IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
AT MELBOURNE
RESIDENTIAL TENANCIES LIST

No. R2008/38217/00

BETWEEN

METROWEST HOUSING SERVICES LTD

Applicant

and

MICHAEL HAILU and FANTANESH HAILU

Respondents

No. R2008/34309/00
No. R2008/35688/00

BETWEEN

METROWEST HOUSING SERVICES LTD

Applicant

and

MAHDI SUDI and NIMO MOHUMUD

Respondents

SUBMISSIONS OF THE HUMAN RIGHTS LAW RESOURCE CENTRE ON SECTION 4(1)(c) OF THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES*

A. INTRODUCTION AND SUMMARY

1. The question whether the applicant, MetroWest Housing Services Ltd (**MetroWest**), was a public authority for the purposes of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**) when it gave notice to vacate to the respondents has been raised for determination as a preliminary question in each of these proceedings. The Human Rights Law Resource Centre (**HRLRC**) seeks leave to file these written submissions and to appear as *amicus curiae* on the hearing of this question by the Tribunal.

2. The subsection of s 4 of the Charter that is potentially applicable to MetroWest is s 4(1)(c). These submissions address some matters of general principle to be applied to the interpretation of that subsection of the Charter and make some reference to the circumstances of MetroWest and transitional housing management entities in general.

3. However, the issues of general principle raised by the present matter are applicable to the outsourcing of a range of functions in respect of which, in the public interest, the State has responsibility. There is a public interest in the Tribunal articulating the general principles that are applicable to the meaning of s 4(1)(c) of the Charter in order to give much-needed guidance as to the scope of the Charter's application to persons and entities potentially affected by it. The elucidation of such principles can assist in ensuring, so far as possible, that Parliament's intention as to the broad scope of the concept of the public authority is not undermined by a too narrow application of s 4(1)(c) that can occur in a case by case application of s 4(1)(c).

B. GENERAL PRINCIPLES

4. Section 4(1)(c) provides that, for the purposes of the Charter, a public authority is:

> "an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)".

5. Section 4(2) sets out a list of factors that may be taken into account in determining whether a function is of a public nature. The list is not exhaustive[1] and the fact that one of more of the factors are present does not necessarily result in the function being of a public nature.[2] Equally, the absence of one or more of the s 4(2) factors does not necessarily result in the function *not* being one of a public nature.

6. Sections 4(4) and 4(5) provide some guidance as to when an entity may be exercising a function on behalf of the State.

7. The provisions of s 4(2), (3), (4) and (5) of the Charter suggest that the question whether an entity is performing a public function on behalf of the State must depend in each case on an analysis of all relevant circumstances and that "*there cannot be a single litmus test of what is a function of a public nature*".[3] Nevertheless, it is submitted there are a several broad principles that ought to guide the interpretation of s 4(1)(c) and the relevant factors that may be considered, including those set out in ss 4(2), (3), (4) and (5).

---

1 Section 4(3)(a).
2 Section 4(3)(b).
3 *YL v Birmingham City Council* [2008] 1 AC 95 at [65] per Baroness Hale.

Broad and generous interpretation

8. First, s 4(1)(c) should be given a broad and generous interpretation. This is consistent with the underlying purpose of the Charter, with the extrinsic materials and with the language used in s 4 itself.

8.1. The underlying purpose of the Charter is "*to establish a framework for the protection and promotion of human rights in Australia*".[4] The particular purposes are more specifically set out in the Preamble and s 1(2). Section 35(a) of the *Interpretation of Legislation Act 1984* (Vic), requires that s 4(1)(c) be interpreted consistently with those purposes.[5]

8.2. Public authorities have specific obligations imposed upon them by s 38 of the Charter, which is one of the principal means by which the Charter seeks to protect and promote human rights. A broad interpretation of what constitutes a public authority under s 4(1)(c) is therefore important to the achievement of the underlying purpose of the Charter. As Lord Nicholls observed in *Aston Cantlow Parochial Church Council v Wallbank* (***Aston Cantlow***)[6] in relation to the comparable provision of the *Human Rights Act 1998* (UK) (the **UK HRA**), "*[g]iving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values...*".[7] The relevance of UK authority will be discussed further below.

8.3. In the Second Reading Speech to the Charter Bill, the Attorney-General said that the intention of cl 4 of the Bill "*is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature*"[8] and that "*the obligation to comply with the charter extends beyond 'core' government to other*

---

4 Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) (**Charter EM**), page 1.

5 See also Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 and the interpretation role provided for by s 32(1)

6 [2004] 1 AC 546.

7 [2004] 1 AC 546 at [11]. See also *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48; [2001] EWCA Civ 595 at [58] per Lord Woolf CJ (for the Court of Appeal); and *YL v Birmingham City Council* [2008] 1 AC 95 at [4] per Lord Bingham.

8 Second Reading Speech by the Hon R Hulls (Attorney-General), *Hansard*, Legislative Assembly, 4 May 2006, vol 470, page 1293 (**Second Reading Speech**).

entities... performing functions of a public nature on behalf of the state. This reflects the reality that modern government utilise diverse organisational arrangements to manage and deliver their services".[9] A similar statement was made in the Explanatory Memorandum to the Charter Bill (the **Charter EM**).[10]

8.4. The fact that the government can, by regulation, declare entities *not* to be public authorities for the purposes of the Charter or not to be public authorities when exercising certain functions[11] also suggests that a broad approach is intended to be taken to s 4(1)(c).

Focus on function

9. Secondly, the focus of s 4(1)(c) is on the nature of the function being performed, not on the nature of the entity exercising the function. The fact that an entity is private or non-governmental in nature, or whether it is a commercial entity or a not-for-profit organisation, ought not be relevant to whether a particular function is public in nature. A particular function will be either public in nature or it will not. The nature of a function does not change depending on the nature of the entity performing it.

10. The fact that an entity is performing a particular function with a view to commercial profit may bear upon whether it is doing so on behalf of the State or a public authority, but ought not to be a factor of great weight. If a private entity in certain circumstances performs a function of a public nature for and on behalf of the State, the additional circumstance that it is motivated to do so for commercial profit does not logically result in the function not being of a public nature.[12] This was explicitly recognised by the Attorney-General in his Second Reading Speech, when he said:

> "The [C]harter does not apply to private businesses or entities or non-government organisations, except to the extent that they may be exercising functions of a public nature on behalf of the state or a public authority."[13]

---

9 Second Reading Speech, page 1294.
10 Charter EM, page 4.
11 Sections 4(1)(k) and 46(2)(b) and (c).
12 Companies operating private prisons are an example
13 Second Reading Speech, page 1294.

Connection with the State

11. Thirdly, the degree to which a public or non-governmental entity performing a particular function is connected with the State or a public authority may be relevant, but again only to the extent that it bears upon the second limb of s 4(1)(c) – that is, whether the function in question is being exercised on behalf of the State or a public authority (whether under contract or otherwise). It is the second limb of s 4(1)(c) which stipulates the nature of the required relationship between the State or a public authority and the relevant entity when it is performing the function in question and relationship need only be a "*loosely connected*" one. The words "*on behalf of*" are not confined to an agency relationship: s 4(4). Rather, the second limb contemplates "*[a] more loosely connected arrangement in which an entity is acting as a representative of or for the purpose of the State or a public authority*".[14]

Focus on substance

12. Fourthly, the consideration of what constitutes a function of a public nature and whether it is being exercised on behalf of the State or a public authority should focus on matters of substance and not on matters of form or on technical legal distinctions. This is well illustrated by the difference between the majority and minority in *YL v Birmingham City Council* (***YL***).[15] In that case, by a contractual arrangement between a private care home and a local authority, the home provided accommodation and care for some residents, including YL, who qualified for public assistance under the relevant statute and whose fees for their residence and care at the home were paid by the local authority. The majority in the House of Lords (Lords Scott, Mance and Neuberger) considered that the relevant statute only obliged the local authority to *arrange* for accommodation to be provided to persons in need of care, but not necessarily to *provide* it. The statute contemplated that accommodation may be provided by the local authority, but also permitted it to engage third parties to provide it. According to the majority, the arrangement of health care may have been a public function, but the provision of it was not.[16] By contrast, Baroness Hale, with whom Lord Bingham

---

14 Charter EM, page 6.

15 [2008] 1 AC 95.

16 [2008] 1 AC 95 at [29]-[31] per Lord Scott, [114]-[116] per Lord Mance, and [145]-[153] per Lord Neuberger.

agreed, said that it was "*artificial and legalistic to draw a distinction between meeting those [health care] needs and the task of assessing and arranging them, when the state has assumed responsibility for seeing that both are done.*"[17] It is submitted that the minority approach to issues of this nature is to be preferred.

13. The focus on substance of the minority in *YL* is more consistent with the approach provided for in Victoria by s 4(1), (2), (3), (4) and (5). That approach was encapsulated by Baroness Hale's reference to the following factors as particularly relevant to determining whether the health and social care provided in that case was provided by a public authority:

(a) One important factor is whether the state has assumed responsibility for seeing that this task is performed.[18]

(b) Another important factor is the public interest in having that task undertaken. In a state which cares about the welfare of the most vulnerable members of the community, there is a strong public interest in having people who are unable to look after themselves, whether because of old age, infirmity, mental or physical disability or youth, looked after properly.[19]

(c) Another important factor is public funding.[20]

(d) Another factor is whether the function involves or may involve the use of statutory coercive powers. In *YL*, Baroness Hale recognised that all in-patients receiving treatment for psychiatric disorder were potentially vulnerable to detention under section 5 of the *Mental Health Act 1983 (UK)*. This meant that their capacity for self-determination was diminished and their vulnerability to human rights abuses increased even before any compulsory powers are invoked.[21]

(e) Finally, then, there is the close connection between the service in question and the core values underlying the human rights in the UK HRA and the

---

17 [2008] 1 AC 95 at [66].
18 At [66].
19 At [67]
20 At [68].
21 At [69].

undoubted risk that rights will be violated unless adequate steps are taken to protect them.[22]

14. Lord Bingham encapsulated the same approach by reference to the following factors:[23]

> "It will be relevant first of all to examine with some care the nature of the function in question. It is the nature of the function - public or private? - which is decisive under the section.
>
> It is also relevant to consider the role and responsibility of the state in relation to the subject matter in question. In some fields the involvement of the state is long-standing and governmental in a strict sense: one might instance defence or the running of prisons. In other fields, such as sport or the arts, the involvement of the state is more recent and more remote. It is relevant to consider the nature and extent of the public interest in the function in question.
>
> It will be relevant to consider the nature and extent of any statutory power or duty in relation to the function in question. This will throw light on the nature and extent of the state's concern and of the responsibility (if any) undertaken. Conversely, the absence of any statutory intervention will tend to indicate parliamentary recognition that the function in question is private and so an inappropriate subject for public regulation.
>
> Also relevant will be the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question, and imposes criminal penalties on those who fall below publicly promulgated standards in performing it. This is an indicator of the state's concern that the function should be performed to an acceptable standard. It also indicates the state's recognition of the importance of the function, and of the harm which may be done if the function is improperly performed.
>
> It will be relevant to consider whether the function in question is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay. The greater the state's involvement in making payment for the function in question, the greater (other things being equal) is its assumption of responsibility.
>
> It will be relevant to consider the extent of the risk, if any, that improper performance of the function might violate an individual's Convention right. In some fields, such as sport, the risk of infringing a Convention right might appear to be small; in relation to certain of the

---

22 At [71]

23 At [6] – [11].

arts, the potential impact of article 10, for instance, could obviously be greater."

Underlying rationale

15. The above principles, together with the list of relevant factors referred to above, and other relevant factors to be discussed below, suggest that the underlying rationale of s 4(1)(c) is that an entity should be a public authority, and therefore bound to act compatibly with human rights under s 38 of the Charter, where:

    15.1. it is performing a function for which the public, in the form of the State or a public authority has, in a broad sense, a responsibility in the public interest to see performed;[24] and

    15.2. it is doing so pursuant to a loosely connected arrangement whereby it is acting as the agent, delegate or representative of, or merely carrying out the purposes of, the State or a public authority.

C. THE FIRST LIMB OF SECTION 4(1)(c) – THE SECTION 4(2) FACTORS

16. The following paragraphs consider the general meaning of the factors set out in s 4(2) of the Charter in the context of their potential application to the functions in question in this proceeding.

That the function is conferred on the entity by or under a statutory provision (s 4(2)(a))

17. The reference to a function "*conferred ... by or under a statutory provision*" embraces functions conferred directly by statute as well as functions conferred

---

24 This part of the suggested underlying rationale is based on the key interpretative principle proposed by the House of Lords and House of Commons Joint Committee on Human Rights (**JCHR**) in its Report on The Meaning of Public Authority under the Human Rights Act, Seventh Report of Session 2003-2004, HL Paper 39, HC 382, 3 March 2004 (the **First JCHR Public Authority Report**), paras 138-141. The test was reiterated in a later JCHR Report of the same name, the Ninth Report of Session 2006-2007, HL Paper 77, HC 410, 28 March 2007, at para 7 (the **Second JCHR Public Authority Report**). See also a statement to similar effect in *YL v Birmingham City Council* [2008] 1 AC 95; [2007] UKHL 27 at [65], where Baroness Hale (dissenting) said that "*the underlying rationale [of the comparable provision of the UK HRA] must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest.*" See also at [73].

under statutory authority, whether by delegation, by contracting out the function in question or by some other means of having the function performed.[25]

18. Section 35 of the *Housing Act 1983* (Vic) contemplates that the Director of Housing may delegate any of his or her functions under the *Housing Act* or any other Act. The act in question in these proceedings is the giving of notice to vacate. That is an aspect of the broader function of allocating and managing the transitional housing stock vested in the Director.[26] Transitional housing managers may perform this function pursuant to a formal delegation under s 35. Delegation of the allocation and management of such premises clearly falls within the scope of s 4(2)(b) of the Charter.[27]

19. In *YL*, Lord Mance (in the majority) contrasted the case before the House with cases where the Secretary of State is empowered by statute to authorise persons to discharge certain statutory functions, such as had been done in the United Kingdom in relation to the "Allocation of Housing and Homelessness Functions". His Lordship commented that in such cases "*there is clear basis for regarding the authorised delegate as a person having functions of a public nature within s 6(3)(b)*" of the UK HRA.[28]

20. The *Housing Act* also permits the Director to enter into agreements with certain bodies such as housing co-operatives to carry out any of the Director's functions. It is submitted that s 4(2)(a) of the Charter also embraces such agreements.

That the function is connected to or generally identified with functions of government (s 4(2)(b))

21. Subsection 4(2)(b) makes clear that the kind of relationship between the function in question and "*functions of government*" that will support the conclusion that the function in question is public in nature may be very broad. The function in question need not be a "*governmental function*"[29]. It need only be "*connected to*

---

25 See the last few words of s 4(1)(c) the Charter EM, at page 5.

26 See, eg, *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin) at [62].

27 Sections 14 and 15 of the *Housing Act* give power to the Director of Housing, *inter alia*, to lease, control, manage and use land vested in the Director.

28 [2008] 1 AC 95; [2007] UKHL 27 at [104] per Lord Mance.

29 See to similar effect the comment of Lord Nicholls in *Aston Cantlow* [2004] 1 AC 546 at [10], in relation to the comparable provision of the UK HRA, that "*[t]he phrase used in the Act is public function, not governmental function*".

or generally identified with" a governmental function. These are words of broad compass. The meaning of the words "*connected to*" will depend upon their context, but are "*capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote*".[30]

22. The width of the phrase "*connected to ... functions of government*" may again be illustrated by considering the distinction drawn by the majority of the House of Lords in *YL* between the local authority's statutory obligation to *arrange* the provision of accommodation and care and the actual *provision* of the same. If the arrangement of accommodation and care of persons in need is a public function (as the majority in *YL* accepted), the actual provision of accommodation and care is at least "*connected to*" the function of arranging it.

23. The words "*generally identified with*" must, if anything, denote an even broader class of relationships. The Charter EM suggests that functions generally identified with functions of government may be those that are "*performed in the broader public interest*". [31]

24. The function of providing accommodation to homeless persons or persons experiencing housing crisis is a function performed in the public interest. It is, at the least, a function connected to or generally identified with functions of government. Plainly, there is public interest in transitional housing services assisting homeless people transition out of homelessness. Homelessness, is a condition that describes for more than the absence of a home. It often describes a consequence of mental illness, drug and alcohol issues, intellectual disabilities, unemployment or a lack of opportunity, education or living skills which have resulted in an individual no longer having meaningful family, domestic or other relationship associations.[32]

25. Homelessness requires an integrated and holistic approach to service delivery so that all underlying causes and effects of homelessness are adequately addressed.

---

30 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288.

31 Charter EM, page 5.

32 See generally, Homeless Persons Legal Clinic, *Righting the Wrongs of Homelessness*, 27 June 2008 (available at www.pilch.org.au under the "Law Reform" tab). See also the Australian Human Rights Commission Report, *Homelessness is a Human Rights Issue*, 2008 (available at www.hreoc.gov.au/human_rights/publications.html).

Transitional housing managers, such as MetroWest, seek to address the underlying causes of homelessness. MetroWest's website states:

> 'The aim of transitional housing is to provide safe and affordable accommodation combined with support from nominating agencies to assist people to begin to address any issues that may have contributed to their situation and work towards re-establishing secure housing as soon as possible.[33]

That the function is of a regulatory nature (s 4(2)(c))

26. Whether this is relevant in the present case is unclear on the material presently before the Tribunal.

That the entity is publicly funded to perform the function (s 4(2)(d))

27. It is true that there are many different ways in which an entity may be "*publicly funded*" to perform a function and that not everything for what the State or a public authority pays is necessarily a public function. Nevertheless, the concept of "*public funding*" should be broadly construed.

28. This may be illustrated by a difference in the majority and minority views in *YL*. In that case, majority took the view that the payment of a fee for a service by a local authority was either not public funding[34] or was not funding of a kind that supported the conclusion that the function being performed by the care home was not public in nature.[35] By contrast, Lord Bingham and Baroness Hale considered the payment of a resident's fees, in whole or in part, by a local authority was a significant factor. As Lord Bingham said, "*[t]he significant thing is that the state is willing to apply public funds to support those ... [who] cannot pay for themselves, rather than leave them unaccommodated and uncared for.*"[36]

29. It is submitted that the minority view is to be preferred. The majority view places too much emphasis on the commercial for-profit nature of the entity rather than the function being performed and turns on a fine distinction that would permit the

---

33 MetroWest website. 'Transitional Housing Overview' is exhibit 14 to the affidavit of Hayley ParkeS affirmed on 27 October 2008, page 1.

34 [2008] 1 AC 95 at [26]-[27] per Lord Scott;

35 [2008] 1 AC 95 at [105] per Lord Mance, [148] and [165] per Lord Neuberger.

36 [2008] 1 AC 95 at [18]; see also at [68] per Baroness Hale, who considered that residents whose fees were paid by the local authority were "people for whom the public have assumed responsibility".

purpose of the Charter to be undermined.[37] In any event it appears (subject to clarification by MetroWest) that MetroWest is funded through government grants or the provision of State housing.

That the entity that performs the function is a State-owned company (s 4(2)(e))

30. This factor is not relevant to the present case.

C. THE SECOND LIMB OF SECTION 4(1)(c) – FACTORS

31. The second limb of s 4(1)(c) requires that the entity be exercising the function in question "*on behalf of the State or a public authority (whether under contract or otherwise)*". These submissions have addressed the interpretation of this limb at paragraph 11 above. In relation to the present proceedings, the Director of Housing is a public authority under s 4(1)(a) of the Charter because he is a public official within the *Public Administration Act 2004* (Vic).[38] The performance by transitional housing managers, such as MetroWest, of functions vested in the Director by the *Housing Act*, whether by delegation or contract, constitutes the exercise of those functions on behalf of a public authority.

D. OTHER RELEVANT FACTORS

That the function is subject to regulation or control by the State or a public authority

32. The Charter EM stated that "*[t]he degree of government regulation and control of the functions being performed are relevant factors to consider when interpreting the meaning of the expression 'on behalf of the State or a public authority'.*"[39]

33. It appears that MetroWest is subject to government regulation in numerous forms[40]. Its application and eligibility for registration as a rental housing agency under Part VIII of the *Housing Act* is confirmatory of that regulation.[41]

---

37 For example, Lord Mance (at [76]) stated the question arising as: "Does a privately owned, profit- earning care home providing care and accommodation for a publicly funded resident have "functions of a public nature', and is it therefore a public authority, under section 6(3)(b) of the Human Rights Act 1988?" As explained at [9] and [10] above that would not be an appropriate way to frame the central question under s 4(1)(c).

38 See s 9(1)(a)(ii) of the *Housing Act*.

39 Charter EM, page 6.

40 See paragraphs 6-17 of the affidavit of Hayley Parkes affirmed on 27 October 2008.

41 See s 93 of the *Housing Act*.

34. It cannot be an answer to a claim that a particular entity is a public authority under s 4(1)(c) of the Charter to say that it is already closely regulated and there is therefore no need for it to be subject to the obligations imposed on public authorities by the Charter. The very enactment of the Charter suggests that, as a matter of principle, regulatory codes applicable to public authorities are not to be regarded as a substitute for a general obligation to comply with human rights.

Vulnerability, risk and the public interest

35. Both of the minority judges in *YL* considered that the vulnerability of persons who may be affected by the exercise of a particular function, the risk of violation of their human rights, and the related public interest in protecting and promoting the human rights of such persons are relevant factors in the assessment of whether a particular function is public in nature.[42]

36. Persons in need of transitional housing are homeless or at risk of homelessness. They may be young people, escaping domestic violence, leaving institutions, or in similar vulnerable situations.[43] In a submission to the Federal Government Green Paper on Homelessness, the Homeless Persons Legal Clinic made the point that homeless persons are at serious risk of human rights violations, including many of the rights protected by the Charter, and recommended a human rights approach to the issue of homelessness in Australia. It said:

> "Homelessness is not just an issue of housing: it is a matter of ensuring that the human rights of all individuals are adequately protected and promoted. In Australia, people experiencing homelessness are subject to multiple and intersectional human rights violations including violations of the right to dignity and respect, the right to participation, the right to liberty and security, the right to freedom from cruel, inhuman or degrading treatment, the right to freedom from discrimination, the right to privacy, the right to social security, the right to the highest attainable standard of health and, of course, the right to adequate housing. In particular these violations include that homeless persons are not able to adequately exercise their right to vote; that they are regularly discriminated against on the basis of their homelessness; that they are

---

42 [2008] 1 AC 95; [2007] UKHL 27 at [7], [11], [19] per Lord Bingham, [67] per Baroness Hale.

43 See the extract from MetroWest's website in paragraph 18 of the affidavit of Hayley Parkes affirmed 27 October 2008.

regularly forced to accept inadequate and inappropriate accommodation in preference to living on the streets..."[44]

37. These are powerful considerations in favour of recognising that entities that deal with homelessness are, in a general sense, exercising a function of a public nature.

E. THE UNITED KINGDOM AUTHORITIES

38. Section 6(3) of the UK HRA contains a non-exhaustive definition of the phrase "*public authority*":

> "*In this section 'public authority' includes –*
>
> *(a) a court or tribunal; and*
>
> *(b) any person certain of whose functions are functions of a public nature,*
>
> *but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.*"

39. The language of s 4(1)(c) clearly had its origins in s 6(3)(b) of the UK HRA. For that reason, some assistance may be gleaned from the UK authorities, but the focus should always be on the language used in s 4(1)(c) and ss 4(2)-(5). There are several reasons why the UK authorities and, in particular, the leading House of Lords decision, *YL v Birmingham City Council*,[45] should be treated with some caution.

40. First, *YL* was decided after the enactment of the Charter. At the time the Charter was enacted, the leading cases were two Court of Appeal cases[46] and a decision of the House of Lords, *Aston Cantlow*.[47] In its first report in March 2004 on "The Meaning of Public Authority under the Human Rights Act" (the **First JCHR Public Authority Report**),[48] the House of Lords and House of Commons Joint Committee on Human Rights criticised the Court of Appeal decisions for taking an unduly restrictive and "institutional" approach to the interpretation of the

---

44 Homeless Persons Legal Clinic, *Righting the Wrongs of Homelessness*, 27 June 2008, page 2 (available at www.pilch.org.au under the "Law Reform" tab). See also the Australian Human Rights Commission Report, *Homelessness if a Human Rights Issue*, 2008 (available at www.hreoc.gov.au/human_rights/publications.html).

45 [2008] 1 AC 95; [2007] UKHL 27.

46 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48; [2001] EWCA Civ 595; and *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; [2002] EWCA Civ 366.

47 [2004] 1 AC 546; [2003] UKHL 37.

48 Joint Committee on Human Rights, Seventh Report of Session 2003-2004 (HL Paper 39, HC 382), 3 March 2004.

phrase "*functions of a public nature*". The Committee considered that this approach created a serious gap in the protection of human rights.[49] It said:

> "It means that the protection of human rights is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body's administrative links with institutions of the State."[50]

41. The Committee recommended[51] the adoption of the broad "functional" approach adopted by the House of Lords in *Aston Cantlow*.[52] It suggested that "*[t]he key test of whether a function is public is whether it is one for which the government has taken responsibility for in the public interest.*"[53]

42. The Report of the Victorian Human Rights Consultation Committee, which led to the enactment of the Charter, referred to the First JCHR Public Authority Report and its conclusion that "*there is a fundamental problem not with the design of the law, but with its inconsistent and restrictive application by the courts*".[54] It is this view of the proper interpretation of the phrase "*functions of a public nature*" that, it is submitted, lay behind the enactment of s 4(1)(c).

43. Secondly, s 6(3)(b) of the UK HRA does not contain the additional requirement in the second limb of s 4(1)(c) of the Charter that an entity will only be a public authority "*when it is exercising those functions [of a public nature] on behalf of the State or a public authority (whether under contract or otherwise)*". This difference permits the words "*functions of a public nature*" in s 4(1)(c) to be more broadly interpreted than they are in s 6(3)(b) of the UK HRA. It also makes clear that the nature of the relationship between the entity in question and the State or a public authority is not dependent on the institutional connections between them, a point that has been a feature of the UK jurisprudence.

44. Thirdly, the majority in *YL* emphasised "*the essentially contractual source and nature of [the care home's] activities*" in order to characterise its activities as

---

49 First JCHR Public Authority Report, para 43.

50 First JCHR Public Authority Report, para 41.

51 First JCHR Public Authority Report, Summary, page 4, and para 42.

52 See [2004] 1 AC 546; [2003] UKHL 37 at [10]-[12] per Lord Nicholls, [41] per Lord Hope.

53 First JCHR Public Authority Report, paras 138-140. These recommendations were reiterated in the Second JCHR Public Authority Report, but that Report post-dated the enactment of the Charter and pre-dated the House of Lords' decision in *YL*.

54 Department of Justice, Victoria, *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee* (November 2005), page 58.

essentially private in nature rather than public.[55] Section 4(1)(c) of the Charter, however, expressly contemplates that an entity might be carrying out a function of a public nature pursuant to a contract with the State or a public authority.

45. The interpretation of s 4(1)(c) should not be constrained by the subsequent decision of the majority in *YL*. As noted above, s 4(1)(c) was intended to reflect the fact that "*modern government utilise diverse organisational arrangements to manage and deliver government services*".[56] It is submitted that, for the purpose of the Charter, the minority approach in *YL* is to be preferred.[57]

46. In any event, it is submitted that the facts of *YL* can be distinguished and that even on the reasoning of the majority in *YL*, a transitional housing manager in the position of MetroWest should be found to be a public authority under s 4(1)(c) of the Charter. The principal differences are in summary: that MetroWest is a not-for-profit organisation; it is exercising statutory functions of a core public authority pursuant to a formal delegation authorised by statute; it is subject to significant state control, which will only increase if it becomes a registered agent under the *Housing Act*; and it is publicly funded by general grants or by the provision of State housing. Factors of this nature led the English High Court in *R (Weaver) v London & Quadrant Housing Trust*[58] to distinguish *YL* and to conclude that a "registered social landlord" fulfilling a role not dissimilar to MetroWest's was a public authority for the purposes of s 6(3)(b) of the UK HRA when it sought an order for possession.

Dated: 5 November 2008

R. MERKEL
Melbourne Chambers

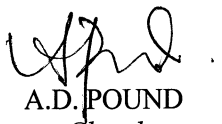
---

55 [2008] 1 AC 95; [2007] UKHL 27 at [121] per Lord Mance; and see at [26], [29] and [31] per Lord Scott.

56 Second Reading Speech, page 1294; Charter EM, page 4.

57 It may be noted in this respect that section 145 of the *Health and Social Care Act 2008* (UK) has effectively reversed the decision in *YL* so far as care homes are concerned and that the JCHR Report on "A Bill of Rights for the UK?" has recommended that any UK Bill of Rights should defined "public function" in a way which ensures that private organisations providing services under a contract with a public authority are caught by the obligation": House of Lords and House of Commons, Joint Committee on Human Rights, "A Bill of Rights for the UK?", Twenty-ninth Report of Session 2007-2008, HL Paper 165-1, HC 150-1, 10 August 2008, page 115.

58 [2008] EWHC 1377 (Admin) at [52]-[63].



A.D. POUND
Melbourne Chambers

.....
Freehills
Solicitors for the Human Rights Legal Resource Centre