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To: Members of the Legislative Assembly

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Dear MLA,

NORTHERN IRELAND WELFARE REFORM BILL – HUMAN RIGHTS ACT 1998

During Further Consideration Stage on 24 February 2015 I made references to comments made on the Human Rights Act 1998 by the Lord Chancellor and Home Secretary in Westminster. These comments were in reference to bodies delivering privatised or contracted-out public services being within the scope of the Human Rights Act 1998 by the "public function" provision in section 6(3)(b) of that Act. A copy of those comments is attached.

MERVYN STOREY MLA
Minister for Social Development

Examples of Comments on Section 6 of the Human Rights Act 1998

House of Commons Debate, 16 February 1998, col 773 (Home Secretary)

House of Commons Debate, 17 June 1998, col 409-410 (Home Secretary)

House of Lords Debate, 24 November 1997, col 800, 811 (Lord Chancellor)

HOME SECRETARY — 16 Feb 1998: Column 773

Mr Straw

Before I turn to the detail of the Bill, I should like to comment on two issues that have gained particular prominence: the positions of the media and the Churches. Both have concerns that centre on the provisions of clause 6, relating to public authorities, so I must briefly explain the principles underlying that clause.

Under the convention, the Government are answerable in Strasbourg for any acts or omissions of the state about which an individual has a complaint under the convention. The Government have a direct responsibility for core bodies, such as central Government and the police, but they also have a responsibility for other public authorities, in so far as the actions of such authorities impinge on private individuals.

The Bill had to have a definition of a public authority that went at least as wide and took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies or charities, have come to exercise public functions that were previously exercised by public authorities. Under UK domestic common law, such bodies have increasingly been held to account under the processes of judicial review.

As was generally acknowledged in debates in another place, it was not practicable to list all the bodies to which the Bill's provisions should apply. Nor would it have been wise to do so. What was needed instead was a statement of principle to which the courts could give effect. Clause 6 therefore adopts a non-exhaustive definition of a public authority. Obvious public authorities, such as central Government and the police, are caught in respect of everything they do. Public—but not private—acts of bodies that have a mix of public and private functions are also covered.

I shall now deal with the position of the media under the Bill. The convention contains two articles of particular concern to them: article 10, the right to freedom of expression, and article 8, the right to respect for private and family life. Given the concerns of the press and the Press Complaints Commission about the possible implications of incorporation for a law of privacy, it is worth pointing out that, in practice, the convention has already been extensively used to buttress and uphold the freedom of the press against efforts by the state to restrict it. There are at least four leading United Kingdom cases in which the Strasbourg Court has done that—and not one on privacy has detracted from such a line.

I am placing in the Library a paper prepared by my Department that contains details of cases on freedom of expression. Among others, there is the 1979 case concerning *The Sunday Times*, where the European Court found that an injunction preventing publication by the newspaper of material on the thalidomide disaster amounted to a violation of article 10. In its judgment, the Court referred to

> "a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."

There was the 1991 "Spycatcher" case, where the European Court held that the continuation of an injunction preventing newspapers from printing excerpts from the book was contrary to article 10. In that case, the Court used the following words, with which I agree, and which I think the media would also endorse:

> "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication for even a short period may well deprive it of all its value and interests."

HOME SECRETARY — 17 Jun 1998: Column 409

Mr Straw

right hon. Member for North-West Cambridgeshire(Sir B. Mawhinney) claimed, it could not be right for all time. One of the issues that we considered—the right hon. Member for North-West Cambridgeshire raised it with my hon. Friend the Under-Secretary of State for the Home Department—was whether we could provide lists of bodies that were and were not public authorities. We could have saved all this argument by doing so, but we thought that that would be inappropriate, for reasons that I shall explain.

We considered a wide range of approaches, some of which were not far removed from the approach in the Opposition amendments, although they were not identical, for reasons that I shall explain.

Miss Kirkbride: Will the right hon. Gentleman give way?

Mr. Straw: I will not, if the hon. Lady does not mind. I should like to continue.

The most valuable asset that we had to hand was jurisprudence relating to judicial review. It is not easily summarised and could not have been simply written into the Bill, but the concepts are reasonably clear and I think that we can build on them.

I am happy to lift the veil on the considerations of the Cabinet Committee and say that we devoted a great deal of time and energy to this issue, as I hope hon. Members would expect us to. We decided that the best approach would be reference to the concept of a public function. After stating that it is

> "unlawful for a public authority to act incompatibly with a Convention right",

clause 6 accordingly provides that a public authority includes a court or a tribunal, and

> "any person certain of whose functions are functions of a public nature."

The effect of that is to create three categories, the first of which contains organisations which might be termed "obvious" public authorities, all of whose functions are public. The clearest examples are Government Departments, local authorities and the police. There is no argument about that.

The second category contains organisations with a mix of public and private functions. One of the things with which we had to wrestle was the fact that many bodies, especially over the past 20 years, have performed public functions which are private, partly as a result of privatisation and partly as a result of contracting out. I am not going to argue with that—it has happened.

For example, between 1948 and 1993, a public authority—the British Railways Board—was responsible for every aspect of running the railway. Now, Railtrack plc does that, but it also exercises the public function of approving and monitoring the safety cases of train operating companies. Railtrack acts privately in its functions as a commercial property developer. We were anxious—I make this point to the right hon. Member for Sutton Coldfield in particular—that we should not catch the commercial activities of Railtrack—or, for example, of the water companies—which were nothing whatever to do with its exercise of public functions.

Column 410

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. The effect of clause 6(7) is that those organisations, unlike the "obvious" public authorities, will not be liable in respect of their private acts. The third category is organisations with no public functions—accordingly, they fall outside the scope of clause 6.

As with the interpretation of any legislation—this picks up the point made by the hon. And learned Member for Harborough (Mr. Garnier)—it will be for the courts to determine whether an organisation is a public authority. That will be obvious in some cases, and there will be no need to inquire further; in others, the courts will need to consider whether an organisation has public functions. In doing that, they should, among other things, sensibly look to the jurisprudence which has developed in respect of judicial review.

As the hon. And learned Member for Harborough knows, the courts have said that the Takeover Panel amounts to a public authority for the purposes of judicial review. They have also said, however, that the Jockey Club is not susceptible to judicial review, even though it is established by royal charter and performs functions which would be performed by the state or a state agency in other jurisdictions.

To take a topical example, the courts have said that the Football Association is not such a public body as to be susceptible to judicial review, so they are used to drawing a line, and, up to now, the line which they have drawn has been sensible. The Takeover Panel plainly performs a public function—there can be no argument about that, even though it is a private

body—and even though the public enjoy football, it is highly debatable whether the functions of the FA are public functions. The same is true of the Jockey Club and its functions. The courts have been careful in holding susceptible to judicial review bodies which are not plainly agents of the state.

The courts will consider the nature of a body and the activity in question. They might consider whether the activities of a non-statutory body would be the subject of statutory regulation if that body did not exist, which covers the point about the Takeover Panel; whether the Government had provided underpinning for its activities; and whether it exercised extensive or monopolistic powers.

What I have said is intended to make it clear why we have drafted clause 6 in the way that we have, and what effect it is intended to achieve.

LORD CHANCELLOR — 24 Nov 1997: Column 800

The Lord Chancellor: I am not sure whether the right reverend Prelate was in the Chamber when I read out Article 9 of the convention. I was at pains to emphasise that the convention guarantees religious freedom and entitles anyone, either alone or in community with others, in public or private, to manifest his religion or belief in worship, teaching, practice and observance. If any words of mine are necessary to add to the remarks of the noble Lord, Lord Lester of Herne Hill, it is well known that the European Court is highly respectful of Article 9. The Court does treat it as a charter for religious tolerance. I doubt whether the right reverend Prelate, were he to study the decisions of the Court under the article would find much, if anything, with which to quarrel.

I shall not be drawn into two particular responses to very particular questions. One of the dangers of Pepper v. Hart is that if one becomes drawn in that way, what one says can be too readily cited in the courts for a particular interpretation of the Bill. Pepper v. Hart does not come free of risk.

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. We believe that the principles of the Bill are right and that the courts will come to answers in which the public will have confidence.

Column 811

The Lord Chancellor: I understand that this is a probing amendment, but what I am concerned to elucidate is whether it proceeds on the basis of a misunderstanding about the way in which Clause 6 works. Interpreting Clause 6(3)(c) as applying to all public authorities,

even obvious ones, they already qualify as public authorities under Clause 6(1), with the result that government departments, for example, would not be bound by the convention in respect of their private acts. Of course, once a body qualifies as a public authority under Clause 6(1), if any of its acts are incompatible with one or more of the convention rights, it acts unlawfully.

The noble Lord has explained the reasoning behind his amendment. Essentially it is intended to ensure that public authorities must comply with Clause 6 in relation to all their acts, including those which might be regarded as private in nature, such as those relating to employment matters, while exempting private bodies with some public functions from Clause 6 in relation to their private acts. With respect, I think that the noble Lord may have misunderstood how Clause 6 in its current form is intended to work in relation to public authorities. I hope that my explanation will persuade him that his amendment is not necessary.

For the purposes of this amendment, I hope that the Committee will forgive me if I repeat and perhaps amplify some of the observations that I made pursuant to an invitation from the noble Baroness, Lady Young, that I give a better explanation. Clause 6(1) refers to a "public authority" without defining the term. In many cases it will be obvious to the courts that they are dealing with a public authority. In respect of government departments, for example, or police officers, or prison officers, or immigration officers, or local authorities, there can be no doubt that the body in question is a public authority. Any clear case of that kind comes in under Clause 6(1); and it is then unlawful for the authority to act in a way which is incompatible with one or more of the convention rights. In such cases, the prohibition applies in respect of all their acts, public and private. There is no exemption for private acts such as is conferred by Clause 6(5) in relation to Clause 6(3)(c).

Clause 6(3)(c) provides further assistance on the meaning of public authority. It provides that "public authority" includes,

> "any person certain of whose functions are functions of a public nature".

That provision is there to include 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.

Perhaps I may give an example that I have cited previously. Railtrack would fall into that category because it exercises public functions in its role as a safety regulator, but it is acting privately in its role as a property developer. A private security company would be exercising public functions in relation to the management of a contracted-out prison but would be acting privately when, for example, guarding commercial premises. Doctors in general practice would be public authorities in relation to their National Health Service functions, but not in relation to their private patients.

The effect of Clause 6(5) read with Clause 6(3)(c) is that all the acts of bodies with mixed functions are subject to the prohibition in Clause 6(1) unless—I emphasise this—in relation to a particular act, the nature of which is private.

Clause 6 accordingly distinguishes between obvious public authorities, all of whose acts are subject to Clause 6, and bodies with mixed functions which are caught in relation to their public acts but not their private acts. In so far as the noble Lord is concerned with obvious

public authorities such as those I have described, Clause 6 already does the job which his amendment is designed to do. In so far as he is concerned with bodies in the second category, I would contend that it is right to exempt from Clause 6 their private acts. In relation to employment matters, for example, I do not see a distinction between a private security company which has a contracted-out prison in its portfolio and one which does not. There is no reason to make the first company liable under Clause 6 in respect of its private acts and the second one not liable simply because the first company is also responsible for the management of a prison. As far as acts of a private nature are concerned, the two private security companies are indistinguishable; nor do I see a distinction in this area between Railtrack and other property developers or between doctors with NHS patients and those without.

Returning to the noble Lord's amendment, I do not believe that its actual effect—or its intended effect—differs significantly, if at all, from the effect of the provisions currently in the Bill. I do not see any real difference between,

> "any person certain of whose functions are functions of a public nature",

as in Clause 6(3)(c), and

> "A private body, which sometimes exercises functions of a public nature",

as in the amendment. Both of them refer to an entity which has mixed public and private functions. Both of them feed into the exemption for private acts in Clause 6(5). As I have explained, it may be that the Government and the noble Lord are aiming at the same target. In the light of that, I hope that the noble Lord will seek leave to withdraw his amendment.