”.

eg, by the Lord Chancellor in the House of Lords, 24.11.87. In that debate he said the section embraced “bodies which are not manifestly public authorities, but some of whose functions only are of a public nature. It is relevant to cases where the courts are not sure whether they are looking at a public authority in the full-blooded Clause 6(1) sense with regard to those bodies which fall into the grey area between public and private. The Bill reflects the decision to include as ‘public authorities’ bodies which have some public functions and some private functions.” Earlier the same day he said: “If a court were to uphold that a religious organisation, denomination or Church, in celebrating marriage, was exercising a public function, what on earth would be wrong with that? Is it not also perfectly true that schools, although underpinned by a religious foundation or a trust deed, may well be carrying out public functions? If we take, for example, a charity whose charitable aims include the advancement of a religion, the answer must depend upon the nature of the functions of the charity. For example, charities that operate, let us say, 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.”

Hansard HC 17.6.98, col 433.

Belief means “more than just ‘mere opinions or deeply held feelings‘; there must be a holding of spiritual or philosophical convictions which have an identifiable formal content.”—McFeeley v UK (1981), 3 EHRR 161. The same phrase appears in the International Covenant on Civil and Political Rights: in Article 18 which “protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.”—Human Rights Committee, 1993 (General Comment no 22/48) (Art 18) adopted on 20 July 1993, CCPR/C/21/Rev.1/Add.4, 27 September 1993, p 1).
3.4 The Government has adopted a policy in many sectors of decentralisation of what were previously unified functions, with delegation to legally independent bodies (trusts, companies etc), often supposedly in the name of efficiency but with an attendant loss of control and loss of uniformity of policy or service provision. Nowhere has this been greater than in the field of education, where LEAs are being encouraged to give away schools to religious trusts and the Government has promoted 100% funding of new independent schools (“Academies”) within the state system, run in some cases by fundamentalist religious trusts. The same policy may well be adopted in the area of social services: ministers from the Prime Minister down have in recent years spoken in favour of increasing the contribution of so-called “faith communities” in the provision of services.11

3.5 The policy itself is objectionable, if for no other reason than that many people will have distinct reservations about sending their children to a school run by a religious group other than their own or applying to bodies with a religious identity other than their own for personal services. (Muslims, for example, might well hesitate before seeking health services from an evangelical Christian health centre.) It is obvious nonsense to suggest “separate but equal” provision for all religious etc groups, and in a free and open society with followers of many faiths and none a single uncompromised service is the commonsense answer.

3.6 The risk that we warn against again, as in 2003—and which Parliament’s intended interpretation of “public authority” would safeguard against—is that the rights of non- and other-believers may be compromised where public services are delegated to religious bodies. In Leonard Cheshire12, a home was found not to be acting as a public authority in providing homes for people with disabilities under contract to a social services department which was thereby fulfilling a statutory duty to house such people. If a nursing home in such circumstances is not a public authority, it is exempt from the obligation under the Human Rights Act for such authorities not to act incompatibly with Convention rights. It may introduce policies that discriminate on grounds of “religion or belief” (eg preference in accepting clients, sabbatarian rules or eviction of atheists), being limited only by discrimination law. This is equally true of those other services increasingly provided not directly by the state but by state-funded religious groups.

3.7 Some Academies controlled by religious organisations, for example, are so pervaded by religiosity that they render nugatory the right of parents to withdraw their children from religious education and worship (the law, of course, not recognising any right of conscience for pupils at any age). We believe the article 9 rights of parents and pupils are compromised in such circumstances, and may be in all manner of services which may be contracted out to groups with a religious ethos—from local welfare to offender management.

3.8 More widely, the commitment of the churches to human rights may be gauged from their past campaign to be exempted from the employment regulations on discrimination on grounds of sexuality—“the Church of England has said that they could lead to a ‘fundamental’ clash between the law and religious belief [and] the Archbishops of Canterbury and York [have] demanded that the Church be granted exemptions from the regulations.”13 A similar campaign is being waged as we write, by religious groups which desire exemptions from the pending regulations to outlaw discrimination on the grounds of sexual orientation in the provision of goods, facilities and services.

3.9 If such attitudes are allowed to govern (say) hospitals (as they are already allowed to govern hospices in receipt of substantial public funding), what is to prevent a situation such as exists in Texas, where a Catholic-run hospital refuses to provide contraception and sterilisation services, with the result that a separate hospital had to be established to make up the deficiency?14 Similarly, the Texas Department of Human Services has funded a welfare to work programme that included Bible studies and prayers as part of job training for unemployed women. What is to prevent such a situation in the UK (in contracted out offender management, for example)?

4. What steps should be taken to address gaps in Human Rights Act protection and accountability?

4.1 The above examples illustrate the potential impact of the courts’ decisions in just one area of Human Rights protection. The British Humanist Association seeks no privilege for itself or for humanists, only equality of treatment by all those exercising public functions. In a society where religious minorities show a vigour in defending and demanding extension of their privileges apparently in inverse proportion to the religious commitment of the population as a whole, we look to the Human Rights Act to counteract...

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11 For example, “Your [religious organisations’] role in the voluntary sector, working in partnership with central and local government, is legitimate and important and where you have the desire and ability to play a greater role, with the support of your communities, we want to see you do so . . . We want to take this partnership forward wherever we can . . . [It was a] misguided and outdated set of values [that demanded a straight choice between state and voluntary aid]. . . Where the two do go together the impact is far greater than government acting on its own. We see this in countless charities, schools, health projects, youth work, provision for the elderly, the homeless, work with offenders and ex-offenders, local regeneration schemes and many other social activities.”—Tony Blair to Christian Socialist Movement conference, 29/3/01. The BHA has no objection to and indeed recognises the great value of many services provided by religious groups but is completely opposed to them becoming a substitute for generally available social services carrying no label of a particular religion or belief.


13 Daily Telegraph, 18.3.03.

14 Austin American-Statesman, 22.8.01.
Government policies which combine determination to distance from themselves the delivery of public services with a degree of preference for faith-based provision on the part of individual ministers unprecedented in recent times.

4.2 The Government clearly intended the Human Rights Act to cover the “increasingly large number of private bodies, such as companies or charities, [that] have come to exercise public functions that were previously exercised by public authorities.”15

4.3 In a number of judgments, the European Court has determined that States cannot avoid responsibility under the Convention by delegation to private bodies16, and “responsibility cannot be avoided by privatisation of state functions,”17 and it seems clear that unless section 6 (3)(b) is interpreted such that the Convention rights of individuals are protected, the UK will be in breach of its Article 1 duty under the Convention.

4.4 In these circumstances, the British Humanist Association believes that section 6(3)(b) needs to be revisited. Given the statement to your committee by the Lord Chancellor, and the unsuccessful intervention by Government in R v London Borough of Havering, we hope that the JCHR will give serious thought to an amendment of the law by means of primary legislation to amend the Human Rights Act.

Andrew Copson
British Humanist Association

15 December 2006

5. Memorandum from Age Concern

1. SUMMARY

1.1 Age Concern has consistently argued that the current interpretation of Section 6(3)(b) Human Rights Act 1998 (HRA) is wrong because it fails to distinguish between services contracted by a public authority to meet its statutory duties, and services merely funded by the public sector. The government has attempted to address the problem created by the Leonard Cheshire loophole by issuing guidance on using contract specification to secure compliance with the HRA. This guidance has been inadequately publicised and we do not believe it has been effective.

1.2 In any event, the government’s recommended approach does not resolve the question of how the end user, who is not a party to the contract, could take legal action in response to a breach of the contract specification. People who pay for their own care (“self funders”) cannot benefit from the contract specification guidance as they have a direct contractual relationship with the care provider. Because they are in a weak bargaining position, they cannot be expected to negotiate contract terms that protect their human rights.

1.3 Age Concern is very concerned about the lack of human rights protection for older residents in the independent care home sector. Residents have no security of tenure, which means that they are unlikely to pursue complaints against the care home provider. Evidence suggests that this group of people are very likely to be immobile or confused and forgetful. Their dependency on public services exposes them to the risk of abuse and neglect.

1.4 Older people who are transferred from one care home to another are at particular risk of human rights abuses. There is some evidence of high levels of mortality following the closure of care homes. A move to another home also has a profound impact on residents’ Article 8 rights; as well as a loss of familiar surroundings, this may result in the loss of social relationships with staff and fellow residents.

1.5 Age Concern cannot speculate on the impact on independent care providers of being brought within the scope of the HRA—although we note that local authority-run care homes have not been subject to many human rights challenges. The positive effect of a human rights framework in driving up service standards should be emphasised; the Department for Constitutional Affairs and the new Commission for Equality and Human Rights both have an important role here.

1.6 The proposals in the Mental Health Bill to close the so-called “Bournewood gap” would allow people lacking capacity and deprived of their liberty by the state to be accommodated by independent sector care homes. We believe it is vital that all care homes should be brought within the scope of the HRA before these new provisions come into effect.

1.7 The Court of Appeal has not yet revisited its decision in Leonard Cheshire18—although the forthcoming appeal in Johnson v Havering now presents an opportunity. However, it seems that the point will only be definitively resolved by the House of Lords. Given this lack of progress in the courts, Age

15 Hansard HC 16.2.98, Col 775.
16 Eg Van der Mussele v Belgium (1983) 6 EHRR 163.
17 Powell and Rayner v UK (1990) 12 EHRR 355.
Age Concern believes that the government should be willing to legislate to widen the scope of the HRA. The promised Single Equality Bill presents an opportunity to consolidate the definition of “public authority” across all equality legislation, as well as the HRA.

1.8 Age Concern does not believe that protection of care home residents who fund their own places can be easily achieved by a straightforward amendment to Section 6(3)(b) HRA. Alternative solutions might be found by amending other legislation such as the Care Standards Act 2000, or by requiring regulatory bodies to police human rights compliance.

1.9 We also suggest that the Public Interest Disclosure Act 1998 be amended to make explicit reference to disclosures of human rights abuses, to make it clear that all such disclosures are protected by the law.

1.10 In conclusion, Age Concern believes it is unacceptable that older people who are dependent on public services delivered by independent sector providers have no redress for abuses of their human rights. The current limitations in the scope of Section 6(3)(b) HRA should be remedied at the earliest possible opportunity, through legislation if necessary. It is important that the scope of the Act is extended to include users of social care who pay for the services they receive. The government should promote the positive benefits to independent providers of underpinning service delivery with a human rights framework, to reassure them that the HRA presents an opportunity rather than a threat. As more and more public services are outsourced to the independent sector, this is becoming a pressing concern for many groups of vulnerable people.

2. INTRODUCTION

2.1 Age Concern England (the National Council on Ageing) brings together Age Concern organisations working at a local level and 100 national bodies, including charities, professional bodies and representational groups with an interest in older people and ageing issues. Through our national information line, which receives 225,000 telephone and postal enquiries a year, and the information services offered by local Age Concern organisations, we are in daily contact with older people and their concerns.

2.2 Age Concern is pleased to have the opportunity of submitting evidence to the second inquiry of the Joint Committee on Human Rights into the meaning of “public authority” under the Human Rights Act 1998 (HRA). In April 2003, we made a submission to the Committee’s first inquiry on this issue in which we expressed concern about the effects of the interpretation of Section 6(3)(b) HRA by the Court of Appeal in the Leonard Cheshire case. We argued that this decision was wrong because it failed to distinguish between services contracted by a public authority to meet its statutory duties, and services merely funded by a public authority. We pointed out that the decision failed to take account of the extent to which the conduct of a care home is determined by regulation rather than private contract. Our submission also drew attention to the damaging impact of this narrow interpretation on older people, particularly on residents facing closure of a care home.

2.3 In this earlier submission, we also argued that, in the absence of a different interpretation by the courts, the Government should take steps to amend the scope of the HRA. At the same time, regulation and commissioning practices should be tightened up to take full advantage of protections already available under the Care Standards Act (especially the requirement for three months’ notice of deregistration and insurance against business failure). We pointed out that the National Care Standards Commission (now the Commission for Social Care Inspection) was a public authority and so its inspectors were obliged to take account of the HRA when making decisions about registration and inspection of care homes. Finally, we raised doubts as to whether terms in the contract between a public authority and care home provider could fill gaps in human rights protection, because this approach leaves victims of human rights breaches without an effective remedy.

2.4 Age Concern remains convinced of the importance of human rights in protecting older people, particularly those who depend on public services. In May 2006, we published Rights for Real, a report commissioned from Frances Butler, a human rights consultant, which reviewed this issue in some detail. It examined the negative implications of the Leonard Cheshire loophole for older people in receipt of services from independent providers. The report made a number of recommendations relating to human rights in policy making and service delivery and also looked at the potential role of human rights in empowering older people. It recommended that the Section 6(3)(b) loophole in the HRA should be closed as a matter of urgency—a position that Age Concern wholeheartedly endorses. It is disappointing, to say the least, that in the three years that have passed since the Joint Committee’s earlier report on this issue, almost no progress has been made in resolving this issue.

3. EFFECTIVENESS OF THE GOVERNMENT’S GUIDANCE

3.1 The guidance on contracting for services drawn up by the former Office of the Deputy Prime Minister (ODPM) advises public authorities to use an approach based on contract specifications to ensure compliance with the HRA, including output specifications where these would be relevant. The ODPM argued that the advantage of this approach would be to provide all potential suppliers with a high degree of certainty as to what will be required from them in performance of the contract. The document was initially...
hard to obtain and does not appear to have been widely publicised. Age Concern is not aware of the extent to which this guidance has been taken on board by public authorities, or whether it has been effective in securing compliance with human rights. However, one example that has come to our attention is the good practice guidance for commissioners of care home services published by the Care Standards Improvement Partnership; the document makes no reference to the ODPM guidance (and indeed makes no reference at all to human rights)\(^\text{19}\). We suggest that the Joint Committee seeks evidence of the extent to which the guidance is known to commissioners and has been effective in the procurement of public services.

3.2 However, this specification-based approach is not without its problems. It is likely that such specifications would be subject to a great deal of negotiation between the local authority and the care provider, with the danger that they end up as being little more than non-contractual guidance, unenforceable in law. There is also the potential for inconsistency between contract specifications in different local authorities, with care home providers benefiting from a lighter touch in areas of the country where there is under-supply. If a breach of contract specification were to give rise to a claim, it would then fall to the local authority to take legal action. We believe that in practice it is unlikely that many local authorities would go to the trouble of doing so, especially as the award of damages for breach could be very limited.

3.3 There would also be difficulties relating to the enforceability of a breach of contract by the end user—who is not a party to the contract. It is our understanding that, in law, a claim would have to be made under the Contracts (Rights of Third Parties) Act 1999, which in certain circumstances may allow someone who is not a party to a contract to enforce it against a contracting party. However, this is not possible if the contract makes it clear that the parties did not intend the third party to have an enforceable right (and such restrictions often appear on the face of the contract). It is also unrealistic in practice to expect that frail and vulnerable care home residents would have the ability to pursue a third party claim, even if the contract permitted this. In any event, a claim would be made only after a breach had taken place.

3.4 An alternative option might be for an individual victim to bring proceedings under the HRA against the contracting authority. However, there are doubts about the effectiveness of this approach; according to the Joint Committee’s earlier report, it is unlikely that the authority would be liable for the human rights breaches of an external provider if the authority had taken reasonable steps to ensure that contracted out services complied with Convention rights.

3.5 Another issue is the need to protect older people who pay for social care services from their own resources—the so-called “self funders”. In these circumstances, the contract is between the resident and the service provider. In most cases, such people are making their own arrangements for care because their capital exceeds the £21,000 limit. Clearly, the contract specification approach recommended for local authorities offers no remedy for protecting the human rights of these service users. Frail and vulnerable older people are likely to be in a particularly weak bargaining position. There would be obvious practical problems if they were expected to participate in negotiating their own contracts to ensure their human rights were protected, before taking up a care home place. It would also be inequitable if self-funders—who pay higher fees (often called the “self-funders rate”)—had less legal protection than residents whose lower fees are met by the local authority.

3.6 The Department for Constitutional Affairs has recently published guidance for public sector managers in the form of a handbook: Human rights, human lives. While this guide is in many ways a welcome initiative, we note that the section covering procurement and contracting out of services (page 62) gives a very limited and somewhat cautious account of the complexities of the law. It also places heavy reliance on a contract specification approach, in spite of the problems identified above.

4. Developments in Case Law

4.1 Age Concern does not claim particular legal expertise in case law developments in this field but we have no doubt that the Committee will have the benefit of submissions from lawyers who have extensive knowledge of human rights law. We are aware of the progress through the courts of the case of Johnson v London Borough of Havering, in part because the claim at first instance was supported by the witness statement made on behalf of Age Concern England by Stephen Lowe, our social care policy adviser. The reluctance of the High Court to reach a decision inconsistent with the Court of Appeal in Leonard Cheshire was predictable. We are very pleased to learn that the Court of Appeal has now agreed to hear an appeal in the Johnson case—although there remains some doubt as to whether this is the best vehicle to test the point. Overall, it seems unlikely that this matter will be properly resolved unless and until this point is determined by the House of Lords.

5. Practical Implications of the Restrictive Meaning of Public Authority

5.1 Age Concern is particularly concerned about the lack of human rights protection for older people who live in care homes in the independent sector. This group is almost uniquely unprotected by other aspects of the legislative framework. They have no security of tenure other than that offered by their contract with the service provider—which often entitles the provider to serve a month’s notice of eviction. Residents have

\(^{19}\) CSIP, Fairer Contracting Part 1. 2005.
no clear redress if the care home provider goes out of business. The majority of care home contracts examined by the Office of Fair Trading were found to contain potentially unfair clauses; older people often enter into contracts with inadequate information under pressurised circumstances—such as discharge from hospital. The imbalance of power between residents and providers means that people who have a grievance or complaint are unlikely to pursue it for fear of losing their home.

5.2 Age Concern recently received a letter from the daughter of a care home resident in the Midlands. This case example illustrates the vulnerability of care home residents to the sort of treatment that could give rise to a complaint about human right abuses. We believe that the experiences of the individual in this case engage Article 8 and Article 2 of the Convention.

The daughter of a care home resident made a formal complaint to the home after her mother had experienced delays in obtaining medical assistance for a respiratory infection. The daughter also complained to CSCI and to the local authority, which was funding the care home place. As a result of this complaint, the resident was given 28 days’ notice to leave the care home. The home relied on a clause in the contract stating that it could be terminated following “any circumstances or behaviour which the home feels may be seriously detrimental to the home or welfare of other service users.”

CSCI declined to deal with the complaint apart from during the course of their next planned routine inspection. The local authority also refused to investigate as it claimed that its complaints procedure only applied to block bookings of care home places, rather than individually purchased places. During the period of notice, the resident became ill and was admitted to hospital. The home refused to allow her to return when she was ready for discharge—even though she was still within her notice period. The resident was subsequently moved to another home where she died two months later.

5.3 As demonstrated by the following statistics, a high proportion of older users of public services are vulnerable because of ill health, disability or dementia:

- In 2005, the chance of living in a long-stay hospital or care home was 0.9% for people between the ages of 65 and 74; 4.2% for those aged 75 to 84; and 19.1% for those aged 85 and over.
- In a care home survey, 72% of residents were immobile or reliant on assistance, 62% were confused and forgetful and 24% were confused, immobile and incontinent.
- In England, from April 2004 to March 2005, 319,000 clients over the age of 65 received home help or home care services, 100,000 received day care and 110,000 received meals.

5.4 This dependency on public services exposes older people to the type of abuse and neglect that could violate their rights under Article 8 or even, in extreme cases, under Article 3. Where life is at risk this could engage Article 2. Abuse can take many forms: physical abuse, emotional/psychological or sexual abuse, and financial abuse. Neglect may be unintentional but in some cases can have consequences that are as serious as those stemming from abuse. The high levels of disability among older care home residents, combined with their frequent personal isolation, exposes them to a greater risk of abuse. Nearly 23% of calls to a national helpline operated by Action on Elder Abuse related to abuse in care homes.

5.5 There are particular problems arising from the transfer of vulnerable older people from one care home to another, often caused by the closure of an establishment. In the year up to April 2005, 580 independent care homes closed with the loss of 12,800 beds. Home closures often give rise to serious concerns about the impact on the health and wellbeing of the individuals concerned. There are some examples of very high levels of mortality following the closure of care homes for older people—for example, following the closure of a residential home in Plymouth in 2001, 10 out of 25 residents died within a few weeks. For those residents who survive a move to another home, the move often has a profound negative impact—which is likely to breach rights under Article 8 of the Convention. As well as resulting in a loss of familiar physical surroundings, it may result in the loss of social relationships with staff and other residents—possibly the only relationships that the older person has. He or she may lack the ability or motivation to build new relationships; for someone suffering from dementia, there may be problems in re-establishing a sense of their surroundings.

5.6 Because of the likely damaging consequences of care home closures, Age Concern has consistently argued that any decision to close a home should be approached by giving the fullest consideration to the rights of the residents under the European Convention on Human Rights—in particular under Article 8 and Article 2.

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20 OFT, Care Homes for Older People in the United Kingdom: OFT Market Study. 2005.
22 Continuing Care Conference Survey of 32,000 care home residents. 2006.
6. Whether Private Providers would Leave the Market if They were “Public Authorities” for the Purposes of the HRA

6.1 It is difficult for Age Concern to speculate on the impact of independent providers being brought within the scope of the HRA. However, it is clear that care homes run by local authorities have not been subject to a large number of human rights cases. The great majority of cases that have been brought against local authorities relate to care home closures. The rate at which local authority care homes have closed has remained fairly constant since the implementation of the Act in October 2000: since that time, 11,500 beds have been lost from this sector, compared to 55,100 in the 10 years prior to October 2000. Good quality care remains fairly constant since the implementation of the Act in October 2000: since that time, 11,500 beds

6.2 Human rights have an important role in transforming public services, by providing an incentive and a framework of values to underpin improvement in services. There is a clear role for the Department for Constitutional Affairs—and, from next year, the new Commission for Equality and Human Rights—in promoting the benefits to service providers of incorporating human rights standards into their framework for service delivery. We suggest that these benefits have been underplayed in the DCA’s recent handbook for public sector managers. Were these advantages to be given higher profile, private providers would understand that any fears were misplaced.

7. Detention of People who Lack Capacity

7.1 As the Joint Committee may be aware, there are proposals in the Mental Health Bill to introduce a new authorisation within the Mental Capacity Act to fill the so-called “Bournewood gap”. This would allow people who lack capacity to be detained in a hospital or care home in circumstances which amount to deprivation of liberty. The fact that these residents will be deprived of their liberty by the state gives an added imperative to ensure that all care homes are within the scope of the HRA. Where there is an authorisation to deprive the person of liberty, it is not yet clear whether the supervisory body will become responsible for making the arrangements for care—and so become liable for the costs. Concerned NGOs are at present trying to establish through the Parliamentary process whether in these circumstances the resident will have to pay for their own accommodation and care and whether the local authority in its role of supervisory body will contract with the home regardless of the person’s financial situation.

7.2 In effect, the proposals will extend cases where there is deprivation of liberty to many private care homes, creating situations analogous to the Partnerships in Care case. The care home would be acting under the authorisation of a supervisory body which could be either the NHS or the local authority. The managing authority would be the hospital or care home where the person is detained. As in the Partnerships in Care case, the institution might lack staff or facilities to enable the resident to make progress—thus prolonging their detention. Before these provisions come into effect, we consider it vital that care homes should be within the scope of the HRA.

8. Options for Change

8.1 As stated above, we are disappointed that no progress has yet been made in addressing the deficit in protection that stems from the Leonard Cheshire interpretation of “public authority” under the HRA. The Joint Committee’s previous report explored a number of options for resolving this matter, including an amendment to the Act itself. The report feared that this approach would sacrifice the flexibility of the legislation and could also lead to unintended consequences. It concluded by urging the government to press the courts for a broad, functional interpretation of Section 6(3)(b) by intervening in a suitable test case.

8.2 However, suitable cases have been thin on the ground. The recent Johnson case has given the Department for Constitutional Affairs its first opportunity of making an intervention. If the appeal in this matter is unsuccessful, it is uncertain when the courts will have another chance to reconsider their interpretation of Section 6(3)(b). If another opportunity does present itself, the case should certainly be expedited through the courts.

8.3 Although legislative change would no doubt present challenges, we would argue that this is the course of action that the government should now pursue. Ministerial statements during the passage of the HRA through parliament make it clear that the intention behind the legislation was to establish a broad, functional approach embracing services provided by private companies and charities that would normally be the responsibility of the state. This intention is simply not being fulfilled.

20 OFT, Care Homes for Older People in the United Kingdom: OFT Market Study. 2005.
8.4 The need to protect care home residents who fund their own places is a major concern for Age Concern. We do not believe that this can easily be achieved by a straightforward amendment to Section 6(3) HRA. Other possible legislative approaches include an amendment to the Care Standards Act 2000 deeming care providers to be performing public functions for the purpose of the HRA. There would need to be parallel amendments to deal with providers such as registered social landlords. An indirect approach might be to achieve change through statutory amendments requiring regulatory bodies to police the compliance with the HRA. Regulators could impose requirements on the contracts between care home providers and self-funders, with a mechanism for reporting human rights breaches, backed by sanctions that might include financial penalties, compensation for victims and/or removal of the licence for the provider to carry on its activities.

8.5 We suggest that the government uses the promised Single Equality Bill as a vehicle to extend the scope of the Human Rights Act using one or more of these approaches. The bill would also present an opportunity to consolidate the definition of “public authority” across all equality legislation, as well as the HRA. This would assist public authorities in fulfilling their statutory duties, and clarify the extent to which out-sourced services were also covered under the relevant legislation. We hope that the Discrimination Law Review Green Paper, expected early in the new year, will make a proposal along these lines.

8.6 Finally, we would like to draw the Joint Committee’s attention to a gap in the Public Interest Disclosure Act 1998 in relation to human rights. The Act protects “whistleblowers” from victimisation or dismissal if they make protected disclosures, which are defined to cover a range of situations. These include circumstances where “a person . . . is failing or is likely to fail to comply with any legal obligation”. However, it is not clear whether this would protect whistleblowers who complain of a failure to maintain human rights standards—for example, through bad practices that infringe the dignity of service users. The Act should be amended to make it clear that disclosures of human rights abuses—whether in the public or independent sectors—are protected by the legislation.

Nony Ardill
Legal Policy Adviser
December 2006

6. Memorandum from Baroness Greengross

The Human Rights Act has been a welcome and positive influence on policy formulation. But the unintended, and limited, definition of ‘public authority’ has led to one of the most vulnerable groups in society being denied its protection.

Older people are as entitled to the protection of their human rights as any other group, and are often the victims of human rights abuses, in the form of physical maltreatment, emotional abuse, bullying, and neglect. Examples I have come across include residents being fed breakfast while seated on the toilet; death from dehydration and hypothermia, and the withholding of personal expenses allowance from residents.

It is worth mentioning that the protection afforded vulnerable older people at the moment compares unfavourably with that given to children and, in many respects, to animals.

One’s rights apply equally and do not depend on where one happens to be at the time. Yet in relation to care services for older people, the Leonard Cheshire judgment in 2001 has led to a most invidious situation for residents receiving care from private and voluntary authorities, who are not deemed to be public authorities. Since over 90% of care home places and two thirds of domiciliary care are provided by private and voluntary agencies, this means that the majority of care recipients fall outside Human Rights Act protection even though their care is funded by local authorities (public bodies).

The Government has recognised the problem, and promised over a year ago during the passage of the Equality Bill to look for a solution. Their preferred route was to wait for a suitable test case. Last year, the Secretary of State for Constitutional Affairs intervened as a third party in a judicial review case: three care home residents argued that the transfer of homes from the ownership of the London Borough of Havering to a private owner would place them outside the scope of the HRA.

The High Court rejected this application, but at the same time confirmed that the local authority would still be responsible for protecting the human rights of the residents after the homes had been transferred.

The position, therefore, is even more confused and unsatisfactory.

It has been suggested that private providers would leave the market if they were “public authorities” for the purposes of the HRA. It is for the care industry to comment on that but I believe they would not, because they already have a duty of care and can be prosecuted if abuse is found.

The Government is to be commended on its Dignity in Care campaign, recently launched by the Department of Health. Its laudable aims can only be achieved, however, if the essential groundwork has been laid and the Human Rights Act anomaly removed. Equally, care services will face significant change in the coming years to meet the challenges of an ageing population. It is estimated, for example, that the incidence of dementia will double over the next 30 years.
Amending the Human Rights Act to bring care services comprehensively within its scope must be a priority.

**Baroness Greengross**

14 December 2006

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7. **Memorandum from the Archbishops’ Council**

**Introduction**

1. The Archbishops’ Council of the Church of England welcomes the opportunity that the Joint Committee’s inquiry gives to provide the evidence contained in this submission.

2. The Archbishops’ Council has an interest in the matter because a large number of Christian charities and other voluntary bodies provide services to a wide cross-section of the public, including some of the most vulnerable and disadvantaged people in our society, often as a result of arrangements made by local or national government. These services are very wide-ranging and include the provision of care homes, hospices, and homeless hostels, adoption and other children’s work, “Surestart” projects, local community regeneration work, youth work, support for offenders and the mentally ill and international development funding.

3. The Joint Committee appears to be suggesting that the meaning of “public authority” under the Human Rights Act should be extended so that charities and other voluntary bodies that provide services under contract to government or governmental bodies are brought within its scope. We have consistently emphasised our strong support for a legal framework that safeguards basic rights and promotes dignity, equality and fairness for all members of society. For Christians the understanding of such rights is derived from our belief that all human beings are created in the image of God and about the justice of God and his action in the world.

4. While continuing that strong support, we have particular concerns as to how legislation that is intended to protect such rights should work in practice. The impetus behind the suggested extension of the meaning of “public authority” appears to flow from a theoretically-based position that the category of persons and bodies who are responsible for securing Convention rights should be widely drawn. In addition to questioning the general basis for such a position, we are also clearly of the view that any extension of the meaning of “public authority” under the Human Rights Act would have a considerable impact on the provision of services by charities and voluntary bodies. While our first concern is for the specifically Christian bodies that are likely to be affected by any extension in the meaning of “public authority”, we also have a wider interest in matters of public policy, which in the present context include seeking to ensure that the work of the voluntary sector generally is not adversely affected as a result of the general application to it of statutory provisions.

**The Current Legal Position**

5. Our understanding of the effect of the judicial interpretation of “public authority” for the purposes of section 6(3)(b) of the Human Rights Act is as follows. Section 6(3)(b) does not make a body a public authority merely because it performs functions on behalf of a public authority which would constitute functions of a public nature were such functions to be performed by the public authority itself. A function can remain of a private nature even though it is performed because another body is under a public duty to ensure that act is performed. What could make a function, which would otherwise be private, a public function is a feature or combination of features which impose a public character or stamp on the function. A number of features have been identified as being particularly important in this process. They include the fact of public funding—though that is not of itself conclusive: the position has to be looked at as a whole.

6. The analysis presented above represents our understanding of the position in the light of *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and *R (Heather & ors) v Leonard Cheshire Foundation and anor* [2002] EWCA Civ 366. That position has more recently been confirmed in *R (Johnson & ors) v London Borough of Havering* [2006] EWHC 1714 (Admin). That line of authority makes it reasonably clear that, save in exceptional cases, charities and voluntary bodies would not be considered to be carrying out a public function when undertaking activities on behalf of government or governmental bodies, even when funded to do so.

7. The Joint Committee on Human Rights appears to consider the effect of the judicial interpretation of “public authority” to be problematic, referring in its press notice of 23 November to a “gap in human rights protection which has been caused by the judicial interpretation of the phrase”. As will be apparent from what follows, we disagree with the Joint Committee as to the existence, or at least the extent, of such a gap. Our position, for the reasons we set out below, is that the current position is generally satisfactory and that such concerns as do exist can be addressed otherwise than by seeking an extension of the meaning of “public authority” under section 6(3)(b).
8. We submit that it is not self-evidently wrong for the availability of protection under the Human Rights Act to vary according to the method of delivery of a particular service. As the Joint Committee pointed out in its Seventh Report of the Session 2003–04, the state cannot evade responsibility for safeguarding Convention rights by delegation to private bodies or individuals. Where a state relies on private organisations to perform essential public functions, it retains responsibility for any breach of the Convention that arises from the actions of those private organisations. This is undoubtedly the effect of the relevant Strasbourg jurisprudence. And, given that the Human Rights Act was intended to “bring home” the rights which had hitherto only been enforceable in Strasbourg, one would expect the interpretation of our domestic courts to achieve the same effect.

9. That expectation appears to us to have been clearly met. As Forbes J held in the Havering case, the transfer of the local authority’s care homes to the private sector would not absolve the Council of its duty under section 6(1) to act compatibly with convention rights, including the convention rights of the claimants in that case. If a transfer were to take place, the Council would accordingly be obliged to take appropriate steps to safeguard the claimants’ human rights.

10. Thus, as would be expected, there is no divergence between the decision of the domestic court and the Strasbourg jurisprudence that the state cannot evade responsibility by delegation to private bodies. But upholding the Strasbourg position is completely different from saying that those private organisations to which the state delegates the performance of certain functions, should themselves be responsible under the Convention.

11. Furthermore, we consider that the Joint Committee’s assertion that voluntary organisations which provide services at the behest of government bodies “stand in the shoes of the state” is misconceived. The responsibilities that arise under the Convention are supremely state responsibilities. States, and their various emanations, have particular legal powers—and therefore particular responsibilities—that private bodies, such as charities, lack. (Indeed, this was one of the reasons for finding that the Leonard Cheshire Foundation was not a public authority.)

12. Moreover, where the state has a duty to secure that a particular service is available to an individual, and has a discretion as to how and by whom such a service is provided, it is not right in principle to say that a private organisation such as a voluntary body that provides the service in question is therefore the surrogate or agent of the state for those purposes.

13. This is, we believe, supported by an analysis of the application of section 21 of the National Assistance Act 1948—the statutory duty that was in question in the Leonard Cheshire and the Havering cases. The duty imposed on the local authority by the section is the making of “arrangements” for the provision of residential accommodation, not the provision itself. The making of such “arrangements” is obviously a proper function of the state. However, when a voluntary body provides accommodation pursuant to such arrangements, it does not do so pursuant to any public duty, but simply because it is a private voluntary organisation established for providing accommodation to persons in need.

14. A similar analysis could be applied to the duty to “secure” that temporary accommodation is made available to a homeless person in priority need pursuant to Part VII of the Housing Act 1996 where accommodation is provided for example by a private bed and breakfast establishment.

15. We can see no convincing argument, therefore, for saying that such a voluntary body should be considered as “standing in the shoes of the state” in such circumstances. In such cases, the local authority’s powers are facilitative. It is misleading to speak of the local authority in such circumstances as “delegating” its functions or to speak of the private provider as performing a “public” function.

16. As to the argument that there is a “protection gap”, we question whether such a gap exists; and suggest that, if it does, its extent has been overstated.

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19. We do not consider that there is any good reason for believing that a resident of a care home who had been abused would be any more likely, or indeed able, to bring a claim under the Human Rights Act to enforce their Convention rights than they would to bring an equally effective claim relying on common law remedies in tort and contract. And an abused resident would, of course, also have the protection of criminal sanctions in appropriate cases.

26 At paragraph 15.
20. As to the specific issue concerning the closure of private or charitable residential care homes, even if the managers were to be brought within the definition of “public authority” under the Human Rights Act and therefore placed under an obligation to respect, for example, Article 8 rights, we consider it exceptionally unlikely that a court would compel such a body to keep open a care home that it could not afford to continue to run or otherwise considered that it had to close for good reason.

21. In practical, as well as legal, terms therefore we do not accept that there is a protection gap that would warrant an extension to the definition of “public authority”.

**Practical Implications of the Joint Committee’s View**

22. Bringing private bodies within the meaning of “public authority” would lead to new and unwelcome anomalies. It is commonly the case that voluntary bodies which act as providers of services under contract from government or governmental bodies also provide their services directly to members of the public. For example, care homes often have local-authority funded, as well as privately-paying, or charitably-funded, individuals among their residents. To widen the meaning of “public authority” under section 6(3)(b) so as to cover such a provider would have the wholly unsatisfactory effect of rendering the care home managers a public authority in respect of their local-authority funded residents but not in respect of the privately-paying, or charitably-funded ones.

23. Such a state of affairs would be highly unsatisfactory both in terms of policy and practice. In policy terms, it is hard to see why it should be right for the local-authority funded residents to have a different, higher-order, set of rights as against the managers than the other residents in the same care home when both categories of resident have essentially the same needs. In practical terms, it seems clear to us that the difference in rights and status between the two categories of resident would be unworkable, given that they would be living together in the same premises and cared for by the same staff. These considerations would apply equally to other forms of care provision.

24. Furthermore, extending the meaning of “public authority” would expose voluntary bodies to new burdens and risks, which could well have the unintended consequence of prejudicing their ability or willingness to provide services and thus, overall, reduce the provision of essential services by such bodies. If it became apparent to a voluntary body that it would be treated as a public authority for the purposes of the Human Rights Act, it seems to us highly likely that it would need to expend considerable time and resources in obtaining and implementing professional advice as to the implications of public authority status for the way in which that body operated; and not just initially, but on an ongoing basis.

25. Very many voluntary bodies that provide services under contract from government or governmental bodies are simply not equipped to address the sort of issues that public authorities are required to address under the Human Rights Act. For example the test of proportionality, as judicially defined, might prove exceptionally difficult for such bodies to grasp and apply in their decision-making.

26. Moreover, the imposition on such bodies of public authority status would be likely to expose them to considerable challenge in their work, diverting resources away from the provision of vital services to those who most need them. As Dawn Oliver, Professor of Constitutional Law at University College, London, has put it:

> “... a broad and generous interpretation [of ‘public authority’] could encourage litigation between private parties which would generate legal uncertainty and have negative effects for the many bodies, often charitable or not-for-profit, providing services for disadvantaged people. It could thus also have negative implications for classes or categories of disadvantaged people for whom provision is already inadequate. ... Litigation or the risk of it could inhibit, and divert resources from, what most of us would regard as desirable activity in civil society, charitable and voluntary sector activity in particular”. [32]

27. Concerns of a similar nature were identified by the Department of Constitutional Affairs in its *Review of the Implementation of the Human Rights Act* published in July 2006. That report [33], while recording that the Government had intervened in the Havering case with the aim of achieving a wider definition of public authority, also identified “concerns that if this results in more litigation against such providers, even if unsuccessful, it might be enough to increase burdens on private landlords, divert resources from this sector and deter property owners from entering the market to provide temporary and longer term accommodation to those owed a duty by the local authority under housing legislation.” In our view, those sorts of concerns are equally applicable to the provision of services by voluntary bodies.

28. Extending the meaning of “public authority” under the Human Rights Act might well also have an unhelpful consequential effect regarding the application of other legislation. Equality legislation frequently employs the concept of “public authority”, defined in a manner similar to that in section 6(3)(b) of the Human Rights Act, and imposes certain general duties on persons and bodies who come within the definition. Examples include sections 21A (general duty of public authority not to discriminate or harass) and 76A (general duty to promote equality) of the Sex Discrimination Act 1975 (inserted by the sections 83

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[33] At page 28.
and 84 of the Equality Act) and section 52 of the Equality Act 2006 itself. Extending the concept of “public authority” in the way proposed by the Joint Committee would seem to have implications for the impact of these and other provisions.

29. In particular, the Equality Act 2006 was enacted while “public authority” had the meaning accorded to it by the line of judicial authority identified earlier in this submission. It was therefore understood that charities and other voluntary bodies would not, typically, count as public authorities for the purpose of this legislation. It seems to us likely that were “public authority” to acquire an extended meaning for the purposes of the Human Rights Act, that extended meaning would also be applied to other legislation where a similar definition is employed.

30. So for example, the general duty imposed on public authorities by section 52(1) of the Equality Act 2006 (under which it is unlawful for them to do “any act which constitutes [religious] discrimination”) could become applicable to voluntary bodies simply because they provide some services under contract to government or governmental bodies. The effect of that would be seriously to enlarge the areas in which they would be under a duty not to discriminate, well beyond the currently well-defined specific unlawful acts set out in Part 2 of the Equality Act34, and to expose such bodies to a wide-ranging liability for breach of statutory duty that was not intended to be the effect of the legislation.

31. Extending the concept of “public authority” would also be likely to have the effect of substantially diluting the exemptions that were carefully inserted into Part 2 of the Act for the benefit of religious organisations. Those exemptions were provided on the understanding that it was not expected that religious organisations would be “public authorities” for the purposes of the Act. They may not therefore be apt to deal with challenges brought on the basis that they are.

32. Finally, in the light of dicta of Lord Nicholls in Aston Cantlow PCC v Wallbank35, it would also appear that to the extent that a private body was treated as a public authority under the Human Rights Act, it could not be a “victim” for the purposes of the Act and would therefore not be entitled to the protection of the Convention articles itself. This would be a highly unsatisfactory situation.

33. It would, for example, put in doubt a charity’s right to bring a claim to secure the peaceful enjoyment of its property under Article 1 of the First Protocol in the event of a threatened compulsory purchase of its premises. And a religious charity, to the extent that it was treated as a public authority, would not have the right to freedom of religion under Article 9, or Article 14 rights protecting it from discrimination on the ground of religion in the enjoyment of its Convention rights generally.

**Changing the Boundary between the State and the Voluntary Sector**

34. We have a general concern that extending the meaning of “public authority” would have the effect of “rolling forward the frontiers of the state” at the expense of the development of civil society, of which charities and other voluntary bodies form a vital part.

35. The potential consequences of an extended meaning of “public authority” are again neatly summarised by Professor Dawn Oliver:

> “. . . a broad reach of the concept of ‘public authority’ under the [Human Rights] Act could affect—adversely—the degree of pluralism and tolerance of diversity in the law of the United Kingdom. The categorisation of bodies into state and non-state pigeonholes could, if the ‘state’ pigeonhole became too full, result in the imposition by the body politic of regulations and checks which could inhibit the development of institutions of civil society. In effect broad interpretations of ‘public authority’ and ‘public function’ would roll forward the frontiers of the state and roll back the frontiers of civil society, not by any means a politically neutral process”.36

36. As this recognises, the extension of public authority status to voluntary and charitable bodies in receipt of public funds would have significant political and societal implications, the specific details of which are beyond the scope of this submission. However, we make the point that given the government’s policy of encouraging service delivery through the Third Sector, were the bodies that make up that sector to be treated as public authorities, that would represent a dramatic extension of the state into civil society when, as we argue in this submission, there are other effective arrangements in place.

37. Given that such an extension would represent a significant departure from the present position in a number of important respects, very careful consideration indeed would need to be given to its implications before any decision could be made as to its merits. We strongly suggest that any such consideration should involve extensive consultation with the Third Sector and more widely.

34 At sections 46 and 47.
35 [2003] UKHL 37, at paragraphs 8–11.
Alternative Approaches

38. We believe that, rather than extending the scope of “public authority” for the purposes of the Human Rights Act, more attention should be given to securing necessary protection through contractual arrangements.

39. In November 2005 the Office of the Deputy Prime Minister issued Guidance on contracting for services in the light of the Human Rights Act 1988. That document, which took into account the recommendations contained in the Joint Committee’s Seventh Report of the Session 2003-04, was aimed at “core” public authorities and was concerned with situations where a provider that is not a public authority provides a service to the public under contract to a public authority.

40. In our view, the Guidance recommends a satisfactory approach. It takes the view that there would be difficulties with seeking to impose on a service provider a contractual obligation to comply with the Human Rights Act as if it were a public authority. We agree, both for the reasons set out in the Guidance itself, and because such an approach would be likely to have similar disadvantages to extending the meaning of “public authority” which we set out above.

41. The Guidance recommends that the best approach is for the public authority to specify particular actions which it considers will need to be performed by the service provider. This has a number of advantages. There is certainty as to what is required to be done by the provider, based on a mutual understanding between the public authority and the provider; and the manner in which the public authority has sought to discharge particular human rights obligations is clear.

42. Additionally, whilst on the one hand, the particular rights-based needs of those to whom the service is provided are directly secured, on the other, the provider is not disadvantaged generally in its operations by being treated for legal purposes as a public authority—the difficulties surrounding which we have identified above. The contractual terms in question are enforceable by the contracting public authority itself and by the person being provided with the service—provided that the contract makes it clear that those terms are for the benefit of, and enforceable by, that person under the Contracts (Rights of Third Parties) Act 1999.

43. We believe that, given the very short time which has elapsed since the issue of the Guidance, there has not been an adequate opportunity to test the effectiveness of its recommended approach, which on its face ought to prove satisfactory. As far as we are aware there have not yet been any decided authorities with regard to this issue. However, we do not consider that there are any persuasive reasons why those being provided with services would be any less likely—or able—to take action to enforce their contractual rights than their human rights generally, given that the enforcement of both sets of rights would involve litigation of similar cost and complexity.

Case for Leaving Further Development of the Concept of “Public Authority” to the Courts

44. Finally, we believe that future development of the concept of “public authority” is better achieved by development through judicial interpretation in particular cases rather than by statutory intervention. A general extension of the meaning of “public authority” would fail to take into account the circumstances of particular cases. By contrast, the judiciary is able—and indeed well-equipped—to do so. The result of the proceedings in the Donoghue case demonstrates that in appropriate circumstances the courts are prepared to accept that a private body is a public authority for the purposes of the Human Rights Act.

45. We submit that a case-by-case approach is best able to take into account the very wide range of situations which are likely to arise as the provision of services through the private and voluntary sector develops. We would add that even if an extended statutory definition of public authority were to be provided for, this would itself be open to judicial interpretation and there would be no guarantee therefore that any greater degree of certainty would be achieved than exists at present.

Conclusion

46. We do not accordingly believe that a persuasive case exists for extending the meaning of “public authority” under the Human Rights Act. For the detailed reasons we have given we consider that there is no pressing need for such an extension; and that in any event any benefits that such an extension might bring would be considerably outweighed by the disadvantages to which it would give rise.

37 The Government might usefully consider amending the Guidance to make it clear that as a general rule public authorities ought to require the inclusion of such terms in their contracts with service providers.

38 As does the outcome of the claim in R (Beer) v Hampshire Farmers Markets Ltd [2004] 1 WLR 233 where the Court of Appeal held that the company set up by the local authority to run the markets was exercising functions of a public nature when considering a licence application from a potential stall holder.
47. We hope that these observations are of assistance to the Joint Committee in its further consideration of the issue.

John Clark
Director, Mission and Public Affairs
December 2006

8. Memorandum from The Salvation Army

The Salvation Army is grateful for the opportunity to respond to this inquiry, and whilst our submission at this stage will be brief, due to the length of time we have had during which to give consideration to this issue, we trust that our misgivings, along with those of others in the field, will cast sufficient doubt over this issue to result in a broader and more substantial consultative process.

The Salvation Army has an interest in this issue due to the publicly-funded work undertaken by many of our centres. It is frequently those on the margins of society who benefit most from The Salvation Army’s work. In the UK alone the Salvation Army has more than 50 centres for the single homeless; 5 ‘drop-in’ centres; 1 night shelter; 6 addiction service centres; 4 centres for families; 1 refuge from domestic violence; 3 centres for people with learning difficulties; 4 residential children’s centres; 4 homeless outreach teams; 1 domiciliary care home for the elderly; 2 employment training centres; 1 probation hostel; numerous preschools and playgroups and almost 800 church/community centres, many of which receive public money to provide services to the community. We have therefore noted with interest the increasing desire from within Government to engage the services of faith-based providers such as The Salvation Army in the provision of public services, and have also noted, with some degree of concern, the confusion within Government over how such faith-based providers ought to be treated and engaged with.

As a Christian organisation, one of whose aims is ‘to meet human needs in Jesus’ name, without discrimination’, The Salvation Army ardently believes in fundamental human dignity. All human beings are created in the image of God and as such, have certain incontrovertible rights. It is within this context and understanding that The Salvation Army offers its services. It is also within this context that our misgivings regarding the extension of the nature and scope of ‘public authority’ status ought to be understood.

Firstly, it must be noted that section 6(3)(b) of the Human Rights Act does not make a body a public authority simply as a result of performing functions on behalf of a public authority. This has been upheld by various judgments (Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48 and R (Heather & ors) v Leonard Cheshire Foundation and anor [2002] EWCA Civ 366 and R (Johnson & ors v London Borough of Havering [2006] EWHC 1714 (Admin)). The Salvation Army finds this current position to be satisfactory.

We do, however, recognise that the JCHR understands the current position to constitute a gap in human rights protection. We would propose that this perceived ‘gap’ is best addressed via local contracts, rather than any extension of the scope of ‘public authority’ status, as to do so would have far-reaching implications for other legislation, such as the Equality Act, which assumes that voluntary bodies such as The Salvation Army provide services to the community. We have therefore noted with interest the increasing desire from within Government to engage the services of faith-based providers such as The Salvation Army in the provision of public services, and have also noted, with some degree of concern, the confusion within Government over how such faith-based providers ought to be treated and engaged with.

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We would be particularly concerned for instance, if The Salvation Army was compelled to abide by the duty on public authorities (section 52(1) Equality Act 2006) not to do ‘any act which constitutes [religious] discrimination’. Whilst it is appropriate for the state to be religiously neutral, this is impossible for an organisation such as The Salvation Army, which delivers its services as a direct outworking of the Christian faith. Salvation Army centres and programmes are already extremely sensitive to and respectful of other faiths, but the implications of non-religious discrimination under the Equality Act could pose particular problems for us were the scope of ‘public authority’ status to be extended.

Bodies such as The Salvation Army can never fully ‘stand in the shoes of the state’ even if they are contracted to fulfil obligations which the state has. The powers and duties of the state differ to those of charitable bodies. Whilst it is perfectly acceptable and indeed commendable for the state to co-opt charitable bodies to carry out certain duties on its behalf, the duty remains that of the state and does not itself transfer to the charitable body, which does not act pursuant to public duty but in line with its purposes in accordance with the relevant charitable instrument. The state in this instance carries out its duties as a public authority by engaging the services of a private provider. The public function of the state is the facilitation of the provision of the particular service which it has a duty to ensure is provided. The private provider does not perform a ‘public’ function simply by virtue of the fact that through them, the state fulfils its duty. The duties and therefore the public status, remain with the state, regardless of how or through whom it chooses to fulfil

39 The Salvation Army operates in 111 countries worldwide.
40 Paragraph 41, Seventh Report, 2003–04 Session of the JCHR.
them. There is therefore no gap in protection, as the authority, having contracted out the particular service, retains its duties as the relevant ‘public authority’. The Convention rights of the service users remain protected as they would if the service were provided directly by the authority itself.

The additional restrictions and responsibilities incumbent upon voluntary bodies were they to be afforded ‘public authority’ status could also prove burdensome and in some cases preclusive. This would be particularly difficult for smaller voluntary agencies which do not benefit from the internal infrastructure which The Salvation Army has. Nevertheless, the additional administrative burden upon The Salvation Army would be unwelcome and could divert resources away from supporting frontline services.

We believe that the rights of both service users and service providers are best served, not by the extension of the scope of ‘public authority’ status, but via local contractual arrangements. For this reason, and those outlined above, we would question the need to extend the statutory definition of ‘public authority’ such as the JCHR is proposing.

Captain Matt Spencer
The Salvation Army
15 December 2006

9. Memorandum from Help the Aged

INTRODUCTION AND SCOPE

1. Help the Aged has been campaigning actively for an effective legal framework for the protection of Convention rights and a culture of respect for the human rights of older people in general and of care home residents in particular. In April 2005 we published Rights at Risk, in which we analysed the range of situations within the health and social care sectors in which older people’s Convention rights were engaged and published some of the cases reported to our telephone advice service, Seniorline, in which worrying allegations of institutional and individual breaches of human rights were made.

2. We are aware that the construction of the meaning of section 6(3) of the Human Rights Act 1998 (“HRA”) and the implications of the judgment in the Leonard Cheshire case affect a far wider group of people of all ages than just those resident in care homes. Our evidence is limited to the issue of care home residents, first because it is an area in which we are well-placed to provide evidence and secondly because, in the response time available, we do not feel able to do justice to the wider context.

3. We would, in general terms, support wholeheartedly a widening of the protective arm of the HRA to embrace other key contracted out services, for instance registered social landlords and domiciliary care providers. This is becoming every more pressing as the social policy developments presaged by the White Paper, Our Health, Our Care, Our Say will lead inevitably to more vulnerable older and disabled people receiving services in the community and being accommodated by registered social landlords in various forms of supported housing.

The effectiveness of the guidance to local authorities on contracting for services in the light of the HRA

4. Help the Aged, in common with other contributors to the first call for evidence, argued that the contractual route was not capable of providing an effective remedy for individual residents for several reasons. This view was supported by the findings of the Joint Committee that:
   — rights that are unenforceable by those they are designed to protect are no substitute for direct protection;
   — they could not be imposed on pre HRA contracts;
   — it is legally doubtful whether local authorities could be required to include such terms; there is no legal precedent for this in UK or Strasbourg case law; and
   — it is likely that there would be inconsistency in contract terms.

5. These observations seem to be borne out in practice. We suspect that the impact of the ODPM guidance is, at best, marginal. Help the Aged has conducted a small-scale piece of research to try to substantiate whether or not our impression that the ODPM guidance has had little or no impact is reflected in local authority practice. We contacted senior staff involved in both commissioning and contracting in six local authorities, including London boroughs, both larger and smaller city councils and county councils.

6. This produced a mixed response. Only one local authority said that it intended to re-write its contract in light of the ODPM advice in order to include a reference to the HRA, however it had not yet done so.
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One other made no reference to the HRA and was unaware of the ODPM guidance. Four did make reference to the HRA, we were sent the relevant clause in two cases:

*Insofar as the Provider may be acting as a public authority for the purposes of the Human Rights Act 1998, the Provider shall at all times when providing the services act in a way that is compatible with the Convention Rights within the meaning of Section 1 of the Human Rights Act 1998. The Provider shall indemnify the Purchaser for any breach of the Provider’s obligations under this Condition.*

and

*The Service Provider will comply with the provisions of the Human Rights Act 1998 ("HRA 1998") as if it were a public body as defined by the HRA 1998 as appropriate to the provision of the Services.*

7. The first would, of course, have no effect given the present construction of s 6 (3) HRA. The second one pre-dates the ODPM guidance, but the relevant authority was aware of it and regarded their contracts as compliant with it. We did not see the wording of the other two, but one was described to us and reflected the first of these two examples.

8. We also contacted the National Care Forum ("NCF") and the English Community Care Association ("ECCA"). The NCF was established to represent the interests of the not for profit sector and has 48 member organisations, including most of the large scale voluntary sector providers, such as Abbeyfield and Anchor Housing. ECCA is probably the largest representative body and represents small, medium and large scale providers, including membership from both the private and not for profit sector.

9. Martin Green, the chief executive of ECCA, has not had any feedback from his membership to suggest that the ODPM guidance has had any impact at all. Had there been any changes to contracts introduced as a result of the guidance, he would anticipate ECCA being approached by its membership. This has not happened.

10. The experience of Des Kelly, director of NCF, echoes that of ECCA. Additionally Des Kelly was involved in some work with the Change Agency Team, now the Care Services Improvement Partnership ("CSIP"), in producing a model contract for use by local authorities. Unfortunately neither we nor NCF are able to ascertain how widely this contract is used in practice, but it appears that many, if not most, local authorities prefer to generate their own contracts in-house.

**Developments in case-law and their implications**

11. Following the reasoning of the House of Lords in *Aston Cantlow v Wallbank Parochial Church Council* [2004] 1 AC 504, Help the Aged agreed with the views of the JCHR that reform was most likely to be effective through developing case-law, and we were encouraged by the commitment expressed to us by the DCA to intervene in appropriate cases.

12. However the reality has been deeply disappointing. * * * *

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14. * * * *

15. In the case of care home provision, the vulnerability and lack of choice facing older care home residents is, we believe, an additional important factor. In *R (A) v Partnerships in Care Ltd.* [2002] 1 WLR 2610 a private psychiatric hospital was recognised as a hybrid authority carrying out some public functions in part because it dealt with vulnerable individuals who were there by compulsion and not by choice. In purely statutory terms, there is a clear distinction to be made between a patient who has been sectioned under the provisions of the Mental Health Act 1983 and a care home resident who has not. However the practical reality is that there is something more akin to a continuum from statutory compulsion at one end of the scale, to a resident who makes a free and informed choice at the other.

16. Many people entering residential care homes, particularly those with dementia, are unable to consent, but are compliant. In the Government consultation following the findings of the Strasbourg Court in the *Bournwood case* (*HL v UK App No 45/08/99*), the Department of Health estimated that 50,000 care home admissions per year involved a deprivation of the resident’s liberty without access to an independent review of their detention which would satisfy Article 5(4) of the Convention. Following proposed amendments to the Mental Health Act 1983 and the Mental Capacity Act 2005, deprivation of liberty in private care homes will need to be authorised by the local authority. However the trigger for the authorisation will be an application made by the care home manager. It is, in our view, irrational to require a care home manager both to identify a potential deprivation of liberty within the meaning of Article 5 of the Convention and to make an application to authorise such a detention, and yet not classify this as a public function.

17. More generally this is indicative of the vulnerability and lack of choice of many care home residents and, in our view, means that, properly understood, their position is not qualitatively different from mental health patients in private hospitals; and that both groups are equally in need of HRA protection. Recent research findings from the Continuing Care Conference indicate that 62% of care home residents are cognitively impaired details to be added.
18. The findings of the combined report of the Audit Commission, CSCI and the Healthcare Commission, *Living well in later life: A review of progress against the National Service Framework* (March 2006) recognise the particular needs of older service users. A key finding in relation to the implementation of standard 1 of the NSF, tackling discrimination reads (page 7):

Some older people can be particularly vulnerable and it is essential that extra care is given to make sure that givers of care treat them with dignity at all times and in all situations. To fail to do this is an infringement of their human rights. (Our emphasis)

19. The recommendation arising from that observation makes no distinction between public and private bodies (page 11):

Managers of NHS trusts, social services and providers of independent health and social care need to ensure that the human rights of older people are upheld at all times.

20. This underlines the extent to which, in policy terms, caregivers must be obliged to comply with the HRA if it is to mean anything for vulnerable groups. A separation of responsibility is wrong in principle and unworkable in practice.

21. Helen Mountfield, of Matrix Chambers, has provided us with the text of a recent presentation given to the Justice Human Rights Law Conference. We gratefully adopt her conclusions and attach the relevant section of her speech.41

22. First, based on the international obligations of the State as developed through the Strasbourg jurisprudence taken together with a reading of the statutory language of section 6(3)(b) HRA, Helen Mountfield concludes that a construction shorn of gloss or authority, would conclude that services are “of a public nature” where they are:

(i) provided by the people as a whole (in the form of legislation passed by the democratic legislature, and funded, where necessary, by general taxation);

(ii) heavily regulated by legislation passed again, by the legislature elected by the people as a whole;

(iii) available, on the basis of publicly assessed “need of care and attention”, to the people as a whole where such accommodation “is not otherwise available to them” (s21 NAA), and not only to those who have the private means to afford it;

23. Secondly, applying the reasoning of the House of Lords in *Aston Cantlow*, particularly the factors identified by Lord Nicholls at paragraph 12 of the decision, Helen Mountfield argues, and we agree, that one would be bound to conclude that the providers of the services were fulfilling functions of a public nature, and so should be regarded in the conduct of those functions only as being a public authority for the purposes of the HRA:

(a) Because the provision of residential accommodation in each of those cases was almost exclusively publicly funded;

(b) Such a body would necessarily exercise statutory functions in certain aspects of the provisions of the care, and in any event is very heavily regulated in the provision of such care. (See the alternative approach shown in cases such as *R(A) v Partnerships in Care Ltd* [2002] 1 WLR 2610);

(c) In each case, the provider was, or would be, taking the place of local government in providing, under s26 NAA, which would otherwise necessarily be provided by the local authority under s21 NAA;

(d) In each case, the provider was, or would be, providing a public service in the sense that it is one provided by the community/public/government at large to the community/public at large, on the basis of assessed need, not ability to provide or organise in a private arrangement.

Any practical implications of the restrictive meaning given to “public authority” in additional to those identified in the previous Committee’s report

24. We enclose, with this statement of evidence, a copy of Rights at Risk referred to above which gives a range of concrete examples of the treatment of older people in the health and social care sectors.41

25. A recurrent problem that we come across in our contact with care home residents and their families is the lack of any effective remedy. There is no clear or accessible mechanism for raising issues of concern, including potential interference with Convention rights. Notwithstanding the requirement for local authorities to keep care plans under review, one of the impacts of resource and staffing pressures is that care home residents have minimal contact with social work professionals once they are accommodated. They do not have an allocated social worker. Annual reviews, if they happen at all, tend to be a cursory and bureaucratic exercise. In other words contact with the authority currently charged with the protection of rights is minimal or non-existent.

41 Ev not printed.
26. Typically, a resident or family member who makes a complaint to the care home has effectively nowhere to go if that complaint is not resolved at the level of the home. There are instances where a complaint can lead to the eviction of a care home resident so the implication can be very serious indeed. The majority of cases we come across then attempt to complain to the regulator, the Commission for Social Care and Inspection (“CSCI”). A complaint to CSCI may trigger an inspection of the home, but the complaint itself will not be investigated; CSCI refers complainants to the local authority.

27. However, some local authorities will not investigate a complaint about the way in which a care home conducts itself, on the basis that the complaint is not specifically related to something the local authority has done—is it does not relate to the authority’s discharge of any of its social services functions in respect of that individual (section 7B(1) Local Authority Social Services Act 1970). The current statutory guidance on the social services complaints procedure, Learning from Complaints reinforces this reluctance to take up such cases:

2.2.5 With complaints involving regulated services under the Care Standards Act 2000 and where services are delivered on the local authority’s behalf or through an internal service that is regulated, the local authority will need to satisfy itself that the complaint can be considered under this procedure.

28. If the complaint raises adult protection issues then the local authority should carry out an investigation under its procedure for safeguarding vulnerable adults. However not all treatment that engages Convention rights would be deemed an adult protection issue; for instance lack of privacy or unduly limited access to visitors would not. The only route for a complainant is to request a reassessment/review of their care provision at the home and then, if dissatisfied, to lodge a complaint about the conduct of the review, which is unquestionably a social services function.

29. This can and does leave the victim of any interference with a Convention right without even an independent complaint mechanism. This situation is far worse for “self funders” as local authorities would certainly exclude them from a complaint about the provision of care within the care home (see last section, below).

Whether private providers would leave the market if they were “public authorities” for the purposes of the Human Rights Act 1998

30. The suggestion that it would be a “regulation too far” appears to be unfounded. The key umbrella organisations for private and voluntary sector care home providers are the English Community Care Association and the National Care Forum, already referred to above. Neither anticipate a large scale reduction, nor does Abbeyfield, one of the largest voluntary sector providers. It is generally agreed that the national minimum standards already incorporate key human rights, although not expressed as such.

31. The view of the National Care Forum, as expressed by the director Des Kelly, is that a few small private providers might leave the market, but that there would be no significant impact in care home provision and that the numbers of beds lost as a result would be negligible. Far from expressing anxiety at the prospect of inclusion within the HRA, Des Kelly regards the ECHR as providing a useful base line for ensuring that residents are treated with dignity and respect, he would welcome the extension of the HRA to include private and voluntary providers within the definition of “public authority”. Mr Kelly believes that there is no justification in maintaining the present position and would like to see a more effective human rights framework available to residents.

32. Martin Green, Director of ECCA, does not support any extension to the remit of the HRA. He has no objection in principle to the imposition of human rights standards on his members’ homes. His objection is more practical. He is fearful that it will lead to an increase in litigation. Martin Green’s opinion is that this issue diverts resources from what he sees as the more pressing need to tackle the fundamental issues of quality of care through adequate financial resourcing to meet the costs of delivering good quality care. Additionally he feels that the better route forward for quality of care would be through the proposed review of the minimum standards and through improving the effectiveness of CSCI in rooting out bad practice through more rigorous policing of the minimum standards.

33. Like the NCF, the ECCA does not envisage an exodus from the sector of any scale. If the HRA were to include private sector providers within the scope of “public authority”, Martin Green thinks that some small businesses would leave the sector, because any extra perceived burden on providers always leads to some businesses deciding to close. However he does express concern that the closure of small businesses, while not statistically significant, reduces consumer choice.

34. Abbeyfield is fully committed to respecting and promoting the human rights of older people. It believes that the regulation and inspection programme particularly the increased emphasis on user views and outcomes provides a stronger focus on human rights for older people than has been the case in the past. Mark Greenwood, Quality Initiatives Manager, explained that Abbeyfield recognises the value of the principle of extending the HRA to cover private providers but is unsure if in practice this would be seen by some providers as additional bureaucratic regulation that would not make a significant difference to the protection of older people. We do not however believe that the extending of the Act to cover private providers would lead either AUK or independent Abbeyfield Societies managing care homes to “leave the market”.

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Any other evidence relevant to the implications of the meaning of public authority on the protection of human rights, especially those of vulnerable people

35. Help the Aged argued, in our evidence to the JCHR in 2003, that “self-funders” are in a unique position in the social welfare context in that they are currently unable to access state provision in the form of Part III accommodation under the NAA. The duty to provide accommodation under §21 NAA is owed to those assessed as “in need of care and attention which is not otherwise available to them”. The effect of §21 (2A) is to prevent local authorities abdicating their responsibility to provide accommodation to less well off groups, by setting out clearly that authorities must not treat the care and attention needed as “otherwise available”, if the financial resources of the individual needing care do not exceed the statutory ceiling provided in regulations made under §22 NAA for charging purposes. However the effect of this has been that, in practice, local authorities always treat care and attention as “otherwise available” to those people with capital over that limit and as a result they take no responsibility for providing care to these groups—leaving them to seek care in the private sector.

36. This excludes 118,000 or 31.8% of older or physically disabled residents of independent care homes from a great deal of state support and protection, although they have not chosen to opt out of state provision. For instance it precludes them from access to the social services complaints procedure, it also precludes them from benefiting from block contracting arrangements between homes and local authorities and leaves them effectively cross-subsidising those who are state funded. This is self-evidently unfair. We have argued that a purposive interpretation of the provisions of the NAA would include self-funders, and attach a paper prepared for the DCA setting out the approach we were advocating (see paragraphs 22—34).

37. If the current attempts to overturn the Leonard Cheshire decision succeed, this would still leave self-funders unprotected. We would therefore support legislative reform.

38. Help the Aged believes that this could be achieved by a deeming provision along the lines proposed by Frances Butler as an amendment to the Equality Bill:

**Applicability**

This Part applies to any establishment or agency (a “care establishment or agency”) within the meaning of sections 1 to 4 of the Care Standards Act 2000 ("Care Standards Act")

**Effect**

Any care establishment or agency is deemed to be a public authority in relation to the provision of care services subject to the Care Standards Act for the purpose of section 6 of the Human Rights Act 1998

39. Alternatively the same effect could be achieved by adopting an amendment of the kind suggested by Helen Mountfield, coupled with an amendment to the NAA to get rid of the current inequities and ensure that only those residents who positively wished to opt out of the state system did, thus bringing the social care regime in line with health care and education.

40. This would mean an amendment to the HRA as below:

A body is to regarded as performing “public functions” for the purposes of section 6 (3) to the extent that it is providing services under a contract made with a public authority which has entered into the contract under a statutory provision which empowers it to make the provision of such services by a third party, in place of provision which would otherwise be made by the public authority itself

41. Plus an amendment to §21 (2A) of the NAA so that it reads:

(2A) In determining for the purposes of paragraph (a) or (aa) of subsection (1) of this section whether care and attention are otherwise available to a person, a local authority shall disregard that person’s financial resources.

42. We would favour the second approach as it would have more general application to the scope of the HRA, as long as it was combined with an amendment to the NAA to ensure the protection of self-funders.

Kate Jopling
Senior Manager, Equality and Public Affairs

15 December 2006

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42 At April 2006 Laing and Buisson page 164.
10. Memorandum by the Information Commissioners Office

Thank you for providing the Information Commissioner with the opportunity to contribute to the discussion on this important subject. The Commissioner is an independent public body. As well as protecting personal information under the Data Protection Act 1998, he is responsible for promoting access to official information through his regulation of the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. Section 50 of the Freedom of Information Act places a duty on the Commissioner to decide whether a request for information made under either regime has been dealt with in accordance with the relevant legislation.

It is in relation to these access regimes for official information that the Commissioner has encountered similar issues to those faced under the HRA in respect of determining what constitutes a public authority. Whilst there are some significant differences between the two regimes, the obvious one being that the Regulations only provide access to environmental information, they are similar in that they only provide a right of access to information held by public authorities. The Act defines public authorities by reference to the bodies listed in Schedule 1 of the Act and then provides that that Schedule can be amended to include other bodies which meet certain criteria. In addition section 5 of the Act provides that the Secretary of State may by Order designate other persons as public authorities if they either exercise functions of a public nature or, provide a service under contract from a public authority which is a function of that public authority. Although the power to designate further bodies as public authorities rests with the Secretary of State rather than the Commissioner the issue nevertheless illustrates that other parties are also faced with determining what activities or roles constitute functions of a public nature.

The Act also provides that a “publicly-owned company” is treated as a public authority for the purposes of the Act. In broad terms, a publicly owned company is defined as one which is wholly owned by the Crown or by a public authority listed in Schedule 1. Having consulted with the Department for Constitutional Affairs, which was the department responsible for drafting the legislation, the Commissioner understands that the intention was to limit this provision to those companies which are wholly by a single public authority. Our own legal advice supports this interpretation. However, applying this construction can have some odd consequences, for example Manchester Airports Group, which manages Manchester Airport, has no obligations under the Freedom of Information Act despite being wholly owned by a consortium of 10 local authorities.

Those persons who are public authorities for the purpose of the Act are also public authorities under the Regulations (regulation 2(2)(a) and 2(2)(b)). The Regulations go on to define a body or person that carries out functions of public administration as a public authority too (regulation 2(2)(c)). Finally, the regulation 2(2)(d) provides that a body or, person, that is under the control of a public authority as defined by subparagraphs 2(2)(a) to 2(2)(c) is also a public authority providing one of three conditions are met. Those conditions are that the body in question must have public responsibilities relating to the environment, exercise functions of a public nature relating to the environment, or provide public services relating to the environment.

There is no requirement for bodies fitting these criteria to be designated public authorities by Order. The criteria have to be applied to the circumstances in each case, initially by the recipient of a request and then by the Commissioner should he receive a complaint about the handling of that request. There is therefore a clear comparison with the operation of the Regulations and the HRA in this respect. It is noted that both the HRA and the Regulations have their origins in international conventions which have then been transposed into UK law from an EU directive. Whilst the Commissioner would not necessarily argue that access to official information is a fundamental human right, it is recognised as an important legal right in a mature democracy.

The Commissioner has exercised his functions under section 50 of the Act to investigate complaints resulting from information requests for two years now. During that period he has concluded on four occasions that bodies which are not public authorities for the purpose of the Act are public authorities under the Regulations (ie that they fall within the definition of a public authority provided by either subparagraph 2(2)(c) or 2(2)(d) of the Regulations). Three of those four cases were decided on the basis that the body was carrying out functions of a public administration, i.e. under subparagraph 2(2)(c). Only in one case has it been decided that an organisation satisfies the criteria under 2(2)(d) and in particular that the body is carrying out functions of a public nature. In practice, so far, the difficulty with satisfying these criteria has proved to be the first limb of that provision, ie establishing whether the body concerned is in fact under the control of another public authority, rather than whether it is carrying out functions of a public nature.

Should you wish to read the details of these case in more detail the relevant case numbers and links to Commissioner’s website are as follows:

FER0086096 Port of London

FER0090259 Environmental Resource Management

FER0071801 Network Rail

FER0087031 Network Rail
It should be noted that the Port of London and Network Rail are appealing against the Decision Notices issued against them on the basis that they are not public authorities for the purposes of the Regulations. It was the case involving Environmental Resource Management to which regulation 2(2)(d) was applied ie that the body was a public authority by virtue of carrying out functions of a public nature.

Graham Smith
Deputy Commissioner
December 2006

11. Memorandum from Liberty

Introduction

1. The Human Rights Act 1998 (the “HRA” or the “Act”) only requires public authorities to act compatibly with the rights and freedoms that the Act protects. The Act places no direct obligation on private bodies or individuals to comply with basic human rights standards. Public authorities are defined in the Act as including core public authorities, like local councils—these bodies are required to comply with human rights standards in everything they do. Private bodies that perform “functions of a public nature” should, in the performance of those functions, also be treated as public authorities for the purposes of the Act (“Functional Public Authorities”). The question of which bodies fall within the definition of public authority is of great significance. The answer to this question determines how effectively the basic rights and freedoms in the European Convention on Human Rights (the “ECHR” or “Convention”) are secured in the United Kingdom and the extent to which UK law provides an effective remedy where an individual’s rights and freedoms are violated.

2. In 2004, the Joint Committee on Human Rights published an important report on the meaning of “public authority” under the HRA (the “2004 Report”). It concluded that the development of case-law on the definition of Functional Public Authority had led to real gaps and inadequacies in human rights protection in the UK which ministerial statements during the passage of the Human Rights Bill indicate were not intended by Parliament. These gaps in human rights protection have arisen because some courts have sought to identify Functional Public Authorities by looking at the character of the institutional arrangements of the body, ie the extent to which the body is controlled or funded by a core public body, rather than the character of the function that it is performing. This has, for example, meant that the rights of an elderly person are unlikely to be protected by the Act when a local council pays for care to be provided in a private care home. By contrast, the same person’s rights would be protected if the care were provided by the local authority in a care home it runs itself.

3. Liberty shares the view expressed in the 2004 Report, by Lord Bingham in the House of Lords and by Ministers during the progress of the Human Rights Bill that “[i]t is the function that the person is performing that is determinative of the question whether it is, for the purposes of the case, a [functional] public authority.” Accordingly, in the hypothetical case described above, we consider that the elderly person’s rights should be protected by the Act regardless of the nature of the body that delivers the care. At the outset we acknowledge that it will not always be easy to identify when a function is “of a public nature”. This will need to be determined on a case by case basis by the courts. The appropriate question for the courts to ask is, however, whether the function in question is one for which the state has taken responsibility in the public interest.

4. The Committee considered various ways of remedying the problem with the way some courts have approached the identification of Functional Public Authorities. The Committee did not consider it appropriate to amend the terms of the HRA and Liberty also opposed this suggestion. The approach we preferred was to allow the courts an opportunity to move towards a broad functional interpretation of the meaning of “public authority” under the Act, with Government interventions in appropriate cases. It is now two years since the Committee’s last report and, sadly, the difficulties remain. Liberty is therefore delighted that the Committee has decided to look at this issue again and to reconsider what, if anything, should be done to address it.

Current Context

5. Since 2004 there have been a number of developments which make the resolution of this problem all the more important. We briefly consider these below.

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43 Section 6.
44 This could, thereby, effect the extent to which the UK could be said to comply with the obligation under Articles 1 and 13 of the Convention.
Universal Protection and Defence of the HRA

6. Universality is the most powerful defence against attacks on the Act launched by some sectors of the media and some politicians; the best response to ill-informed and misleading claims that the HRA is no more than a charter for terrorists and criminals. This means that the Act must be shown not only to protect individuals whose rights are traditionally and rightly argued over by lawyers and considered by the courts. The Act must also provide visible and accessible protection for children, disabled people and older people at the most vulnerable times in their lives. It must provide redress where rights have been violated and an unequivocal direction to those who design and deliver important public services that people must be treated with freedom, respect, equality and dignity. As long as protection for a person’s rights and freedoms depends on arbitrary and irrelevant questions about the type of body that provides a public service, rather than the nature of the service provided, the claim that rights are universal is undermined. We fear that the current approach of some courts to the definition of Functional Public Authority weakens the case for the HRA.

Sub-contracting of Law and Order Functions

7. As the Committee explained in its 2004 Report private bodies now provide many public functions. The tendency of government to contract-out public services has continued at a significant pace in the last two years. This has been particularly visible in the context of law and order/anti-social behaviour functions. The Police and Justice Act 2006, for example, created a power for local authorities to contract-out their powers to enter into parenting contracts and to apply for parenting orders. A similar provision already exists in relation to applications for ASBOs and it is proposed to give local authorities the power to contract-out their ASBO powers to organisations managing their housing stock including small tenant-run organisations. The Act also gave the Home Secretary the power to specify an unrestricted range of bodies on whom the police can confer the power to issue on-the-spot fines.

8. The exercise of such powers could clearly engage a wide range of rights and freedoms, such as the right to freedom of expression (Article 10), freedom of association (Article 11) and private and family life (Article 8). When local authorities or the police exercise these powers they are required to comply with these basic human rights standards as they are clearly public authorities for the purposes of the HRA. Law and order is a classic public function, a matter for which it is generally accepted that the state has taken responsibility in the public interest. This is expressly accepted in the Prime Minister’s rhetoric on the criminal justice system being a public service in need of reform. One would therefore expect that private bodies would, in the performance of those functions, be required to respect basic rights and freedoms. During debates on the Police and Justice Bill Lord Bassam of Brighton expressly stated that this was the Government’s intention. Sadly, the approach taken by some courts to the identification of Functional Public Authorities would mean that many of the private bodies on whom these functions are conferred would not be treated as public authorities for the purposes of the HRA when performing them. Accordingly, those whose rights have been violated would be denied a remedy purely because the law and order function has been contracted out.

A Change of Tack by Government

9. In its recent report The Human Rights Act: the DCA and Home Office Reviews, the JCHR expressed its disappointment at an apparent change of approach by the Government on this question. The generally welcome DCA review into the implementation of the HRA stated that a wider re-interpretation of public authority could “increase burdens on private landlords, divert resources from this sector and deter property owners from entering the market to provide temporary and longer term accommodation to those owed a duty by the local authority under housing legislation”. In evidence to the Committee, the Lord Chancellor added that the risk of such an impact should be considered before any change is made to the definition of public authority in the Act.

10. We agree that the wider impact would need to be considered before any change is made to the current definition of public authority in the HRA. For example, if the Convention rights were to become directly enforceable against private individuals in the performance of private functions this would significantly change the scheme of human rights protection in the Act. There is, however, a significant difference between

48 Paras 59 ff.
49 Section 25.
50 Section 1F Crime and Disorder Act 1998.
51 ODPM, “Enabling local authorities to contract their anti-social behaviour functions to organisations managing their housing stock”. Liberty’s response to that consultation is available at: http://www.liberty-human-rights.org.uk/resources/policy-papers/main.shtml
52 Section 16.
53 ie “And here is where the fourth strand of work is relevant. Whenever I talk of public service reform, then, not unnaturally, people think of the NHS and education. But many of the same principles apply to the CJS. It is a public service, or at least should be. Its role is to protect the public by dispensing justice.” (Speech, “Our Nation’s Future—Criminal Justice System”, 23 June 2006).
54 HL Deb, 6 July 2006, col 440.
55 Thirty-second Report, HL 278/HC 1716, para 90.
this kind of change and ensuring that Parliament’s intention, as currently expressed in section 6 of the Act, is reflected in judicial decisions. Section 6 already states that any body which performs a public function should, in the performance of that function, comply with human rights standards. While the question of whether or not a function is of a public nature will often be a difficult one, the Act states that the focus should be on the nature of the function rather than the nature of the institution performing it. It would not be appropriate to condition Government action in support of such a position on the basis of the potential burdens on those performing public functions. The appropriate time for such considerations was when the Human Rights Bill was drafted and the HRA passed not several years later. The costs of compliance with basic rights standards should not be a defence to unlawful human rights violations by private bodies performing public functions.

The Havering Case

11. The Government recently intervened in the case of R (on the application of Johnson and others) v London Borough of Havering, which concerned the transfer of local authority care homes to the private sector. * * * *

12. In evidence to the Committee the Lord Chancellor commented that the Government’s intervention in Havering had failed. The High Court decided that it was bound to follow the Court of Appeal’s approach in Poplar Housing and Regeneration Community Association v Donoghue and Callin and Others v Leonard Cheshire Foundation. Accordingly, it decided that the private care home would not be required to act compatibly with the Convention rights in the HRA. The High Court refused permission to “leapfrog” to the House of Lords and permission to appeal to the Court of Appeal was initially refused. We are, however, delighted that, in the last two weeks, an appeal of the Havering case to the Court of Appeal has been allowed. We understand that the case will be heard early next year and that both the Government and the Disability Rights Commission are likely to intervene. As we discuss below, we consider the best way of remedying the problems to be a change of approach by the judiciary to the identification of Functional Public Authorities.

How to Remedy the Problem?

13. In its call for evidence the JCHR specifically sought views on possible ways of remedying the problematic approach taken by some courts to the identification of Functional Public Authorities. In particular it asked whether primary legislation may be needed including amendments to the HRA itself.

A Change of Judicial Approach

14. In our evidence to the Committee in 2003 we stated that it would be “premature to consider taking any steps to further refine the definition of a public function under the Human Rights Act”. Three years later the problematic Court of Appeal precedents have still not been overruled. Despite this considerable delay we still believe that the best way to deal with this issue would be a change of judicial approach which the courts themselves initiate. Despite the delay we do not consider such an approach to be unrealistic. Since we submitted our evidence to the JCHR the House of Lords has considered this question and explained that, in deciding whether a body is a functional public authority, “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 [functional] public authority”. Sadly, the House of Lords did not overrule the earlier Court of Appeal judgments which had focused on the nature of the body in question rather than the nature of the function being performed. Nevertheless, this statement of the proper approach to the identification of Functional Public Authorities by the House of Lords provides a powerful authority in support of a change of judicial approach in an appropriate case. As noted above, the Court of Appeal has recently agreed to hear the appeal from the High Court’s decision in Havering. We hope that this case will provide an opportunity for the Court of Appeal to change its approach to this important issue.

Amending the HRA

15. We do not believe that amending the HRA would be the best way of dealing with this issue. For the reasons set out in the 2004 Report and in our evidence to that inquiry we would not support amendments to the HRA which would specify a list of public functions or of public authorities. Ultimately the question of whether a body is a Functional Public Authority will have to be determined by the courts on a case-by-case basis. The only thing that section 6 of the Act should provide is an indication of the appropriate

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57 Section 6.
questions for the courts to ask. In our view section 6 of the Act already states clearly that the appropriate focus for the courts should be the nature of the function in question rather than the nature of the body performing it. We do not consider it necessary to design another way of expressing this idea. Given the profound constitutional importance of the Act amendments to it should only be considered where this is absolutely necessary for a pressing reason of constitutional importance. In addition we fear that in the current political climate if any Bill were introduced to amend the HRA this would be likely to lead to a reduction in the level of human rights protection that is currently afforded by the Act.

Other Forms of Legislative Intervention

16. Despite our preference for a change of judicial approach we do understand the JCHR’s view that: “failure of that strategy to date and the growing urgency of the problem mean that it is now time to give serious consideration to whether or not to introduce legislation to reverse the effect of the Leonard Cheshire decision and to seek to give proper effect to Parliament’s intention at the time of the passage of the HRA.” While waiting for the courts to change their approach, people’s rights are not being protected by the Act in the way that Parliament intended.

17. For this reason Liberty has proposed a number of legislative interventions which would clarify that bodies performing specific functions are, in the performance of those functions, public authorities for the purpose of the HRA. As discussed above the Police and Justice Act 2006 enabled local authorities to contract out the power to enter into parenting contracts and to apply for parenting orders. We proposed amendments to the Bill which would have clarified that private bodies are, when performing these functions, public authorities for the purposes of the HRA (the text of the amendment is below).

“28B Treatment of organisations performing parenting contract and parenting order functions as public authorities

(1) Any person with whom arrangements are made under or by virtue of section 28A for the performance of the functions under section 25A or 26A shall, in the discharge of those functions, be treated as a public authority for the purposes of the Human Rights Act 1998 (c 42).

(2) For the avoidance of doubt it is hereby declared that nothing in this section affects the meaning of “public authority” in section 6 of the Human Rights Act 1998 (c 42) or the determination of whether functions, other than those referred to in subsection (1) above, are functions of a public nature for the purposes of section 6.”

18. The Government did not disagree with the principle underlying the amendment but nevertheless opposed it. Lord Bassam explained the Government’s view that a change in the courts’ interpretation of “public authority” would “present the best possibility of resolving the lack of clarity of the case law in this subject.” He commented that this would have a wider and more consistent impact on this area of law than the ad hoc statutory clarification that certain functions are to be treated as “public” for the purposes of the Human Rights Act. As we explain above, this would also be Liberty’s preferred means of addressing this problem. We do not, however, believe that the possibility of a future change of approach by the judiciary should prevent Parliament clarifying its intention in the meantime when new legislative powers to contract out public functions are proposed.

19. Lord Bassam also expressed concerns about the fact that “[i]f we put such provisions in this Bill, it would cast doubt on previous legislation in which we have intended the same but have not stated it explicitly.” We understand this concern. We would not want to include a provision in a Bill which would have the undesired impact of suggesting that other public functions conferred on private bodies pursuant to other legislation should not be treated as public functions for the purposes of the HRA. For this reason we added a second part to the amendment which clarified that this is not the effect of the statutory provision. We believe that, with this addition, the amendment would enable Parliament to clarify the position with respect to a particular power to contract out while avoiding wider undesired consequences.

63 Section 6(3)(b).
65 In its scrutiny of the Bill, the Joint Committee on Human Rights also expressed the view that “it would be desirable if the Bill were to provide that the person to whom the functions are contracted out is to be treated as a public authority for the purposes of the HRA 1998 in the discharge of those functions” (JCHR, Legislative Scrutiny: Tenth Progress Report, HL Paper 186, para 1.30).
66 HL Deb, 6 July 2006, col 440.
67 Ibid.
68 Ibid.
20. A similar amendment to address the specific circumstances in Leonard Cheshire could also be included in an appropriate Bill. Such an amendment might read:

“After subsection 26(7) of the National Assistance Act 1948 there is inserted—

(8) Any person with whom arrangements are made under or by virtue of this section for the provision of accommodation, nursing and/or personal care, shall, in the performance of those functions, be treated as a public authority for the purposes of the Human Rights Act 1998 (c 42). For the avoidance of doubt it is hereby declared that nothing in this subsection affects the meaning of “public authority” in section 6 of the Human Rights Act 1998 (c 42) or the determination of whether functions, other than those referred to in this subsection, are functions of a public nature for the purposes of section 6.”

By means of such a provision Parliament could expressly address the problematic Court of Appeal precedent. Such an amendment would ensure that, in future cases, lower courts would not be required to apply the decision reached by the Court of Appeal Leonard Cheshire in a new case concerning the same functions (as happened in Havering at first instance).

Direct Enforcement against a Core Public Authority

21. * * * *

22. * * * *

Protection by Contract

23. As the 2004 Report explained, another indirect means of protecting human rights is by contract. A requirement for a private service provider to act compatibly with Convention rights would have to be included in either (A) the contract under to which the core public authority’s public functions are contracted out to the private body; or (B) the contract between the private body and the recipient of the service. The recipient of the service could then seek to enforce a breach of their rights and freedoms as a breach of contract.

24. Liberty does not consider such an approach to be a satisfactory alternative to the judiciary identifying Functional Public Authorities by focusing on the nature of the function that a body is performing. The difficulties with this approach include:

— It does not deal with those individuals who were never in the care of a core public body where, for example, the public function is conferred directly on the private body rather than sub-contracted. Neither would this provide a remedy where public functions were contracted out before the HRA came into force.

— As we explained in our response to the JCHR’s 2004 inquiry on this issue this would create a two-tier system of enforcing rights. For example, actions against a local authority under the HRA would be in the administrative court with judges and advocates with greater human rights experience.

— There is no legal requirement for the core public body to ensure such contract terms are in place and no obligation for the private body to accept such terms. It may also be difficult for a public body to find a sufficient pool of private sector service-providers that are willing to accept such terms at an acceptable contract price. It is also unrealistic to expect the recipient of a service to insist that these terms are included in the contracts between them and the private service provider.

— A culture of respect for human rights would be better ensured by an awareness that Functional Public Authorities are subject to a direct legislative obligation to act compatibly with human rights.

25. Nevertheless, despite these inherent problems, contract terms could provide some degree of human rights protection pending a change of approach to the identification of Functional Public Authorities by the judiciary. We therefore welcome the fact that in response to the 2004 Report the Government has published guidance on contracting for services in the light of the Human Rights Act 1998. A number of general questions do, however, need to be answered before any reliable assessment of the effectiveness of this guidance in practice can be made, including: do core public bodies know that the guidance exists and have they used it?; is there any evidence about the extent to which terms are included in contracts for the provision of public functions by private sector providers?; and have standard contract terms been drawn-up in the context of specific types of contract?

Jago Russell
Policy Officer, Liberty
15 December 2006

12. Memorandum from the National Secular Society

BACKGROUND

1. Our submission is made in response to the Committee’s call for written evidence. We note that the enquiry into the meaning of “public authority” under the Human Rights Act, is made “in light of the continuing trend towards the outsourcing of public services and the failure so far of other strategies to fill the gap in human rights protection which has been caused by the judicial interpretation of the phrase.”

2. The National Secular Society was founded in 1866. It is the principal national organisation which represents those who do not profess a religion and it seeks to eliminate religious privilege and works towards a public life blind to religion. The Society is committed to the uniform application of human rights. We believe that the subject matter of this consultation should be one of major concern and are very pleased that the Committee has invited submissions on it.

THE NON-RELIGIOUS/NON-RELIGIOUSLY INFLUENCED: THEIR NEEDS AND LEGITIMATE EXPECTATIONS

3. Around half the population are subject to no or minimal religious influence and only a small proportion are significantly influenced by religious doctrine. While Human Rights should apply regardless of the numbers involved, we believe the foregoing should be borne in mind in weighing up the extent to with those carrying out service functions to the public at large with public money should be constrained from being able to act in a manner prohibited to a public authority.

4. According to the 2001 Census, the non-religious constitute 16% of the population—(23% if “not stated” responses are included). These figures are recognised by academics to be grossly understated, as many of the 72% recorded as Christians have little connection with any church. Doubt is similarly cast on them by the ODPM’s report “Review of the Evidence Base on faith communities”. Our Submission in 2005 to the Office of National Statistics on the 2011 Census explores these points forensically and is available on request. It concludes that the 72% broadly represents the proportion of the population brought up in nominally Christian households. It is unthinkingly assumed that everyone in the minority faith communities are active religious adherents. It is far from being the case.

5. The Home Office Citizenship Survey, carried out in the same year as the Census, confirms this and paints a starkly different picture from the 72%: indeed, the proportions of religious and non-religious almost change places. When asked “what says something important about you if you were describing yourself”, religion came just ninth in the list of priorities. Even more significantly, four times as many thought religion was not important to their identity as those who did. A middle way would suggest the population is split fairly equally between the religious and non-religious.

6. Only one person in 14 is in church on an average Sunday, and that attendance has been in steep decline for over 50 years and the decline is set to continue. Those of other religions total only around 5%. Taken together, this suggests a nation much less strongly influenced by religious bodies than the Census implies. In the BBC’s Soul of Britain survey in 2000 found that in response to the question “When it comes to judging right from wrong which of the following have been the main influences in your life?”, “minister” narrowly missed the bottom (least influential) place which was taken by the “media”. Hugely more influential were parents, relatives, friends, school and school teachers.

7. The non-religious are by any estimation a significant section of the population as a whole. In any event, regardless of numbers, they are entitled to full human rights, including the right not to participate in religious beliefs.

8. Our preferred position is that state funds should not be directed to institutions which discriminate, but if this aim is not achieved in its entirety, then even more strongly, we consider that the need for protection of the non-religious is all the greater. If public authorities are increasingly outsourcing, and if that outsourcing is increasingly linked to faith-based welfare, the gap in human rights protection resulting from the narrow judicial interpretation of the definition of “public authority” is of increasing significance.

9. Recipients of services outsourced by public authorities frequently have no choice over the vehicle of delivery. Their only choice may well be limited to whether or not they avail themselves of the service at all, which is to say that the choice for a vulnerable individual may well be meaningless. The non-religious (and those who may on occasion be identified as religious but for whom religion does not play a central role in their lives) will therefore be at significant risk in their dealings with the state unless they have clear protection that all service providers have a clear s 6 duty for which they hold unequivocal liability.

70 according to press notice no 3 Session 2006–07, issued on 23 November 2006
http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchr231106pn03.cfm
OUR CONCERNS IN GENERAL

10. The NSS shares the concern of the JCHR to find strategies to fill the gap in human rights protection caused by judicial interpretation of s 6(3)(b) Human Rights Act (HRA). We note that the issue has arisen primarily in the context of care for the elderly but the implications are naturally much wider given the continuing trend to outsource public services. In particular, we consider that the implications of the restricted definition of “public authority” will be of immense significance in the field of faith-based welfare which is the focus of this submission.

11. The gap in Human Rights (HR) protection caused by judicial interpretation is of concern in whatever context it arises. However, there are reasons for viewing its application to faith-based welfare provision as particularly worrying. It is not surprising that a provider of services outsourced by a pure public authority might prefer to remain outside the definition of a public authority for the purposes of s.6 HRA on the grounds that it may fear that inadvertent actions or changes in case law might render it liable for wholly unintentional HR breaches.

12. One of our concerns, however, is that some religious organisations may have identified other risks in addition. In our view, it appears that they are aware that some of their activities run the risk of giving rise to claims that they infringe the human rights of others. Orchestrated mass lobbying on an almost unprecedented scale carried out on behalf of such groups has sought (and in some cases obtained) wide exemptions from equality legislation (for example in areas such as sexual orientation).

13. We would be highly concerned if there ever arose similar lobbying to exclude religious organisations engaged in providing services outsourced by a pure public authority from the s 6 HRA duty. The language of the debate emanating from religious lobby groups in respect of exemptions from the uniform application of equality enactments (see below for example) suggests that a failure to accommodate the demands of the religious will itself threaten the human rights of those within the religious organisations. This claim cannot pass without full scrutiny and outside a context of resolution of conflicts of rights.

14. In our view, there is a grave risk that the many vulnerable people who are recipients of such provision will suffer an alarming reduction in the level of human rights protection if the many religious organisations who currently deliver, or plan to deliver, welfare are not subject to the duty of public authorities in s 6(1) HRA. Faith based welfare restricts their right to “walk away”. Faith based welfare without full human rights protection oppresses them even more.

THE THREAT TO HR PROTECTION FOR RECIPIENTS OF FAITH-BASED WELFARE—THE NATURE OF THE PROBLEM

15. We have been monitoring for some time the approach of religious organisations towards the implication of both equality and human rights legislation for the manner of the delivery of their services. Religious organisations providing services to the public or sections of the public frequently demand that legislation relating to equality or discrimination issues provides exemptions for religious groups so that they may (or may continue) to treat certain people or groups of people unequally or discriminate against them if a religious doctrine or view in their opinion requires them to do so.

16. We are afraid that some religious organisations appear to consider that conditions requiring delivery of publicly-funded services to be made in a manner which is neutral in respect of religion or belief are unacceptable to them regardless of recipients’ human rights, in particular (but not limited to) those recipients’ Article 9 rights.

17. Specifically, we fear that recipients may be forced to witness, attend or even take part in religious observances in order to access services, or that they may not qualify for delivery either at all or unless they conform to requirements laid down by religious service providers. In addition, we fear that occasion may arise when intrusive and unwarranted investigations might be made into a potential recipient’s private life and/or conscience in order to establish entitlement to a service. Unless a recipient has robust human rights protection, the potential for breaches to occur must be considerable.

THE EXTENT OF LOBBYING BY RELIGIOUS ORGANISATIONS FOR SUBSTANTIAL EXEMPTIONS FROM EQUALITY LEGISLATION, AND THE WIDER IMPLICATIONS OF THIS

18. In respect of equality legislation, there was successful lobbying by religious organisations in the context of the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003. A similar approach has been adopted in relation to the forthcoming Sexual Orientation (Provision of Goods and Services) Regulations. Current lobbying has included a full page advertisement placed in The Times on 28 November 2006 by Coherent and Cohesive Voice which describes itself as “a network of hundreds of Christian leaders in the UK representing hundreds of thousands of voters”. This specifically called for a clause to be inserted to allow exemptions to prevent an individual being forced to act against “their conscience or strongly held religious beliefs”. No reference is made to wider considerations, nor of potential conflicts of rights between providers and recipients of the services. We believe the claims made in the advertisement to be alarmist, exaggerated and in at least one respect, incorrect. Were such a clause to be inserted in the Regulations it would emasculate them to the point of almost nullifying them. A similar advertisement was also placed in the influential Parliamentary House Magazine.
19. We itemise below recent threats made by mainstream Christian organisations to the effect that failure by the Government to amend the legislation in the light of their opposition to the proposed form of the Regulations would lead to their withdrawal from the “market” of services to the vulnerable in a number of areas.

20. These threats have been made in the context of the forthcoming Sexual Orientation (Provision of Goods and Services) Regulations. Nonetheless, we consider them relevant to this JCHR inquiry concerning the meaning of public authority; should these organisations find that there was a risk that they might become subject to the duty in s 6(1), any prospect that they might adopt a similar approach to avoid liability for any breaches of a recipient’s rights (for example Article 8 rights) is alarming.

**Threats Associated with Equality Legislation by Religious Organisations**

21. A number of threats associated with equality legislation have been made recently by religious organisations and they include the following:

(a) The Roman Catholic Archbishop of Birmingham, Vincent Nichols was quoted in the *Daily Telegraph* (29 November 2006) as saying that it was “simply unacceptable” to suggest that the “resources of the faith communities, whether in schools, adoption agencies, welfare programmes, halls and shelters, can work in co-operation with public authorities only if the faith communities accept not simply a legal framework but also the moral standards at present being touted by Government”.

(b) The same report stated that “The English and Welsh bishops told the Government earlier this year that, without an exemption, their seven agencies (which last year placed 227 children with new families) would shut, creating ‘a huge gap in service provision for many of the most vulnerable children’”.

(c) An article in the *Daily Mail* of 9 December 2006 states that “A senior Church of England bishop have (sic) warned that Anglican youth clubs, welfare projects and charities may close because of new gay rights laws. The Bishop of Rochester, the right Reverend Michael Nazir-Ali, said that the Church of England’s charities would be ‘affected’ by the rules, which will force them to give equal treatment to homosexuals”.

(d) The same *Daily Mail* article quotes Pastor Ade Amooba of Christian Voice as saying “We will shut down the youth clubs and welfare projects rather than obey these laws”.

**Appropriate Response to Threats to “Leave the Market”**

22. The tenor of this debate indicates strongly to us that there is a possibility that religious private providers might threaten to “leave the market” if they were “public authorities” for the purposes of the HRA. It remains to be seen whether any such threat would be put into action in those circumstances.

23. Nonetheless, the response of the Government must be absolutely clear and robust: there can be no compromise on human rights protection. The Court of Appeal in *R (on the application of Heather and others) v Leonard Cheshire Foundation* considered that the local authority retained its obligation to the service recipients regardless of the delegation to third party.

24. As the government Guidance to Local Authorities on Contracting for Services (published on 3 November 2005) makes clear at the outset, failure to provide services in a way that takes account of HRA obligations may expose a public authority to legal liability. It would not therefore appear to be legal for a pure public authority to agree to demands akin to those for exemptions based on religious conscience for providers, if in so doing it failed to protect the rights of others (eg a recipient’s Article 8 rights to privacy and family life).

25. If there are situations in which there is conflict between the rights of a service provider (eg under Article 9) and a service recipient, normal conflict of rights resolution principles must apply. There can be no blanket assumption from the outset that the provider’s rights will supersede of services those of a recipient.

26. One possible example of tension we have heard raised is the situation of where a religious provider of services for the homeless might wish to say a prayer prior to delivery and in the presence of recipients. In this case, it is particularly important to note that the most relevant Article 9 rights may well be concerned with manifesting religion and that these are qualified rights. It seems entirely wrong to us that qualified rights could potentially be given greater protection than unqualified rights by virtue of a failure of nerve on the part of a public authority to challenge religious organisations or to yield to a threat to withdraw from the market.

27. We worry that, given the tenor of the current debate (namely that if religious organisations are required to change their practices, this may constitute an infringement of Article 9 rights) those involved in the decision-making process may not fully appreciate that individuals are not prevented from exercising their Article 9 rights merely by a failure of a commissioning pure public authority to comply with the demands of religious organisations for exemptions.
28. If religious organisations fund their current welfare programmes from their own resources, the question of whether they constitute a public authority in terms of the HRA does not arise, and therefore they need do no more than comply with the general law (including the equality enactments). The question of whether the duty in s 6 HRA applies arises only if religious organisations wish to use public money. Since Government tendering is itself subject to human rights law, no legitimate complaint can arise over a religious (or any) organisation’s decision to rule itself out of the tender process on the grounds that it refuses to accept a duty to refrain from acting in a way which is incompatible with Convention rights. A threat to withdraw is, after all, only a genuine loss to a public authority if the offer to take part in the market was one of which the public authority could lawfully have availed itself.

POSSIBLE SOLUTIONS

29. This is not an easy problem to resolve. None of the proposed solutions is without risk. Our preferred option, however, would be by means of primary legislation. We consider that the problem is so serious that solutions other than amending the definition in s 6(3)(b) will fall short creating an effective regime and providing an effective remedy for those whose rights may be infringed. We set out our reasons for this, and comments on other options below.

Primary Legislation

30. We would support this problem being addressed by primary legislation so that there is maximum clarity, uniformity and so that providers have statutory duty rather than a derivative/contractual duty.

31. As a model for an amendment, we endorse the approach suggested by the Law Society as reported in the JCHR Seventh Report of Session 2003–04 ie that the definition be amended so as to include “when a public body delegates functions that would otherwise be the response of that body, those functions and the private body delivering them are considered public for the purpose of the Human Rights Act”.

32. We are aware of the risk that most potential solutions may create new anomalies. Although any amendment will be open to judicial interpretation, we consider that amendment of the primary legislation offers the best opportunity for a uniform regime to be created. It also ensures that the private body has a primary statutory duty and removes scope for disagreement on the nature of its duty by virtue of that duty being contractual or derived from any other source than the HRA itself.

Government Guidance to Local Authorities on Contracting for Services in the Light of the HRA, issued 3 November 2005

33. This guidance advises that a specification-based approach is the appropriate way to proceed. Though we welcome attempts to tackle this issue, we have reservations about using specification of services. Such an approach could possibly give a misleading impression that the specifications are comprehensive. It is, of course, simply not possible to anticipate every situation which might found a potential claim that an end-user’s rights have been breached.

34. With a specification-based approach, should a breach of an end-user’s rights occur, there may be a lack of clarity over the body against whom the complaint should be pursued. This could add considerably to the expense and practical problems already faced by vulnerable and poorly-resourced individuals.

35. We are also concerned that the specification-based approach might be open to a process of discussion and negotiation between contracting parties which disenfranchises the end-users. We note the recommendation to consult end-users of outsourced services but, as remarked above, particularly in the field of welfare provision, end-users may include highly vulnerable and inarticulate people. Moreover, as we discussed above, in respect of religious organisations, the problem may well not lie in the fact that end-users’ wishes are not known but rather in the fact that the relevant organisation may regard not those considerations as sufficient to alter its conduct. A potential problem may not borne of ignorance but rather related to motivation and lack of incentive to change.

36. Furthermore, it must be noted that any such negotiation will currently be taking place in a climate of intense lobbying by religious organisations. Given that these organisations are prepared to threaten to withdraw from the market in the context of (on their interpretation) unwelcome equality legislation, and indeed express a sense of righteous indignation at even being expected to defend their stance under the law (a position we have heard articulated frequently by representatives of religious bodies in meetings at the Home Office), we foresee that there will be considerable pressure on the part of the commissioning or pure public authorities to negotiate concessions. In addition, we worry about transparency; specification agreements may be of considerable relevance to a significant number of end-users and yet are not even as readily accessible as statute law, let alone likely to be readily available in the public domain.
CONCLUSION

37. For reasons of efficacy, transparency and uniformity of approach, we would prefer to see this problem addressed by means of primary legislation.

Keith Porteous Wood
Executive Director
15 December 2006

13. Memorandum from The Commission for Social Care Inspection (CSCI)

INTRODUCTION

The Commission for Social Care Inspection [CSCI] was set up in April 2004. The Commission’s powers and duties derive from the Health and Social Care Act 2003. CSCI combines inspection, review, performance and regulatory functions across the range of social care services in the public and independent sectors.

CSCI exists both to promote improvement in the quality of social care and to ensure public money is being well spent. It works alongside councils and service providers, supporting and informing efforts to deliver better outcomes for people who need and rely on services to enhance their lives. CSCI aims to acknowledge good practice but will also use its intervention powers where it finds unacceptable standards.

HUMAN RIGHTS

The Commission has adopted a rights-based approach to its work and this is reflected in its dealings with external audiences, whether it is with people who use services and their carers, councils (in their role as both providers and commissioners of services) or service providers, most of whom are in the private and voluntary sectors. The rights enshrined in the Human Rights Act inform our inspection and regulation activity.

MODERNISING REGULATION, DIGNITY, RESPECT AND PRIVACY

CSCI regards the safeguarding and promotion of dignity of people who use social care services as an essential component of good social care.

Earlier in 2006 the Commission, as part of its programme to modernise the regulation and inspection of social care services, we consulted on a new way of assessing the qualities of services, linking those qualities to the Department of Health’s White Paper “Our Health, Our Care, Our Say” as well as the National Minimum Standards. That consultation which set out proposed key lines of regulatory assessment included the need to put the principles of dignity, respect and privacy into practice in care homes regulated by the Commission, irrespective of whether the home is in the public, private or voluntary sector.

This proposed regulatory assessment process is designed to enable CSCI to judge how well a provider delivers outcomes for the people using the service, rating them as either excellent; good; adequate or poor.

For example the draft key lines of regulatory assessment suggest that for a care home to be assessed as excellent it will need to demonstrate that it “respects residents’ privacy and dignity when delivering health and personal care (and that this) is a key principle of the home’s aims and objectives. Staff are aware that this also applies to all areas of the resident’s life.”

CSCI also published its Equalities and Diversity Strategy in October 2006 which states that the “in all we do, we must ensure we recognise and respect the human rights of those who use social care, provide it and regulate it.”

Whilst the Commission’s inspection work can go a considerable way in ensuring that people who use social care services are afforded dignity, respect and privacy, we are aware that the “Leonard Cheshire” Judgement places some restrictions on the ability of CSCI to apply HRA principles in the majority of the services that we regulate.

CSCI would bring to the attention of the Committee that, nationally, approximately one third of people who use social care services are self funders—these people are not referred to a social care service by a public body, such as a local authority, and any care service they use will be provided by the independent (private or voluntary) sector, and as such are not covered by the “public authority” test. The Commission is concerned that this group of people who use services have no recourse to the protection afforded by the Human Rights Act.
EQUITY

The Commission carries out its work according to principles of equity, for example the National Minimum Standards, against which the Commission measures providers of care services, apply to all categories of providers. This “level playing field” provides equity to all groups of people who use services. The Commission believes that there is a potential conflict between this policy of equity and the exclusion of independent providers from the provisions of the HRA.

PROTECTION FROM ABUSE

Protection from abuse is another way of ensuring that people who use services are afforded their human rights. The Commission has published information telling people what they should do if they suspect abuse or mistreatment of older people who receive care at home or in a care home. CSCI has published a leaflet explaining what rights people have, including maintaining their privacy, control of finances, cultural and spiritual needs, and social life and meals.

CHOICE AND RISK

A key challenge for social care is to shift the balance towards supporting individuals who choose to take informed risks in order to improve the quality of their lives. Respect for people’s rights is enshrined in legislation and government policies to reform public services, including the Department of Health White Paper—Our Health, Our Care, Our Say—support people’s wishes to exercise choice and control over their lives. A CSCI report, published on 12 December “Making Choice Taking Risks” finds that older people continue to experience age discrimination from care services and are not always afforded the dignity and respect they have a right to expect.

Recent legislation has sought to enshrine people’s rights. For example the Mental Capacity Act 2005—which assumes that a person has capacity unless proven otherwise—will require all decisions to be made in the “best interests” of people that lack capacity. People with capacity must be allowed to take unwise decisions. This Act, together with other legislation designed to promote equalities and to safeguard human rights have the potential to create the right conditions to empower older people to exercise more control.

TEST CASE

The Commission is also aware of a “Public Authority” test case: Johnson v London Borough of Havering. In this case three older people are “challenging their local council’s threat to move them into private care. They say that moving them from their current home could put their lives at risk and strip them from receiving any protection from the Human Rights Act.” (source The British Institute of Human Rights) This case could have important implications in respect of human rights and social care and we will monitor the outcome carefully.

CONCLUSION

The Commission would welcome further clarification by Parliament, or through the courts, on the application of the Human Rights Act, as it applies to care services not currently included by the “public authority” test. For reasons set out in this submission, such as equity, and the need to include self funders, the Commission would welcome the extension of the provisions of the HRA to independent sector providers.

In the meantime CSCI has been working with a wide range of stakeholders, including providers of social care services, to put into place safeguards to ensure that dignity, respect and privacy and human rights principles are an integral part of our inspection activity, and of the way providers carry out their own work. Recent legislation, such the Mental Capacity Act 2005, do enshrine people’s rights and the Commission will ensure, as part of its inspection activity that such legislation is applied in care settings.

Paul Snell
Chief Inspector
15 December 2006

14. Memorandum from Justice

SUMMARY

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. We welcome the Committee’s continuing inquiry into the meaning of “public authority” under section 6 of the Human Rights Act 1998. JUSTICE submitted evidence to the Committee’s previous inquiry on this issue in May 2003. We also intervened in the Leonard Cheshire case in 2002 to argue for a broad definition. We continue to believe that the current definition given to “public authority” by the courts is too narrow.

3. Although we welcome the government’s own intervention in the R (Johnson and others) v London Borough of Havering in support of a broader definition, we also consider:

— the Lord Chancellor’s view that a broader meaning of public authority may drive private providers out of the market to be ill-advised; and

— the ODPM’s guidance to public authorities on contracting for services in light of the HRA to be inadequate.

NARROWNESS OF THE EXISTING DEFINITION

4. In our 2003 submission to the Committee, we set out our reasons why the Leonard Cheshire decision was wrongly decided. We restate those grounds in summary form here. In our view, the Court’s approach was flawed for three reasons: (i) it failed to have regard to the nature of the statutory duty; (ii) it failed to consider whether the Claimants themselves had any choice but to accept the regime of private care; and (iii) it gave insufficient weight to the question of public authorities evading public liability under the HRA by contracting out the discharge of its statutory duties to private bodies.

The nature of the statutory duty

5. In our view, the nature and purpose of the statutory duty to be important to the question of whether a private body is performing a “public function” within the meaning of section 6(3)(b) HRA. The fact that the duty being discharged is one referable to the rights of particular individuals—especially their unqualified rights—makes it more likely that the actions of the private body in discharge of that duty will attract public liability. Similarly, the fact that a private body’s activities are subject to regulation, the purpose of which inter alia is to ensure respect for individual rights, is another useful indicator that a private body discharging a statutory duty that engages such rights is performing a “public function”. As we noted in our submission to the Court in Leonard Cheshire, the important feature is the manner in which a private body acting in performance of a statutory duty is in a position to exercise “real power” in respect of the individuals concerned:\textsuperscript{71}

the key factor in determining whether or not a public function is involved in an area where the activity in question may be being undertaken in a different context for purely commercial reasons (eg in most circumstances private medical provision) is whether or not the body is in fact acting so as to assist in the discharge of the state’s role and duties (eg the provision of a free NHS service) with the result that the body in question is exercising real power over third parties.

The unavoidableability of the private regime

6. Another serious flaw in the existing definition of “public authority” is the failure of the courts to have due regard to the relative unavoidability of private regimes in particular cases. In Leonard Cheshire, for example, it was far from clear that the claimants had any realistic alternative to being placed in a private home by their local authority—eg whether the claimants had the option of living in a residential care home run by their local authority.

7. In our view, the mere absence of compulsion is not sufficient to remove the public character from the discharge of a public duty by a private body. The very fact that someone’s support has fallen to a local authority under section 21(1) NAA, for example, tends to shows that they lack the private means to make appropriate contractual arrangements. Instead, the avoidability (or non-avoidability) of any private regime discharging public duties seems to us a key feature in determining whether it attracts public liability. While it is plausible to distinguish for HRA purposes between public and private regimes where those subject are genuinely free to choose, it is much less so where the individual has no practical option but to accept private provision, eg the supply of accommodation to an asylum seeker or a recipient of income support. If “public authority” is to be interpreted generously, as the Court held in Donoghue, then JUSTICE submits the question of whether a given private regime was avoidable in practical terms must be closely considered by the courts in each case.

\textsuperscript{71} Para 9. Cf also 583 HL Official Report (5th Series) col 808, in debates over the then-Human Rights Bill where the Lord Chancellor justified the proposed general definition of “public authority” in the following terms “because we want to provide as much protection as possible for the rights of the individual against the misuse of power by the State” [emphasis added].
The possibility for evasion of public liability by public authorities

8. Thirdly, the current approach of the courts to the definition of “public authority” fails to give sufficient weight to the possibility of public authorities evading their liability under the Human Rights Act 1998 by contracting out the discharge of its statutory duties to private bodies.

9. As we noted in our submission in Leonard Cheshire, the European Court of Human Rights has clearly established that contracting states cannot absolve their responsibility to respect Convention rights by delegating their obligations to private bodies or individuals.72 This principle is analogous, too, to the special extension of public liability under Community law to otherwise private acts in order to prevent a state taking advantage of its own failure to implement a directive.73 And it is consistent with the Canadian approach to the extension of public liability to private bodies for “governmental” activities under section 32 of the Charter of Rights and Freedoms 1982.74 As La Forest J noted in McKinney v University of Guelph (whether a university in its capacity as an private employer could be liable as a “government actor” under section 32 of the Canadian Charter): “It would be strange if the legislature and the government could evade their Charter responsibility by appointing a person to carry out the purposes of the statute”.75

THE PUBLIC INTEREST IN OUTSOURCING V THE PUBLIC INTEREST IN PROTECTING RIGHTS

10. We note that the Lord Chancellor recently expressed concern that widening the meaning of public authority might drive private providers of services such as residential care out of the market for such services and so be counter-productive.

11. In our 2003 submission, we similarly noted that one of the considerations in the mind of the Court in Leonard Cheshire appeared to be a concern that attaching public duties to private bodies might inhibit the marketplace for community care services (and harm the apparent public interest in local authorities being able to reduce their costs by farming out services).76 A public body in order to perform its public duties can use the services of a private body. Section 6 should not be applied so that if a private body provides such services, the nature of the functions are inevitably public. If this were to be the position, then when a small hotel provides bed and breakfast accommodation as a temporary measure, the small hotel would be performing public functions and required to comply with the HRA. This is not what the HRA intended.

12. However, we consider that the importance of ensuring respect for human rights in the provision of public services outweighs the potential difficulties such an extension may involve. If the purpose of the Act is to give further effect to rights and freedoms guaranteed under the ECHR, it seems difficult to see how human rights can be promoted by restricting—as the Court did in Leonard Cheshire—the number and quality of the bodies that are publicly responsible.

13. We also note the criticism of a broad definition of “public authority” offered by Professor Oliver and relied upon at first instance by Stanley Burnton J in Leonard Cheshire, such that, were public liability to be extended to private bodies discharging public functions, then such bodies would themselves be deprived of the protection of the HRA.77 In our view, this criticism seems wholly misplaced. First, hybrid bodies would have the benefit of the saving provisions in Articles 8-11, as the Court itself accepted in Leonard Cheshire.78 Secondly, where a private body in the position of discharging public duties to individuals, the notion of “deprivation of protection” must be considered in the round. In such a context, we doubt whether the human rights of a private body engaged in a commercial enterprise could ever be afforded greater weight than those of the individuals who have no choice but to be subject to its activities.

14. While the extension of public liability to private bodies discharging public functions may in some cases reduce the benefits of outsourcing for public authorities, we consider that the extension of respect for rights to be a more important end. We also suspect that the burden of public liability would, in most cases, not be as onerous as is sometimes claimed. Similarly, the competitive nature of the market for public sector contracts suggests that those private bodies unwilling to shoulder the burden of public liability will be replaced by those that are. If the economic arguments against extending public liability are to be taken seriously, then it is important that those in favour should also be considered.

72 See Van der Mussle v Belgium (1983) 6 EHRR 163, esp paras 28–30; Cosado Coca v Spain (1994) 18 EHRR 1, para 39. Accordingly, the state is also responsible for the actions of any such delegate and must provide an effective remedy against their actions: Costello-Roberts v UK (1993) 19 EHRR 112, esp paras 29 to 32 and 37 to 40.
73 See Marshall v Southampton and SouthWest Area Health Authority (ECJ, case 152/84) para 49.
74 Note that the reference to “government” in section 32 of the 1982 Charter is narrower than that of section 6 HRA. See JUSTICE submission, paras 16–18 and the judgment of La Forest J in Eldridge v AG for British Columbia [1997] 3 SCR 624.
75 [1990] 3 SCR 229.
76 Donoghue, para 58.
77 Judgment of Stanley Burnton J, para 11; citing Oliver [2000] Public Law 476: “It would be very tempting for the courts, committed to maximising the protection of Convention rights, to give a wide meaning to ‘public authority’ but this could deprive a wide range of bodies of the protection of the HRA.”
78 Para 28.
15. We note that the Court in Leonard Cheshire placed weight on the possibility of public authorities using contractual means to safeguard the Convention rights of those subject to private care:79

If the arrangements which the local authorities made with [the Respondent charity] 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 and if this was done, this would provide additional protection. Local authorities who rely on section 26 should bear this in mind. Then not only could the local authority rely on the contract, but possibly the resident could do so also as a person for whose benefit the contract was made.

16. However, it seems difficult to see how private contractors would be less reluctant to take on contractual obligations than public obligations. Certainly it is questionable whether, in Leonard Cheshire, the private charity would have been willing to agree terms allowing patients to challenge its commercial decisions (eg closing a care home) on human rights grounds.

17. To this end, we note the November 2005 ODPM guidance to local authorities on contracting for services in light of the Human Rights Act. In fact, when looked at closely, the guidance seems to us to provide little practical guidance to public bodies other than eschewing “conceptual” provisions in favour of those which specify particular steps, procedures to be taken by private providers, and the possible use of output measurements. In and of themselves, recommendations of signing off procedures and checklists seem sensible instances of good practice. However, this emphasis on greater specificity seems only to beg our earlier question: if private providers fear public liability, why is it reasonable to believe that they will be more prepared to assume the same obligations (eg towards individual recipients of community care) by way of private agreement? As we also noted in our 2003 evidence, it seems deeply unsatisfactory to leave the task of negotiating the protection of Convention rights to the same public bodies who are themselves concerned to obtain the benefits of outsourcing.

18. Thus, while we welcome the ODPM’s attempts to secure best practice in agreements between public authorities and private providers, we do not believe such provisions are enough to close the current “protection gap” brought about by the narrow meaning given to “public authority” by the Court of Appeal.

Eric Metcalfe
Director of Human Rights Policy
15 December 2006

15. Memorandum from the Disability Rights Commission

1. INTRODUCTION

The Disability Rights Commission (“the DRC”) is a statutory body established by the Disability Rights Commission Act 1999 and its duties are outlined in section 2(1) of that Act, as follows:

The Commission shall have the following duties:

(a) to work towards the elimination of discrimination against disabled persons;
(b) to promote the equalisation of opportunities for disabled persons;
(c) to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons; and
(d) to keep under review the working of the Disability Discrimination Act 1995 and this Act.

The DRC provides advice and assistance, as well as representation, to disabled people in respect of cases brought under the Disability Discrimination Act. The Commission also intervenes in cases to promote equality of opportunity for disabled people.

From its inception the DRC has recognised that human rights are of enormous interest to disabled people. In September 2000 we published a guide to the Impact of the Human Rights Act on Disabled People, to encourage understanding of and awareness of the importance of the HRA. The fact that the original print run of 6,000 had been distributed within six months is testimony to the great resonance that human rights have for disabled people.

The Report highlights a number of ways in which disabled people’s human rights are affected.

— Article 2, which guarantees the right to life, will have a direct impact on the service disabled people can expect in the health system. It will strengthen their equal right to medical treatment in life-threatening circumstances and it should prevent more routine decisions being made on the basis of the inferior quality of life of disabled people. It should lead to a greater consistency in delivery of services and may have some impact on the allocation of resources within the NHS.

79 Para 34.
— Article 3 protects disabled people against inhuman or degrading treatment. There are many examples where disabled people have been neglected, abused or treated with cruelty in residential homes and prisons and cases where the standard of community care has been seriously deficient. Many public authorities may be affected by this Article.

— Article 5 provides for the right to liberty. It is relevant to people with mental illness who are compulsorily detained and to other disabled people in institutional or community care. In the latter instance, Article 5 will pose dilemmas for the courts and for public authorities in balancing safety with individual rights, particularly for people with learning difficulties or with Alzheimer’s disease who may need the protection of restrictions being placed on their freedom. Persons detained under the mental health laws must be released once they are no longer of unsound mind. Their mental condition must be periodically reviewed. In these respects the UK Mental Health Act needs reform.

— Article 6 provides rights of due process in criminal and civil cases. It imposes standards in the determination of social security disputes and complaints in the health service as well as on courts and tribunals. In giving an individual greater rights to be heard and possibly greater rights to legal representation it will benefit those disabled people for whom access to the law has been virtually impossible.

— Article 8 protects the right to private and family life and Article 12 the right to marry and found a family. These articles have widespread implications for disabled people and will challenge the current policies and practices of local authorities. Rights to fertility treatment, the sterilisation of young women with learning disabilities, the rights of severely disabled people to live independently, and rights of adoption are among the issues that will arise. Its main impact for disabled people will be in ensuring that local authorities treat disabled people equally with non-disabled people in the delivery of services. It may lead to extra protection in areas of housing and access to medical records and other information in the hands of public authorities.

— Disabled people who find difficulty in accessing information held by public authorities are likely to be assisted also by Article 10 which guarantees freedom of expression.

— Protocol 1 protects rights of property, of education and the right to participate in elections. While educational authorities must respect the philosophical convictions of parents of children with special educational needs Protocol 1 is unlikely to strengthen a child’s right to a place in a mainstream school. Since children also have rights under the Act it will impose new requirements on the Special Educational Needs (SEN) Tribunal to consider the child’s views. Together with new laws to prohibit discrimination in education, the Protocol will help to outlaw practices which marginalize disabled children in schools and deny them access to further and higher education.

— The right to property may have implications for the treatment of the property of disabled adults in care and to their receipt of welfare benefits. It should help in ensuring a speedy determination of their claims for benefit.

We are limited in the work that we can do to promote the human rights of disabled people both by our limited resources but also by statute. Our remit does not extend to enforcement of the Human Rights Act, although this was a power recommended by the Disability Rights Taskforce. The Secretary of State can extend the DRC’s enforcement remit by regulations, and we have asked him to do so in respect of individual disabled people in taking forward cases under the HRA.

The DRC has, however, been able to use its powers to intervene in a number of cases involving human rights issues—such as R (on the application of Burke) v General Medical Council [2005] EWCA Civ 1003, R v East Sussex County Council Ex parte A, B, X and Y High Court CO/4843/01 17 December 2002 and 18 February 2003, in order to promote the human rights and equality of opportunity of disabled people.

More recently, the Commission has intervened in the case of R (on the application of Johnson and others) v London Borough of Havering. It is of considerable concern to the Commission that the definition of a function of a public nature has been given such a narrow interpretation in the dominant caselaw. In our view, this means that large numbers of potentially vulnerable people are left without the protection of the Human Rights Act. We have set out below some extracts from our witness statement in the Havering case, to illustrate our concerns.

Extracts from DRC witness statement in the case of R v London Borough of Havering

The DRC has a vision of a society in which all disabled people can participate fully as equal citizens including the right to live independently in the community. The DRC believes the promotion of independent living is a key objective to be secured in order to meet the objectives in section 2(1) of the DRC Act 1999. A key aim of the DRC’s model of independent living is that:

There should be a basic enforceable right to independent living for all disabled people.80

80 1 DRC 2002, Policy Statement on Social Care and Independent Living.
The DRC defines independent living as:

“All disabled people having the same choice, control and freedom as any citizen—at home, at work and as members of the community.”

The DRC is involved in work in this vital area, including this case, as a matter of priority as our vision will not be fulfilled unless, and until, disabled people have the same options, ability and right to live independent lives in the community as non disabled people.

However, there remain significant barriers to achieving the goal of independent living for all who wish it, resulting in large numbers of disabled people being unable to live independent lives in the community. That means that, as explained below, many still live in residential care, similar to that which is the subject matter of the present case, such that the applicability and enforceability of Convention rights remains an issue.

However, the DRC agrees with the Claimants and Defendant that the decision in Leonard Cheshire was wrongly decided and supports and adopts their submissions to that effect.

It does so in the context of its experience that disabled people who live in private residential care homes, funded by local authorities, are some of the most vulnerable members of our society who are in particular need of the protections afforded by the Human Rights Act in relation to “Convention rights”.

Throughout the 1970’s and 1980’s there were many investigations and enquiries highlighting the appalling conditions, abuse and inhumane and degrading treatment to which disabled people living in long term residential care were subjected.

A major objective of the NHS and Community care Act 1990 was to “promote the development of domiciliary, day and respite services to enable people to live an independent and dignified life at home wherever feasible and sensible”, which, it was hoped, would see a shift in the way that care was provided.

Where that happens, disabled people have greater control over their lives, particularly where they receive local authority funds through “direct payments” or a “User Independent Trust” with which to purchase their care directly. They are thus able to ensure that their Convention rights are protected.

However, despite the clear intentions of the 1990 Act, many people are still placed in residential care, rather than being supported in their own homes. Those that are in residential homes are, therefore, often the most vulnerable with the most intense needs. They have a particularly acute need for the protections of the Human Rights Act when it comes to matters such as dignity, privacy, family life and protection from inhumane and degrading treatment.

By way of an example of the way in which many disabled people are compelled to take up residential care (even though they could well live in the community if properly supported), I note that many disabled people, particularly wheelchair users, find there is a lack of suitable accessible accommodation in the community. Despite the implementation of the DDA 1995, and developments in planning legislation, the design of most buildings has not taken account of disabled people. Research suggests that there is an approximate shortfall of 300,000 homes for disabled wheelchair users, leaving individuals in unsuitable and inaccessible accommodation or necessitating a forced move into residential care.

Results from the 2001 Survey of English Housing show similar difficulties faced by disabled people. Over 270,000 households in England contain someone with a serious medical condition or disability, living in accommodation that is not suitable for that person.

As a result of the severely restricted housing opportunities open to disabled people, many are faced with no other option but to move into residential accommodation. Once in such accommodation, even if placed there against their wishes, a disabled person is deemed to be suitably housed.

The Commission for Social Care Inspectorate (which inspects local authority funded residential care home provision) also provides anonymous examples of bad practice taken from care homes that they have inspected. If Leonard Cheshire is correctly decided, the question of whether individuals, subject to human rights breaches, have a remedy, would depend purely on whether the authority in question contracted out residential care or employed council staff to provide the accommodation and support.

Whilst the Commission for Social Care Inspectorate provides some protection against the worst examples of bad practice in the sector, individuals in receipt of substandard levels of residential care should not have to rely on the “arm’s length” regulatory function of the Inspectorate to uphold their human rights. The Human Rights Act, itself, offers protection beyond that of the regulator, setting out not just a prohibition on negative actions, but providing a positive duty on authorities to prevent individuals having their rights breached and to ensure that inhumane and degrading treatment does not occur in the first place.

81 See for example the Mary Dendy Hospital Enquiry 1972 or the Rampton Hospital Enquiry 1982.
Recent examples of bad practice in care homes from CSCI inspection reports include the following example, found in an older people’s care home:85

A CSCI inspector found, on an unannounced visit to a care home on the south coast, that the level of hygiene left much to be desired. Residents seemed quite listless and unmotivated.

Jim Towers has been inspecting care homes for many years, and so has become quite used to seeing varying standards of care.

But he was quite surprised, when visiting this care home, to find that that the place smelt of stale urine.

There was dust on the furniture and the windows on to the garden were smeared with grime.

He also was quite saddened to see that the residents were slumped in front of the television, in the lounge, in the middle of the day.

“It wasn’t as if any of them were even watching it,” he said.

“They had it on at full volume, probably for those with hearing difficulties”.

“So whatever daytime programme they were watching was boring them enough to be of little interest”.

“But it was loud enough to prevent any other form of communication”.

“This meant that each resident was just slumped in their own armchair and in their own world, when they could have been having a good chat, or a game of cards or something”.

“’I asked for the remote control to the television, to turn it down. But none of them knew where it was.’”

On talking to the manager, Jim realised that this wasn’t just a one off. It was what happened on most days.

CSCI also give an example of bad practice identified during an inspection of a residential home for individuals with learning difficulties, carried out by Marion Trewellyn, a CSCI inspector:86

Communication problems between staff and residents seems to be a real stumbling block at Beech House, and not just in the language that is used.

Marion found that the staff are often out of touch with the needs of the residents for a number of reasons.

Inspectors on a recent visit to Beech House also found that the behavioural psychological guidelines were out of date.

New care plans were not in place for all residents and reviews of these plans were not happening often enough.

This can affect how well the staff know and understand the changing needs of each resident.

“On top of that, the daily notes that they keep about events in the home are not sufficiently detailed and don’t show how each resident’s needs, which are listed in their care Plan, were met on that day,” says Marion.

“This gives the impression that the staff don’t know their residents’ needs very well—or, at least, well enough to fill in notes about them.”

Another problem is the food. Although there’s always plenty to eat, the ingredients are not always as nutritious as could be.

Vegetables are not always served, and when they are, they tend to be frozen and tinned.

The residents also need help in deciding what they should be eating but, at this home, there is no advice on healthy eating.

“Records on what medicines are given out, and when, also leave a lot to be desired,” says Marion.

“We found a number of errors, which is worrying because bad record keeping could have a direct knock on effect on residents’ health.”

CSCI is continuing to work with the home to help improve standards.

It is not clear whether these particular residential homes were managed by the local authority or a private or voluntary provider and, accordingly, whether (assuming Leonard Cheshire to be correctly decided) the individuals would have been protected by the Human Rights Act.

The DRC helpline has also been contacted directly on a number of occasions regarding alleged human rights abuses of people with severe and profound learning difficulties and physical disabilities. Examples of unacceptable treatment include:

Toileting

Residents left to sit in own urine or faeces.

X has said, “wee wee” and made the Makaton sign for toilet several times but has not been taken to the toilet by staff.

X has been left alone several times in toilet for 30–45 mins.

Care

It has been agreed, last year, that X should have her teeth taken out to prevent her from biting her hands. However, several people who worked with X, and myself had noticed that X’s hands were cleared from any bites. For over a year I have not witnessed X put her hands in her mouth.

Since I (a volunteer) have been on the villa this is a list of the people who have had bruising and “accidents” there:

- L fall marks on face 3x
- X black eye “fall at toilet”
- Y black eye, fall
- Z black eye
- X red marks on arm, crying
- M bruise on face
- N broken leg

Clothing

- Y frequently wears a jacket with a broken zip and that his trousers fall down to his ankles.
- Y shows awareness of his trousers falling down because he holds them up when he is walking. This is an additional disability for him and he also has cerebral palsy in the other half of his body so he has no hands free when he is walking.

Despite the Government’s intentions, more than a decade after the implementation of the Community Care Act and accompanying policy guidance, there are still nearly 300,000 people supported by local authorities in institutional care in England. Only around 9,000 people currently receive direct payments to enable them to live independently, by organising their own support arrangements.87

The number of disabled people in residential care, despite government policy, is increasing. Between 1997 and 2002, the number of people with physical and sensory impairments, in local authority supported residential and nursing care, showed a modest decrease. For people with learning disabilities, on the other hand, there was an increase of nearly 20% from 25,446 to 30,345, while the figure for people with mental health problems rose by more than 40% from 7,965 to 11,275.88

Research shows that many disabled people are living in institutions inappropriately and/or against their wishes.89 Despite these factors disabled people still have no right to refuse institutional care and have no protection against being compelled to live in institutional care against their wishes.

Older people and disabled people

An extensive body of research has also shown a strong association between increasing age and the onset of disability, particularly in older age groups. It is therefore expected that, as rates of disability increase with age, older people will be proportionately over-represented in the disabled population.

It is estimated that nearly half, 48%, of the disabled population are aged 65 and over, and 29% are aged 75 years or more, compared with 21% and 9%, respectively, of the general adult population.90 It should be noted that the report excluded people living in non-private households (mainly institutions such as residential and nursing homes). Were this population included, it is likely that the age distribution of the disabled population would appear older still.

It is well known that Britain has an ageing population, with demographic trends over the next 20 years projecting a fall in the proportion of the population under 25 years and a large increase in the over 65s. To enable older and disabled people to remain active, independent, integrated and contributing members of society will require changing the attitudes of the whole population. It will also require the embracing of inclusive design for the whole population, to reduce the impact of disabling barriers in the built environment and in product design,91 thus allowing disabled people to avoid a move into residential care.

The evidence set out above suggests that, if Leonard Cheshire is correct, large (and increasing numbers) of disabled people would not have their rights protected under the HRA as the care staff they are dependant upon for support are not employed directly by the local authority.

Possibilities for change

The DRC agrees with the Joint Committee that making a change to the Human Rights Act is not the most appropriate means of ensuring that the Human Rights Act’s breadth is as originally intended—it is in particular by means of our and others’ interventions in the Havering case that we would hope to see the effects of the decision in the Leonard Cheshire ameliorated. However, in order to address the particularly acute position of those in residential care homes, we believe that further consideration should be given to the feasibility and desirability of specific provision for registered homes to be deemed public authorities for the purposes of the Human Rights Act.

Catherine Casserley
Senior Legislation Adviser
19 December 2006

16. Memorandum from the MHA Care Group

MHA is a charity providing care homes, housing and support services for older people throughout Britain. MHA serves 8,500 older people in residential and nursing care homes, specialist dementia care homes, sheltered housing schemes and community projects.

As a major charitable care provider, MHA has significant concerns with regard to any proposal to include such providers within the definition of “public authorities” for the purposes of the Human Rights Act 1998.

MHA’s concerns may be grouped under three main headings:

Independence

Regarding charities as “public authorities” would lead to a blurring of the voluntary sector’s independence. The government acknowledges that the sector makes a valuable contribution to society, recognising that its relative autonomy and difference enables innovative solutions. Any move towards making the voluntary sector an agent of the state would damage the concept of charity and ruin charitable giving.

Limit service improvement

The restrictions of the Act for public authorities could lead to service improvement being limited if an individual states that their human rights are infringed, ie care homes which are no longer viable may not be able to be replaced by a better one. Continuing to provide services in care homes which are not to the standard a provider would wish to offer will also limit service development. The need to continue operating services which are no longer financially viable is not cost-effective.

It is our view that imposing these limitations could lead to providers leaving the market if they were “public authorities” for the purposes of the Human Rights Act 1998.

Individual rights in communal living

The question of how far one individual’s rights should override another’s or indeed a whole community is raised by this issue. Service improvements may be made in everyone’s interests but one individual may prevent this by citing the Act, thus overriding the best interests of the majority. This has implications for the future of the service, the majority and indeed, that one individual in the future.

MHA would like to clearly state that it is not in the best interests of the voluntary sector and those receiving social care for charities to be included in the definition of public authorities for the purposes of the Act.

Anna Marshall-Day
Company Secretary
December 2006
17. Memorandum by The British Institute of Human rights

1. The British Institute of Human Rights (BIHR) is a human rights organisation that is committed to challenging inequality, injustice and disadvantage in everyday life. We aim to achieve this by supporting others to use human rights principles in their policy and practice. We want a society that has become stronger because all human beings are equally valued, can participate fully and are treated with fairness, dignity and respect. We take forward this vision by raising awareness of the value and relevance of human rights standards in tackling inequality and social exclusion, making these standards meaningful by providing practical human rights supports to both the voluntary and community sector and the public sector. Our core activities include training and other development supports such as information resources and consultancy, pilot and demonstration projects, research and policy analysis, campaigns and strategic legal interventions.

2. This submission draws on our particular experience developing and delivering human rights supports for organisations in direct contact with disadvantaged and socially excluded people. Over the past four years, BIHR has delivered more than 230 full-day training sessions to voluntary and community sector organisations working with groups including older people, disabled people, people living with mental health problems, and refugees and asylum seekers. Since 2003, BIHR has also worked with public sector employees from over 60 different organisations including social services, housing and education departments in local authorities, NHS Trusts, inspectorates and central government departments.

3. BIHR draws wider lessons from our experience of capacity-building with the voluntary and public sectors by channelling our evidence and insights into policy recommendations. We work closely with decision makers (and those who influence them) at all levels of local and central government to demonstrate the value of human rights based approaches in tackling inequalities and promoting social justice.

4. It is on the basis of this work that we make this submission as this is where we can offer practical insights into the important issues addressed in this call for evidence.

5. From the outset BIHR would like to stress the fundamental importance of this issue and the urgent need for a solution to be found. We have sometimes heard it said that there is no “protection gap” when residential care is outsourced since the local authority retains ultimate responsibility under the Human Rights Act 1998. We know from direct experience that this technical approach denies the reality on the ground:

Firstly, public awareness of human rights remains very low. We know from our consultancy and training that we have to invest considerable time initially explaining basic human rights ideas and entitlements—to both individuals and organisations alike. Misperceptions prevail—for example that you have to go to court to assert a right—as well as fears that asserting one’s rights can antagonize a service provider and aggravate a problem. Court rulings that deny the legal responsibility of voluntary and private residential care providers to protect human rights compound these problems. They confuse matters and place a further barrier in the way of someone who does wish to assert their rights directly against the organisation that is actually providing them with a service day-to-day. We are frequently asked about the public authority issues by individuals and organisations (including senior managers) who are confused as to their obligations.

Secondly, when the Act was introduced Ministers made it clear that individuals should not always have to go to court to have their rights respected or fulfilled. Instead they would have a new “language” with which to win arguments. An individual in residential care is not in regular or daily contact with the public authority that contracts out the service they receive. They are in contact with the staff and managers who run the home in which they live. In practical terms, to raise a human rights concern in the way that was intended, it should be those directly providing services who should be taking responsibility.

Thirdly, the different treatment of organisations depending on their “character” directly contradicts the broader underlying purpose of the Human Rights Act. This was to stimulate a culture in which organisations were routinely respectful of human rights considerations, proactively rather than reactively taking these into account. The present situation sends a negative signal to residential care providers about their crucial role in contributing to this culture of respect for human rights as well as discouraging individuals from using the language of human rights to challenge poor treatment at its source. Instead of every organisation which provides care services and support to individuals routinely building human rights considerations into their work, they will look to the local authority who contracts them to “take care” of human rights.

BIHR’s capacity-building work demonstrates how useful human rights arguments can be when used by an individual or an advocate to directly challenge poor service. The following representative examples come from our work with the UK voluntary and community sector:

— The parents of a learning disabled patient in a hospital noticed unexplained bruising on their son. When they raised the issue with staff, their concerns were dismissed and they were no longer allowed to visit. After receiving human rights training they used their son’s right not to suffer inhuman or degrading treatment (Article 3) and their right to respect for family life (Article 8) to challenge the hospital. The result was that the ban on them visiting has been overturned.
A local authority was failing to provide school transport for physically disabled children in its area with special educational needs. A local action group used human rights arguments to persuade them to change their policy—recognising that they needed to get out and about and take part in social activities just like other children (Article 8).

A man with mental health problems was placed in seclusion in hospital where he kept soiling himself. Staff refused to clean up the mess or move him to another room, arguing that the same thing would happen again. Local volunteers argued that this was a breach of Article 3, which bans "degrading treatment". As a result, the man was moved to a new room.

A care home for elderly people had a blanket policy of not providing residents with bed-pans between lunch-time and tea-time. This was challenged by a local support group as a breach of the residents’ right to respect for their private life (Article 8). The policy was changed.

In each of these examples, the relevant institution changed the problematic policy or practice once the law was explained to them: there was no need to go to court. This is the case with many of our practical examples—some of the most sensible uses of the Human Rights Act are “on the ground” and not in the courts.

These examples also provide an insight into the extent and range of human rights concerns that exist in the community. Human rights are not academic—rather they are central to the lived experience of “ordinary” people across the UK. The everyday importance of human rights has been clearly demonstrated by a number of high profile cases involving older people in residential care. For example, the separation of Mr and Mrs Driscoll when Mr Driscoll was placed in residential care provoked a media outcry given the couple’s mutual dependencies—he is unable to walk and relies on her to get around while she is blind and uses him as her eyes. A campaign, led by the family and supported by human rights and older people organisations as well as the press, emphasised their right to respect for private and family life (Article 8) and was successful in persuading the local authority to reunite the couple in shared accommodation.
Developments in case law and their implications

10. As the Committee is aware, the Government intervened in a recent legal case brought in an attempt to close the “protection gap” opened by the Leonard Cheshire case.93 This case, Johnson v London Borough of Havering, involved residents of three care homes owned and run by the local authority.94

11. The High Court held in the Havering case that it was bound by the Court of Appeal’s decision in the Leonard Cheshire case. However, permission to hear the residents’ appeal has been granted by the Court of Appeal meaning that the merits of the Leonard Cheshire approach will, we hope, be properly re-examined by the courts. The hearing is scheduled for 24 January 2006.

12. The Havering case coincided with extensive work by Government officials for a consultation on the “public authority” issue, which was interrupted while the Government intervened in the case hoping that it would provide the necessary clarification. We understand that this led to the postponement of a public consultation on the issue. If the Havering appeal is unsuccessful, the Committee should recommend that the Government launches its public consultation as a matter of urgency and that legislative time be secured for an amendment to the Human Rights Act if this is deemed an appropriate course. If there are genuine and evidenced concerns raised by government departments about the implications of any reforms for contracting out, then these should be shared as part of any consultation so that they can be properly responded to.

Practical implications of the restrictive meaning given to “public authority” in addition to those identified in the previous Committee’s report

13. In its Seventh Report of Session 2003–04, The Meaning of Public Authority under the Human Rights Act,95 the previous Committee noted a number of practical implications of the restrictive meaning given to “public authority” as a result of the Leonard Cheshire case including the uncertain scope of the Human Rights Act and its reduced protection for people at some of the most vulnerable moments in their lives.

14. BIHR would like to highlight a particular practical implication of the uncertainty of the legal definition of public authority under the Human Rights Act. The anxiety and disruption caused by seeking advice, contemplating legal proceedings and initiating litigation should not be underestimated. These barriers are reflected in the low number of older people who pursue complaints (and the fact that it took several years for a test case to emerge that challenged Leonard Cheshire), despite evidence (from Action on Elder Abuse and other sources) that they are subjected to human rights abuses. Moreover, BIHR strongly believes that the onus should not be on vulnerable individuals having to bring legal proceedings to assert their rights. Those who work with them or on their behalf (often lay advisers or advocates from the voluntary sector) should raise with the particular authority the human rights which are not being respected. In BIHR’s direct experience of training a range of individuals and organisations, trying to inform non-lawyers of the test used to determine which bodies might be caught by section 6(3)(b) of the Human Rights Act is extremely challenging. In practice, therefore, advocates who assist potential victims are unable to raise Convention rights issues with any confidence when negotiating on behalf of their clients. In addition, where a body is unsure whether or not the Human Rights Act applies to it at all, it is more likely to ignore or resist any arguments based on human rights. As a result, vulnerable, older individuals have not benefited from the protection which the Human Rights Act was intended to offer, and the agenda to foster a human rights culture has been severely frustrated.

Whether private providers would leave the market if they were “public authorities” for the purposes of the Human Rights Act 1998

15. The question of whether private providers would leave the market if they were “public authorities” for the purposes of the Human Rights Act is an evidential question. The Lord Chancellor’s remarks suggesting that they would leave the market were not accompanied by any evidence.96 BIHR is not aware of any research that demonstrates that private and voluntary sector providers would leave the market in these circumstances and feels strongly that this untested hypothesis should not guide public policy. In any case, voluntary and private providers of residential care should be proactively supported to deliver their services in a way that respects human rights. If they were considering quitting the residential care business because of a duty to respect human rights, then it seems to us it would be incumbent on the Government to dissuade them, for example by demonstrating that human rights are a practical tool for improving service delivery.

94 R (on the application of Johnson and others) v Havering LBC [2006] EWHC 1714 (Admin).
95 HL Paper 39/HC 382.
16. BIHR’s experience of providing training to voluntary sector providers of residential care suggests that many providers do take seriously their responsibility to protect the human rights of those in their care and, irrespective of whether they are caught by the “public authority” definition, consider it good practice to train their staff to act compatibly with human rights. Clarification that the Human Rights Act applies to all such providers of residential care is an essential step towards ensuring that these obligations are taken seriously across the board and that good practice becomes embedded in the sector.

Potential means of addressing the problem including by means of primary legislation—if primary legislation, how precisely should this be done

17. There is a possibility that the Court of Appeal will use the Havering appeal to reverse the narrow approach it adopted four years ago in the Leonard Cheshire case and that the “protection gap” opened by this decision will finally be closed. If the Havering case has a different outcome, then the Government and others will need to consider other options. BIHR plans to convene a broad group of stakeholders to explore these options, including the use of primary legislation, in more detail. This is a genuinely complex issue and a solution must be found. It is vital that the full implications are considered, especially as the “public authority” issue is not unique to the Human Rights Act. The language in section 6 of this Act is mirrored in race, gender and disability equality legislation and it is vital that these equalities measures are considered alongside human rights laws.

18. Outsourcing of public services in health and social care and other areas is on the increase, and ever more nuanced breeds of service providers including NHS Foundation Trusts and Academies are filling the shoes of pure public authorities. The pace of these developments means that the legal uncertainty over the scope of the Human Rights Act becomes ever more unacceptable. Given the widespread consensus that the present situation is unacceptable, BIHR wants to see a solution urgently identified to the public authority issue. This solution must achieve the original ambition—for meaningful legal protection under the Human Rights Act to be available to all individuals in relation to those organisations providing them with a public service.

Katie Ghose
Director
2 January 2007

18. Memorandum by The Rt Hon The Baroness Ashton of Upholland,
Parliamentary Under-Secretary of State, DCA

In light of the Committee’s recently-announced inquiry into the above subject, I am writing to update you on some recent developments that the Committee may wish to consider.

The duty under section 6 of the Human Rights Act not to act incompatibly with the Convention rights falls upon “public authorities”. These are defined as courts and tribunals, and “any person certain of whose functions are functions of a public nature”.

Following a series of judgments, particularly in the case of R (on the application of Heather) v Leonard Cheshire Foundation (the “Leonard Cheshire case”), the interpretation given to “public authority” in the Human Rights Act is not as clear as it might be. In particular this term has not been interpreted as widely as the Government and Parliament originally intended, particularly where a public function is being carried out other than by a core public authority. The most significant effect of this is that where a person in the care of a local authority is resident in a private care home, the care home itself may not be a public authority for the purposes of the Human Rights Act.

The previous Joint Committee reported on this subject in 2004, and you will be aware that the Government accepted the Committee’s recommendations. In particular, the Committee recommended that amending the Human Rights Act was not a suitable approach as it would “be likely to create as many problems as it solves”. Instead, the Committee recommended that the Government should, amongst other things, seek to intervene in a suitable case to argue for its original intention in the interpretation of “public authority”.

The Committee is aware of the case of R (on application of Johnson & others) v London Borough of Havering, in which residents of local authority care homes seek to the challenge the legality of the transfer of those homes to the private sector. A key question in the case is whether, following a transfer, the homes themselves would be public authorities for the purposes of section 6 of the Human Rights Act 1998 in respect of the residents in local authority care.

The Secretary of State for Constitutional Affairs intervened in the case in the Administrative Court to argue for a functional interpretation of “public authority”. As Lord Falconer informed the Committee in his recent evidence, those arguments were not accepted by the Court, and permission to appeal to the Court of Appeal was refused.
I am however pleased to inform the Committee that the Court of Appeal has now granted the claimants permission to appeal in Johnson, and has invited the Secretary of State to take part in the appeal, on the basis particularly that the Government’s submissions are arguable and of significant importance. The case has been set down for hearing on 11 and 12 January, and the Government will make submissions to the Court in similar terms to those at first instance.

I believe that these cases represent at present our best opportunity for clarifying the definition of “public authority” after Leonard Cheshire, and I am very pleased that the Government’s strategy has resulted in a reconsideration of this issue by the Court of Appeal. Should this strategy ultimately prove unsuccessful, we would of course consider all available options when assessing how to proceed. However, at this stage, I continue to support the recommendation of the previous Joint Committee that litigation offers the fastest and most effective way of addressing this issue.

Catherine Ashton
19 December 2006

19. Memorandum from the Commission For Racial Equality

1. Introduction

The Commission for Racial Equality (CRE) welcomes the opportunity to respond to the inquiry by the JCHR into the meaning of “public authority” under the Human Rights Act 1998 (HRA).

The CRE has the following duties under the Race Relations Act 1976 (RRA):
— to work towards the elimination of discrimination and harassment;
— to promote equality of opportunity and good race relations between people of different racial groups; and
— to keep under review the workings of the RRA. 97

One of the CRE’s primary goals is to create an integrated society. We have defined an integrated society as being based on three inter-related principles:
— Equality—for all sections of the community—where everyone is created equally and has a right to fair outcomes.
— Participation—by all sections of the community—where all groups in society should expect to share in decision-making and carry the responsibility of making society work.
— Interaction—between all sections of the community—where no-one should be trapped within their own community in the people they work with or the friendships they make.

This submission indicates:
— the position of the CRE on developments to date;
— why the issue is highly relevant to the work of the Commission for Racial Equality and the practical implications of a restrictive interpretation under the HRA for racial discrimination claims;
— the implications of a restrictive interpretation on equality legislation; and
— possible ways forward.

2. The Position of the CRE on Developments to Date

The CRE did not make a submission to the committee’s inquiry during 2003–04 into the meaning of a public authority but it agrees with a number of the conclusions, such as:

“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)

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)

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)\(^98\)

In our view the gaps and uncertainties expressed three years ago are only in danger of growing today.

It is clear that the volume of public procurement in terms of public services being provided by the private sector is ever increasing. The CRE Public Procurement Guide defines public procurement as:

"the process by which a public authority enters into a contract with an external supplier to carry out works or provide goods and services. The term encompasses the full range of public authority contracts, including private finance initiative (PFI) projects and public private partnerships (PPP). It does not include the decision to ‘buy’ from an external supplier."\(^99\)

Public authorities (such as central government departments, local authorities and agencies such as the NHS) now spend £125 billion per year on procurement.\(^100\) This means that there are an increasing range of situations in which the current narrow interpretation of the scope of the definition of public authorities (in so far as it relates to private bodies exercising public functions) could adversely affect disadvantaged groups such as ethnic minorities.

In addition, although the Department for Constitutional Affairs (DCA) and interested parties such as the Disability Rights Commission intervened in the case of R (on the application of Johnson and others) v London Borough of Havering\(^101\), in seeking to assert the need for a broad interpretation to the definition, we note the High Court decided it was bound by the Court of Appeal decision in Leonard Cheshire in applying a narrow interpretation of what constitutes a private body exercising public functions. As leave to appeal to the Court of Appeal or House of Lords was refused, this means there is great uncertainty as to the scope of the definition and narrow interpretation in Leonard Cheshire continues to prevail.

We also note that since that judgment this year the Lord Chancellor has stated his preferred approach is to seek to intervene in another appropriate case rather than introducing primary legislation to attempt to clarify the law.\(^102\)

The CRE does not agree with that approach for the following reasons:

— the problem in terms of the gap in human rights protection for vulnerable groups including ethnic minorities is only increasing as the numbers of private bodies exercising public functions increases;

— even if the DCA intervenes in a case, that will take a considerable period and this is an issue which requires urgent attention. In addition, a court it would by necessity need to restrict its analysis on the particular facts of the case and the particular sector of private bodies exercising public functions. This means that it may not provide more widely applicable judiciary guidance on the scope of what constitutes a private body exercising public functions; and

— the issue of what constitutes a public authority is also relevant to equality legislation in two contexts: the requirement for public authorities not to discriminate in the exercise of their functions and the duty on public authorities to have due regard to the need to eliminate unlawful discrimination, promote equality of opportunity and good relations between groups (the “race equality duty”).

As the definition of what constitutes a public authority for the purposes of equality legislation is very similar to the definition under the HRA, similar uncertainty and gaps in protection could arise and there is a need for a comprehensive approach rather than a piecemeal approach looking only at the HRA. This is even more the case given that issues associated with breaches of human rights by public authorities could be inter-connected with issues of racial discrimination by public authorities and their race equality duty. This is discussed in greater detail below.

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98 Pages 52–53 of the 7th report of session 2003–04, The Meaning of Public Authority under the Human Rights Act, JCHR.

99 Glossary, page 11.


Given the above the CRE considers that it is desirable for the HRA and relevant equality legislation to better define what will constitute a public body where it is a private body exercising public functions. In that regard we agree with some of the comments of the JCHR in its latest report on the HRA:

“...although we do not seek to discourage the Government from pursuing its strategy of intervening in an appropriate case, the failure of that strategy to date and the growing urgency of the problem mean that it is now time to give serious consideration to whether or not to introduce legislation to reverse the effect of the Leonard Cheshire decision and to seek to give proper effect to Parliament’s intention at the time of the passage of the HRA. We do not think it would be advisable to try to prescribe a comprehensive list of persons or bodies who are public authorities for the purposes of the Human Rights Act, and we recognise that seeking to define ‘public authority’ generally would not be desirable because of the knock-on effect on other areas of law. However, we think there may not be insuperable obstacles to drafting a simple statutory formula which makes clear that any person or body providing goods, services or facilities to the public, pursuant to a contract with a public authority, is itself a public authority for the specific purposes of the HRA.”

The reasons for the need for legislative reform under the HRA and equality legislation in the context of racial discrimination is examined below.

3. Relevance of the Meaning of Public Authority to Human Rights Claims Involving Racial Discrimination Elements

This part of the submission seeks to address the evidence requested concerning the practical implications of the restrictive meaning given to “public authority” under the HRA.

Under the European Convention on Human Rights, where one of the convention rights is engaged, article 14 provides that those rights shall be secured without discrimination on any ground which includes race, colour, language, national or social origin, association with a national minority, or other status. There can therefore be no racial discrimination in the enjoyment of convention rights.

There are a number of examples of situations in which claims under HRA which involve a claim of racial discrimination could involve arguments as to liability of a private body and whether it constitutes a functional public body for the purposes of the HRA. Some possible examples of such situations are provided below.

3.1 Privately run prisons

A claim of breach of the right to life under article 1 and article 14 where in a prison a person of ethnic minority origin has been murdered by a white inmate. A case similar to the murder of Zahid Mubarek in Feltham Prison (if a claim of racial discrimination had been brought) is a possible example.

The formal investigation of the CRE into the death of Zahid Mubarek and racism in the Prisons Service104, as well as the public inquiry into the death of Mr Mubarek105 provide clear evidence of a culture of racial discrimination within the Prisons Service.

The then Home Secretary prior to the enactment of the HRA stated in parliament:

“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.”

An issue therefore arises as to whether a private security firm running a prison in such circumstances would be subject to the provisions of the HRA and any potential claim involving racial discrimination.

3.2 Privately run detention centres for asylum seekers

An example of such a situation would be a claim of a breach of the right to liberty under article 5, together with a racial discrimination claim under article 14.

It is likely that several thousand asylum seekers are held in immigration detention each year. Several hundred of these are likely to be held in prisons.107

103 Ibid at paragraph 92.
107 The government does not publish annual figures. Instead it publishes a quarterly “snapshot” of how many people are currently in asylum detention. On 24 June 2006 there were 1,825 asylum seekers in detention. 120 of these were in prison establishments. Home Office, Asylum Statistics: 2nd Quarter 2006: http://www.homeoffice.gov.uk/rds/pdfs06/asylumq206.pdf
The policy of detention of asylum seekers has been used by the government since March 2000 and was last updated in February 2006. Detention is used in purported “fast-track” cases where it appears the claim is straightforward and can be decided quickly. Detention can also be used where officials believe an individual is at risk of absconding, where there is a need to establish an individual’s identity or for the purposes of removal.

The Prison Ombudsman’s enquiries into Yarl’s Wood and Oakington detention centres in 2004 and 2005 detail evidence of widespread racism, and poor management in the area of race equality, in those centres. Her Majesty’s Chief Inspector’s subsequent reports on Oakington and Yarl’s Wood detention centres suggest some improvement in the management of race equality issues at these centres following the Prison Ombudsman’s investigations in 2004 and 2005. However the Chief Inspector’s reports on other detention centres published in 2005 and 2006 show that there continue to be failings of varying degrees in some facilities such as Lindholme, Heathrow, Colnbrook, Dover and Harmondsworth. Common failings are inadequate or non-existent mechanisms for the reporting and investigation of racist incidents, lack of race or diversity policies, lack of training for staff in race issues, and lack of interpretation and translation.

Some detention of asylum seekers is contracted to private firms such as GSL UK and Premier Detention Services. A question may therefore arise as to whether they would be carrying out public functions and be covered by the HRA.

3.3 Private hospitals detaining persons under the Mental Health Act 1983

An example of such a situation is where a person of ethnic minority is sectioned under the Mental Health Act 1983 and brings a claim of a breach of the right to liberty or not to be subjected to inhumane and degrading treatment (articles 5 and article 3), together with a racial discrimination claim under article 14.

Within the mental health system in England and Wales, 10% of inpatients are now in independent, private healthcare and 90% are in NHS organisations.

In 2005 for the first time the Commission for Healthcare Audit and Inspection carried out a census of inpatients in mental health hospitals and facilities in England and Wales. Amongst its findings are figures showing that Black African and Caribbean people are three times more likely to be admitted to hospital and up to 44% more likely to be detained under the Mental Health Act, as well as being more likely to be placed in seclusion or being restrained. This has significant ramifications for possible human rights claims involving independent healthcare and claims of racial discrimination.

3.4 Registered social landlords providing housing for Gypsies and Irish Travellers

In relation to issues of housing and the right to family life under article 8, a number of cases have been brought by Gypsies and Irish Travellers, including some claims involving article 14. Gypsies and Irish Travellers have both been recognised as racial groups for the purposes of the Race Relations Act 1976.

One issue is whether registered social landlords (such as housing associations) managing caravan sites owned by local authorities on which Gypsies or Irish Travellers live, would in fact be covered by the Human Rights Act as being private bodies exercising public functions. The issue of protection from indiscriminate and disproportionate action by registered social landlords (for example by evictions) has been previously raised in the last report by the JCHR on the meaning of public authorities.

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110 Inspectorate Reports on immigration removal centres can be viewed at: http://inspectorates.homeoffice.gov.uk/hmprisons/inspect_reports/irc-inspections.html/
111 “Count me in”, Results of a national census of inpatients in mental health hospitals and facilities in England and Wales, Commission for Healthcare Audit and Inspection, December 2005, page 13 and Figure 1.
112 “Count me in”, ibid.
113 R (Albert Smith) v Barking and Dagenham LBC and Secretary of State for the Office for the Deputy Prime Minister [2002] EWHC 1014 Admin; Clarke v Secretary of state for the Environment, Transport and the Regions and Tunbridge Wells BC [2001] EWHC 800 Admin.
4. **The Implications of a Restrictive Interpretation on Equality Legislation**

The JCHR has also called for "any other evidence relevant to the implications of the meaning of public authority on the protection of human rights, especially those of vulnerable people."

A restrictive interpretation of the meaning of a public authority under the HRA could also have important adverse implications for race equality law and equality law generally. This is relevant in two contexts:

- firstly, the requirement under section 19B of the Race Relations Act 1976 that public authorities do not discriminate in carrying out their functions; and
- secondly, the race equality duty under section 71 of the RRA which requires listed public authorities in carrying out their functions to have due regard to the need to eliminate racial discrimination, promote equality of opportunity and good relations between persons of different racial groups.

4.1 **The requirement that public authorities do not discriminate**

The definition of what constitutes a public authority for the purposes of section 19B which was introduced in 2000 is very similar to the definition under section 6 of the HRA. Indeed it is clear that the intention of parliament is that they have the same meaning.116

Section 19B(2)(a) states that “public authority” includes any person whose functions are functions of a public nature (other than excluded bodies such as either House of Parliament). Further, section 19B(4) states that in relation to a particular act, a person is not a public authority by virtue only of section (2)(a) if the nature of the act is private.

There has been no judicial examination of whether the narrow test of a public authority in Leonard Cheshire would or should also be applied to a racial discrimination claim under the RRA. One important point is that if a narrow interpretation were applied it is potentially of less consequence than under the HRA as there is a separate prohibition under section 20 of the RRA from discriminating in the provision of goods, facilities or services to the public or section of the public. This applies to both the public and private sector so most private bodies carrying out public functions in providing goods facilities or services to the public would be covered by this provision.

Notwithstanding the above, the CRE believes that the scope of the definition of a public authority under section 19B of the RRA raises the same sorts of issues as under the HRA and that for reasons of consistency and clarity, any change to the definition under the HRA should be mirrored in the forthcoming Single Equality Act since it will also cover discrimination by public authorities in all six strands of equality legislation.

4.2 **The race equality duty and other equality duties**

There has been an evolution in the way in which public authorities are defined for the purpose of equality duties on different strands of equality.

In relation to race, the general race equality duty introduced in 2001 under section 71(1) applies to approximately 40,000 public authorities which are listed in schedule 1A of the RRA. A number of those public authorities also have specific duties to help them fulfill their general duty, such as consulting on the likely impact of policies, carrying out impact assessments and monitoring policies.

Rather than taking an approach focusing on the type of organization, more recent equality duties on public authorities relating to disability and gender have defined public authorities generically for the purpose of the general duty using the same functional approach as under the HRA.117 The definition of what constitutes a public authority for the purpose of the new duties is very similar to the definition under the HRA.

The CRE understands the government’s reasons for such an approach in order to ensure that, as under the HRA, the defining criteria is the nature of the function being provided is public, irrespective of whether the organization providing it is public or private. However, the CRE is concerned that such an approach raises similar concerns as to what will be considered a private body carrying out public functions as under the HRA and this will create uncertainty as to which such private bodies will be subject to the general disability duty and the general gender duty.

In our view those concerns are in some respects of potentially greater effect than under the HRA. Section 6 of the HRA is prohibitive in that it prohibits public authorities to act in a way incompatible with Convention rights but does not expressly require them to do carry out certain acts. On the other hand, the

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116 For example, the Explanatory Notes to the Race Relations (Amendment) Act 2000 which introduced section 19B to the Race Relations Act states that the definition of public authority is based on the definition used in section 6 of the Human Rights Act.

117 See section 49B Disability Discrimination Act 2005 which came into force in December 2006 and the new section 76A of the Sex Discrimination Act 1975 which comes into force in April 2007. But note that for the specific duties the provisions on disability and gender still specify the organisations to which the specific duties apply.
equality duties place a positive duty on public authorities to proactively consider whether their functions are eliminating discrimination and promoting equality of opportunity and good relations between different groups.\textsuperscript{118} It is of great concern if a private body potentially exercising public functions will not know whether it is subject to a general equality duty.

As the JCHR would be aware, the government’s Discrimination Law Review (DLR) is currently consulting with stakeholders on developing a Single Equality Act that will cover six strands of equality law (race, sex, disability, religion, age and sexual orientation) to improve, reform and harmonize equality law. The government’s Green Paper on the bill is planned to be sent out for consultation in the first few months of 2007. The current indications on these issues are:

— in relation to discrimination by public authorities, there has been no proposal in the terms of reference of the DLR to consider reviewing the definition of a public authority; and

— in relation to the public equality duties, the DLR team is likely to propose that there be a single general equality duty that covers all strands rather than separate duties covering different strands. In addition it is also likely that the test of what constitutes a public authority be the same as under the disability and gender duty rather than the list approach under the race equality duty.

5. Possible Ways Forward

The view of the CRE is that given the growing use of procurement by public authorities, the obligation on the UK government under the ECHR to secure peoples’ Convention rights and effective remedies,\textsuperscript{119} the gap in protection created by the narrow interpretation of what constitutes a public authority in the Leonard Cheshire case, and the failure of the intervention in the Johnson case to provide further clarification of the law, it is crucial for the government to provide legislative clarification on the issue to ensure vulnerable peoples’ rights are protected.

We also consider that human rights law and equality law are often inter-related and the definition of a public authority in the two areas of law are the same it is appropriate and important for the government to take a co-ordinated approach in both areas of law by amending the HRA and ensuring that the definition under the Single Equality Act is drafted in the same way by. The DLR provides a perfect opportunity for the government to consult with all stakeholders as to whether there should be greater clarification in the Single Equality Act (in light of concerns under the HRA) of what constitutes a public authority.

5.1 The definition under the Human Rights Act

We agree with the conclusion of the JCHR that in broad terms a body is a functional public authority under section 6(3)(b) of the HRA where it exercises a function that has its origin in government responsibilities, in such a way as to compel individuals to rely on that body for realization of their Convention rights.\textsuperscript{120}

In our view the definition of a public authority under the HRA could be clarified by inserting further interpretative provisions. We have not yet had an opportunity to consider exactly what that or those provisions would look like but intend to do so in the next few months in the context of our work on the Discrimination Law Review.

We recognise that adding further interpretative provisions will themselves not provide a complete solution as they will be subject to future judicial examination, however we believe that given the seriousness of the problem it is necessary and helpful to clarify the law and ensure that it accords with the intention of parliament and the government’s international obligations.

5.2 The definition under the Single Equality Act

For reasons of consistency, the CRE considers that any amendments to the definition of a public authority under the HRA should be mirrored in the provision prohibiting discrimination by a public authority under the Single Equality Act.

In relation to the public equality duty, if the government decides to use a generic definition for the public authorities that are subject to the general equality duty within the Single Equality Act, we also anticipate recommending to the DLR team that further clarification of the term “functions of a public nature” is provided.

However, given the differences between the nature of the provisions prohibiting breaches of human rights under the HRA or discrimination under the RRA and the positive obligations under equality duties, we have not yet had the opportunity to consider whether this further clarification should be similar or the same as the clarification provision relating to the HRA. We have not for example considered whether the legislation

\textsuperscript{118} See the comments regarding the nature of the race equality duty in Elias v Secretary of State for Defence [2005] EWHC 1435 (Admin), paragraph 91–99.

\textsuperscript{119} Articles 1 and 13 European Convention on Human Rights.

\textsuperscript{120} see paragraph 157 JCHR 7th report from session 2003–04.
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should attempt to provide indicators of whether a private body is exercising public functions as is provided in the Equal Opportunities Commission Code of Practice on the gender equality duty, such as whether the body:

— is publicly funded;
— is exercising powers of a public nature directly assigned to it by statute;
— is taking the place of central or local government;
— is providing a public service;
— its structures and work are closely linked with the delegating or contracting-out state body; and
— there is a close relationship between the private body and any public authority.121

We will be in a better position to provide a clear recommendations regarding this when we respond to the government’s Green Paper on the Single Equality Act.

Peter Reading
Head of European and International Legal Policy
22 December 2006

20. Memorandum from the Department of Communities and Local Government

1. The Department for Communities and Local Government is responding to the JCHR’s call for Evidence into the meaning of “public authority” under the Human Rights Act 1998 (HRA). The Department wishes to draw to the Committee’s attention the possible effects that a change in the current interpretation of what constitutes a public authority might have on three areas within the Department’s policy remit—Registered Social Landlords, private landlords providing temporary accommodation for homeless applicants, and New Deal for Communities local partnerships.

Registered Social Landlords

2. The key issues in relation to Registered Social Landlords (RSLs—more commonly known as registered housing associations) are as follows:

— any practical implications of the restrictive meaning given to “public authority”, for example those identified in the previous Committee’s report;
— whether private providers would leave the market if they were “public authorities” for the purposes of the Human Rights Act 1998; and
— any other evidence relevant to the implications of the meaning of public authority on the protection of human rights, especially those of vulnerable people.

Practical implications

3. There would be practical implications for RSLs if, in carrying out their letting activities, they were deemed to be carrying out functions of a public nature under section 6(3)(b) of the Human Rights Act. It could impose additional burdens, and potentially additional costs on RSLs (see paragraph 9 below).

4. In addition, under section 170 of the Housing Act 1996, RSLs have to co-operate, where a local authority requests it, to such an extent as is reasonable in the circumstances in offering accommodation to people with priority under the authority’s allocation scheme. However, while RSLs have to offer up at least 50% of their lettings to local authority nominations, RSLs are not obliged to accept any particular person nominated by a local authority provided their overall lettings and sales policies are non-discriminatory.

5. Once an RSL accepts an applicant via a local authority nomination, that local authority’s duty to allocate housing to that applicant is discharged. The individual becomes a private tenant of the RSL. There is no ongoing statutory duty of care owed to the tenant by the local authority. This situation differs to that of (for example) a care home where there would be likely to be a continuing duty to assess whether accommodation meets a person’s needs.

6. RSLs also accept direct applications from individuals outside of the nominations process. As stated above, a minimum of 50% of nominations must be offered to the local authority but the actual proportion will vary from RSL to RSL.

7. If it is proposed that the key test of whether a function is public should be whether it is one for which the government has in the past taken responsibility, this would arguably only affect those tenants which had been housed by the RSL via the local authority nominations process. The implication of this is that tenants on exactly the same assured tenancies would have different protections in law and thus a two tier system of rights would be created.

8. The application of the HRA to certain housing management functions must also be considered alongside the considerable protections that already exist for all RSL tenants and leaseholders. RSLs are subject to stringent regulatory regimes—they are regulated by the Housing Corporation. In the event that tenants are dissatisfied with their landlord they have recourse the RSL’s formal complaints procedure and in the event they remain unhappy, to the Housing Ombudsman Service. RSLs are of course bound by discrimination legislation which will apply, for example when allocating housing, transferring tenants and evicting them. Tenants have the benefit of the contractual rights set out in their tenancy agreements and the additional protection provided by statute which means, for example, that their tenancy agreements cannot be brought to an end by a landlord except by an order of the court, and on the grounds set out in statute (s 5 Housing Act 1988. In these circumstances, our view is that many of Shelter’s concerns are likely to be unfounded (see for example paragraphs 68122 and 72 of the Seventh Report of Session 2003–04 (the Report)). Annex A to this document sets out the regulatory framework which applies to RSLs.

Private providers leaving the market

9. We would be concerned about any increase in the administrative burdens (in an environment in which we are trying to reduce such burdens) placed on RSLs and consider that the application of the HRA to their housing would have that effect. Any litigation would divert resources available to be spent on front line services. This would be likely to have an effect upon the availability of affordable housing for the some of the most disadvantaged members of society. It will be difficult to reassure the RSL sector that their revenue streams will continue to be protected. Lenders may also be discouraged from entering/remaining in the market or may reflect the perceived risk in investing in RSLs by raising their interest rates.

10. In addition to dealing with the legal costs of claims which would be brought under the HRA, (rather than any of the existing mechanisms which exist to resolve disputes), RSLs would be likely to also find themselves facing judicial review claims. The House of Lords in Aston Cantlow and Wilcote v Wallbank [2004] 1 AC 546, stated that the question whether an authority is exercising a public function is not the same as whether an authority is amenable to judicial review: domestic administrative case law on the one point may assist in deciding the other, but it is not determinative. However, in practice, the courts have generally applied tests which are very similar and further legal costs are likely to be incurred while these questions are resolved.

11. The application of the HRA to social housing providers could present a barrier to developing a mixed market in management services in order to drive up standards—the creation of such a mixed market is something which we are considering at present as part of the Cave Review of Social Housing Regulation.

12. The application of the HRA would create a disincentive for other private housing providers to enter the social sector. The Housing Act 2004 gave the Housing Corporation the power under section 27A Housing Act 1996 to give grants to persons other than RSLs to provide, construct or improve houses for letting. Recipients of grant under these powers would be subject to a contractual relationship with the Corporation (rather than meeting the requirements of the Regulatory Code). The burden of compliance with the requirements of being a public authority for some of their operations would be a disincentive for the private sector.

13. We are concerned that some of the risks to tenants of the activities of RSLs not falling within section 6(3)(b) of the HRA have been overstated in the Report. As stated previously, it does not follow that if tenants are unable to enforce their Convention rights directly under the HRA against the manager of an RSL, those rights will not be protected. RSLs are subject to a detailed regulatory regime, and housing legislation itself provides a strong source of protection of those rights. (for example, see Kay v London Borough of Lambeth [2006] UKKHL 10, per Lord Bingham [33–35]).

Private Landlords Providing Temporary Accommodation to Homeless Applicants

14. The key issue in this instance is whether private landlords would withdraw their assistance to local housing authorities in providing temporary accommodation for homeless applicants if this meant they were “public authorities” for the purpose of the Human Rights Act 1998.

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122 In addition, paragraph 68, it is not correct to say that RSLs have the power to “issue ASBOs to their tenants;” or that they can “remove the security of tenure of ‘anti-social’ tenants”. Under Part V, Chapter III of the Housing Act 1996, RSLs have a power to apply to the court for an injunction against anti social tenants; under section 82A of the Housing Act 1985, they may apply to the court for a demotion order.
15. We note the Committee’s concern about private bodies undertaking public functions. We note also the Committee’s view, set out in its Seventh Report of Session 2003–04, that 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.

16. However, we would be concerned if any extension of the definition of “functional public authority” included a private body or landlord who provides accommodation to assist local authorities discharge their statutory homelessness functions. In some cases, accommodation is made available to the local authority who then provide it to the homeless applicant; in others the private landlord will provide it directly to the homeless applicant pursuant to an agreement with the authority.

17. A local authority carrying out homelessness functions under Part 7 of the Housing Act 1996 will frequently secure accommodation from private sector landlords, bed and breakfast hoteliers and registered social landlords in a number of different situations. In particular, the authority might secure private sector accommodation to fulfil its duties to provide: interim accommodation for applicants awaiting a homelessness decision; temporary accommodation to applicants for whom it has accepted a main homelessness duty; settled accommodation which will bring the homelessness duty to an end.

18. The Department’s concern is that if private landlords and hoteliers were to be classed as a functional public authority for the purposes of the HRA the risk of legal challenges under the HRA would deter them from making their accommodation available for households owed a homelessness duty by a local authority, or would add significantly to the public cost of securing such accommodation. Even if successful challenges under the HRA were unlikely in practice, the perception that challenges might arise could be enough to provide a deterrent. Such accommodation can be put to use to earn an income in other less onerous ways, if the risks of making it available for homeless applicants appear too high.

19. Under the homelessness legislation, authorities’ principal function is to secure accommodation for applicants in certain circumstances. However, there is no requirement on the authority to provide accommodation itself, and there are a number of ways in which it can secure that accommodation will be available for an applicant. Therefore, in the Department’s view, where an authority ask a private body or landlord to assist it by providing accommodation, the private body or landlord is not taking on the authority’s public function of securing accommodation: the authority retains, and discharges, this function itself by arranging with the private body or landlord to provide the accommodation.

20. The Department would be concerned if the Committee took a contrary view. Some housing authorities have very limited or no housing stock of their own. This could mean that, if they were unable to secure sufficient accommodation from private providers, they may be unable to discharge their homelessness functions.

21. In many areas of the country, there are huge pressures on social housing. With encouragement from the Department, the majority of temporary accommodation (around 75%) is now provided by private sector landlords (and a further 6% is provided by RSLs). This position would be seriously jeopardised if private landlords were designated as public authorities. Despite the high proportion of temporary accommodation in the private sector, many private landlords are disinclined to have tenants who have experienced homelessness or who are in receipt of benefits, so housing authorities already face difficulties in securing sufficient accommodation in the private sector to help them discharge their homelessness functions. Including private landlords within the definition of a public authority for the purposes of the HRA would add to landlords’ reluctance and to authorities’ difficulties.

22. A further knock on effect in relation to temporary accommodation would be that if housing authorities who have their own stock of social housing had to use this as temporary accommodation to discharge their homelessness functions, this would tie up a valuable resource which could be put to better use as long term settled accommodation for others in housing need seeking accommodation through the housing waiting list.

23. Finally, the private sector landlord may well be a small scale body, or an individual with only a few properties. His relationship with the local authority is in many cases a fairly distant one: he has simply agreed to take a tenant or licensee put forward by the local authority. Although he is assisting the local authority to exercise its functions, he is doing so for purely commercial purposes in a private capacity. In our view, he is in no sense carrying out the function of “securing accommodation” imposed on the local authority by the 1996 Act. Where he does have a direct relationship with the tenant, the nature of that relationship is a purely private landlord—tenant arrangement. He will be very ill-placed to carry out the public interest balancing test required by the Human Rights Act 1998, and it is in any event not clear whether or how he could balance the public interest with his own legitimate commercial interests.
NEW DEAL FOR COMMUNITIES

24. The New Deal for Communities (NDC) programme is a 10 year grant-making scheme. It is a key funding programme in the Government’s strategy to tackle multiple deprivation in the most deprived neighbourhoods in the country. The NDC programme supports local partnerships in those areas.

25. The key issue here is whether community involvement in the NDC programme would be deterred, if NDC partnerships were found to be carrying out “functions of a public nature” and thus become public authorities for the purpose of the HRA.

26. The NDC programme is intended to devolve the ability to decide how a community should be regenerated and supported to the level of the neighbourhood. NDC partnerships are made up of local residents and representatives of key local bodies and organisations, including public agencies, local businesses and voluntary bodies. They represent the local community in identifying the needs of their neighbourhood and developing appropriate regeneration strategies, via the delivery plans. The NDC partnerships do not undertake statutory duties of the local authorities.

27. The Department is concerned that an extension of the meaning of “public authorities” for the purpose of the HRA may have the effect of deterring community involvement in the NDC itself, undermining the principles of community engagement in regeneration. Resident Board Members in particular are willing to act in that capacity in order to represent the community and are unlikely to be equipped with the expertise required to ensure that their decisions are compatible with the HRA or comply with public law principles of reasonableness. What was intended to extend community involvement to residents or business or voluntary sector leaders could instead be seen as imposing duties and burdens and lead to difficulties in engaging those community representatives in the NDC programme, thus significantly reducing the benefits of the programme to those neighbourhoods.

Andy Tindall
21 December 2006

Annex A

HOUSING CORPORATION

BACKGROUND

The Housing Corporation (the Corporation), which was established in 1964, is an NDPB sponsored by the Department for Communities and Local Government. It is both the regulatory and investment body for the Registered Social Landlord (RSL or housing association) sector.

The Corporation’s constitution and its powers are set out in Part 3 of the Housing Associations Act 1985, and the arrangements relating to its functioning in Schedule 6 to that Act. The Housing Act 1996 (the 1996 Act) confers additional powers on the Corporation in respect of an RSL.

Broadly, the Corporation’s powers over an RSL may be categorised as indirect (it has wide powers to make grants, and provide other financial assistance, and to impose procedures and conditions) and direct (for example, it is responsible for registering an RSL and its consent is required by an RSL before it can take certain action and it can intervene directly in the management of the affairs of an RSL).

Part II Housing Act 1988 and Part II of the Housing Act 1996 set out the Corporation’s powers in relation to providing grants and other types of financial assistance to an RSL.

Some of the more important regulatory functions of the Corporation123 include:

— Registration of RSLs (sections 1–6 of the 1996 Act). This is the pre-condition which must be met before any other decision of the Corporation regarding RSLs is made. Registration brings RSLs within the scope of regulation and establishes the basis on which social housing grant is paid to them. Regulation is the main means of ensuring the terms on which tenants are treated and of taking action to secure improvement in the landlord’s services to them and protecting public investment in RSLs.

— Giving of consent to disposals of land by an RSL under section 9 of the 1996 Act. This section requires the consent of the Corporation to be obtained by an RSL for any disposal under section 8 of that Act.

— Giving of consent to changes to RSL rules which govern their constitutions and borrowing/finance powers (paragraphs 9–11 Schedule 1 to 1996 Act).

— Giving of consent to applications for mergers and some structural changes of RSLs (paragraph 12, 13 to Schedule 1 Housing Act 1996).

123 Functions are expressed as being those of “relevant authority” defined as either the Secretary of State or the Corporation.
Powers to Issue Guidance to RSLs

The Corporation also has specific powers under section 36 to issue housing management guidance (approved by the Secretary of State) in defined areas.124

The extent to which this guidance has been followed may be taken into account by the Corporation when determining (a) whether action needs to be taken to secure the proper management of the affairs of a registered social landlord, and (b) whether or not there has been misconduct or mismanagement for the purposes of the exercise of powers under Schedule 1 or otherwise.

All the principal aspects of housing management are expected to be covered in the schedule of particular matters which may be the subject of guidance (s 36(2)) (including, for example, how allocations are provided, terms of tenancies125; services to be provided to tenants; standards of maintenance and repair; procedures for complaints; any anti-social behaviour policy and procedures). Related to guidance on maintenance and repair, the Corporation enjoys power of entry under s 37, backed by offence of obstruction under s 38. In addition, Guidance may be issued on more general matters of governance and financial viability (ss 2A). In addition, Guidance may be issued on more general matters of governance and viability.

Powers of the Corporation to Take Action in Relation to a Specific RSL

These powers, set out in Schedule 1 to the 1996 Act, include:

A power to direct an enquiry into affairs of an RSL (para 20 to schedule 1 to the 1996 Act) “if it appears to the Relevant Authority that there may have been misconduct or mismanagement.” For these purposes misconduct includes any failure to comply with the requirements of Sch 1, Part IV.

Even if an inquiry is not completed, the relevant authority has interim powers (paragraph 23) exercisable where it “has reasonable grounds to believe (i) that there has been misconduct or mismanagement and (ii) that immediate action is needed to protect the interests of the tenants or assets of the landlord.”

The interim orders that may be made include suspension of officers, employees or agents, directing assets not to be released by bankers without the consent of the relevant authority and subjecting to the consent of the relevant authority the exercise of powers of the landlord.

Where, on the basis of an inquiry under paragraph 20 or an audit under paragraph 22, the relevant authority is satisfied that there has been misconduct or mismanagement in the affairs of an RSL, it enjoys the same powers, but on a permanent basis (paragraph 24.)

Where satisfied as a result of an inquiry under paragraph 20 or an audit under paragraph 22 either that there has been misconduct or management, or that the management of the social landlord’s land would be improved if transferred, the relevant authority (the consent of Secretary of State required if directions given by the Corporation) may order the land to be transferred to the relevant authority or to another social landlord (position differs slightly in the case of a charity) (paragraph 27).

2. Housing Ombudsman

Section 51 of the 1996 Act and Schedule 2 set out the basis upon which tenants and other individuals who have complaints against registered social landlords may have them investigated by an independent ombudsman in accordance with a scheme approved by Secretary of State.

All social landlords must be members of the scheme.

Schedule 2

Paragraph 7. The Ombudsman has power to order the member of a scheme against whom a complaint has been made to pay compensation.

The Ombudsman also has the power to order the member or the complainant not to “exercise or require the performance of any of the contractual or other obligations or rights existing between them.”

If the member fails to comply with the determination within a reasonable time, the Ombudsman may order him to publish a statement of his failure.

Paragraph 8. This paragraph empowers the Ombudsman to publish his determination, and such reports as he thinks fit on the discharge of his functions.

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124 Guidance is found in “The Way Forward: Our approach to Regulation issued by the Housing Corporation in 2002. Specific guidance has also been issued in Housing Corporation Circular 07/04 “Tenancy management: eligibility and evictions” and in “Anti-social behaviour: policy and procedure: Guidance for Housing Associations, issued under cover of Housing Corporation Circular 08/04 “Statutory Housing Management Guidance on Anti-Social Behaviour Policies and Procedures.”

125 Corporation asks RSLs to grant most secure form of tenure available to tenants. Usually achieved by granting periodic tenancies of which possession only be achieved on discretionary grounds. However, under Corporation guidance, RSLs can also grant assured shorthold tenancies as part of a managed strategy for dealing with anti-social behaviour.
21. Memorandum from the Northern Ireland Human Rights Commission

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights, advising on legislative and other measures which ought to be taken to protect human rights, advising on whether a Bill is compatible with human rights and promoting understanding and awareness of the importance of human rights in Northern Ireland. In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding “soft law” standards developed by the human rights bodies.

2. The Commission welcomes the Committee’s renewed consideration of the scope of application of the Human Rights Act 1998 (HRA), a matter of the utmost importance for the protection of human rights in the United Kingdom. We regret that constraints of time and resources at this time of year did not permit us to provide a detailed response to the call for evidence. We would, however, like to submit to the Committee the following brief comments.

3. The Commission is concerned that the narrow interpretation of the HRA since the case of R (Heather) v Leonard Cheshire Foundation [2002] has undermined the effective and comprehensive protection of human rights, particularly of vulnerable persons such as those in residential care. Considering the number and character of services contracted-out by the State and the continuing growth of private sector provision, the questions of responsibility under the HRA and compatibility of service providers’ actions with the Convention rights need to be addressed promptly.

4. The Commission is not aware of any cases taken to date in Northern Ireland which would challenge or address the question of the meaning of “public authority”. We are, however, concerned that the continuing uncertainty around the definition of “functional public authorities” will—sooner or later—adversely influence the protection of individual rights in this jurisdiction.

5. In its intervention in the case of R (on the application of Johnson and others) v London Borough of Havering (the Johnson case), the Government argued that the residents’ rights would be protected after transfer of local authority care homes to the private sector because private sector providers would be performing a “public function”. The position argued in the intervention was for an interpretation of the Act that would bring private providers performing public functions (functional public authorities) into the sphere of liability under the Human Rights Act. We regret that the Court did not find the intervention persuasive and share the Joint Committee’s analysis that the gap in protection no longer seems likely to be closed by the Courts.

6. We also share the Joint Committee’s concern at the opinion expressed by the Lord Chancellor in recent evidence to the Committee that widening the meaning of public authority might drive private providers of services “out of the market” and be counter-productive. It is the view of this Commission that the primary consideration in settling the issue of the definition should be the protection of rights of those who are often most vulnerable in our society and who—save for the privatisation of an ever increasing number of services—would remain under the protection and care of the State, with the State being subject to judicial control for breaches of human rights legislation.

7. The key to the interpretation of the meaning of “public authority” under the Act should be the intention of Parliament and the Government at the time of the enactment of the HRA, as expressed in the White Paper introducing the Bill and Parliamentary debates on the Bill itself. The then Home Secretary, Mr Straw, stated in the House of Commons:

We wanted a realistic and modern definition of the state so as to provide a correspondingly wide protection against the abuse of human rights. Accordingly, liability under the Bill would go beyond the narrow category of central and local government and the police—the organisations that represent a minimalist view of what constitutes the state.

8. The Rights Brought Home White Paper stated on the matter of what would constitute a “public authority” (with emphasis added):

The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers;

126 Northern Ireland Act 1998, s 69(1).
127 Ibid, s 69(3).
128 Ibid, s 69(4).
129 Ibid, s 69(6).
prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as the privatised utilities.\footnote{Rights Brought Home.}

9. To date, that sort of formulation has not proven sufficiently clear to the courts. The legislative intention may need to be underwritten by change to the HRA should there not emerge, in the near future, a more extensive judicial interpretation of the definition of “public authority”. Given the imperative, from Article 1 of the European Convention, of securing the ECHR rights to everyone within the State’s jurisdiction, any policy or action of Government that tends to diminish its direct accountability in this area should see a corresponding widening of the coverage of the Human Rights Act to those to whom the State devolves its responsibilities. Unless the impending appeal in Johnson makes it clear that contracting-out neither requires nor excuses any erosion of Convention protections, a consultation on legislation should follow.

Northern Ireland Human Rights Commission

January 2007

22. Memorandum from the Charity Commission

I am writing in response to the call for written evidence in connection with the inquiry by the Joint Committee on Human Rights into the meaning of “public authority” under the Human Rights Act (HRA). I am grateful that you have allowed a late submission from the Charity Commission.

The Charity Commission is the independent regulator of charities in England and Wales. Our job as regulator is to provide the best possible regulation of charities in order to increase charities’ effectiveness and public confidence and trust. We want charities to be well run and meet their legal requirements which include their equality and human rights obligations. There are some 190,000 registered charities in England and Wales.

38\% of the charitable sector’s income\footnote{NVCO Voluntary Sector Almanac.} comes from “public authorities”. Many charities are involved in delivering services under arrangements with government departments and other “public authorities”. As the charity regulator we want to make sure that the interests of charities are taken into account in the development of the definition of “public authority”.

Within this submission we want to:

— emphasise the unique position of charities;
— give a more detailed picture of the range of services that they provide under such arrangements; and
— comment on the guidance on contracting for services.

As you are aware the Charity Commission made representations to the Joint Committee on Human Rights about the meaning of “public authority” in 2003. That submission took account of the cases of Poplar Housing v Donogue [2001] EWCA Civ 595 and R v Leonard Cheshire Foundation [2002] EWCA Civ 366. The subsequent developments in case law since that time in the Aston Cantlow and Hampshire Farmers’ cases do not impact on the legal position which has been established. Of course we are aware that this may change with the Johnson v London Borough of Havering case once a decision has been reached at the Court of Appeal. Until the case has been decided our view of the legal position remains the same as our previous submission (a copy of our previous submission has been included).

The unique position of charities

One important characteristic of charities is that they are independent. They can still provide services on behalf of government. However, charity trustees must still make their own decisions and act within the purposes of a charity.

Charities have, in many cases, a long history of being in the vanguard of promoting the human rights of individuals and the equality agenda. Both the advancement of human rights and equality and diversity are recognised as charitable purposes.

The range of services provided by charities under arrangements with public authorities is very wide and we set out more details in this regard in the next section. They may be providing a service that is funded in part by donation, grant, under contract or funded privately and across a number of different sectors and geographical areas.
If charities that provide public services under contract were to be included within the definition of functional public authority, this would not mean that all vulnerable people would have the protection of the Human Rights Act as some charities may provide services (such as perhaps well endowed almshouses or those that are funded by a mixture of private donation and self-funding) without the benefit of any public money.

Charities that provide public services vary in size (and I give more details below). A small to medium charity reliant on volunteers would potentially have considerable difficulties in complying with the obligations of a public authority, although it is right that they should comply with the legal framework that promotes equality and human rights.

The effectiveness of the Government’s guidance on contracting for services in the light of the Human Rights Act

In order to examine the effectiveness of the “Guidance on Contracting for Services in the Light of the Human Rights Act” (the Contracts Guidance) we think it is important to provide a picture of charities that provide public services under arrangements with government.

— 38% of the charitable sector’s income comes from “public authorities” funding; this suggests that approximately one third of registered charities (65,000) may be involved in public service delivery;
— public services can range from large undertakings, such as the provision of social housing, to small projects, such as a local youth group;
— charities of all sizes and incomes are funded to undertake public services; and
— 87% of all registered charities have an income below £100,000.

The Charity Commission has recently conducted a survey of all registered charities to find out about their involvement in public service delivery and its impact upon them. Figures and analysis of the data will be published on the 21 February. A copy of the research report will be sent to the Joint Committee for information.

As you may be aware charities and voluntary sector organisations have a written Compact with Government. This is an agreement to improve the relationship between the two sectors; “Both Government and the voluntary and community sector share a vision of a fair society, with strong communities and opportunity for everyone. The Government recognises that the voluntary and community sector can make a significant contribution to this vision”.

The Compact has five codes of practice including one for Funding and Procurement. These documents outline government undertakings and undertakings by the charitable and voluntary sectors. It is important that reference is made in the Contracting Guidance to the Compact and that the Compact Working Group are involved in changes that may affect the procurement process for charities (there is also a requirement to consult for a minimum of 12 weeks to changes of policy within the Compact).

The Contracts Guidance is designed primarily for “Public Authorities”. It assumes knowledge of the Human Rights Act and is written in quite complex language. Clearly, charities need to be informed about their responsibilities. It is clear that the charitable sector is made up of differing sizes of organisations undertaking a broad range of functions. As stated in our previous submission the exercise of most of these functions would not in our view, give rise to Human Rights considerations.

There is a major difficulty (with which the Contract’s Guidance does not help) in charities’ ability to appreciate whether some or all of their functions will be regarded as a “public function” or help charities to understand their responsibilities.

Were charities, in some circumstances not envisaged by the decisions of the court, to be held to be acting as “public authorities”, this may lead to smaller charities not taking on a contract because this appears so complex and they may not have the resources to explore the legal issues. It is also the case that even if organisations that provided public services were to come within the understanding of “functional public authority” there would still be people receiving services who would not be covered—those who are self-funded and those funded by donation.

We would suggest that separate guidance may be needed for charities and the voluntary sector to help them understand their responsibilities and the legal duties on the “Public Authority” with which they are contracting. Since it has implications for them. It would need to be written in straightforward language to take account of the different size, resources and expertise of these organisations. It may also be useful to give details of organisations that could inform charities about human rights.

135 Compact Code of Good Practice.
136 Funding and Procurement Compact Code of Good Practice.
Any other evidence relevant to the implications of the meaning of “public authority” on the protection of human rights especially those of vulnerable people

Within our developing guidance on charities and public service delivery we highlight the difficulty of identifying where a service is a “public function”. “Public Authorities” do not always have legal duties to provide all of their services; some services are provided under statutory powers. Some services are provided under a purely discretionary power and not a duty.

Charities are contracted to provide services at grass roots levels to some of the poorest and most vulnerable members of society. A higher level of regulation, with uncertain obligations not understood by those responsible for fulfilling them, may discourage smaller grass roots organisations from carrying out their work with vulnerable people.

Joanne Edwardes
Human Rights Co-ordinator
January 2007

23. Memorandum from Marie Robson

How much longer do we have to suffer the loopholes in current legislation?

I write to express my disgust at the lack of proper legislation for the elderly in private care homes.

Perhaps the Lord Chancellor, Lord Falconer, would like to tell me what we should do in our current circumstances.

Our mother died on the 25th February this year. She had suffered neglect and abuse in a private care home. She was thrown out of the care home because we had dared to complain about her care.

We now wish to make a formal complaint about the home, and need a copy of our mother’s care plan whilst she was there. The care home refuses to do this.

The Information Commissioner informs us that the Freedom of Information Act does not apply to private care homes, only public authority care homes. Our mother’s care plan is therefore classified as the "private property" of the care home and they are under no statutory or legal obligation to release a copy to either ourselves, the Commission for Social Care Inspection, or Social Services.

It is a national and legal disgrace that private care homes—which now comprise 90% of all long term residential care provision in England thanks to the closure of nearly all local authority homes—are not only exempt from the Human Rights Act, but also from the Freedom of Information Act. People in "private" prisons have more rights than our most vulnerable elderly people in "private" care homes!

Is this justice? What rights is our mother actually left with? The “right” to be abused, even after death? Perhaps Lord Falconer could kindly tell us?

The current situation with the Commission for Social Care Inspection we find to be wholly unsatisfactory. They are as confused as the general public and, to express it in colloquial terms, appear to be a bunch of toothless, procrastinating bureaucrats. No secrets? Whistle blowing encouraged? Protection of Vulnerable Adults? Absolutely not, according to the evidence before us.

We cynically do not expect any kind of useful or informative response from Lord Falconer’s office. After all, they have an entire legal system to oversee. However, in this instance I think the wearing of some Asses’ ears would be wonderfully appropriate.

In the meantime we will be continuing our fight—albeit against the odds due to disgracefully inadequate legislation—to achieve some kind of posthumous justice for our mother and the thousands of other elderly residents who, with no means of redress, are still suffering as I write this letter.

Marie Robson
March 2007