



House of Lords
House of Commons
Joint Committee on
Human Rights

Schools White Paper

Ninth Report of Session 2005–06

Report, together with formal minutes

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Lord Bowness
Lord Campbell of Alloway
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

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Mary Creagh MP (Labour, *Wakefield*)
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The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Jackie Recardo (Committee Assistant), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

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Summary

In this Report the Committee considers the human rights implications of the Schools White Paper *Higher Standards, Better Schools For All: More choice for parents and pupils*. The Committee hopes that by considering the White Paper's proposals at this stage of the process, before publication of the expected Education Bill, it will be able to influence the drafting of the bill and its parliamentary consideration from the earliest time.

The Report briefly describes the main proposals in the White Paper which engage human rights. These relate to its proposals for changes to school governance, primarily the creation of independent, self-governing Trust schools and a change in the role of local authorities from providers of education to commissioners of education services from private providers (paragraphs 3 to 7). The Report then explains the human rights engaged by the proposals, notably the right to education under Article 2 of Protocol 1 of the European Convention on Human Rights (ECHR) (paragraphs 8 to 15), and briefly summarises the statutory provisions which currently give effect to these rights (paragraph 16) and the current structure of state education (paragraphs 17 to 20).

In its analysis of the implications of the human rights implications of the White Paper's proposals, the Committee identifies one general issue and a number of specific issues which it draws to the attention of both Houses.

The general issue is that, as the Committee states, in its view there is “considerable doubt” as to whether Trust schools will be treated by the courts as functional public authorities within section 6(3)(b) of the Human Rights Act 1998. Under section 6(1) of the Act it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The Committee points out that, since there is a serious question as to whether Trust schools will be regarded as public authorities under the Act, whether the fundamental rights of parents and children are protected will depend on the terms of the contract between the individual Trust and the Secretary of State, and will require parents and children seeking to protect their rights to take the very uncertain course of judicially reviewing the Secretary of State for failing to secure the necessary protection for human rights in the contract with the particular Trust school. **The Committee therefore concludes that, if Trust schools are not made public authorities within the meaning of the HRA, their status, as presently defined, could undermine the practical effectiveness of protection for human rights, and recommends that this uncertainty should be clarified on the face of the Bill** (paragraph 27).

In paragraph 28 of the Report the Committee lists a number of more specific implications which may arise for the protection of human rights. The first of these would arise if the proposed Trust schools were not public authorities under the HRA, the remainder if they were not maintained schools—

- a child's right to manifest their religion under Article 9 ECHR (freedom of thought, conscience and religion), which requires schools to justify uniform policies which interfere with that right, may only be enforceable against the Secretary of State, not the school itself

- the ability of LEAs to fulfil their statutory duty to find a school place for every school age pupil in their area may be undermined, risking breaches of the right to education in Article 2 Protocol 1 ECHR
- a risk of incompatibility with Article 6(1) ECHR (right to a fair hearing in the determination of civil rights) in the lack of right of access to an independent and impartial tribunal to appeal against exclusions
- parents' statutory right to withdraw children from religious assembly and instruction will depend on contractual arrangements between the Secretary of State and Trust schools, risking breaches of parents' right to have their religious and philosophical convictions respected in their children's education in Article 2 Protocol 1 ECHR and of the child's right to freedom of thought, conscience and religion under Article 9 ECHR
- Trust schools' flexibility over curriculum content may give rise to conflict with the right not to be indoctrinated in the second sentence of Article 2 Protocol 1 ECHR
- with Trust schools under no obligation to admit statemented children with special educational needs, children with SEN may be denied a place at the most suitable school and therefore their right to education
- LEAs could not compel independent Trust schools to take a child, so children might be denied their right of access to existing education provision under Article 2 Protocol 1 ECHR
- if schools were to devise their admissions policies in such a way as to disadvantage children from more deprived areas, this would lead to less favourable treatment of children from such areas potentially in breach of Article 14 in conjunction with Article 2 Protocol 1 ECHR.

The Committee asks the Government to give its views on each of the specific points above in its Response to the Report.

Schools White Paper

Introduction

1. In this Report we set out our views about the human rights implications of the Schools White Paper, *Higher Standards, Better Schools For All: More choice for parents and pupils*, published in October 2005.¹ We hope that by providing our views at this stage of the process, before publication of the expected Education Bill, we will be able to influence the drafting of the bill and its parliamentary consideration from the earliest time.

2. The White Paper sets out the Government's plans to "transform" the state school system in the UK. In accordance with our terms of reference we do not consider the merits of the proposals² but seek to identify the proposals which engage human rights, the human rights engaged, and any risks of incompatibility to which the proposals give rise. Most of the human rights implications of the White Paper arise from its proposals for school governance and we therefore focus on those aspects of the White Paper.

The relevant proposals in the White Paper

3. The White Paper proposes to create a system of independent self-governing state schools freed from local authority control. Every school will be able to acquire a self-governing Trust similar to those supporting Academies. A central objective is to make the state school system as a whole increasingly driven by parents and by choice. State schools are to be given greater freedom and flexibility, including freedom to work with new partners to develop a distinctive ethos. New providers of education will be encouraged to enter the system and schools will be encouraged to become increasingly specialist. The aim is to open up the state school system to a diversity of school providers, bringing in educational charities, faith groups, parents and community groups and other not-for-profit providers to run schools. New providers will have the freedom to give their school a clear direction and ethos and to shape its curriculum.

4. Education provision is to be modelled more closely on market principles. Provision of new schools is to be opened up to competition. It will be easier to establish new schools. Good schools will be able to expand or federate more easily with other schools. Failing schools will contract and be replaced by new or better schools.

5. Central to the proposed reforms is a fundamental change in the role of local authorities in the state education system. Their role will change from providers of education to commissioners of education services from private providers. They will have new duties to champion the needs of parents and pupils, pushing for improvements in schools rather than interfering in the day to day running of schools.

6. The new type of independent Trust schools will have control over their own admissions policies. They will be able to introduce banding into their admissions policies, so that they

1 Cm 6677

2 The Commons Education and Skills Committee published a wide-ranging Report on the White Paper on 27 January, their First Report of Session 2005-06, HC 633-I.

can keep a proportion of places for students who live outside traditional school catchment areas.

7. Before assessing the human rights implications of these radical proposals for reorganising state education, we first identify the human rights which they engage, together with some of the relevant provisions of UK law which give effect to those rights in the education context, and give a brief account of the current organisation of the state education system.

The human rights engaged

8. The Human Rights Act gives effect in the UK to one provision of the ECHR which is expressly concerned with the right to education and a number of other rights which are also engaged by the provision of state education.

9. Article 2 of the First Protocol to the ECHR provides:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

10. On ratifying the First Protocol, the UK entered a reservation in respect of the second sentence of Article 2:

... in view of certain provisions of the Education Acts in force in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

11. The reservation was entered to reflect the principle originally contained in the Education Act 1944 and now re-enacted in s. 9 of the Education Act 1996:

that pupils are to be educated in accordance with the wishes of their parents so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

12. Following its recent review of the UK's international human rights obligations, the UK Government concluded that the reservation to Article 2 of Protocol 1 should remain in place.

13. The first sentence of Article 2 Protocol 1 has been interpreted by the European Court of Human Rights as including a positive right of access to the educational institutions which exist in a state at any given time.

14. The second sentence of Article 2 Protocol 1 has been interpreted as imposing a broad positive obligation on the state to respect parents' religious and philosophical convictions. This includes a prohibition on indoctrination, and a requirement that information or knowledge be conveyed in an objective, critical and pluralistic manner.

15. A number of other Convention rights are also relevant in the education context, in particular the right to freedom of thought, conscience and religion in Article 9, the

freedom to receive and impart information and ideas in Article 10, the right to a fair hearing in the determination of civil rights in Article 6(1), and the right not be discriminated against in the enjoyment of Convention rights in Article 14.

Statutory provisions giving effect to the relevant rights

16. As is often the case with social and economic rights, the obligations contained or recognised in international treaties are given effect by a number of much more specific statutory rights and duties, many of which are imposed on local authorities as the Local Education Authority. A number of statutory provisions give concrete effect to certain human rights in the education context. For example:

- the right of access to the educational facilities available, guaranteed by the first sentence of Article 2 Protocol 1, is achieved by a number of statutory duties imposed on LEAs, for example to find a local school place for all school age children in their area,³ to make alternative provision (“education otherwise”) where no suitable school place is available,⁴ or where a pupil has been excluded for more than a certain number of days, and also by some specific duties on maintained schools, for example to admit a statemented child with special educational needs, only to exclude after following the statutory procedure, and to reinstate following a successful appeal.
- the right of an excluded pupil to a fair hearing before an independent and impartial tribunal, recognised both at common law and under Article 6(1) ECHR, is currently satisfied by a combination of the statutory right to appeal to an Independent Appeal Panel and the subsequent statutory right of appeal to the High Court on a point of law.⁵
- the right of a parent to have their child educated in accordance with their religious or philosophical convictions, guaranteed by the second sentence of Article 2 of Protocol 1 to the ECHR, is given effect in part by the statutory right to withdraw one’s child from religious assembly and instruction.
- the right not to be indoctrinated is protected in part by a right to complain to an LEA about implementation of the curriculum.

The current structure of state education

17. The Secretary of State for Education is under a general statutory duty to “promote the education of the people of England and Wales”.⁶

3 Section 13 of the Education Act 1996 imposes a duty on LEAs to secure that efficient primary and secondary education are available to meet the needs of the population of their area.

4 Section 19 Education Act 1996 requires each LEA to make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.”

5 *S v Brent London Borough Council* [2002] EWCA Civ 693, [2002] ELR 556 (CA)

6 s. 10 Education Act 1996

18. It is local education authorities, however, which have general responsibility for education, including a duty to secure that efficient primary and secondary education are available to meet the needs of the population of their area,⁷ and that suitable education is provided for any pupil who otherwise would not receive it.⁸

19. The state school system contains five types of maintained school. The duty to maintain such schools rests on the LEA. Maintained schools do not have legal personality. Every maintained school has a governing body, which does have corporate status and which is responsible for the conduct of the school and its budget.

20. Maintained schools are required to have regard to various guidance issued by the Secretary of State covering matters such as admissions, exclusions and special educational needs.

The human rights implications of the White Paper proposals

(a) The general issue: practically effective protection for human rights

21. Academies, although largely publicly funded, are not maintained schools, are subject to the same light touch regulatory regime as independent schools, and operate under individual contracts with the Secretary of State.

22. On the one hand, the Secretary of State for Education, LEAs and the governing bodies of maintained schools are clearly all “public authorities” for the purposes of the Human Rights Act and are also judicially reviewable.

23. At the other end of the spectrum, independent schools are neither public authorities for the purposes of the Human Rights Act, nor are they judicially reviewable, even on the application of a pupil who is wholly state-funded at such a school (e.g. pursuant to a statement of special educational needs).⁹ The only remedies available against such schools are contractual.

24. Academies and the independent, self-governing Trust schools envisaged in the White Paper fall somewhere between the two ends of the spectrum. They clearly will not be core public authorities such as the Secretary of State, LEAs or the governing bodies of maintained schools for the purposes of the Human Rights Act. We note that the Government is of the view that—

The governing bodies of all maintained schools are public authorities for the purposes of the Human Rights Act 1998, and the governing bodies of trust schools will be no different in this respect. Although the matter has not been judicially determined, in the department’s view academies exercise functions of a public nature by providing education at public expense and are therefore public authorities for the purposes of the Human Rights Act 1998.¹⁰

7 s. 13 Education Act 1996

8 s. 19 Education Act 1996

9 *R v Muntham House School, ex p. R* [2000] ELR 287 (decision of the governors of a non-maintainable fee-paying school did not have a sufficient public law character to make it amenable to judicial review)

10 HL Deb., 31 January 2006 col. WA 46

In the light of the state of the current case-law on the meaning of a public authority under the HRA, in particular the decision in *Leonard Cheshire*,¹¹ in our view there is considerable doubt whether they will be treated by the courts as being functional public authorities within s. 6(3)(b) of the HRA. They are more likely to be held to be amenable to judicial review, in light of the case-law establishing that City Technology Colleges (the predecessors of Academies, also established under agreement with the Secretary of State) are judicially reviewable,¹² but this will be of little assistance to parents and children if, in those proceedings, they cannot rely directly on their Convention rights against the school.¹³

25. Many of the statutory protections referred to above only apply to “maintained schools”.¹⁴ The proposed Trust schools are unlikely to be “maintained schools.” Like Academies, they will be independent, self-regulating schools. Unlike independent schools, on the other hand, there will be no right of contractual recourse against the schools by children or parents. They will be regulated largely by a contract between the Trust and the Secretary of State, to which the parents and children will not be a party.

26. Since there is a serious question as to whether Trust schools themselves would be regarded as public authorities under the HRA, whether the fundamental rights of parents and children, such as those mentioned above, are protected will depend on the terms of the contract between the individual Trust and the Secretary of State. The protections will be dependent on a process of negotiation to which the parents and children are not party. Pupils and parents will be left for the protection of their fundamental rights to the very uncertain recourse to judicial review of the Secretary of State for failing to secure the necessary protections for human rights in negotiating or enforcing the contract with the particular Trust school. For example, if an independent Trust school were to use CCTV to monitor pupils in places where they might have a reasonable expectation of privacy, or to release students’ e-mails or medical records, the child would not be able to rely on their right to respect for privacy in Article 8 ECHR directly against the school, but would have to bring proceedings against the Secretary of State for not ensuring in the contract that this did not happen.

27. If Trust schools are not made public authorities within the meaning of the HRA, the status of proposed Trust schools as presently defined could undermine the practical effectiveness of protection for human rights for all the reasons explained in the previous Committee’s Report on The Meaning of Public Authority in the Human Rights Act.¹⁵ We recommend that this uncertainty should be clarified on the face of the Bill. We draw this matter to the attention of both Houses.

11 *Callin and Others v Leonard Cheshire Foundation*, [2002] EWCA Civ 366

12 *R v Governors of Haberdashers’ Aske Hatcham College Trust*, ex p. T [1995] ELR 350; *R v Governors of Bacon’s City Technology College*, ex p. W [1998] ELR 488. One of the factors influencing the decision that the schools were amenable to judicial review was the fact that the Secretary of State could, by virtue of the statute and through funding and the terms of the agreement with the college, control various aspects of the running of the college.

13 Being able to rely directly on Convention rights means that better remedies are available. For example, a pupil who has been unlawfully excluded from a maintained school, or unlawfully removed from the school roll, in circumstances where this amounts to a violation of the pupil’s right to education under Article 2 Protocol 1 ECHR, can recover damages under s. 8 of the Human Rights Act 1998: *A v Head Teacher and Governors of Lord Grey School*, [2004] QB 1231 (CA).

14 The term “maintained school” includes “community” schools, “voluntary controlled” and “voluntary aided” (i.e. church) schools, and “Foundation” (formerly Grant Maintained) schools

15 JCHR 7th Report of 2003–04, *The Meaning of Public Authority under the Human Rights Act*, HL 39, HC 382 at paras. 110–126

(b) Specific issues

28. We also draw the attention of both Houses to a number of more specific implications for the protection of particular human rights under the proposed reforms to the state school system. The first of these would arise if the proposed Trust schools were not public authorities for the purposes of the HRA, the remainder if they were not maintained schools:

- The child's right to manifest their religion under Article 9 ECHR requires schools to justify school uniform policies which interfere with that right. For a child in a maintained school this right is enforceable directly against the governors of the school under the Human Rights Act.¹⁶ Under the proposals in the White Paper there is a risk that the right will only be enforceable against the Secretary of State for not adequately securing protection of the right in the contract with the independent Trust school.
- The right to an education, guaranteed by Article 2 Protocol 1 ECHR, is given effect by the statutory duty on local education authorities to find a school place for every school age pupil in its area. The ability of LEAs to do this may be undermined by the removal of LEA control over schools in its area and giving control over admissions policies to the new Trust schools.
- In Academies the statutory appeal machinery against exclusions is not available and there is no obligation to follow the statutory guidance on exclusions. In some Academies appeals against exclusion are to the governors. The Trust appoints a majority of the governors. There is therefore no right of access to an independent and impartial tribunal. This gives rise to a risk of incompatibility with Article 6(1) ECHR, which UK courts under the HRA have assumed applies to such decisions.¹⁷
- Parents have a statutory right to withdraw their children from religious assembly and instruction, which is an important protection for their rights under the second sentence of Article 2 Protocol 1 and for the child's rights under Article 9 ECHR. Whether or not the right applies in the new type of independent Trust schools will depend on whether or not it is provided for in the contract between the school and the Secretary of State.
- The new flexibility over curriculum content, and the freedom to be given to Trust schools to create a distinctive ethos, may give rise to conflict with the right not to be indoctrinated in the second sentence of Article 2 of Protocol 1. The contractual documentation of one of the new Academies,¹⁸ for example, indicates that the school will "present matters in a way which is consistent with Biblical teaching." This would give rise to the risk, for example, of creationism being taught as part of the science curriculum.¹⁹ A child at a maintained school has a right to complain to

16 *R (SB) v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] ELR 198

17 *S v Brent*, above, at para. 30

18 South Middlesbrough City Academy

19 See e.g. the remarks of Nigel McQuoid, chair of the Governors of one of the Vardy Academies, in an interview with David Frost on the BBC on 17 March 2002 ("BBC Breakfast with Frost"): asked whether he planned to teach creationism, and if so whether he planned to do so in the science classes or the religious classes, he said "Well there's certainly no doubt that it's part of RE but it's also part of the national curriculum in science, where we're asked to deal with controversies relating to evolution."

the LEA about the way in which the national curriculum is being taught at their school. There is no such right of complaint about curriculum in an Academy or in the proposed independent trust schools.

- Maintained schools are under an obligation to admit statemented children with special educational needs. Independent Trust schools will not be subject to this obligation. A child with SEN may therefore be denied a place at the most suitable school and thereby be denied their right to education under Article 2 Protocol 1. Nor is it clear whether independent Trust schools will be required to follow the SEN Code.
- A child has a right to a suitable education under s. 19(6) EA. But an independent school cannot be made to admit a child who is placed there by an LEA. The LEA has a duty to place every child in its area. But it cannot compel independent trusts to take a child. Children might therefore be denied their right of access to existing education provision under Article 2 Protocol 1.
- A recent report from the Audit Commission suggests that giving each school the power to set its own admissions policies, free of LEA control, might lead to schools devising their admissions policies in such a way as to disadvantage children from more deprived areas.²⁰ This would lead to less favourable treatment of children from such areas, potentially in breach of Article 14 in conjunction with Article 2 Protocol 1.

29. We would welcome the Government's views on each of the specific implications for human rights which we have identified in paragraph 28 above when they respond to this Report.

Formal Minutes

Wednesday 1 February 2006

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Mr Douglas Carswell MP
Lord Campbell of Alloway	Mary Creagh MP
Lord Judd	Dr Evan Harris MP
Lord Lester of Herne Hill	Dan Norris MP
Lord Plant of Highfield	Mr Richard Shepherd MP

* * * *

Draft Report [Schools White Paper], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 29 read and agreed to.

Resolved, That the Report be the Ninth Report of the Committee to each House.

Ordered, That the Chairman do make the Report to the House of Commons and that Lord Judd do make the Report to the House of Lords.

* * * *

[Adjourned till Monday 6 February at 4 pm.]

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850