

# HUMAN RIGHTS REFORM AND ‘FUNCTIONS OF A PUBLIC NATURE’

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## A. INTRODUCTION

In December 2021, the United Kingdom government launched a consultation on its proposals to replace the Human Rights Act 1998 (HRA) with a Bill of Rights.<sup>1</sup> Among the twenty-nine questions posed in the consultation paper (CP) is whether the current definition of ‘public authorities’ under s 6 should be maintained, or whether it should be amended to provide ‘more certainty...as to which bodies or functions are covered’.<sup>2</sup> In this note, I argue that this is a welcome question, considering that the courts have taken a restrictive approach to interpretation,<sup>3</sup> arguably leading to a ‘gap in human rights protection’ as public services are increasingly outsourced to private providers.<sup>4</sup> However, the question must be considered alongside the wider proposals for reform, which are unlikely to lead to greater certainty and are in fact likely to weaken human rights protection within the UK.

## B. WHAT ARE ‘FUNCTIONS OF A PUBLIC NATURE?’

S 6(3)(b) of the HRA states that ‘public authorities’ include ‘any person certain of whose functions are functions of a public nature’. The functions are not defined in the Act to provide for greater flexibility as privatisation in its various forms has led to diverse arrangements for public service delivery. It was drafted in acknowledgement of the challenges posed by privatisation and with the understanding that private bodies responsible for carrying out public functions must be held accountable for respecting human rights, at least with respect to those functions.<sup>5</sup> It was accepted that the HRA should have a broader application than judicial review, and s 6(3)(b) was drafted to capture so-called ‘hybrid bodies’ so that they

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<sup>1</sup> Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (CP588, December 2021).

<sup>2</sup> *ibid* para 269 (Question 20).

<sup>3</sup> See eg *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; *YL v Birmingham City Council* [2007] UKHL 27; *Ali v Serco* [2019] CSIH 54.

<sup>4</sup> Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act: Seventh Report of Session 2003-04* (HL Paper 39; HC 382, March 2004) para 41.

<sup>5</sup> In the second reading of the HRA Bill, the Lord Chancellor, Lord Irvine, stated ‘We also decided that we should apply the Bill to a wide rather than narrow range of public authorities, so as to provide as much protection as possible to those that claim their rights have been infringed’. HL Deb 03 November 1997, vol 582, col 1232. Lord Bingham, in his *YL* (n 3) dissenting judgment explained, ‘(w)hen the 1998 Act was passed, it was very well known that a number of functions formerly carried out by public authorities were now carried out by private bodies. Section 6(3)(b) of the 1998 Act was clearly drafted with this well-known fact in mind’ at para 20.

would be covered for the functions they performed that were public in nature, but not for their private activities.<sup>6</sup>

Despite the apparently broad scope of s 6(3)(b), the courts have developed a restrictive approach to interpretation, meaning that many private contractors delivering public services are not subject to the HRA. In *Donoghue*, Lord Woolf suggested that ‘functions of a public nature’ should be interpreted broadly by considering a range of factors.<sup>7</sup> However, in determining whether a housing authority set up by a local authority was a ‘public authority’ for HRA purposes, the Court of Appeal based its decision largely on the close relationship between the two authorities and the extent to which the housing authority’s activities were ‘enmeshed’ with those of the contracting authority.<sup>8</sup> The Court of Appeal later applied the *Donoghue* reasoning to conclude that the Leonard Cheshire Foundation, which had contracted with a local authority to provide residential care services for the elderly, was not ‘standing in the shoes of the local authorities’ and therefore not a public authority under the HRA.<sup>9</sup>

Following these decisions, the Parliamentary Joint Committee on Human Rights (JCHR) described the courts’ interpretation as ‘highly problematic’.<sup>10</sup> They argued that the criteria used to determine whether a body was a public authority gave too much weight to the ‘administrative links’ between the contracting body and the state, rather than the nature of the function.<sup>11</sup> The report considered a range of possible solutions, including an alternative drafting of s 6(3)(b), but concluded that it was too early to consider legislative amendment, and, in any event, it would be difficult to come up with a ‘magic formula’ for an improved definition of public authority.<sup>12</sup> Its successor committee published a further report in 2007, largely in agreement with the previous recommendations, but also arguing that the time had come to consider a legislative solution.<sup>13</sup>

The report was published as the *YL* case was being appealed to the House of Lords, where a majority of 3-2 held that private care home operator Southern Cross Healthcare Ltd

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<sup>6</sup> S Palmer, ‘Public Functions and Private Services: A Gap in Human Rights Protection’ (2008) 6 I-CON 585.

<sup>7</sup> *Donoghue* (n 3) at para 65.

<sup>8</sup> *ibid* at paras 65-66.

<sup>9</sup> *Leonard Cheshire* (n 3) at para 35 per Lord Woolf.

<sup>10</sup> JCHR (n 4) para 41.

<sup>11</sup> *ibid* para 41.

<sup>12</sup> *ibid* para 149.

<sup>13</sup> Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act: Ninth Report of Session, 2006-07* (HL 77, HC 410) para 136.

was not a public authority under the meaning of the HRA.<sup>14</sup> In delivering the majority judgment, Lord Scott reasoned that it is not sufficient ‘to compare the nature of the activities being carried out at privately owned care homes with those carried out at local authority owned care homes’ and instead the court must consider the reason these functions are being performed.<sup>15</sup> Explaining that whilst a local authority providing care services does so pursuant to its statutory duties, a private contractor does so pursuant to private law contractual obligations, the majority held that it would not be necessary nor desirable to classify Southern Cross as a public authority for HRA purposes.

The *YL* decision demonstrates the courts’ misplaced emphasis on institutional, rather than functional characteristics, and it received considerable criticism at the time.<sup>16</sup> Ultimately, the question of whether private care home operators should be subject to the HRA was referred to Parliament,<sup>17</sup> and the Care Act 2014 now makes clear that registered care providers funded or providing care arranged by local authorities are exercising ‘functions of a public nature’ and subject to the HRA.<sup>18</sup> However, the reasoning of the House of Lords in *YL* has continued to influence the courts, including the Court of Session in *Ali v Serco*.<sup>19</sup> The case concerned the question of whether private contractor Serco Ltd. had violated the applicants’ Article 3 and 8 Convention rights in changing the locks on their flat after their claims for asylum were rejected. First, the court had to consider the preliminary question of whether Serco, which was in a contract with the Home Office to provide accommodation to asylum seekers and refugees, was a public authority.

The Outer House decided that Serco’s provision was ‘clearly... a function which is governmental in nature’ largely because the function was part of the implementation of the UK’s international obligations.<sup>20</sup> Moreover, the fact that the applicants had no choice but to live in the accommodation suggested that this was not a typical commercial arrangement and was instead analogous to the exercise of coercive powers, similar to *Campbell v Scottish*

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<sup>14</sup> *YL* (n 3).

<sup>15</sup> *ibid* at para 31.

<sup>16</sup> See eg Palmer (n 6); R Austin, ‘Human Rights, the Private Sector, and New Public Management’ (2008) 1 UCL Human Rights LR at 17; J McLean, ‘Public Function Tests: Bringing Back the State?’ in D Dyzenhaus, M Hunt, and G Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) at 185.

<sup>17</sup> *YL* (n 3) at para 171.

<sup>18</sup> s 73.

<sup>19</sup> *Ali v Serco* [2019] CSOH 34; *Ali v Serco* [2019] CSIH 54. The CP cited the divergent approaches taken by the Inner and Outer Houses of the Court of Session in *Ali* to illustrate its point about the ‘uncertainty’ in the current definition of public authority at para 267.

<sup>20</sup> *Ali v Serco* [2019] CSOH 34 at para 31. The obligations are set out in the Asylum Seekers (Reception Conditions) Regulations 2005; Asylum Support (Prescribed Period following Appeal) Regulations 2007.

*Ministers*.<sup>21</sup> However, the Inner House overturned this decision, drawing on the reasoning of the House of Lords in *YL* to conclude that Serco was not a public authority under the meaning of the HRA as it was ‘merely’ providing services under contract with the Home Office and did not exercise any coercive powers.<sup>22</sup>

### C. THE GOVERNMENT’S PROPOSALS

Given the restrictive interpretation of s 6(3)(b) by the courts, resultant criticism, and the failure of either of the JCHR reports to result in any satisfactory solutions, the government’s suggestion to clarify the meaning of ‘public authority’ is at first glance a welcome and reasonable proposal. However, the suggestion is part of its wider proposal to replace the HRA with a ‘modern’ Bill of Rights and must be understood in this context.<sup>23</sup> The CP furthers the Conservative Party’s 2015 manifesto pledge to ‘scrap’ the HRA and proposes significant changes to the framework for human rights protection and the relationship between the UK’s domestic courts and the European Court of Human Rights (ECtHR).<sup>24</sup> The proposals are premised on the argument that the courts have taken an expansive approach to the interpretation of Convention rights, and the ECtHR has become too influential. A complete analysis of the government’s proposals is not within the scope of this article, but there are indications within the CP that the proposals would do little to improve human rights within the UK and could in fact undermine the framework for rights protection. For example, the CP argues that the ‘ambiguity’ of s 2 HRA leads to uncertainty and an ‘over-reliance’ of the ECtHR jurisprudence by domestic courts,<sup>25</sup> but the suggestion to codify within the Bill of Rights the option for courts to ‘have regard to’ the judgments of courts outside of the UK or Strasbourg does little to address the purported problem of uncertainty.<sup>26</sup> The options to replace s 2 appear to have been drafted to limit the influence of Strasbourg, but give judges little guidance on how to weigh judgments from other jurisdictions.

The CP explains that should the HRA be replaced with a Bill of Rights, the government intends to maintain a broad approach to defining ‘public authorities’, but it notes

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<sup>21</sup> [2017] CSOH 35.

<sup>22</sup> *Ali* (n 3) at paras 54–57.

<sup>23</sup> CP 558 (n 1).

<sup>24</sup> Conservative Party, *Election Manifesto 2015* at 58.

<sup>25</sup> CP 558 (n 1) para 114.

<sup>26</sup> *ibid*, Appendix 2, 96-97. For more on this, see Rt Hon Lord Carnwath of Notting Hill, former Justice of the UK Supreme Court, ‘Lord Carnwath’s Lecture on Human Rights Act Reform – Is it Time for a New British Bill of Rights?’ (Speech at the Constitutional Law Matters event, Centre for Public Law, University of Cambridge Faculty of Law, 8 February 2022) <<https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/>> accessed 23 February 2022.

that it can ‘be difficult...to predict with certainty whether particular functions are of a public nature’<sup>27</sup> and asks whether an alternative approach can help ensure that the Bill of Rights applies broadly without adding ‘new burdens’ for private contractors.<sup>28</sup> In comparison with some of the other proposals, this is relatively uncontroversial. However, it is notable that the question provides very little detail on the longstanding debates over s 6(3)(b), the extensive case law, or the academic criticism. To illustrate its point about the ‘uncertainty’ surrounding the meaning of ‘public authority’, it briefly refers to two recent cases: *Ali*<sup>29</sup> and *LW and others v Sodexo*.<sup>30</sup> However, it does not provide any detail on how these decisions were reached, or the criteria used by the courts to determine whether a body falls within the scope of the HRA. Indeed, *YL* is reduced to a mere footnote.

The lack of detail or suggestions for alternative wordings gives the impression that the question was an afterthought.<sup>31</sup> Considering that this is not a new question, it is disappointing that additional context has not been provided, as this would be helpful in evaluating the question.<sup>32</sup> As it stands, the CP frames the problem of definition as one of legislative drafting, rather than judicial interpretation.<sup>33</sup> In the cases discussed in the previous section, the courts do appear to have ‘struggled with methodology’ when it comes to identifying the characteristics that make a function public in nature.<sup>34</sup> However, this cannot be attributed solely to the wording of s 6(3)(b) as the courts’ emphasis on institutional characteristics appears to have been influenced by the reasoning in earlier cases on the scope of judicial review. Therefore, whilst the time has come (again) to seriously consider an alternative definition of ‘public authority’, it is not accurate to say that the current definition is inherently unclear.

An alternative drafting could reverse the restrictive approach by the courts and give potential claimants greater certainty over which bodies are covered under the Bill of Rights. However, as the 2004 JCHR report concluded, it is difficult to think of an alternative drafting

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<sup>27</sup> CP 558 (n 1) para 267.

<sup>28</sup> *ibid* para 269.

<sup>29</sup> *Ali* (n 3).

<sup>30</sup> [2019] EWHC 367 (Admin).

<sup>31</sup> By contrast, the government’s proposals on the reform of ss 2 and 3 HRA include illustrative draft clauses for consideration.

<sup>32</sup> The question has previously been raised by the JCHR (n 4). In its 2004 call for written evidence, it asked ‘Whether in your view the meaning of public authority under the Human Rights Act, as interpreted by the Courts, is the right one?’

<sup>33</sup> *ibid* para 269.

<sup>34</sup> McLean (n 16) at 199. McLean was referring specifically to the *YL* decision in this comment, but the argument can be extended to other cases concerning the meaning of ‘public authority’ under the HRA.

that would provide greater clarity.<sup>35</sup> The suggestions previously put forward are imperfect, such as classifying functions that would otherwise be performed directly by public bodies as ‘public’.<sup>36</sup> However, focusing on historic arrangements still does not capture the nature of the function, though in conjunction with other factors the reasons for why the function has historically been performed by the public sector could shed additional light. Any alternative wording would have to be very carefully drafted to avoid limiting the scope of the Bill of Rights and making it more difficult to hold private bodies accountable for breaches of human rights.

Considering that any alternative drafting would still be subject to judicial interpretation, a list of factors to assist judges in making this determination would also be useful. Similar to the factor-based approach to designation proposed by the Scottish Information Commissioner in the context of the Freedom of Information (Scotland) Act 2002, the factors could be taken into account by judges to ensure that their decisions align with the Parliamentary intention for a broad application to private bodies carrying out public functions.<sup>37</sup> Factors should focus on the nature of the function being performed, rather than the characteristics of the body performing it, and could include, inter alia, whether it involves coercive powers normally exercised by the state and the extent to which the inadequate performance of the function would interfere with the fundamental rights of its recipients. This approach would maintain the flexibility needed to respond to varying models of privatisation and outsourced public services, but would provide greater clarity as well as the forum for a broader discussion on what makes a function or a service ‘public’.

#### D. CONCLUSION

Should the HRA be replaced with a Bill of Rights, it could provide an opportunity to bridge the ‘gap in human rights protection’<sup>38</sup> by reversing the narrow approach and ensuring that ‘public authority’ is given a broad meaning that reflects the original Parliamentary intention. This would be a welcome development in a debate that has been taking place for roughly two decades with little concrete progress. However, the question on the definition of ‘public authority’ seemed to be a mere afterthought in a CP chiefly concerned with limiting the influence of the ECtHR on domestic courts and law within the UK. The *Ali* judgment has

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<sup>35</sup> JCHR (n 4) para 98.

<sup>36</sup> JCHR (n 13).

<sup>37</sup> Office of the Scottish Information Commissioner, *FOI 10 Years On: Are the Right Organisations Covered?* (2015).

<sup>38</sup> JCHR (n 4).

demonstrated the need to revisit the question of what constitutes a ‘function of a public nature’, but it is one that would be better raised as part of a discussion on enhancing rights protection within the UK. This would allow for a more robust consultation on the meaning of ‘public authority’ and a meaningful evaluation of the potential solutions. As it stands, this discussion is likely to be drowned out by the noise of the wider government proposals.

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