Acts Of Public Authorities

Volume 314: debated on Wednesday 17 June 1998

Sir Norman Fowler
(Sutton Coldfield)
I beg to move amendment No. 106, in page 4, line 7, at beginning insert—

`( ) A public authority is any person or body which—
- (a) is established and regulated by statute; or
- (b) has ministerial appointments on its governing body;

and for the purposes of this Act such a person or body under paragraph (a) above is only a public body when acting in the discharge of its statutory functions.'.

The Chairman
With this, it will be convenient to discuss the following amendments: No. 27, in page 4, line 17, leave out from 'court' to 'the' in line 22 and insert `and'.

No. 28, in page 4, line 24, leave out 'or tribunal'.
No. 29, in page 4, line 24, leave out from second 'court' to 'when' in line 25.
No. 30, in page 4, line 27, leave out
'by virtue only of subsection (3)(b)
No. 31, in page 4, line 31, leave out subsection (7) and insert—
'(7) For the purposes of this Act, the private acts of a public authority shall not be regarded as incompatible with Convention rights'.
No. 34, in page 4, line 31, leave out
`by virtue only of subsection (3)(b)'.
No. 142, in page 4, line 32, at end insert—
'( ) A court or tribunal shall not determine that a person is a public authority for the purpose of subsection (3) (b) if in relation to a complaint based on similar facts made against the United Kingdom in respect of an act, decision or omission of that person the European Court of Human Rights would declare a complaint to be incompatible with the Convention under Article 27(2).'.
No. 143, in page 4, line 32, at end insert—
'( ) A court or tribunal shall determine that an act is private in nature for the purpose of subsection (7) if in relation to that act the European Court of Human Rights would declare a complaint based on similar facts to be incompatible with the Convention under Article 27(2).'
No. 93, in clause 21, page 13, leave out lines 43 and 44.

Sir Norman Fowler
The amendment was originally tabled by my right hon. Friend the Member for North-West Cambridgeshire (Sir B. Mawhinney). In so far as it relates to the press, I declare an interest as non-executive chairman of Regional Independent Media, which publishes newspapers both in Yorkshire and in Lancashire, although regrettably not in

Blackburn. As the Committee knows, there is more than one view in the newspaper industry on the issues surrounding the clause.

The amendment goes far beyond the press and the Press Complaints Commission; it relates to the definition of a public authority. Clause 6 makes it
"unlawful for a public authority to act in a way which is incompatible with a Convention right."
However, there is substantial vagueness in the definition of a public authority. Clause 6(3) states that a
"'public authority' includes…a court or tribunal, and…any person certain of whose functions are functions of a public nature".
The notes to clauses say that the clause proceeds on the basis that some authorities are so obviously public that it is not necessary expressly to define them. Indeed, in the other place, the Lord Chancellor said:
"Clause 6 is designed to apply not only to obvious public authorities such as government departments and the police, but also to bodies which are public in certain respects but not others."— [*Official Report, House of Lords,* 3 November 1997; Vol. 582, c. 1232.]
Unsurprisingly, the vagueness of such language has led to substantial argument about what is and what is not covered. Lord Donaldson, the former Master of the Rolls, asked the obvious question—what are functions of a public nature? In the other place, he said that central Government, local government, the police, immigration officers, prisons, courts and tribunals were covered, but that he found it difficult to understand the White Paper guidance that
"companies responsible for areas of activity which were previously within the public sector, such as the privatised utilities",
also exercised public functions. He asked:
"What has the fact that the activity was originally in the public sector got to do with the definition that we find in the Bill"?— [*Official Report, House of Lords,* 3 November 1997; Vol. 582. c. 1293.]
He wondered whether there would be any difference between the BBC and ITV companies or commercial radio. Indeed, he took the view that all of them were included in the definition of a public authority. He asked where the process would end—he wanted to know whether Safeway or, indeed, Asda were covered, as they self-evidently conducted business of a public nature. He was led to the conclusion that there must be a better way in which to define what is meant by a public authority. The amendment seeks to address that issue.
Responding to the concerns raised on Second Reading in the other place, the Home Office Minister, Lord Williams of Mostyn, said that he anticipated that the BBC would be a public authority, that Channel 4 might be a public authority and that commercial television stations might not be public authorities. He said:
"Some authorities plainly exercise wholly public functions; others do not. There is no difficulty here."—[*Official Report, House of Lords,* 3 November 1997; Vol. 582, c. 1309.]
My response to that is, with respect,
"Up to a point, Lord Copper",
as he then went on to discuss newspapers. His view was, subject to the proviso that this was a matter for the courts to determine in due course, that a newspaper was not a public authority. Indeed, much of the debate has been about that issue, particularly the status of the Press Complaints Commission.

Mr. Lansley
I am listening with care to my right hon. Friend. Before he moves on to the press, will he agree that it is remarkable that, in the other place, a Minister abandoned to the future jurisprudence of UK courts the definition of the scope of the Bill? Does not that leave us in a difficult position in examining the Bill?
Sir Norman Fowler
That is exactly my point—my hon. Friend is entirely correct.
Miss Julie Kirkbride
(Bromsgrove)
On that point, I was musing why, when the BBC and, presumably, Channel 4 and ITV, are public authorities, ITV companies probably are not— on newspapers, the matter is not clear. From my recollection of my days at ITV, its functions had a public service element, so one would suppose that its activities could be drawn into the ambit of the Bill.
Sir Norman Fowler
The Home Secretary, with his usual clarity, will be able to guide the Committee on those questions, although I am not sure that the Government have so far entirely succeeded in giving clear guidance—we look forward to what the Home Secretary has to say.

My hon. Friends the Members for South Cambridgeshire (Mr. Lansley) and for Bromsgrove (Miss Kirkbride) point to the vagueness that surrounds the matter—none of us is clear about what the legislation means, especially as it seems that it will partly be interpreted only later. As they suggested, it is not that the press is the only issue or that the Press Complaints Commission is the only body that will be affected by the Bill; the status of the press merely serves to illustrate the difficulties with which the amendment is concerned.
Clause 1 sets out the convention rights that are given effect by the Bill, including articles 8 and 10. The trouble is that those articles could be in conflict. Article 8 concerns the right to respect for private and family life; it states that a public authority should not, except in certain circumstances, interfere with the exercise of that right. Article 10 sets out a right to freedom of expression and to receive and impart information and ideas without interference by a public authority. Somehow, a balance must be struck between what we can call the rights to privacy and free speech and free reporting—we cannot burke the fact that there is a conflict between the two articles. The Burgess and Maclean case of the 1950s provides a practical example of what I mean. As the Committee will recall, the two British traitors suddenly left the country—they left alone, but Maclean left behind his wife. One newspaper, the *Daily Express,* took a close interest in Mrs. Maclean, believing that she might join her husband behind the iron curtain. There was a row and the *Daily Express* was roundly condemned, not least in the other place, for its breach of privacy and its intrusion. Ultimately, of course, Mrs. Maclean did exactly as the newspaper suspected and slipped away to Russia. I do not want to argue the merits of the case. Suffice it to say that there is a true illustration of the real conflict between the two articles.
5.30 pm
So, not surprisingly, a debate has centred on the Press Complaints Commission. Clause 6 provides that it is unlawful for a public authority to act in a way that is incompatible with a convention right. Does that include the commission? The Government's view was that it was exempt from the provisions of the Bill—or, to put it more precisely, that was the Lord Chancellor's view. According to a report on 1

December 1997 in *The Guardian*—a paper in which I always have the greatest trust—the Lord Chancellor was involved in what the newspaper called a "lively argument" with the now beleaguered Secretary of State for Culture, Media and Sport, who warned the Lord Chancellor that the new law could damage press freedom and interfere with the commission's judgments. According to *The Guardian,* that argument was shot down in flames by the Lord Chancellor on the grounds that the Secretary of State was a layman and that he was an experienced lawyer. The newspaper reports the Lord Chancellor as telling senior newspaper executives that there was no question of the Press Complaints Commission being affected by the law. Indeed, the Lord Chancellor sought to give reassurance on Second Reading in the other place when he said—perhaps a less than resounding phrase—

"I am a member of a Government who, as a whole, give the highest value to upholding the freedom of the press."—[*Official Report, House of Lords,* 3 November 1997; Vol. 582, c. 1229.]

I am not entirely sure what he meant by "as a whole". I suspect that he meant except when the Government's interests are affected. He went on to say, directly to the press—

The Secretary of State for the Home Department
(Mr. Jack Straw)

Where?

Sir Norman Fowler

I shall have to look that up if the right hon. Gentleman really wants to know. The Lord Chancellor went on to say to the press:

"I understand your concerns but let me assure you that press freedom will be in safe hands with our British judges and with the judges of the European Court."

There might be agreement on both sides of the Committee that "safe in your hands" is a political expression that should be avoided these days by any wise politician because, only a few weeks after the Second Reading debate, on 18 November, David Pannick QC wrote an important article in *The Times* suggesting that the Press Complaints Commission was a public authority. On 24 November, the Lord Chancellor did a spectacular legal U-turn and accepted that his advice had been wrong. In a press notice he said:

"It is possible that the Press Complaints Commission will be held to be a public authority under the Human Rights Bill when it becomes law. I had earlier thoughts that it would probably not, but an Opinion given to the PCC by David Pannick QC persuaded me that it probably will be."

However, he added:

"If so this is good news for the press because the courts will regard the PCC as the primary body to provide effective protection to people who suffer from press abuses."

He went on to add the slightly dubious proposition that he and Mr. Pannick

"have both been telling the press exactly the same thing."

Those assurances did not entirely settle the matter with the public, the press or, perhaps above all, with the Press Complaints Commission. As the noble Lord Wakeham, the chairman of the commission, pointed out, if his adjudications on matters of privacy could be subject to subsequent action by the courts, his task of trying to resolve differences would no longer be a practicable proposition. The courts would be able to intervene after the commission's work had finished. He added that his chances of making self-regulation work to the benefit of ordinary people and without cost to them would be minimal.

The point being made was that the Press Complaints Commission seeks to mediate and reach agreement. The fear is that, if it becomes a body with new procedures to fine newspapers and to introduce a mechanism for prior restraint of newspapers shown to be on the point of breaching someone's privacy, the whole nature of the commission will change. Certainly it can be argued, as some have, that that should be the case, but I do not think that anyone would seriously argue that we should do all that and change all that entirely by accident. That again is what lies behind my fears about the Bill.

Miss Kirkbride

Perhaps this is a question for the Home Secretary, but you—

Hon. Members

Right hon. Friend.

Sir Norman Fowler

I will answer to anything.

Miss Kirkbride

My right hon. Friend might like to muse on whether, if a judge takes that decision, that judgment could then be overtaken if another judge decided in another case that some of the capacities of the Press Complaints Commission should be considered those of a public authority under the relevant legislation. How moveable a feast will it be?

Sir Norman Fowler

As my hon. Friend said, that is really for the Home Secretary to explain. As far as the chairman of the PCC is concerned, it raises the fear and doubt that it will be bypassed and that people will go

straight to the courts. I am trying to be as neutral as I can—I have my own views on this—and would merely say that, if we are to make changes of that sort, they should be made deliberately and explicitly and in the knowledge of what we are doing. We do not want to drift into such a change.

Mr. Robert Maclennan

(Caithness, Sutherland and Easter Ross)

To clarify the thinking of the chairman of the PCC, if possible, was he saying that the commission felt that it could not be effective if there were a potential legal remedy? If he was, it would seem to rule the PCC out of considering, for example, potential defamation cases. I am not clear whether its case was expressed as widely as that.

Sir Norman Fowler

The right hon. Gentleman must make up his own mind and he will have read the debates in the other place as I have. Basically, my noble Friend Lord Wakeham said that, first, there was a danger that the whole nature of the PCC would be changed with the right to fine or order compensation, which it does not have at the moment—the idea of prior restraint is certainly entirely different. The second danger would be that no one would take the slightest bit of notice of the commission in any event, but would simply bypass it and go to the courts. Why deal with the middle man, so to speak? My noble Friend had a number of concerns.

Mr. Andrew Rowe

(Faversham and Mid-Kent)

My right hon. Friend has set out a number of criteria against which a change might be made—I think he included words such as "coherent", "deliberate" and "carefully thought through". Is he not asking rather a lot? This Government have so far made few changes that could possibly match up to any of those criteria.

Sir Norman Fowler

I do not want to enter into such deliberate party political banter at this point because I am optimistic that the Home Secretary will agree with everything that I have said and accept my amendment. I shall leave it at that.

Let me go back to the danger that I see. As I understand it, the Government are not only in favour on the whole of press freedom, but are, on the whole, opposed to introducing a new general law of privacy. It must follow that they do not want to achieve that by the back door. They do not want to make law explicitly, but nor do they want it to slip in. I agree with the Government's intention not to introduce a general law. Newspapers are there to expose; that is their function. At their best, the media expose crooks, spies and fraudsters, although at their worst they intrude into private lives when no public interest is served. The difficulty is obviously in drawing a line.

The law should certainly protect the public against phone tapping or interception of mail, but it should not attempt to judge taste, on which the public are capable of reaching their own conclusions. I do not think that public opinion is overwhelmingly conclusive on the question of a general law of privacy. A House of Commons reference sheet in November 1997 said that *The Guardian* had published the fascinating finding of an ICM opinion poll that 90 per cent. of respondents favoured a privacy law, but 53 per cent. felt it should not protect politicians from media investigation into their private lives. That is a curious proposition, although it is doubtless a true sign of public opinion.

The point is that the uncertainty surrounding clause 6 of the Bill means we are in danger of making changes that are neither intended nor explicit. Arguments can be, and are, made in favour of changing the Press Complaints Commission. That seems to be what the Lord Chancellor was advocating outside Parliament earlier this year in an interview with the *New Statesman* . He advocated a PCC that would have powers to fine newspapers that breached the commission's privacy guidelines, or, more accurately, to award compensation. The Lord Chancellor appeared also to advocate a mechanism for prior restraint of newspapers that were shown to be on the point of breaching someone's privacy without justification.

It is argued that such change would avoid the danger of people using the courts—the danger I mentioned to the right hon. Member for Caithness, Sutherland and Easter Ross (Mr. Maclennan)—rather than the PCC to pursue grievances. That danger has also been pointed out by the constitutional lawyer Sir William Wade. The price of that, however, is that the PCC would become a different animal. A few newspapers, including *The Guardian,* accept and support that idea; others, such as *The Times,* say that the PCC would not and could not survive the strain of its new obligations, and that not many newspapers would voluntarily co-operate with it. I do not want to argue which of those cases is correct, but to change the whole nature of the PCC by accident and without sensible consultation would not be good law making.

The amendment would bring greater certainty to the definition of a public authority. We have sought to limit the bodies or people covered. A body would be a public authority established and regulated by statute, or one that had ministerial

appointments to its governing body. That does not settle everything; it excludes the PCC, for example, but could well affect the Broadcasting Standards Council. The way forward is for the Government to produce an amendment or new clause—the Home Secretary promised some such action on Second Reading— that would give primacy to the effect on the media of article 10 on freedom of expression. The aim should be to have a measure that covers all media, not just the press. To use the jargon, they should be on a level playing field.
The important principle behind the amendment is that we should aim for more certainty over who is or is not covered. What is a public authority, and what is not? The Bill is vague and uncertain, and that is neither good law nor in the interests of the public.
Mr. Straw

It may help the House if I respond first to the speech by the right hon. Member for Sutton Coldfield (Sir N. Fowler). It is a matter of great regret that the newspaper chain of which he is the non-executive chairman does not have a newspaper in Blackburn. It would be welcome, and I would enjoy its competition with the world's finest newspaper, the *Lancashire Evening Telegraph. [Laughter.]* I mean that; I have often said so on the record.

5.45 pm
The amendments raise an important question at the heart of the Bill—the definition of a public authority. The right hon. Gentleman dealt with some of the issues very elegantly. Before I turn to the amendments, and comment on what he said about the press, which will come up later in our consideration, I want to explain what clause 6 is intended to achieve and why we came to the conclusions written into the Bill.
When we were drawing up the Bill, we noted that the convention had its origins in a desire to protect the individual against the abuse of power by the state, rather than to protect one individual against the actions of another. The history of the establishment of the Council of Europe and the great desire at the end of the war that states in Europe should never again be able to oppress their citizens as Nazi Germany and the axis powers had done, explain why the convention places on the state responsibilities in respect of its treatment of residents and citizens.
We decided that convention rights should be available in proceedings involving what might be very broadly described as "the state", but that they would not be directly justiciable in actions between private individuals. Although we were not prepared to go as far as that, we wanted a realistic and modern definition of the state so as to provide correspondingly wide protection against an 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. The principle of bringing rights home suggested that liability in domestic proceedings should lie with bodies in respect of whose actions the United Kingdom Government were answerable in Strasbourg. The idea was that if someone could get a remedy in Strasbourg, he or she should be able to get a remedy at home. That point was crucial to the Bill's construction.
For those Members who are not particularly conversant with the jurisprudence of the European Court—I make no point about that; why should they be?—it is worth noting that the Strasbourg court has over the years developed its own concept of the state, and its idea of the bodies for whose actions a Government, as a signatory high

contracting party, are answerable goes much wider than the original narrow definition of the state.

Having set those principles, the question is how we are to translate them into legislation. I do not for a second pretend that that is the easiest matter in the world or that there is one simple answer. As long ago as when we issued the Labour party's consultation document, "Bringing Rights Home", we recognised that there was no cut-and-dried, off-the-shelf answer as to which organisations in today's society stand in the shoes of the state and act on its behalf.

That is a particularly difficult question in the circumstances of the development of institutions in this country, which does not have a single, codified written constitution. I am proud of the way in which we have, for at least three and a half centuries, avoided violent revolution, while every other European country was either conquered by another, larger country or went through an internal convulsion. The reasons for that are the subject of many learned tomes, but—

Mr. Oliver Heald
(North-East Hertfordshire)

First past the post.

Mr. Straw

The hon. Gentleman should not tempt me too far, but let me tell him that in Old Sarum before 1832 it would not have made a huge difference whether we had first past the post, additional vote plus or even our old friend Mr. Victor d'Hondt. For the many seats that were controlled by the Duke of Newcastle, the voting system made no difference, because he either had only one candidate or bribed the electors.

One of the reasons why we were able to develop our institutions peacefully concerned the development of our legal institutions, with the common law and jurisprudence behind them. Over the years, institutions have evolved that perform functions that are effectively those of the state, in its continental sense, but are not directly under the control of the state. I happen to think that that is a good thing, but it poses some difficulties for the drafting of legislation.

Mr. Grieve

It is a matter, not only of the lack of codification but of the fact that we have deliberately farmed out functions to charitable organisations such as the Royal National Lifeboat Institution that in other European countries would be discharged by the state. That is the nub of the problem. I assume that the RNLI would be a public body.

Mr. Straw

It would be a public body in respect of the public functions that it performs, but not of all its charitable functions.

Our society has placed a high value on the notion of self-regulation. Essentially, the House has told particular professions or organisations that they should put their house in order and regulate themselves or we will introduce statutory regulation. Many institutions have accepted that incentive.

The best example involves regulation in the City: the Takeover Panel was not established by statute and, as far as I am aware, none of its members is appointed by Ministers, but it plays a crucial role in the regulation of markets and competition

policy and has been regarded by our domestic courts as susceptible to judicial review. Although they have not used that language, the courts have effectively said that the Takeover Panel, which may be entirely private in its composition, exercises a public function. That is one of the complexities with which we have had to deal in trying to draft the Bill.

Mr. Rowe

Is the Home Secretary saying that, for the purposes of the Bill, the definition of the state is that which has been evolved by the court in Strasbourg, or that it is what we have traditionally defined as the state? That is quite an important distinction.

Mr. Straw

I take the hon. Gentleman's point, but the distinction is not as great as he thinks. If we are to incorporate the convention in British law and make sense of it we must, as a basic minimum, ensure that the Bill and its application require that the British courts recognise domestically as public bodies those bodies that would be recognised as such in Strasbourg. Otherwise we will not be bringing rights home and we will simply make a rod for our own back by ruling out adjudication by British courts on questions that can plainly go to Strasbourg.

In that case, we would miss out on what has been recognised by all parties as a benefit, whatever other arguments we may have had in the Chamber, and British judges would not be able to adjudicate on the convention. If we can give the margin of appreciation of the benefit of British jurisprudence to the development of convention concepts, we may avoid what people sometimes regard as foreign judges pronouncing on British matters. That could ultimately happen, but the possibility will be reduced.

As a matter of practice, we think that there is much guidance to be gained from the way in which British domestic courts have developed the concept of judicial review. The hon. Member for Faversham and Mid-Kent (Mr. Rowe) used the word "traditionally". We are not dealing with something that is cut and dried or traditional. In terms of both convention jurisprudence and the British courts, the matter is very dynamic; 30 or 35 years ago, when I took my law course, administrative law was an obscure diversion for the odd academic postgraduate, because concepts of judicial review were undeveloped, but now it is an essential part of lawyers' activity.

Mr. Edward Garnier

(Harborough)

I hope that I am not being too dim, but it seems to me that the nub of the clause is the difference between an act of a public nature, as set out in subsection (3)(b), and a private act. In any given case, a court will have to decide whether what a body is doing—be it an omission or a positive act—is public or private. Is the Home Secretary saying that jurisprudence at Strasbourg would allow any given judge to say straight away that an act is clearly public or private, or is he saying that the clause offers the English courts the opportunity to develop a common-law understanding of the difference between public and private acts?

Mr. Straw

If the hon. and learned Gentleman will bear with me, I would like to continue my explanation and, if he is not satisfied, I will gladly give way to him again. The matter

is extremely complicated and it has been challenging for us to deal with. There are problems with the amendment that show some of the hazards in the way of anyone who tries to define satisfactorily what are public authorities and public functions in a way that will stand the test of time.

As a minimum, we must accept what Strasbourg has developed and is developing, as otherwise we will not be bringing rights home. We wanted to ensure that, when courts were already saying that a body's activities in a particular respect were a public function for the purposes of judicial review, other things being equal, that would be a basis for action under the Bill.

In most cases in which convention rights are prayed in aid, that will be done by way of an application for judicial review. That will be one of the arguments as to why an administrative decision should be overturned, but others, relating wholly to domestic law, will no doubt be on the application.

As I have made clear, I am happy to give way, but I hope that hon. Members will bear with me. Even if a fixed view of the question could be reached, as the 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.

6 pm

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.

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 is 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.

Sir Norman Fowler

rose—

Mr. Roger Gale
(North Thanet)

rose—
Mr. Straw

I shall give way to the right hon. Member for Sutton Coldfield.
Sir Norman Fowler

Will the right hon. Gentleman confirm my suggestion that, when the Government put clause 6 together and discussed the matter in detail in the Cabinet Committee, the Lord Chancellor's advice was that the Press Complaints Commission was not a public body, and that the Government have proceeded on that basis?
Mr. Straw

The right hon. Gentleman tempts me to a path down which I do not want to go. This is as far as I

Column 411

shall go in lifting the veil: as I recall, the discussion about the middle group — bodies which are not plainly organs of the state, but could exercise public functions— was about Railtrack and the water companies, not directly about bodies such as the PCC. I shall be quite open about the fact that we discussed the BBC and the press. The BBC is plainly performing a public function, and the House has long accepted that it should be the subject of much greater regulation than the press. We have ended up with a mixed economy: the BBC has clear injunctions on it about balance, while the press rightly have no such injunctions on them, except those which they impose on themselves through the PCC. That is entirely right in a free society.
Mr. Garnier

rose—
Mr. Straw

I have given way to the hon. and learned Gentleman quite a lot, so would he allow me to continue?
Mr. Gale

Before the right hon. Gentleman moves on, will he deal with this important point? He said that the courts would take into account whether a body was underpinned by legislation. The PCC, to an extent, is underpinned by legislation, such as law on trespass and various other laws which affect its workings. Does he think that the courts would consider the PCC to be a public body?
Mr. Straw

My noble Friend Lord Williams of Mostyn made clear in the House of Lords our considered view that we believe that the PCC would be regarded as a body exercising public functions under clause 6, but not for the reasons raised by the hon. Gentleman. All bodies that are entirely private are subject to the law of trespass and the law at large. We are not discussing that, but whether they are exercising a public function.

Amendment No. 106 states:
"A public authority is any person or body which—
- (a) is established or regulated by statute; or
- (b) which has ministerial appointments on its governing body".

Bodies established and regulated by statute would be public authorities only when discharging their statutory functions. If amendment No. 31 is agreed to,
"the private acts of a public authority shall not be regarded as incompatible with Convention rights".
I do not want to "mix it". I hope that we are having a serious discussion. Having spent 18 years of my life sitting on the Opposition Benches, I recognise that drafting amendments is not the easiest task in the world for Opposition Members: I could probably list all the occasions on which I was admonished by Ministers for my lack of technical brilliance in that regard. There are, however, some internal curiosities in the amendments that we are discussing, which highlight the problems that exist.
Mr. Garnier

rose—
Mr. Straw

The hon. and learned Gentleman is bursting, so I will give way to him.
Mr. Garnier

I hope that I will not be admonished myself, given that my name is attached to a number of the amendments that we are discussing.

In many ways, I agree with what the Home Secretary is saying. My hon. Friend the Member for North Thanet (Mr. Gale) mentioned the Press Complaints Commission. Amendment No. 32—to which I subscribed—has not been selected, but paragraph (h) deals with the General Medical Council.
The General Medical Council was created by statute, but performs an internal disciplinary function. It disciplines doctors who fall into error, but its functions are not set out in statute. It is not a statutory body in the sense that some nationalised industries are statutory bodies. Nor is it even a body to which the law of contempt applies when it sits as a court. That was decided only this week in the Court of Appeal.
We have here a delicious mixture. The General Medical Council is a body created by statute —as, I believe, is the Law Society—or at least recognised by statute; but it performs internal disciplinary functions of a quasi-courtlike nature. As we discovered this week, it is not susceptible to the law of contempt. In carrying out its judicial and disciplinary function, will the GMC fall foul of clause 6 as it is now drafted, or does the Home Secretary believe that our amendment would assist public understanding of the issue by introducing at least a degree of clarity?
Mr. Straw

With great respect to the hon. and learned Gentleman, I do not think that the amendments would assist in that way. They are clear, but they are wrong. *[Interruption.]* Let me make my point. There was a Second Reading debate about whether we should incorporate the convention; this debate is beyond that.

As I was saying, the amendments are clear, but they are wrong. The list—I will not go into it in too much detail—would exclude from the definition of public functions some bodies whose functions are so plainly public that they would be held to be so by the Strasbourg court. If we did not incorporate the convention, people would have to

traipse off to Strasbourg to claim their rights, and the main object of the Bill would be rendered nugatory.
I submit that to argue that
"any part or member of Her Majesty's armed forces"
is not a public authority, while certainly clear, is plainly wrong. Surely the first function of the state is to establish the armed forces, and to preserve the security of the state. The General Medical Council is plainly performing the function that the state expects it to perform—regulating the conduct of doctors.
Mr. Grieve

Surely any body that regulates a profession of any kind must be a public body for the purpose of that regulation.
Mr. Straw

That is true, unless the professions exist as conspiracies against the public, which is what the public sometimes think. Those of us who are members of a profession that is unregulated by statute should recognise that we have responsibilities to ensure that that great profession is regulated in a manner that is consistent with the public interest. In fact, I have no doubts about the matter. I think that the hon. Gentleman is absolutely right.

As I was saying, there are some internal curiosities. If a body is established by statute, under amendment No. 106 everything that it does will, by definition, be part of the

discharge of its statutory functions. The proviso to amendment No. 106 will therefore never bite. That means that the private acts of Railtrack would be included in the Opposition amendment, but not in our legislation. I suspect that Railtrack would prefer our legislation to that of the Opposition. I am not making a technical point; I am merely drawing attention to the difficulties that are caused when someone seeks clarification, but gets it wrong.
The most obvious reason why amendment No. 106 will not do—I have given technical reasons, but this is really important—is that it does not include Secretaries of State like myself. The Secretary of State for the Home Department is not a
"person or body which… is established and regulated by statute";
nor are Departments generally. Most are not legal entities in their own right. Ministers and Departments exercise a range of statutory powers, but many of the powers that I exercise relate to the royal prerogative, or are common-law powers.
6.15 pm
If the amendment were adopted, it would go both too far and not far enough. It would go too far by including the private acts of bodies such as Railtrack and the water companies, which were established by statute, when we want only the public functions to be included. It would not go far enough, by a long way, in that it would not include Government Departments. It would also exclude other bodies that are at present judicially reviewable. The most obvious example is the panel on takeovers and mergers, which was held to be judicially reviewable following the judgment of the Court of Appeal in the ex parte Datafin case in 1987, but which is not regulated by statute. The same applies to the British Board of Film Classification.
That is a very interesting body. As I know all too well, following the interesting discussions in which I have had to engage with the board to get it to do the job that is expected of it, it is an entirely private organisation. It is not regulated by statute. It has

a curious connection with the Video Recordings Acts, but hon. Members on both sides of the House—on behalf of the public—are pressurising it to do a job on behalf of the public, and classify films properly. In any other jurisdiction, a state body would probably do the work. Here, it is done by a self-regulating body that clearly has a public function. I believe—and I think the public would believe—that that body should be seen as exercising public functions.

I doubt that these are the results that the Opposition want to achieve. As I have said, we live in a common-law jurisdiction—living law is a great strength, although it sometimes produces intellectual challenges—and in a world in which the boundaries between what is public and what is private are changing. Bodies established by statute, and with statutory functions, must properly be regarded as public authorities, but that is too narrow a criterion to stand on its own.

I wanted to make another point before talking about the press, which was raised by the right hon. Member for Sutton Coldfield. Amendment No. 27 would remove references in clause 6(3) to tribunals being public
authorities. I do not know why the amendment was tabled. We think that tribunals should be public authorities, at least in so far as they are bodies in which legal proceedings may be brought. If they were not, there would be a significant gap in the protection of human rights offered by the Bill. "Tribunals" include industrial tribunals, the employment appeals tribunal, immigration adjudicators and the immigration appeals tribunal. If those bodies are not required to comply with convention rights, it is hard to think of bodies that should be. If the employment appeals tribunal were deemed not to be a public body, the cases would go straight to the court in Strasbourg.

Let me now deal briefly with the issue of the press. It is an important issue, but we shall have an opportunity to return to it when we debate the result of the consultations and considerations on the question of protection of press freedoms—which, as I told the House on 16 February, I have undertaken with Lord Wakeham and, through him, the Press Complaints Commission. On 16 February, I told the House:

"Lord Williams and I have been involved in detailed discussions with Lord Wakeham. In particular, we have considered whether safeguards similar in framework to those set out in clause 31 of the Data Protection Bill"—

which was satisfactory to all parties—

"could be brought into this Bill, without compromising its essential purpose.

I am pleased to tell the House that these discussions have borne fruit, and we have reached an understanding with Lord Wakeham … on a framework for amendments to the Bill".

I then said:

"The precise wording of the amendments has not yet been agreed".—[*Official Report,* 16 February 1998; Vol. 306, c. 776-77.]

They will be brought before the House in due course.

There has been a series of discussions with Lord Wakeham and, through him, those whom he represents. They have almost reached a satisfactory conclusion. I shall table those amendments and, as the usual channels are well aware, they will be properly debated. It will ultimately be a matter for the courts, but our considered view is that the Press Complaints Commission undertakes public functions but the press does not, which is crucial. We shall seek in the amendments to give the press further protection and reassurance.

Sir Norman Fowler

Where does that leave broadcasting organisations? Will the treatment that is applied to the press be extended to broadcasting organisations, so that they work in the same way and are subject to the same rules as the press?
Mr. Straw

The amendment as currently drafted does not mention the Press Complaints Commission specifically. It refers to a privacy code. The protection would be available to any broadcaster or publisher. For example, if someone feared that he was about to be exposed, he may seek an interlocutory action. In such a case, broadcasters would be treated similarly, but not the same, because they are not in the same position as the press. The BBC has its own charter and a separate code, which is different from that of the PCC. We are not working on an ad hominem basis in respect of the Press Complaints Commission code. I said that I would be happy to discuss the matter with the right hon. Member for North-West Cambridgeshire before the debate, and I should be happy to discuss it outside the House with the right hon. Member for Sutton Coldfield if that would be of assistance.
Sir Norman Fowler

What the right hon. Gentleman is saying is important, and we shall have to wait and see the amendment that he tables. Does it mean that, for all media organisations, freedom of expression and the right to report take precedence over some rights of privacy?
Mr. Straw

I ask the right hon. Gentleman, if he would not mind, to wait until he has seen the terms of the amendment. The same issue arose with respect to the Churches. This is not a consequence merely of the incorporation of the European convention: having signed up to it, we cannot assert, as a contracting party, that one part of it wholly trumps another part. There is a separate issue about article 3, which is a stand-alone article, but the whole point about the convention is that it balances one article with another. What we did in respect of the Churches was to suggest to the courts that they pay particular regard to freedom of religion. That is the essence of what we are seeking to do for the press: we want to provide important procedural safeguards.

The press are most anxious about the procedural safeguards. I understand and share their concern. Someone may be worried, not that an untruth will be told, which would lead to an action for defamation, but that the truth will be told about them. The press are concerned that that person will be able to prevent that truth from being told about them by obtaining an interlocutory injunction. That shows the complexity and intellectual challenge of the law of privacy. We are entitled to keep truths about us private, but the law of privacy is complex. The law of defamation is about preventing the press or anyone else from uttering untruths or punishing them for doing so and forcing them to correct the untruth.
Mr. Garnier

It is not to punish them.
Mr. Straw

Sometimes exemplary damages are awarded as compensation for an untruth, and it has to be shown publicly that it is untrue. A recent case involved *The Mail on*

Sunday in a spectacular way. The problem with privacy law is that it does not deal with the publication or the unearthing of an untruth, but with the publication or unearthing of a truth. The difficulty is that once a truth has been told, it cannot be untold, unlike an untruth. That is the problem with which we have been wrestling.

I subscribe to a view on the importance of press freedom similar to that of the right hon. Member for Sutton Coldfield. As public figures, we have to take our knocks, and some of us have done so. We need to achieve a balance, and that is what we are trying to do in the amendment. I am happy to discuss it with the right hon. Gentleman and to make it available to the House as soon as possible.

Mr. Gale

Will the right hon. Gentleman give way?

Mr. Straw

I shall give way for the last time, because I have spoken for a long time.

Mr. Gale

When does the right hon. Gentleman expect these amendments to be tabled? He is giving the

impression that we are waiting for the Press Complaints Commission to draft amendments that are in its interest. Those of us who believe in privacy law find that extremely unsatisfactory. We are debating clause 6, and in a moment we shall have to vote on whether we want the clause to stand part of the Bill.

Mr. Straw

I have made no secret of this amendment: I made it clear on 16 February.

Mr. Gale

We are now in the middle of June.

Mr. Straw

There is no secret about the process. I am well aware that we are in the middle of June, but I have had to deal with plenty of other matters in the meantime, as has the Press Complaints Commission. The amendments will be tabled as soon as possible.

I have spoken at length, and I hope that right hon. and hon. Members have found my explanation helpful. I hope that in the light of what I have said the Opposition will not push the amendment to a Division.

Mr. Maclennan

This has been a tantalising debate: it is perhaps a trailer for a later debate in which we shall all be better armed to participate fully because we will know what resolution the Government have proposed to meet the concerns of the Press Complaints Commission. It has been a valuable debate, as it has allowed the Home Secretary to bring home firmly the point that the convention does not rank fundamental rights in accordance with some hierarchy. It would be extraordinarily unattractive if, during the passage of the Bill, we allowed the special concerns of particular organisations, even such august organisations as the PCC, to prevent us from understanding that the

balance of these rights is very much a part of the protection provided by the convention.

It is certainly true that if there appears to be a conflict, particularly in respect of articles 8 and 10, the European Commission and Court have leant in the direction of guaranteeing freedom of expression. None the less, they have weighed these issues against each other when they have appeared to be in conflict. I hope that we shall seek to take that approach in our domestic courts and that we shall not try to develop a different statutory provision. If we were to do so, that would threaten the process of repatriating these rights and would require people to go to Strasbourg where a different line has been developed.

The Government's approach in clause 6, of defining public authorities—in so far as it defines them—by what they do, is question begging. In view of the options, that is perhaps the best way to approach the matter. It does not make sense to list the bodies that the Bill intends to cover because, as the Home Secretary said, such a list could develop over time. We have no wish constantly to revise the Bill to take account of changes, but it is probably preferable to admit that there is some uncertainty and that it is not possible to get rid of it by legislation. We could eradicate it only by being exclusive, which would not serve the purpose of the Bill.

6.30 pm

The uncertainty is sufficiently narrow in practice for it to be justifiable to allow the courts to seek to resolve uncertainties where they arise. That is not a horrifying principle. For too long we have deceived ourselves into thinking that Parliament can foresee and take into account all the circumstances that might arise under some of our legislation and exclude problems. In terms of jurisprudence, that is a mistaken approach. I am happy to see much broader definitions and language in Bills because the courts have shown themselves to be conservative in their interpretation of Parliament's intention. They come up against hard, practical applications and can apply broad principles more effectively and certainly than can Parliament in anticipation of the application of rules that it seeks to draw up.

We do not need to spend much time on the Opposition amendments. They have stimulated debate, but they seem to be defective in ways to which the Home Secretary referred and others. Perhaps they were intended to be no more than a peg on which to hang an interesting debate. I have rarely been riveted by any 40-minute speech, but the one made by the Home Secretary was enthralling. The definition of a public authority by reference to what it does is right because that widens the scope of the coverage to include not only Departments and other central arms of the state, but subordinate and perhaps even localised public bodies that should be made accountable, under the terms of the convention, for their behaviour so as to secure fundamental rights and freedoms.

Mr. Gale

I suppose that I should declare an interest as a paid-up member of the National Union of Journalists. I should welcome the clauses and their relationship to the European convention on human rights because they seem to inject a privacy law by the back door into the law of the United Kingdom. As one who believes that it is time this country had a law of privacy, I ought to welcome that, but I have a difficulty with clause 6 and my reason for speaking to the amendment is that I face the problem that faces my right hon. Friend the Member for Sutton Coldfield (Sir N. Fowler), although

I approach it from a different angle. The problem is that the clause is neither fish nor fowl.

The Home Secretary said a couple of times that he would prefer to await the results of the deliberations of the Press Complaints Commission before tabling amendments to protect the interests of the press. It seems that that is the closest we shall get to a privacy law from an Administration who live by quote, photo-opportunity and soundbite. Any Administration who sought to introduce a proper privacy law would undoubtedly be soundly bitten by the media upon which they feed. The Bill will not protect the individual as he should be protected, neither will it enshrine the proper rights of a free press in a free democracy.

The European convention on human rights contains a clear conflict between the interests in article 8, the right to respect for private and family life, and article 10, freedom of expression. Amendment No. 106 seeks to define a public authority in a way that would remove the Press Complaints Commission from the province of the Bill and would therefore negate the Home Secretary's undertaking—perhaps indication would be fairer—that he thinks that the courts would hold the commission to be a public body. If the matter goes to a vote I shall find it difficult to support the amendment.

There is a need for a privacy law. The press have increasingly demonstrated overweening intrusion. I do not seek to protect a Foreign Secretary who has been caught in flagrante or a Treasury Minister with offshore interests, but I would seek to protect their children from press intrusion. My noble Friend Lord Wakeham, for whom I have an extremely high regard, has tried hard to develop a press code that offers a fair degree of protection to individual privacy of the kind that is mentioned in the Bill. The amendment relates to that. At the same time, he has tried to protect the interests of the press in their lawful aim of publishing in the public interest matters that are directly important to, for instance, the security of the realm.

Lord Wakeham has failed because until the Bill hits the statute book, the Press Complaints Commission has no statutory power or sanction. It has no power to fine. Not long ago, as a result of gross intrusion into the lives of at least two minors—the children of hon. Members—the commission amended its code of conduct to give specific protection to children. Only a few weeks ago there was the revolting spectacle of the press beating a path to the door of Mary Bell and her 14-year-old daughter, a girl who, as far as anybody is aware, has committed no crime whatever. It remains to be seen whether Lord Wakeham's admonitions will be heeded or whether the true story of the people's nanny, as it will become known, will be published within a few days.

If I understood him correctly, my right hon. Friend the Member for Sutton Coldfield referred to the primacy of article 10, but I would argue that article 8 should have primacy and that the right to respect of private and family life is paramount. Amendment No. 106 would negate that right, because it would deny the thesis offered by the Home Secretary that, as the Bill is drafted, a court would deem the Press Complaints Commission to be a public body. However, I quite understand why my right hon. Friend tabled the amendment—at the moment, we do not know whether that will be the case. At the moment, we do not know what amendment or amendments the Government will table, or at what stage during the Bill's passage the Government will table the amendment or amendments—I assume that it will be an amendment and I am looking at the Home Secretary in the hope that he might nod—

to enshrine rights of freedom for the press; nor do we know whether those rights also guarantee rights of privacy for the individual, as enshrined in article 8. At the moment, my right hon. Friend is absolutely right to say that we do not know, because the Bill is profoundly unclear. The clause is also profoundly unclear and, if there is a vote on clause stand part, I shall have to vote against it on that ground.

Mr. Edward Leigh
(Gainsborough)

I shall speak to amendments Nos. 142 and 143, which stand in my name and would clarify the definition, central to our debate, of what is a public authority.

An individual will be able to sue a public body, claiming a breach of his convention rights. When the judges consider the action, they will have to consider two points: first, is the body actually a public body and, secondly, is the act complained of one on which they can rule? The answer to the first question relies on the definition of a public body, which we shall debate in relation to clause 6. The answer to the second question relies on the definition of what is a private act and what

is a public act, which is dealt with in clause 6(7). Under clause 6, it is possible for a private body, such as a Church, to be considered a public body when it performs what are deemed to be public functions.

Throughout our consideration of the Bill, we have debated what is a public body. The definition of a public authority offered in clause 6 is:

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

That is a woefully inadequate definition, which is badly drafted, lacks certainty and will make bad law. The two principal concerns, as we have heard, centre on the Press Complaints Commission and the effects on religious bodies. I shall not deal with either of those in detail as they are not central to my argument today, but they should not be forgotten.

Both Houses have tried on numerous occasions to tease out from the Government what they mean by "a public body". My hon. Friends have put long lists of questions to the Government, but so far we have been unable to obtain from them a satisfactory definition of a public body. Today, we have debated the BBC. The Home Secretary originally said that the BBC would be a public authority, but ITV would not. I am advised by Professor Ian Leigh of Durham university, who has helped me with the drafting of my amendments—

Mr. Straw

Any relation?

Mr. Leigh

No, but his name is spelt the same way as mine. He is professor of law at Durham university and he has advised me that the BBC would not be a public authority. As the Home Secretary and other Ministers have admitted time and again on the Floor of the House and in written answers, no one really knows what a public authority is until the courts start to make their decisions—"We will leave it to the courts," is the usual answer. How on earth is the Committee supposed to know what laws it is passing if we use forms of words that no one can explain until after the Bill has been enacted? If Ministers do not know what they mean by "a public authority", how can judges be expected to know? They interpret the laws we make, but we are making a law that we

do not fully understand because the Government have refused to explain precisely what it means.

Earlier, the Secretary of State for Scotland, summing up for the Government, said that the Bill was nothing to worry about—that it simply brought about a change of venue for human rights issues and that, instead of cases being heard in Strasbourg, they could be heard in a local British court. On 20 May, he confidently asserted that none of the problems that I and others had identified, for example in relation to religious liberties or press freedoms, would arise because no such problems had occurred so far in Strasbourg. His exact words were:

"no one can point me to any single change, other than the forum in which the cases may be heard that will result from the Bi11."—[*Official Report,* 20 May 1998; Vol. 312, c. 1066.]

In so saying, the Secretary of State for Scotland sought to dismiss our concerns, but the truth is that there are many changes in the Bill other than a change of venue, which is why it is a serious matter that we should debate carefully.

6.45 pm

First, a green light is given to judges to develop rights well beyond the convention. The Secretary of State for Scotland might have less understanding, but the Home Secretary has a full understanding of the Bill and he knows that the Bill does not just incorporate the convention—it is not as simple as that. Repeating the slogan "Bringing Rights Home" does not change the fact that the Bill creates rights that go far beyond the convention. The Government have created a bill of rights that is based on the convention, but it is a bill of rights that goes far further than the convention and it will give scope for creative judgments by the courts. Judges will be able to interpret convention rights in new ways, not accepted in Strasbourg. As was pointed out when we debated clause 2, the jurisprudence of Strasbourg is not binding on the UK courts as they interpret the law. For us in the UK, this Bill will be more far reaching than the convention on human rights that we have come to know and love over the past 50 years.

The second reason the Bill goes far further than the convention is that there is a radical change in respect of who can be sued under convention rights. Only Governments can be sued in Strasbourg, but the Bill allows individuals to take a public authority to court over their convention rights. That is a fundamental change from the convention as we have known it. Until now, if someone felt that their convention rights had been breached, they sued their Government in Strasbourg. Their Government conducted the defence and paid the legal bills. If the actions of a public authority were questioned, the Government had to defend that public authority, not the public authority itself. The public authority—bear it in mind that we are about to suck in many organisations that have hitherto not been considered public authorities—did not even need to be represented and did not have to pay any legal bills; the Government handled it all.

If the Strasbourg court found in someone's favour, it made an order against their Government, not against any individual or the public authority. If damages were payable, they were paid by the Government, not by any individual or public authority. We should remember that we are dragging in many quasi-public bodies that might not have the resources to meet that sort of legal challenge. If a change in law were required, the Government changed the law; the public authority did not have to change anything. The judgment of the Strasbourg court did not have any direct effect

at all. Even in the famous Costello Roberts case, which abolished corporal punishment, it was the Government who were sued, not the school.
The third change relates to who foots the bill. Clauses 6 and 7 allow people to sue the public authority directly and clause 8 provides for damages or other penalties to be ordered against that authority. The change of venue will also cause legal action to proliferate, which is no small matter. It will be far easier to trot along to the local High Court and sue a public authority than it is to go to the expense of suing the Government in Strasbourg. Those of us who question the Bill fear that there will be a flood of cases to establish exactly what a public authority is. That is why this debate is so important. Any body that looks even vaguely as if it might fit into this wide category, which the Government have failed to define, may find itself on the receiving end of a summons.

My amendments seek to address the issue of what is a public authority and what actions it can be sued for so as to limit the number of cases that might arise and to introduce some certainty. I should have thought that the Committee was united behind the idea of certainty and the attempt to limit the number of cases.
The problem with clauses 6 and 7 is that they show the massive inconsistency in the Bill. Clause 6 deals with who can be sued and clause 7 deals with who is entitled to sue. Clause 6 is so widely drawn that no one is able to say what a public authority is, but clause 7 is very different. That is what irritates groups such as Liberty and Justice, which were hoping to be able to sue under clause 7. They wanted the Bill to give pressure groups a right to initiate legal action, but the Home Secretary argues—rightly, in my view—that only an individual can be a victim, so only an individual can sue. Therefore, in defining who may or may not sue, the Bill becomes tied to the practice of Strasbourg.
Clause 7(6) states:
"a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights".
As the Bill defines so clearly and precisely who may sue by reference to the convention, one would have thought that it would define who can be sued by reference to the convention, but it does not. That is the problem.
What I argued in our previous debate, and what I continue to argue, is that if we are to incorporate the convention—it is a big if, but I shall not go into that now—we should tie the UK courts to the jurisprudence of Strasbourg to stop them feeling compelled to interfere in social, ethical, spiritual and moral issues that have traditionally been left to Parliament. If we are going to incorporate the convention, it is far better to do it in a sensible way than in a way that results in huge uncertainty and creates the spectre of judge-made law—something that we have always resisted and is not in our traditions, although it is in the traditions of countries such as the United States that have a bill of rights. Therefore, my two amendments simply use the same standard as is accepted in Strasbourg.
One of my amendments would require the UK courts to define a public authority as Strasbourg does. The other requires them to define acts of a private nature in the same way as Strasbourg. Nothing could be simpler. It would add to the Bill an obligation on the courts to consider whether a claim should be entertained by the courts on the same basis that Strasbourg would consider it.
We should not consider the nebulous definitions along the lines of clause 6—Strasbourg does not. There has been much debate about this and I appreciate the

Home Secretary's problems in this respect. Strasbourg does not have this problem. Instead, it refers to article 27(2) of the convention, which deals with the inadmissibility of cases—whether courts should entertain them.
A wealth of jurisprudence on the admissibility of claims has grown up around article 27(2). When considering the admissibility of any complaint, the European Court of Human Rights considers whether the body against whom the complaint is made is a body whose acts are subject to the convention and therefore a body for whose actions a Government can be held

responsible. The jurisprudence already exists, so it seems to make perfect sense for us to use that experience, not to dismiss it.
Article 27(2) also considers the nature of the act itself. Clause 6(7) refers to acts of a private nature. A body that falls within this strange broad definition of "public authority" has a possible escape route if it can show that the nature of the act complained of is private. That is perfectly justifiable. An authority may be a public authority, but we accept that it carries out private actions. However, the problem is that we have no clear guidance in the Bill as to what that means.
I believe that by referring the courts to article 27(2) of the convention we can give them clear guidance by requiring them to abide by Strasbourg's approach. Under protocol 11 of the convention, the existing filtering body—the European Commission of Human Rights —is to be abolished as the full court is restructured. Article 27(2) will then become article 35(3), but it will still exist.
To sum up one argument, there is a glaring inconsistency in that the Bill clearly defines who can sue by reference to the convention, but defines who can be sued by reference to the Government's own home-made formula. That means that no public authority or quasi public authority can really be sure whether it fits the definition. Good law requires certainty. Requiring the courts to apply the Strasbourg test for liability in the way that the Bill requires them to apply the Strasbourg test for standing will increase certainty. Surely that is something in which the Committee should be interested.
When considering what bodies can be subject to judicial review, we should be wary of creating the sort of confusion that has existed in our courts for many years. The Home Secretary hinted at the difficulties that we have experienced. Every time an application is made for a judicial review of the actions of a public body, the argument about whether the body complained of is public has to be rehashed. That sows confusion.
Hours have been spent in court rooms and thousands of pounds of taxpayers' money has been wasted on the problem of what is a public body. Every time there is an application for judicial review, the question of what is public has to be argued all over again because the law is unclear. Unfortunately, there is already extensive confusion in our law, and we are going to make it worse.
There have been numerous appeals to the higher courts where pronouncements have been made, but the question of what is a public body remains unresolved. Since the 1980 case on judicial review—O'Reilly and Mackman—five House of Lords decisions have been handed down on this one point and there have been numerous other appellate decisions. It is no good for the Government to pretend that clear jurisprudence already exists in this country which can guide the courts on what is or is not a public body. The Government are not telling us in the Bill; nor does the jurisprudence exist.
Mr. Grieve

Is not that the whole point—what is public has not been defined hitherto and cannot be defined? To that extent, is not my hon. Friend perhaps worrying overmuch about judicial interpretation in relation to human rights? Will not developments in that sphere

follow almost exactly developments involving public bodies generally and which inevitably have come from the courts with very little comment on them here?

Mr. Leigh

That is true, but new rights will be created. I am sure that my hon. Friend appreciates that the courts will have a virtually clean sheet. If the convention is to be incorporated, we fear that many bodies that have hitherto been considered private and which could not be sued will be sued. Of particular concern are the private Churches, which have very few resources and will now be sued because they will be considered public bodies. Therefore, I cannot accept my hon. Friend's seeming lack of concern about this issue; it is vital.

As was made clear earlier, we do not even know whether the Jockey Club is a public body. Apparently it is now a public body but that was not clear before, as the Home Secretary said. *(Interruption.]* I am sorry. Have I got that wrong? I apologise.

Mr. Garnier

I do not want to interrupt my hon. Friend, but I think that he quite innocently got things the wrong way round. I think that the Home Secretary said that the Jockey Club was not a public body.

Mr. Leigh

I apologise, but that shows that there is going to be confusion about what is or is not a public body. The fundamental failure of clause 6 is that it invites a similar confusion. A huge amount of time and money will be spent over hair-splitting definitions. I believe that the Bill will place a foot flat on the accelerator, pushing the limits yet again of the definition of a public body, and create a whole new flood of cases on the point.

I believe also that there will be years of uncertainty in the courts. Some banisters, or some judges, will try to assimilate the English judicial review test, whereas others will argue on the basis of Strasbourg jurisprudence. Those consequences are all quite unnecessary and could be substantially avoided simply by following Strasbourg on who can be sued, just as the Bill follows Strasbourg on who can sue. I think that that would be a neat solution.

One might argue that if we are to incorporate the convention—a point on which I have some doubts, although it is not for the Committee to debate it today—we should at least try to do it properly and in a manner that will not cause years of confusion. I take the view that we would make a more, not less, certain law if we followed the course that I have been advocating. I think that judges would be grateful for clear guidance and a clear sign that they should keep out of the internal affairs of many public bodies—including Churches and religious charities—on which they will otherwise be forced to adjudicate.

7 pm

Including in the Bill a reference to article 27(2) would invite the court to consider whether an applicant could bring a complaint at Strasbourg against the Government about an action. If we are bringing rights home, as the Government now claim, we should ensure that they are the same rights as currently exist at Strasbourg, not new rights to sue bodies that were previously exempt.

The other advantage of my approach over the Government's approach is that it is more flexible. My approach should appeal to the Government because it

would eliminate the danger of a gap over interpretation appearing between the United Kingdom and Strasbourg, as UK courts would automatically follow the line taken by the Strasbourg court. My approach would avoid the danger of a burden being placed on bodies that normally would not be liable.

It is bizarre that the Government's approach raises the possibility that a body that is successfully sued as a public authority in the United Kingdom might subsequently go to Strasbourg, which might decide that the result of the action was a breach of the body's human rights. A charity, for example, would not normally be considered to be a public authority as it is a private association. However, the Lord Chancellor has said that, in the Bill, charities would be considered to be public authorities.

If the Government want to impose liability on certain bodies in addition to those that are already covered by Strasbourg, they should say so now and name those bodies in the Bill —which is all that I and other Conservative Members have asked for, repeatedly. The list of privatised utilities, for example, is not so long that it could not easily be incorporated in a schedule.

Why are the Government refusing to name in the Bill the public bodies that will be covered by the Bill? Why are they not coming clean to Parliament? Surely the Government should have the courage to state clearly who the Bill is intended to catch and not hide behind the courts, which is what they are currently doing. The Government's current definition is simply not good enough or clear enough.

I believe that the Bill goes wider and deeper than the convention. It goes wider because the definition in clause 6 of a public body includes bodies whose actions have never, ever been dealt with by the European Court of Human Rights. It goes deeper because United Kingdom courts will be forced to become involved in social, religious and other issues in which they should have absolutely no involvement.

The Bill leaves fundamental issues in a mess, whereas in Strasbourg at least there are clear rules. As I said, the Government want to follow those clear rules in clause 7—which is fair enough—when deciding who can sue, but not in clause 6. Therefore, the matter of which bodies can be sued is wide open and the Government have given no help to the Committee.

Would Parliament ever pass a Finance Bill without knowing to whom it applies? Is not the affected party a central matter included in any Finance Bill? To whom will a tax apply? When the Chancellor of the Exchequer delivers the Budget, does he say, "I think that we should create a general right. The courts have a wealth of jurisprudence to decide it and they can be relied upon to do so"? No; the Chancellor states to whom the Bill will apply. The Committee is being asked to consider a Human Rights Bill without being told in clear detail—in any detailx2014;to whom the new rules will apply.

The Bill will leave judges free to exercise creativity and poetic licence and require them to go further than Strasbourg has ever gone. As there will be little or no jurisprudence dealing with the cases that courts will have to consider, they will—as I told my hon. Friend the Member for Beaconsfield (Mr. Grieve)—be starting with a

clean sheet. Confusion will immediately be created and courts will have to create that jurisprudence as they go along.

I believe that my amendments would deal with some of those points and I commend them to the Committee.

Mr. Garnier

I shall endeavour to speak as briefly as I can. We have had a very good debate, and I pay tribute to the speech of my hon. Friend the Member for Gainsborough (Mr. Leigh), who thoughtfully highlighted the very point that I wished to make on clause 6—which is that it is vague for uncertainty.

As I said in the debate on the Bill's Second Reading, and the debate on the Gracious Speech, I do not have any specific fears about introducing into domestic legislation the European convention on human rights. However—as Ministers tell us that they are bringing rights home and creating a new approach, so that people can litigate on some matters in domestic courts rather than in Strasbourg—the Government owe a duty to Parliament and to those who will hereafter have to interpret the law to avoid as much uncertainty as possible.

The Home Secretary has returned to the Chamber. I have not started making polite remarks about him, but I soon shall. I am glad that he has returned.

From my own experience as a barrister practising in the law of defamation, I know that, in any given case, the law frequently develops. I know from my own experience at the Bar that judges frequently develop the law. I shall give two examples from my own sphere of practice —qualified privilege and fair comment.

It is often said that the categories of fair comment are never closed. Occasionally, a new case will be decided that extends the list of occasions of publication when qualified privilege applies. We are currently awaiting a judgment in the case of the former Taoiseach of the Republic of Ireland, Albert Reynolds, who recently had an action against *The Sunday Times.* An interesting question will be decided by the Court of Appeal in that case, by the Lord Chief Justice and two other Lord Justices, which is whether qualified privilege applies to the particular fact of Mr. Reynolds's case. I shall not go into the detail of the case now, as it is not germane to our debate.

What constitutes a matter of public interest for the purposes of fair comment also is not frozen. Our courts are perfectly accustomed to extending the categories of matters of public interest, so that justice can be done in any particular case. We are used to that practice. However, that was under the old system.

Under the flashy new Labour Government, we are being given rights which, if we are to have them—as my hon. Friend the Member for Gainsborough said, and I fully accept— should be so drafted by the Government that any possibility of doubt is avoided.

As I said a moment ago, judges are perfectly capable of deciding whether a particular function is of a public nature or whether an act is a private act. I do not doubt that judges will be able to deal with that question, as they deal so with so many other questions in their daily working lives. However, as I said, as we are moving into a new era of activity, it seems only right and proper that the Government should be a little more careful in how they draft legislation.

The point was underscored by my hon. Friend the Member for Gainsborough. Whereas clause 6 is vague for uncertainty, clause 7 is quite the opposite. The category

of those who may sue is carefully defined, whereas the category of persons who may be the respondents is not certain. I am quite happy to live with that, but it is a regrettable matter on which we are entitled to comment. We have the opportunity to get it right—or more right—but at least at the moment the Government appear not to be persuaded by the arguments of my right hon. Friend the Member for Sutton Coldfield (Sir N. Fowler) and those who spoke subsequently.

The question of definition is always difficult. Reverting to my own sphere of practice, it is often asked of me and my fellow defamation specialists how one defines what is defamatory. Like an elephant, it is easier to recognise than it is to define, but we have to do the best we can. I had hoped that this new, wonderful Government would do rather better than the best that they could, and apply their mind and get their head round the question of definition.

The failure adequately to define what is a public authority means that the convention is no longer considered to be the perfect catalogue of rights as it was in the post-war period. I fully accept the analysis of the Home Secretary that the convention came into being after the second world war, to prevent the new states from repressing their peoples, who had been the victims of Nazi and fascist dictatorships. We are fortunate that we are the only one of the first 12 countries in the European Union that has had neither a home-grown nor an imported dictatorship, so we can stand back a little from the problems of post-war continental Europe. However, this evening's debate gives us the opportunity to push the Government a little and to ask them to apply their mind a little more rigorously to the issues.

The points made by my hon. Friend the Member for North Thanet (Mr. Gale) about the likely contest between article 8 and article 10 are valid, although I do not agree with him in all circumstances. Reverting again to my own sphere of practice, the courts frequently have to balance the rights of a plaintiff who has been defamed or is about to be defamed and wants an injunction prior to publication, and the rights of the newspaper or potential defendant who says, "I shall prove that what I say is true." In those circumstances, at an interlocutory stage, the judge says to the plaintiff, "I am sorry, but the right to utter an untruth, if it proves to be so, takes precedence over your right to protect your reputation." The injunction is not granted and the article is published. If the defendant fails to justify at the trial, additional compensatory damages are available. It does not do the plaintiff much good at the time, but I am concerned that the contest between freedom of expression and the right not to have one's privacy invaded has been overtaken by a little too much emotion and perhaps not enough reason. However, that is a matter that may be for another day.

Mr. Straw

It certainly will.

Mr. Garnier

I am glad that the Home Secretary says that it will be a matter for another day. I wish that he would tell us when it will be. Every day when I wake up and open my bedroom curtains I think that that day will dawn, but sadly, since February, the sun has not risen. Perhaps some legislative Viagra could be introduced to assist the Home Secretary in his thinking, but on that rather flippant note, I shall return to my first point in at least partial support of my hon. Friend the Member for

Gainsborough. Clause 6 is vague for uncertainty. It could be improved upon, and I invite the Home Secretary to think again.

Mr. Grieve

We have had a fascinating debate, which has been made all the more enjoyable by the diversity of views expressed. I pay particular tribute to the speech by my hon. Friend the Member for Gainsborough (Mr. Leigh), who latched on to a number of important points about the legislation and its effect, although I cannot agree with everything that he said.

As my hon. and learned Friend the Member for Harborough (Mr. Garnier) said, we are in danger of getting ourselves bogged down in the Press Complaints Commission and the issue of privacy. It is a bridge to be crossed when we reach it, but it should not impinge on the question of what is or is not a public authority. It is a separate, important issue, but we would be making a mistake if we started worrying about the privacy law and the slight difficulty into which the Government seem to have got themselves, to which I shall return in due course.

7.15 pm

I prefer to start with basic principles. It is well known that I am broadly—and in many ways in detail—in favour of incorporation. It is clear that the thrust of the convention is aimed at controlling governmental authority, which extends its influence not only through Government, but as the Home Secretary rightly said, through a variety of agencies and bodies that come from it or are tolerated by it for a variety of purposes. For example, the Royal Society for the Prevention of Cruelty to Animals has charitable status, but also has the task of prosecuting for the purposes of animal welfare. It is a charitable body, which has been granted quite extensive powers by Parliament. It clearly falls within the ambit of an extension of the state because it is tolerated in the functions that it exercises. Therefore, the idea that we have to extend to public authorities the discipline of the convention should not be a matter of dispute.

What I found more interesting in this evening's debate was the possibility that what we see as a public authority might be different from what is perceived to be a public authority in Strasbourg, not only in terms of definition, but in terms of function—what it does and what powers it has been granted. When we were discussing the clauses that we introduced for the protection of religion and religious freedom, we drew attention to the margin of appreciation. I assume that there will also be a margin of appreciation in the interpretation of the legislation by our national courts. I should be grateful for confirmation of that when the Home Secretary replies to the debate.

If there is a margin of appreciation, it would follow logically that our national courts will first apply to the definition of a public authority the definition that they have been applying historically in the growing process of judicial review and secondly, where necessary, make reference to foreign jurisdictions and decisions in Strasbourg, to draw comparables. I would also assume that the fact that they draw comparables does not necessarily require them to follow them. Again, I should be grateful for the Home Secretary's confirmation.

Whereas hitherto we have seen the margin of appreciation as a device by which our national courts would narrow the scope of the convention, what I found

fascinating and cogent about the arguments presented by my hon. Friend the Member for Gainsborough was fear that, in this area, our national courts are ahead of

Strasbourg and might well use the margin of appreciation for a wider test than is being applied there.
The question is: should we worry about that? My hon. Friends think that we should. That brings us back to the Bill's fundamental issues and the understandable fears expressed by my hon. Friends, that the creation of the convention and the granting to the judiciary of the powers of definition and interpretation will lead to the erosion of parliamentary sovereignty, and potentially to our loss of control over the development of the law in that area.
At the end of the day, I do not think that I shall lose sleep over this. I must accept that that may differentiate me from my hon. Friends, but my view derives from my experience as a barrister and my knowledge of how the national judiciary appears traditionally to work. The rock-bottom question is: am I prepared to trust the judiciary with the interpretation of the definition of a public authority?
I listened carefully to the explanation of the amendments. I am delighted that this debate has taken place, because people should realise what is happening and what we are doing. The issue cannot be swept under the carpet. The discussion has taken place and many people have applied their minds to the definition of a public authority and, quite understandably, expressed their anxieties, and I believe that the Home Secretary's escape from the morass was more cogent than that of other hon. Members who participated in the debate. There is an all-or-nothing aspect to the discussion. If we were to define a public authority in the way that some have suggested, I believe that we would get into other unintended areas of difficulty.
Will this situation produce what my hon. Friend the Member for Gainsborough fears so much: all sorts of small-scale bodies being carpeted through the courts in ways that they did not expect? We cannot escape the fact that, following the passage of the legislation, there will be a blossoming of litigation on the subject. I suppose that I should declare an interest as a lawyer—although I do not think that I shall practise in this field. I suppose that litigation will blossom until the matter settles down through judicial interpretation.
When I consider whether judicial interpretation will mean that Parliament has shed its rights and exposed people to unintended consequences, I must admit that I think it will not. I believe that the public authority definition is already established pretty well in our law. It has developed over time. A feature of this country is that we have allowed the judiciary historically to develop all sorts of areas of law. My hon. and learned Friend the Member for Harborough referred to the question of defamation. Equitable estoppel has not been discussed in the Chamber, but the consequences of its emergence in the past 50 years have been dramatic, to say the least, in relation to the rights of the individual.
I am content to leave to the judiciary the task of interpretation, precisely because I think that public authority is not a new concept and is already well established in the mind of the judiciary. I also take the view that, with the margin of appreciation, it is less likely that the judiciary in this country will start to apply that definition to bodies that none of us would assume to be

public authorities. If it does and that means that Strasbourg disagrees and imposes its view upon us, so be it—we shall be no worse off than we are now. I do not believe that it is likely that the extensions will be so great in our domestic field—where we have already gone beyond Strasbourg—as to cause us particular concern.
I welcome the discussion on this fundamental and important issue. I am happy to say that we live in a state where we have common law—that is one of our great treasures.

In a funny way, we are adding to it, and I do not think that we shall do ourselves a great deal of harm in the process.

Mr. Lansley

I am grateful for the opportunity to add to this very interesting discussion. Like my hon. Friend the Member for Beaconsfield (Mr. Grieve), I have enjoyed listening to the different perspectives. I am not a lawyer, and it has been interesting trying to keep up with the legal arguments. However, I suppose that there are benefits in not being a lawyer, as I have endeavoured to understand, as a law maker, how the measures will impact upon the bodies that will be affected.

I confess that I believed at the outset that the Government were not offering any definitions or allowing any scope for applying the measures—my right hon. Friend the Member for Sutton Coldfield (Sir N. Fowler) made that perfectly clear in his speech—and were, in effect, surrendering that power to the courts. The Home Secretary explained some of the Government's thinking, which was interesting and added substantially to the debate. However, I do not think that he addressed the heart of the problem: the motivation behind the amendments.

The problem is not simply that the Government are abandoning any thought of defining the scope of public authorities for the purposes of the Bill and handing that power over to the courts—I understand that the Government have considered carefully the consequences of seeking to define the scope of public authorities in the Bill. Our courts have tended to move towards wider judicial review of administrative action by bodies that are not necessarily considered to be Government bodies but which perform a quasi-judicial function similar to that of a conventional public body. If we were to seek to define the scope of public authorities narrowly, we would expose ourselves to the risk of people going directly to the court at Strasbourg and we would not be well served by giving a right of action in United Kingdom courts. However, I am not clear—the Home Secretary's speech did not provide the answers—about the basis upon which he understands that United Kingdom courts will operate in attempting to define a public authority. Will they do so by referring to the developing thesis of what judicial review should constitute? In the context of the application of the European convention on human rights, it would be inapplicable to think too widely or too narrowly. There would not necessarily be a read-across between the appropriate application of the European convention—which is a treaty made by Government, with the intention of incorporating it into the actions of public authorities and making them liable to action by private individuals—and the question of judicial review. I suspect that the courts will examine the manner in which a body that operates in relation to a profession, for example,

carries out its functions. If that body has a judicial character, it should do so with reference to principles that are subject to review by the courts.

If it is not appropriate to use that basis, perhaps, in time, the courts will put that to one side and look specifically towards Strasbourg. If it is intended to allow our definition of a public authority to be precisely the definition adopted by Strasbourg, we shall face the problem upon which my hon. Friend the Member for Beaconsfield expanded—and he did a much better job than I could. That is the heart of the problem. If we in this country understand the state differently from the manner in which it is understood by other countries that are parties to the European convention and subject to the Strasbourg court, should not that be reflected in our jurisprudence? We should

acknowledge that we have that different understanding rather than simply incorporating, by virtue of the wider definition of public functions, a broader definition and encouraging our courts to adopt it and to interpret it as being consistent with what would be the conclusion of the Strasbourg court as it might be applied in a different jurisdiction.

There is a difference between the state in our context and that in other contexts. We all have our examples. My hon. Friend the Member for Beaconsfield referred to the Royal National Lifeboat Institution; that example goes in one direction. I have worked in the chambers of commerce, which are voluntary bodies in this country but public law bodies in most EU member states. There will be a range of such differences in the manner in which bodies operate in different countries.

There are great differences now, which might increase, in the extent to which industry is owned by the state or has the character of a public function. We have far fewer nationalised industries than other countries. Of the industries that were formerly nationalised, an increasing number are becoming competitive in the marketplace rather than exercising a quasi monopoly. It is terribly important that we understand how we can ensure that we establish through the European convention an exercise of the rights applicable to individuals as against public authorities, by reference to an understanding here of what constitutes a public authority following our signing up to the convention. Such a definition should not necessarily be exactly the same as that in the Strasbourg court.

7.30 pm

Uncharacteristically, the Home Secretary was not generous enough about the amendments. If the amendments do not technically do the job, it would be possible to go down a path indicated by them: considering bodies that are framed by statute over which Ministers have powers of appointment, perhaps including reference to the Crown and the bodies and powers that emanate from it. Alongside amendment No. 106, we should perhaps consider something like amendment No. 31, which specifically excludes the private acts of public authorities.

We should move towards a definition that looks to the source of authority rather than simply to the nature of the activity. By using the definition of
"functions of a public nature",
one is opening the door to UK courts looking directly to a Strasbourg-style definition of what constitutes the state and public authorities. We should look, through the source

of authority, to what in this country might turn out to be a narrower definition. We should follow not public money but the public authority—authority being the operative word—which is passed on through legislation, the Crown and statutory obligations. By doing that, which is distinct from the judicial review test, we might be able to establish in this country a definition of public authorities that is distinct and relevant in our circumstances, even if it is not conterminous with that which might be applied by the Strasbourg court in other countries.

Miss Kirkbride

I do not intend to speak for very long, because I am somewhat in awe of my hon. Friends who are lawyers and who quote cases of which I have never heard.

I have found the debate interesting, as I did the Home Secretary's explanation of why he was unhappy about the Conservative amendments. I took on board his comment

that, if he were to list public authorities in the way in which we suggest, difficulties in the ability to repatriate rights would be created. Sadly, in my view, which I know is somewhat beyond the scope of this debate, that appears a very good reason to have left things well alone, leaving rights just to sue the British state in the European courts. That would not lead to all the difficulties to which my hon. Friends have drawn attention.

The description of how matters might develop given by my hon. Friend the Member for Gainsborough (Mr. Leigh) was particularly illuminating. Will the Secretary of State say who will pay the legal fees of the various bodies that at present can be sued only vicariously through the British state, but may soon be sued in their own right? Some of the bodies exist on relatively limited resources. The public functions they provide might be diminished by the fact that they will encounter significant and expensive legislation. I am sure that the Bill will create something of a beanfeast for lawyers—sadly not those in the House.

Mr. David Ruffley
(Bury St. Edmunds)

The debate has been very interesting; I was certainly interested to hear the Home Secretary's comments. He made his points in a non-partisan manner, which we appreciate.

Before dealing with two specific points on which I should like the Home Secretary's views, I must say that the uncertainty inherent in the definition of public authorities is unfortunate. It is caused by the Government's unwillingness to take responsibility for listing the public authorities that they have in mind. They are abdicating their responsibilities by saying that the courts should decide; that, in some sense, Parliament is not fit or able to determine, or capable of determining, which public authorities should be brought within the ambit of the European convention as it is incorporated into UK law.

My first specific point relates to the operation of the term "public authority". I understand why the Home Secretary does not wish to be drawn on specific cases. None the less, paragraph 2.2 of the White Paper provides some guidance on what the Government would consider a likely candidate for a public authority. I draw the Home Secretary's attention to companies that are responsible for areas of activity that were previously in the public sector, such as privatised utilities. He referred to Railtrack, and we take his points.

It has been brought to my attention that companies such as British Gas and BT, which fall into the category of privatised utilities, could be brought within the definition of public authorities. How can they be treated differently from companies that have always been in the private sector and which compete in the same market? That is a potential breach of competition or company law. The question is certainly being aired. Will the Home Secretary specifically meet the objection to the definition in the White Paper?

The second specific point relates to the Press Complaints Commission. We are very worried about how the nature of that body may change. There has certainly been debate in government. We know that the Secretary of State for Culture, Media and Sport has had certain disagreements with the Lord Chancellor. There is general confusion about the PCC's status.

I have a point to put to the Home Secretary. If the Press Complaints Commission is indeed a public authority—on 1 December, a press release from the Lord Chancellor suggested that, following some high-powered advice from David Pannick QC, he probably now thought that it was a public authority—certain things follow. It follows that individuals may, under article 8, wish to pursue a claim for a breach of their right to privacy. Such people would go to the Press Complaints Commission, but they may not get a determination that they like there. They may then wish to go to the court, and under the convention the court would be obliged to deliver effective remedies. If that is the case, there will be an in-built incentive, almost a requirement, for the courts to ensure that the public authority in question delivers effective remedies. What might those be? There could be a power of prior restraint. The court may say that the PCC should have the powers to fine or compensate. That is the inescapable logic of bringing the PCC within the definition of a public authority.

Will not the nature and character of the PCC as a voluntary organisation that can deliver swift justice at a low price to ordinary people, with all the advantages that that brings, therefore be destroyed? It is in that spirit that I urge that amendment No. 106, especially in terms of exempting privatised utilities and the PCC from what could be damaging consequences, be taken seriously.

Mr. Straw

I shall try briefly to answer some of the points that have been raised—those, that is, that I did not try to answer during the debate. I thank hon. Members on both sides of the Committee for the way in which they have entered into the debate.

The hon. Member for Beaconsfield (Mr. Grieve) asked me about the margin of appreciation, and whether our national courts will be ahead of Strasbourg in applying the convention. He and I both use the term "margin of appreciation" in a loose way, for which I have been admonished, so I pass that admonition on to him. Technically, the term refers to the way in which the Strasbourg court gives the benefit of the doubt to a domestic jurisdiction. It will continue to do so. Indeed, the more we can develop our own jurisprudence in connection with the convention, the greater the margin of appreciation that will be given.

I should have explained before that we could not directly replicate in the Bill the definition of public authorities used by Strasbourg, because, of course,

the respondent to any application in the Strasbourg court is the United Kingdom, as the state. We have therefore tried to do the best we can in terms of replication by taking into account whether a body is sufficiently public to engage the responsibility of the state. The hon. Gentleman explained that well.

The hon. Member for Bromsgrove (Miss Kirkbride) asked who would pay in domestic actions. The organisations concerned will pay, so some aspects will depend on the depth of their pockets. That was one of the reasons why I made that clear a couple of weeks ago when we debated the subject in respect of the Churches. I wanted to avoid vexatious litigation against the Churches, which is why I was persuaded to provide them with additional protection in the Bill.

The hon. Member for Bury St. Edmunds (Mr. Ruffley) picked me up on paragraph 2.2 of the White Paper, which mentions privatised utilities. That put the matter in a general way, to make the point that, if we had a list of public authorities, it would quickly go out of date. I am absolutely clear that we must, to use the old cliché,

provide a level playing field between BT and other, wholly private, operators. They would have to be treated the same under the Bill.
That is why we do not want to go down the road advocated by amendment No. 106, which, with commercial property developers, for example, would treat Railtrack more onerously than any other body—such as the wholly private developer McAlpine, which is known both to the hon. Gentleman and to me—simply because Railtrack happens to be a statutory body. I do not want to do that, which is why I say that there is a defect in amendment No. 106.
7.45 pm
Overall, the difference between some Opposition Members and other hon. Members on both sides of the Committee is whether we seek to define a public authority and a public function by reference to the substance and nature of the act, or to the form and legal personality of the institution. **As we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality.**
If we were to do as the Opposition recommend, we would have a definition too wide in some respects, which would cop Railtrack's purely commercial activities as it should not, and too narrow in others—that is, it would exclude the Home Secretary, and I think that I ought to

be covered by the Bill. I hope that, in the light of that explanation, the Opposition will seek leave to withdraw the amendment.
Sir Norman Fowler

This has been a valuable and rather important debate, and I congratulate those of my hon. Friends who have taken part in it, such as my hon. Friends the Members for Gainsborough (Mr. Leigh) and for North Thanet (Mr. Gale), my hon. and learned Friend the Member for Harborough (Mr. Garnier), and my hon. Friends the Members for South Cambridgeshire (Mr. Lansley), for Bromsgrove (Miss Kirkbride) and for Bury St. Edmunds (Mr. Ruffley). I also listened with interest to the speech by the right hon. Member for Caithness, Sutherland and Easter Ross (Mr. Maclennan).

I think that I am right in saying that, apart from the Home Secretary, no Labour Member has taken part in the debate.
Mr. Straw

My hon. Friends wanted to leave more time for you.
Sir Norman Fowler

I am most grateful for that—but it may also say something about Labour Members' commitment to the legislation.

I cannot say that I am happy with the position under the clause. As my hon. Friend the Member for Gainsborough said, with great eloquence, there is a lack of clarity and certainty. The Home Secretary has been discreet about what has taken place in government and the processes of government. However, the potential confusion is illustrated by the fact that no less a person than the Lord Chancellor proceeded into the legislation on the basis that one important body was not a public authority, but has now come to the conclusion that it is.
I acknowledge the important assurances that the Home Secretary has given, and his response to the debate. He has said that new amendments will be brought forward to

cover the area of interest of the PCC, and the press and the media generally. For us that is an important commitment, and we welcome it. We would like to see those amendments sooner rather than later, because, as several of my hon. Friends have said, we have been waiting for them for some time.

Having secured that commitment from the Home Secretary, I do not wish to press amendment No. 106 to a vote, so I beg to ask leave to withdraw it.