Joint Committee on Human Rights
Inquiry into the Meaning of Public Authority under the Human Rights Act
Evidence from the British Humanist Association (BHA)

1. Summary

1.1. The British Humanist Association has a particular interest in the interpretation of the meaning of Public Authority by the courts as it would relate to religious organisations undertaking responsibility for education and public services.

1.2. We believe that the courts’ interpretation undermines the Government’s and Parliament’s intent, and will result in the UK failing to implement its duty under Article 1 of the Convention.

1.3. The BHA believes that the courts’ interpretation will result in human rights being compromised in the provision of education and other public services where these are delegated to religious organisations: we provide examples of potential violations of human rights. We note that the Churches and other religious organisations have campaigned for the right to discriminate in employment not only on grounds of religion or belief but also of sexuality, and that the draft Employment Equality (Religion or Belief) Regulations 2003 give no protection against discrimination in access to or delivery of services. There are also exemptions for schools under these draft Regulations.

1.4. The BHA believes that section 6(3)(b) needs to be revisited. We do not believe that Convention rights can adequately be protected by such alternatives as the delegating public authority retaining accountability for delegated services, by the inclusion of protection within the terms of the contract, or the horizontal application of rights between private persons.

2. The British Humanist Association

2.1. 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.

2.2. 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. These include a Humanist Philosophers' Group, a body composed of academic philosophers whose purpose is to promote a critical, rational and humanist approach to public and ethical issues.

2.3. The BHA 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. While we seek to promote the humanist life-stance as an alternative to (among others) religious beliefs, we do not seek any privilege in doing so but rely on the persuasiveness of our arguments and the attractiveness of our position.

2.4. Correspondingly, while we recognise and respect the deep commitment of other people to religious and other non-humanist views, we reject any claims they may make to privileged positions by virtue of their beliefs.

2.5. The British Humanist Association welcomes the opportunity to give evidence on the meaning of Public Authority under the Human Rights Act. With our particular interest in human rights as it relates to “religion or belief”, we have concentrated on exploring the impact of the definition of Public Authority in this area, with only brief comments on the other questions.

3. The courts’ interpretation of the meaning of Public Authority under the Human Rights Act

3.1. 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\(^1\) but also the clear wish that the exposition given by Ministers in the debates\(^2\) should be taken into account by the courts.

3.2. 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.

3.3. At some time in the past it might perhaps have been a simple matter to determine what was and was not a public authority (although even in the nineteenth century questions might have been asked about the East India Company). Today, with executive agencies, public corporations,

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\(^1\) 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".

\(^2\) e.g., 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? If a court were to hold that a hospice, because it provided a medical service, 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."
public/private partnerships, privatised utilities, statutory standards and compliance organisations (Ofcom, Offer, FSA, 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.

3.4. 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 one 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.

3.5. 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 will (in common with a small number of other broadcasters) shortly have public service obligations imposed by the Communications Bill. Moreover, it was cited by the Government as an example of a public authority during the passage of the Human Rights Act.

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

4.1. 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.

4.2. "Religion or belief" in Article 9 encompasses Humanism and other non-religious lifestances (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).  

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3 Hansard HC 17.6.98, col. 433.
4 Hansard HC 17.6.98, col. 411.
5 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." - McFeekly 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 July 20th 1993, CCPR/C/21/Rev.1/Add.4, September 27th 1993, p1.)
4.3. 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.

4.4. 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 replaced the previous administration’s assisted places scheme with 100% funding of new independent schools (“Academies”), 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.  

4.5. 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.

4.6. The risk that we warn against - 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 the Leonard Cheshire case, 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 (e.g., preference in accepting clients, sabbatarian rules or eviction of atheists), being limited only by discrimination law. It may be noted that, while the draft Employment Equality (Religion or Belief) Regulations 2003 provide

\[\text{For example, "Your [religious organisations'] role in the voluntary sector, working in partnership with central and local government, is legitimate and important and where you have the desire and ability to play a greater role, with the support of your communities, we want to see you do so ... we want you as partners, not substitutes. We want to take this partnership forward wherever we can. . . . [It was a] misguided and outdated set of values [that demanded a straight choice between state and voluntary aid.] . . . Where the two do go together the impact is far greater than government acting on its own. We see this in countless charities, schools, health projects, youth work, provision for the elderly, the homeless, work with offenders and ex-offenders, local regeneration schemes and many other social activities." - Tony Blair to Christian Socialist Movement conference, 29/3/01. The BHA has no objection to and indeed recognises the great value of many services provided by religious groups but is completely opposed to them becoming a substitute for generally available social services carrying no label of a particular religion or belief.}\]

some protection against discrimination on the grounds of religion or belief in employment (if not totally adequate because of the exemption for organisations with an ethos based on religion or belief), they do not cover discrimination in the provision of services, and hence provide no protection for the service user.

4.7. Presumably also a train operating company - Stagecoach, for example - would be within its rights to refuse to carry gays and lesbians - or, if obliged by its contract to carry them, could otherwise restrict its service to them or require them to occupy designated seats. Similarly, if the BBC is not a public authority, it may legally bias its coverage of religion towards (say) the Church of England, broadcasting few or no Roman Catholic or non-conformist services.\(^8\)

4.8. These examples may seem far-fetched – and we are far from suggesting that the bodies concerned would adopt such policies – but the clear implication of the current interpretation of "public authority" by the courts is that they would not be open to check under section 6 of the Human Rights Act. Moreover, in our view they are only extensions of current practice in education, where the only schools available in many areas are religious, and some 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). The attitude of the Church of England, moreover, to which the majority of these schools adhere, is that they should take advantage of their "engagement with children and young people in schools . . . to challenge those who have no faith."\(^9\)

4.9. More widely, the commitment of the churches to human rights may be gauged from their continuing campaign to be exempted from the impending 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."\(^10\)

4.10. If such attitudes are allowed to govern (say) hospitals (as they are already allowed to govern hospices in receipt of substantial public funding), we may find ourselves in 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.\(^11\) (Of course, abortions are simply not available – such is the religious domination of so much of America.) 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.

\(^8\) It already broadcasts many hours of Christian services and exposition without any parallel provision for those with non-religious ethical beliefs such as humanists.


\(^10\) Daily Telegraph, 18.3.03.

\(^11\) Austin American-Statesman, 22.8.01.
5. **What steps should be taken to address gaps in Human Rights Act protection and accountability?**

5.1. 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 Government policies which combine determination to distance from themselves the delivery of public services with a degree of religious zeal on the part of individual ministers unprecedented in recent time.

5.2. 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.”

5.3. In a number of judgements, the European Court has determined that States cannot avoid responsibility under the Convention by delegation to private bodies, and “responsibility cannot be avoided by privatisation of state functions, 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.

5.4. In these circumstances, the British Humanist Association believes that section 6(3)(b) needs to be revisited.

6. **Could alternative means be used to fill the gaps in human rights protection?**

6.1. The JCHR’s Call for Evidence suggests three possible alternatives. While the British Humanist Association has limited expertise in this area, we would have concerns about each of these approaches.

6.2. Thus, it has been argued (e.g., by Lord Woolf in R (Heather and others) v. Leonard Cheshire Foundation) that a narrow definition of "public authority" can be mitigated if the delegating authority is held responsible for the actions of its contractors or other agents. However, it can only be held accountable under section 6 if it has the power to remedy violations of the Convention by a service provider.

6.3. The second alternative would be to require the authority specifically to write its obligations under the Human Rights Act into its contracts or agreements with third parties. This would introduce a variety of situations in different areas according to the arrangements made by local authorities, over which the individual would have no control. Moreover, it seems to us that this is an exercise fraught with difficulties and unlikely to offer adequate redress to a member of the public with a human rights grievance, whose action would lie against an authority whose power to ensure relief would often be lacking.

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12 Hansard HC 16.2.98, Col 775.
13 E.g. Van der Mussele v. Belgium (1983) 6 EHRR 163
14 Powell and Rayner v. UK (1990) 12 EHRR 355
Where discretionary services were involved, where an unforeseen situation arises, or where entitlement was otherwise not cut and dried, the difficulties could be even greater.

6.4. If "horizontal" litigation between complainants and agencies were to be the route to redress, to added complexity of litigation would be added the probability that the courts would be even more inclined to limit or deny the obligations of private companies and other agencies, being reluctant to reach decisions with such far-reaching consequences, particularly as these consequences, unlike the accountability of private bodies carrying out public functions, were probably not intended by the Government.

British Humanist Association
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