

Meaning of 'Public Authority' examined by Joint Committee on Human Rights

Alison Presly examines the latest report from the JCHR which adds to considerable academic and judicial debate about the meaning of "public authority" under the Human Rights Act 1998 and its implications for effective human rights protection.

Section 6(1) of the Human Rights Act 1998 ("HRA") makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right". By virtue of section 6(3) HRA, the term "public authority" includes a court or tribunal and "any person certain of whose functions are functions of a public nature". It has been established by jurisprudence that two different categories of public authority are intended to be covered by the concept of "public authority": Firstly "pure" public authorities such as central government authorities and local authorities; and secondly "hybrid" public authorities, who will fall within the provisions of section 6(3) when they exercise "public functions" but not otherwise.

An express statutory definition of "public authority" was omitted from the HRA. In contrast to the approach adopted for the Freedom of Information Act 2000 and the Scottish Public Services Ombudsman Act 2002, there is no schedule to the Human Rights Act in which the public bodies or authorities affected by the legislation are listed. As a result, the practical meaning of the term "public authority" in terms of the HRA has been left open to judicial interpretation. It is a concern about the narrow interpretation applied to the meaning of "public authority" in recent cases involving the delivery of public services by private suppliers which has provoked considerable academic debate. The practical effect of applying a narrow interpretation to the meaning of public authority is to potentially deprive individuals from the full extent of human rights protection that the HRA was intended to deliver.

The latest contribution to the debate is a report published in March 2007 from the Joint Committee on Human Rights ("JCHR"). The JCHR is composed of six MPs and six peers, appointed by the House of Lords and the House of Commons with the broad remit of considering matters relating to human rights in the United Kingdom. This report aims to build on and update the recommendations of a similarly entitled report published by their predecessor Committee in session 2003-04. The latest report states that "*during the last three years there has been little evidence 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.*" On this basis and in view of the "*continuing trend towards the outsourcing of public services*", the report sets out recommendations in three main areas: guidance on contracting for services, litigation and legislative proposals.

- Government Guidance on contracting for services

In light of the increase in private bodies supplying public services (one example is the provision of care services to the elderly by private care providers) there is an increasing reliance on human rights protection by way of contracts between public authorities and the private providers of public services. The previous JCHR Report had urged the Government to publish guidance on the protection of human rights through contracts as the Committee recognised that contract terms alone could not provide a substitute for the direct protection of Convention rights guaranteed by sections 6 and 7 of the HRA. The Government published this Guidance in November 2005.

The JCHR in its latest report is highly critical of the Government's response, stating that the Guidance is overly-technical and "badly written". The JCHR urges the Government to revise the Guidance to incorporate practical and accessible advice for all commissioning authorities, including the drafting of template contract clauses. In addition, the JCHR recommends that the Guidance should be revised in consultation with relevant NGOs and the Local Government Association.

- Further litigation

The report states that awaiting the outcome of further litigation whereby judicial decision-making could further shape the definition of "public authority" under the HRA is not an option as uncertainty surrounding the application of the legislation may endure for many years to come. The JCHR are of the opinion that such a scenario is unacceptable as it could lead to a serious risk of discrepancies across public service delivery.

- Legislative solutions

The previous report by the JCHR in session 2003-04 stated that it was not yet desirable to consider a legislative solution to the problem because at that time it was too early in the implementation of the HRA to consider amendment. The latest report however recommends that a legislative solution is now required given the continuing interpretative problems associated with the meaning of "public authority". The Committee examines several legislative solutions and makes the following proposals:

- Resist the amendment of the HRA to identify individual types of "public authority";
- Recommends that urgent consideration be given to amendment of existing primary legislation to ensure that sectors most seriously affected by the narrow interpretation of public authority are subject to the HRA;
- Ensure that Bills providing for the contracting-out or delegation of public functions identify clearly that the body will be a public authority for the purposes of the HRA;
- Direct amendment of the HRA to clarify the meaning of "public authority" should be considered "as a last resort" given the pivotal constitutional nature of the statute. However, an interpretative statute could be enacted which would help clarify the meaning of "functions of a public nature" in section 6(3) HRA.

In conclusion, the purpose behind the HRA was, by enabling individuals to enforce their Convention rights before the domestic courts, to "bring rights home" and instil a culture of human rights protection in the United Kingdom. This latest report from the JCHR undoubtedly adds weight to the argument that interpretative uncertainties mean that the HRA is far from realising its primary objective.

Weblinks

- [Human Rights Act 1998](#)
- [Joint Committee on Human Rights Ninth Report of Session 2006-07 "The Meaning of Public Authority under the Human Rights Act"](#)