

JUSTICE 1 COMMITTEE

Wednesday 24 January 2007

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2007.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Wednesday 24 January 2007

Col.

SUBORDINATE LEGISLATION	4187
Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2007 (Draft)	4187
Police (Injury Benefit) (Scotland) Regulations 2006 (SSI 2006/61 0)	4204

JUSTICE 1 COMMITTEE

† 5th Meeting 2007, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Bill Aitken (Glasgow) (Con)
Karen Gillon (Clydesdale) (Lab)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED

Dr George Burgess (Scottish Executive Justice Department)
Johann Lamont (Deputy Minister for Justice)
Rosemary Whaley (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

† 4th Meeting 2007, Session 2—held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 24 January 2007

[THE CONVENER *opened the meeting at 10:16*]

Subordinate Legislation

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2007 (Draft)

The Convener (Pauline McNeill): Good morning, and welcome to the fifth meeting in 2007 of the Justice 1 Committee. I apologise for keeping Johann Lamont and her officials waiting. The committee had some questions about subordinate legislation to discuss. All members are present, so no apologies need to be recorded.

For item 1, which is consideration of an item of subordinate legislation, I welcome Johann Lamont, who is the Deputy Minister for Justice, and the officials George Burgess, Nigel Graham and Rosemary Whaley. Welcome to the Justice 1 Committee and thank you for coming. I invite the deputy minister to make some opening remarks on the draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2007, which will be followed by questions from the committee.

The Deputy Minister for Justice (Johann Lamont): Before I discuss the details of the draft order, I will set out the background to the Rehabilitation of Offenders Act 1974. The act sets out to improve the rehabilitation prospects of people who have been convicted of a criminal offence, have served their sentence and have since lived on the right side of the law. It provides that anyone who has been convicted of a criminal offence and sentenced to less than two and a half years in prison can be regarded as rehabilitated after a specified period with no further convictions. After that period, the original conviction is considered to be spent.

The act generally prevents evidence of spent convictions being admitted in proceedings, whether before judicial authorities or otherwise, but in certain specified proceedings and circumstances—for example, when licences are applied for under the Private Security Industry Act 2001—those provisions of the act are excluded and details of spent convictions can be disclosed.

The act also provides that once a conviction is spent, the convicted person does not have to reveal it and cannot be prejudiced by it in the

course of their employment. For example, a failure to disclose a spent conviction is not to be a ground for excluding someone from employment. However, there are some categories of employment to which that provision does not apply and in relation to which a spent conviction can still be a proper ground for excluding a person from employment. Those categories of employment are defined as exceptions to the act. Among the main types of employment in relation to which questions can be asked about spent convictions are jobs in the financial sector, child care, care services and the health professions.

The purpose of the draft order is to update the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 to take account of such changes in legislation as those brought about by the Gambling Act 2005 and the Mental Health (Care and Treatment) (Scotland) Act 2003. It has the additional purpose of allowing spent conviction information to be disclosed in further sets of proceedings before a judicial authority, such as proceedings before the Parole Board for Scotland, the Risk Management Authority or the Criminal Injuries Compensation Authority. The existing order also requires to be amended to enable questions about spent convictions to be asked of any person other than in such proceedings. For example, there is a need to ensure that spent conviction information may be sought when the eligibility of economic operators for the award of public contracts is considered.

The new order extends the categories of excepted professions, offices, employments and occupations that are set out in the 2003 order. Their inclusion in the new order means that, for example, a failure to disclose a spent conviction can be a proper ground for excluding a person from an office.

Examples of that are fire and rescue service staff, those working under Victim Support Scotland, social work inspectors, the Scottish Criminal Case Review Commission and the Risk Management Authority. The amendments are necessary to ensure that various agencies and bodies are able to fulfil their functions effectively. Positions that involve a particular level of trust, such as work in the child care and health professions, should be exempt from the act to ensure adequate protection, particularly for children and vulnerable people.

It is important that we strike the right balance between supporting the rehabilitation of offenders and protecting the public. Employment can reduce reoffending, and thereby cut the cost of crime and help to close the opportunity gap. I am happy to discuss the proposals in detail. If the committee has any questions about the thinking behind any of the provisions, I am more than happy to seek to respond.

The Convener: Thank you, minister.

Stewart Stevenson (Banff and Buchan) (SNP): I seek a piece of information, which I hope you or your officials may be able to supply. You spoke about the order applying to convictions that result in less than two and a half years in prison. Forgive my ignorance, but does it also apply to convictions where there is no prison sentence?

Johann Lamont: Yes.

Stewart Stevenson: So it applies all the way down to the most trivial criminal conviction?

Johann Lamont: Yes.

The Convener: What consultation was undertaken on the order? Will you give the committee an idea of the types of people or bodies that were consulted?

Johann Lamont: I will ask officials to give the factual detail on that in a moment. It is fair to say that a significant amount of what the Executive has undertaken in laying the order has been done in response to the decisions of the Scottish Parliament and the Parliament at Westminster. Such tidying-up provisions include changing the name of the Gambling Board to the Gambling Commission. I ask officials to give more information on the consultation.

Dr George Burgess (Scottish Executive Justice Department): As the committee will have seen, a variety of policy areas are covered in the instrument. The work on each of those areas was developed in conjunction with the relevant Executive officials and, in most cases, the bodies themselves. For instance, the Scottish Criminal Cases Review Commission and Victim Support Scotland were involved in developing the content of the order.

The provision for fire and rescue service staff is possibly the most significant area in the order. A specific consultation with the fire authorities and unions on that part of the proposal was undertaken during 2005. In short, all the areas in the order were developed with the policy leads and bodies involved.

Mr Bruce McFee (West of Scotland) (SNP): Good morning, minister. My question is on the degree of retrospection in the instrument. What was the objective of that retrospection, particularly in relation to fire and rescue service staff? What assumptions did the Executive make of the effect of those changes?

Johann Lamont: The critical thing to say about fire and rescue service staff is the need to recognise the changing nature of the job. The staff recognise that—indeed, only yesterday, we met to discuss this very matter with the fire boards and union representatives. Those involved recognise

the shift—it is a literal one—that has taken place from fire fighting to preventing fire and acknowledge that their work is now more educational.

The provisions are also the result of discussions that were held during the passage of the Fire (Scotland) Act 2005. The underlying policy, which the Parliament agreed to, recognises the changing nature of the job of fire and rescue service staff and the contact that those staff members now have with the public, including young people and vulnerable groups. That is part of the reason for laying the order. I ask officials to deal with the technicalities of retrospection.

Dr Burgess: As the minister explained, fire and rescue service staff who are already involved in working with children are covered by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005—they go through vetting procedures under the act. The order will allow a spent conviction to be considered by employers more generally. An authority would therefore be able also to check individuals who might not, in most of their work, come into contact with children or vulnerable adults. As a result, it would allow checks to be carried out on those who are already in employment and allow the authority to determine the most suitable deployment for that member of staff.

If, as part of the process, an earlier conviction that involved children came to light, the staff member in question would be able to continue their normal mainstream firefighting duties, but the authority might choose to ensure that that person was not employed in particular roles in the fire service that would bring them into close contact with children.

Mr McFee: I have listened to what—

I am sorry; I do not have my glasses on, so I cannot see the witness's name.

Mike Pringle (Edinburgh South) (LD): His name is George Burgess.

Mr McFee: I am sorry about that, Mr Burgess. I will try to wear my glasses next time.

The purpose of this order is to deal with people who are engaged in employment and fail to disclose any convictions that might previously have been considered spent by allowing their employer to remove them from their post. If someone in the fire and rescue services who was not required to disclose spent convictions when they became an employee were required to do so—according to line 5 of paragraph 11 of the Executive note, the order seeks retrospectively to apply its conditions to existing staff—could they be removed from their post?

Mike Pringle: In other words, could they be fired?

Mr McFee: Yes. Could they be sacked?

Rosemary Whaley (Scottish Executive Legal and Parliamentary Services): The order's purpose is to give employers all relevant information about employees' previous convictions. It is really a tool for employers. However, an employer might well have cause for concern if they discovered that an employee had a spent conviction of a certain nature or if they felt that the employee was dishonest in not disclosing the conviction.

Mr McFee: I am sorry, but we are in danger of confusing a couple of issues. On the point about a staff member being dishonest because they did not disclose a spent conviction when they did not need to—

Johann Lamont: That would not be dishonesty.

Mr McFee: Precisely.

Rosemary Whaley also said that the order is a tool. Tools are normally meant to be used. If all the relevant information has now to be disclosed and if an employee has to disclose something that they have not previously been required to disclose, could an employer use that information to sack that individual?

Johann Lamont: The technicalities of the matter can be dealt with. The point is that, in practical terms, the nature of the job has changed.

Mr McFee: I understand that.

Johann Lamont: As a result, when they are deciding how to deploy fire service staff appropriately, an employer will have to take into consideration the fact that the job has changed, that the employee is being asked to do different things and that, given their conviction, it might not be appropriate for them to carry out certain aspects of it. The employer might well decide that it would be appropriate for the employee to carry out that new element of their job, but such a decision will have no implications for the old bit of their job, if you know what I mean.

The Convener: That is the question. We are clear about the fact that this provision has been included to deal with the changing nature of the job. People might well feel that an individual with a spent conviction can never work with children. Leaving that argument aside, under the order, an employee who might have worked for the service for 20 years will be required to reveal a spent conviction, which will allow employers to choose not to put them into situations that might bring them into close contact with children and, instead, to keep them doing other parts of their job. Surely there is nothing to prevent an employer from

sacking that employee once that spent conviction is disclosed.

Johann Lamont: In general, the fire service is content with the situation and recognises the changing nature of the job. I should also point out that, under other legislation, disclosure is required if an employee is asked to carry out particular work. That does not necessarily mean that, in this case, an employee would be vulnerable to being sacked. After all, because they are already doing a certain job, they would be protected by existing employment law.

That said, under the order, the employer will have to make a judgment about whether the employee can be properly deployed in another area of work that—if I remember correctly—already requires spent convictions to be disclosed. The view that was taken was that it would be better, more efficient and more rational for employers to be able to consider spent convictions of people in the service who are going into new jobs. However, such convictions do not have to be acted on.

10:30

Mr McFee: Paragraph 2 of the Executive note, which sets out the policy objectives of the order, is crystal clear. It states:

"The amendments also add to the categories of excepted professions, offices, employments and occupations in the 2003 Order; their inclusion in the Order means that spent convictions—or the failure to disclose a spent conviction—can be a proper ground for dismissing or excluding a person from a specified profession, office employment or occupation."

It is clear from the note that, rightly or wrongly, the employer of a member of staff of the fire and rescue services could use the order to remove them from their employment. The note states that failure to disclose a spent conviction would be "ground for dismissing" someone.

Dr Burgess: The person would still have all the normal protections of employment law. In its normal operation, the Rehabilitation of Offenders Act 1974 prevents spent convictions from being disclosed. It goes further than normal employment law and makes absolutely clear that failure to disclose a spent conviction when there is no requirement for a person to disclose cannot be a ground for dismissing or not advancing them. You are thinking of a scenario in which someone is already employed by a fire and rescue service and has a spent conviction that they have not disclosed, because they did not need to do so. Under the new regime, they would be required to disclose it. I do not think that that would allow a fire authority to dismiss someone because they had not disclosed a conviction five or 10 years beforehand, when they were not required to do so.

Mr McFee: I agree that the instrument would not allow that to happen, but the paragraph on policy objectives describes not just the failure to disclose a spent conviction, but having a spent conviction as a ground for dismissal. Is the Executive note wrong? It states that

“their inclusion in the Order means that spent convictions—or the failure to disclose a spent conviction—can be a proper ground for dismissing”

someone. The note does not refer only to the failure to disclose, which was not an offence at the time.

Johann Lamont: An employer would have to justify a dismissal on the ground of a spent conviction. You have in mind a scenario in which someone has been doing mainstream fire service work for 10 years with a spent conviction. If their job has changed, they will have to be disclosed in order to do the new work. An employer would have to justify why in those circumstances it was proportionate for them to dismiss the person.

The Convener: The order seems to say that someone could be dismissed for that reason. Will you clarify whether that is the policy objective?

Johann Lamont: The person continues to be protected by employment legislation.

The Convener: The order may be at odds with such legislation. We need to be clear about the issue. Bruce McFee suggested to you that, according to the order, having a spent conviction is a ground for dismissal. That means that when employees who have not been required to reveal a spent conviction are required to do so, they may be dismissed.

Johann Lamont: There is no policy intention that anyone who is doing a job that they were doing before should be dismissed because they did not reveal something that they were not obliged to reveal. We know that spent convictions can be taken into account by employers, but presumably employers' reaction to them must be proportionate. I am aware that I am straying into technical territory around employment law. It might be helpful for us to reassure the committee by providing it with a definitive answer in written form.

The Convener: We need that. It may not be the policy intention that having a spent conviction is a ground for dismissal. We are being asked to recommend today that the instrument be approved, but the policy objective that is stated in the Executive note suggests that there are two grounds for dismissal: having a spent conviction and failure to disclose one. Perhaps the note was not meant to be worded in that way, but it is.

Dr Burgess: We are getting into double negatives here. The Executive note to the order is a précis of the Rehabilitation of Offenders Act

1974, which does not create a ground for dismissing someone. The act does not state that if a person has a spent conviction that is required to be disclosed they can definitely be sacked as a result of not disclosing it. Rather, it works the other way round: it provides that if a person has a spent conviction that is not subject to the power requiring disclosure, failure to disclose the conviction definitely cannot be used as a ground for dismissal. The order would take away from that complete ban on taking spent convictions into account so that we return to what we might call the normal employment law situation.

Mr McFee: Precisely. As a consequence of the order, an employee currently in post in the fire and rescue services could be sacked.

Dr Burgess: The person could be sacked only if that was a legitimate thing for the employer to do under employment law.

Johann Lamont: So that is nothing to do with the order.

Mr McFee: It has everything to do with the order. The order would open up that possibility for existing staff. I understand the policy objective, which has been explained in straight terms, but there would be other implications if the requirement is to apply retrospectively.

The Convener: My concern is about that retrospective element. I now understand the Executive's argument—it is the flip-side—about the ability to take such matters into account as a proper ground for dismissal. However, the policy intention of the Rehabilitation of Offenders Act 1974 was that, apart from in certain cases, people should not have to disclose a conviction after a certain time and should be given—I cannot remember whether this is the phrase that Unison used—a second chance to move on. For all we know, a whole lot of people in the fire service might now be required to disclose convictions that will potentially, once the information is known, result in their being dismissed.

Dr Burgess: Nothing in the order creates a ground for dismissal. Under employment law, having a spent conviction or any conviction does not of itself constitute a ground for being dismissed. We can confirm this, but I think that it would be very difficult for a fire authority to dismiss a member of staff because of a spent conviction that was not required to be disclosed when the person entered the service five years ago. If, after the order comes into force, a member of staff is asked to disclose any spent convictions and fails to do so, that might be another matter. However, if people were not required to disclose spent convictions when they entered the service and if they complied with the requirements at that time, I very much doubt that there would be grounds

under employment law for dismissing them. As the minister suggested, it is probably best that we confirm that in writing for the committee.

The Convener: I think that we have been drawn to that conclusion by the fact that the word “ground” is used in the Executive note, which states:

“their inclusion in the Order means that spent convictions ... can be a proper ground for dismissing ... a person”.

It reads as though the possession of spent convictions could be a ground for dismissal, but you seem to be saying that that is not the case.

Margaret Mitchell (Central Scotland) (Con): I want to ask about the thinking behind including two categories in particular within the professions that are excepted from the requirements of the act. Independent custody visitors are volunteers who can enter a police station at any time to look at the circumstances in which a prisoner is held. According to the Executive note, the eight police authorities currently recruit, select and appoint such visitors and carry out their own independent assessment of the suitability of those who volunteer. Is there a problem with that at the moment?

Johann Lamont: We have sought to reflect on all the issues that need to come under the order. Given the nature of the voluntary work concerned, the assessment of a volunteer's suitability must involve checking the person's background. At the moment, the precise format of those background checks and whether they should include an examination of the individual's criminal record for unspent convictions are matters for the discretion of the police authority or joint board. The policy intention is to formalise those arrangements by enabling questions about spent convictions to be asked as part of the assessment of a candidate's suitability for the occupation of independent custody visitor and by ensuring that spent convictions or failure to disclose such convictions may be considered as a ground for excluding a person from such a post. However, past offending will not be an automatic barrier to acceptance. The information will be used as part of the assessment.

Margaret Mitchell: If the system is working at the moment, why should we impose an additional burden that could deter people from volunteering to carry out a very important job? The police carry out their own assessment and appoint people and, as far as I am aware, there is not a problem. Why should this provision be included?

Johann Lamont: I suppose it is a matter of the order presenting the opportunity. It is also about consistency. There is always a broader argument about what deters volunteers and how to balance that challenge against protecting vulnerable groups where volunteering can be seen as a way

in. That has been debated elsewhere in the Parliament and we know that it is a matter of balance and judgment. The view was taken that independent custody visitors could comfortably be included because that would formalise the arrangements and give consistency.

Dr Burgess: At the moment, the checks cannot include spent convictions, but the new order will allow them to be taken into account. It does not require background checks to be done; it allows them to be done. It does not impose an additional burden on local authorities or the volunteers. To be consistent with other areas such as protection of children, and because of the nature of the work that will bring custody visitors into contact with potentially vulnerable people, we think that it is sensible to give local authorities access to spent conviction information and allow them to take it into account.

Margaret Mitchell: My fear is that it will deter people who would make very good candidates for this important role.

On European Union procurement rules, I understand that any potential contractor already has to disclose any convictions for offences relating to criminal organisations, corruption, fraud or money laundering. That seems eminently sensible, but I am wondering what would be relevant. The tendering process is very delicate and certain local authorities are already concerned about it. Catch-all provisions about commercial sensitivity or other commercial reasons mean that why someone was excluded from the tendering process cannot be disclosed. My difficulty is that the order could have the unintended consequence of making that situation even more vague unless the process is transparent.

Johann Lamont: That is not a matter for this order. The directive exists, so the order has to address it. There is a separate argument about how EU procurement law operates and the power of directors and all the rest of it. The fact is:

“An amendment to the 2003 Order is required to allow spent convictions to be disclosed, in order to comply with Directives 2004/18/EC and 2004/17/EC of the European Parliament and of the Council. These Directives co-ordinate the processes and procedures that must be followed when awarding public contracts for goods, services, works and utilities.”

Particular convictions result in a person being ineligible to tender for public contracts. The order responds to an EU directive. There is a separate place for arguments about the directive.

Margaret Mitchell: Presumably, we look through directives and decide whether there is something we want to comment on. Perhaps there is something we think would be unfair or would adversely affect the tendering process. What do

you envisage coming under the order, which is not already covered?

Johann Lamont: If you are commenting on the directive, that is clearly a matter for the committee and the Parliament, and it might even be a matter for other committees. The provision in this order is in the order because the directive exists; you are trying to deal with a separate matter. The order is trying to ensure that it matches up to the legislation that has been passed here or has the power of a directive behind it.

Margaret Mitchell: Are you telling me that you have laid the order before the committee today but have no clear idea about one of the offences that might be covered?

Johann Lamont: I am not saying that. What I am saying is that regardless of what that is, it is in the order because the directive has already been—

Margaret Mitchell: Could you proffer an example of an offence that would be covered?

Dr Burgess: The directives concerned are reasonably new. As I recall, previous procurement directives did not include provisions on conviction information. The new directives say that certain categories of conviction must be considered and will bar economic operators from being considered as part of the tendering process. They also allow the tendering authority to take other types of offence into consideration. The United Kingdom is one of the few places in Europe where the concept exists of convictions having been spent. In a sense, therefore, our legislation allows some old convictions to be dropped off the list, which does not fit particularly well with legislation in the rest of Europe. The order will allow those spent convictions to be taken into account.

10:45

Margaret Mitchell: With respect, you still have not answered the question. You have not given me one example of something that would be covered.

Dr Burgess: Money laundering.

Margaret Mitchell: It is there already.

Dr Burgess: What we have is a conflict between bits of legislation. On the one hand, we have the European directive and the implementing domestic regulations that say, "These things are to be taken into account", and on the other hand we have the Rehabilitation of Offenders Act 1974, which says, "These things cannot be taken into account." The order brings the two into alignment.

Mr McFee: Given that in any EU procurement exercise, or any other exercise that requires us to go to tender, it is often a limited company that

tenders, at what level will the order apply—director, senior manager or shop-floor worker?

Rosemary Whaley: I believe that it will apply at the level of directors or any other person who has powers of decision making in or control of the candidate company. That is specified in the Scottish statutory instruments that govern public contract tendering.

Mr McFee: So it could apply to any person on the board of directors or the management board.

Rosemary Whaley: If they satisfy that test, yes.

Mr McFee: That is very wide. How does the order apply to foreign companies or foreign nationals who are directors of companies?

Rosemary Whaley: I imagine that it would apply to them in the same way.

Mr McFee: How can we apply it to them? A company might be based in France, for example. That is not uncommon in EU procurement.

Dr Burgess: The legislation would apply equally. They would be required to disclose convictions on the same basis as people in this country would be. I think that you are getting at the practical difficulty of how we actually get—

Mr McFee: Absolutely. How do we avoid potentially disadvantaging companies based in this country, where we can carry out checks? How do we apply the checking process to a foreign company or to a foreign national who happens to be a director of a company in this country?

Dr Burgess: We would need to check with our procurement colleagues just how the process works in practice. What the order does is ensure that spent convictions can be disclosed.

Mr McFee: I understand the idea behind the order. My concern is about that potential disadvantage. Wonderful excuses can be used for not awarding contracts in certain situations.

Johann Lamont: The implication of what you say is that the existence of the Rehabilitation of Offenders Act 1974 causes such disadvantage.

Mr McFee: You could argue that if, first, no such provision existed in any other country where there was a foreign competitor, and secondly, you had the ability to check.

Johann Lamont: The logic of that position is to debate whether we should have a rehabilitation of offenders act. Does it disadvantage us competitively?

Mr McFee: No. I am sorry, but that is not the logic of my position; I simply gave two grounds for argument. The problem is that we cannot check. That is the difficulty.

The Convener: I will take one more question on that area.

Stewart Stevenson: I want to be absolutely clear about whether convictions outwith Scotland and the United Kingdom are covered. If, for the sake of argument, someone who was resident in Scotland and who was party to a contract had a conviction in another EU country, would that require to be disclosed?

The Convener: Are you referring to a spent conviction?

Stewart Stevenson: We have been told that there is no concept of spent convictions in the other countries.

Dr Burgess: Yes.

Stewart Stevenson: Such a conviction would require to be disclosed. There may be practical difficulties with establishing whether someone has such a conviction that should have been disclosed, but which has not been. However, that is a different issue, which I do not wish to explore.

Similarly, if someone who was resident not in Scotland or another part of the United Kingdom—there may be a distinction between residency in Scotland and residency in another part of the UK—but elsewhere in the EU had a conviction from Scotland or another part of the UK, they would have to disclose it because it would be covered by the disclosure of spent convictions provisions. Are we therefore saying that there is absolute equality in what people have to disclose, regardless of where in the EU they may be resident and where in the EU they were convicted? I can see a head nodding.

Finally, how will the provisions apply to people who live outside the EU and who have convictions outside the EU?

Dr Burgess: To my knowledge, there is nothing in the directive that limits disclosure from the point of view of where the offence took place. It provides a level playing field; it would be unusual if it did anything other than that. In a tendering process that took place in this country, it would not matter whether the person was convicted here or in France, and in a tendering process in France, it would not matter whether the person was convicted there or here.

Stewart Stevenson: Sure. I am not trying to catch anyone out. I just want to have it on the record that the country in which the person was convicted is immaterial to the requirement to disclose—albeit that there may be practical difficulties in establishing that a failure to disclose has occurred, but that is a quite different issue, which I will not pursue.

The Convener: That ends the questioning on that topic.

Mike Pringle: The last two lines on page 4 of the Executive note, which appear under the heading “Her Majesty’s Inspectorate of Education”, say:

“The current wording of the order covers permanently employed staff but is not sufficiently clear about staff seconded from other organisations and those employed as Associate Assessors, Assistant Inspectors or Lay Members.”

The last line on page 9 of the note, which comes under the heading “Social Work Inspectors”, says:

“This is to include not only permanently employed staff but also staff seconded from other organisations and those employed as Associate, Sessional or Lay Inspectors.”

Why is there such a conflict? In some cases seconded staff will be required to disclose spent convictions, but in others it is not clear whether they will have to. What is the position?

Dr Burgess: That is not true. Paragraph 21, which is in the part of the note about HMIE, says that the wording of the 2003 order is not clear about whether seconded staff are required to disclose spent convictions—that is what is meant by “the current wording”. The change is being made to allow spent convictions to be taken into account for people who come to work for HMIE on secondment. The position will be the same for people who come to work as social work inspectors on secondment. Once the draft order goes through, there will be parity.

Stewart Stevenson: Forgive me, but I want to check that I understood something that the minister said about fire and rescue staff, now that I have thought about it. I believe that she said that the staff who will be covered by the draft order’s extension of the requirement to disclose will already have been checked under other legislation. That appeared to be the substance of what she said, but I would be grateful for clarification of that. I want to be clear about whether the draft order will draw in any new people to be checked.

Dr Burgess: It will draw in new people. At the moment, people in the fire and rescue service who work in what count as child care positions under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 are required to undergo checks. Fire service staff who regularly work in schools and meet the tests in the 2005 act will be covered. The order will apply across the board for fire and rescue service staff.

Stewart Stevenson: Does that mean that we are checking staff who do not undertake any duties that, until now, require that they be checked?

Johann Lamont: The role of the fire service is changing and staff will increasingly come into contact with a range of different groups. After consultation, we recognised the logic of having an opportunity to look at spent convictions at the point of appointment, rather than at the point at which somebody was specifically doing child care work.

Stewart Stevenson: Might I suggest that that is not what you are doing? It would not greatly exercise the committee if you wished, from now on, to make those checks at the point of appointment. I shall put it to you in the following terms to see how you respond. I think that what is actually happening is that, for administrative convenience, you have decided to check everybody, even though the additional people you are checking are people who do not currently work with children and who, prior to the order, you would simply have checked at the point at which they started to work with children. Am I being unreasonable in characterising it thus?

Johann Lamont: I do not know whether you regard administrative convenience as always a bad thing if it rationalises systems and makes them logical.

Stewart Stevenson: Well, take away the label.

Johann Lamont: In certain circumstances, I would not necessarily baulk at administrative convenience. However, my understanding of the order is that it recognises the changing nature of the job and the fact that it will continue to change. Clearly, there are people who have been in the service for a long time and who have never worked with children before. If they were to work with children, they would have to go through certain legislative procedures. The view was taken that, given the changing nature of the job, increasing numbers of people will come into contact with vulnerable groups. It was therefore considered logical to consider spent convictions. However, there is no obligation on anybody to respond—

Stewart Stevenson: Hitherto, the disclosure process has taken place when the activities of a current employee changed such that they engaged with children and vulnerable people. The position at the moment is not that people who work with children and vulnerable groups are unchecked—that is not the issue. Potentially, there are people who have been employed in the fire service for a considerable period who have not been involved with children and vulnerable groups and who have not been checked. The effect of the order is that they will be checked, but because they do not work with children or vulnerable groups, that has no practical effect. I accept that if the check discloses something, they will never work with children or vulnerable groups—that would have been the case if the check was carried

out at the point at which whether they should engage with such groups was being considered. However, the order means that information that has no relevance to their job is put unnecessarily into their file. Is that a fair observation?

Johann Lamont: It is not a case of “never”. We are talking about information that the employer can consider. It is not that that person would then never work with any vulnerable groups. The information does not lead to compulsory consequences—

Stewart Stevenson: I have a final point. I think I have established, and I think we understand, that, for people who work with children and vulnerable groups, the check is done when their tasks—but not necessarily their job description—are changing. Therefore, vulnerable groups and children are currently protected. I accept that the order does not make the situation worse in any sense. I just do not know why we are taking the time and effort, and spending the money, to check in advance people who may never require to be checked. That is all that it boils down to.

Dr Burgess: That is not actually what the order does. The order does not require any check to be undertaken in respect of anyone. It does not require a fire authority to carry out any check that it does not already—

Stewart Stevenson: What about a current employee who does not work with vulnerable people or children?

Dr Burgess: If they work with vulnerable people or children, they already have to be checked and they will continue to have to be checked. Nothing in the order will force fire authorities in Scotland to start going through their payroll and undertaking background checks on all their employees.

11:00

Stewart Stevenson: Will you suggest to fire services that they do not carry out checks, except when they are required to do so?

Mr McFee: I am sorry to interrupt, convener, but is the Executive note entirely wrong? Page 3, paragraph 11, line 5 says:

“It was also agreed that this requirement should be extended to existing staff.”

Johann Lamont: Was that the bit—

Mr McFee: The Executive note says:

“The policy intention is that individuals applying to join the service would have to disclose any conviction, including spent ones, as part of the assessment of their suitability. It was also agreed that this requirement should be extended to existing staff.”

That is the nub of the issue.

Johann Lamont: I would like the opportunity to reflect on what the committee has said and to respond in writing on some of the technicalities. I emphasise, however, that the policy intention is very positive. We consulted on the contentious bits, and the vast majority of what is left tidies up and supports a policy on which we would all agree—the rehabilitation of offenders in certain circumstances, with exceptions for those from whom we might need to protect vulnerable groups. Nothing in the order goes counter to the generally expressed view of the committee and the Parliament about the way in which we should deal with those matters. However, I would prefer to reflect on the technicalities and come back to the committee in writing about them.

The Convener: That would be helpful. Having examined the issue, I get the sense that the committee is content with the provision on checking new people who apply to join these services. That is clear. The committee is also clear about why the Executive is taking this action. In a changing situation, the employer should be in possession of all relevant information, particularly now that the fire service is expanding into work with schools and children.

However, the committee is still concerned about the wording of paragraph 11 of the Executive note about existing staff. The first sentence of paragraph 11 says that

“questions may be asked of fire fighters and other relevant staff in relation to spent convictions.”

Mr McFee: Yes, but there is a bit before that changes the meaning of “may”.

The Convener: We want to be clear about the Executive’s policy intention on existing staff before we are content to recommend the approval of the draft order. Could you clarify that for us, minister?

Johann Lamont: Absolutely.

Stewart Stevenson: I have attempted to read the order and the terms “fire service” and “firemen” do not appear anywhere. Where does the order refer to them? We have been talking about the Executive note, which attempts to describe what the order does. I am just not sure where the order refers to those terms. This is my inability rather than yours, minister—it would be helpful if you could point to that reference.

Johann Lamont: The reference is found in proposed new paragraph 25 of part 2 of schedule 4, which says:

“Any office or employment in a relevant authority as defined in section 6 of the Fire (Scotland) Act 2005.”

Stewart Stevenson: Where—

The Convener: It is halfway down the page.

Stewart Stevenson: Okay. Thank you very much. That is helpful.

The Convener: That just shows that Stewart Stevenson is not infallible.

Stewart Stevenson: Sometimes the simple things defeat us—I just could not see it.

The Convener: We have reached the end of our questions. The minister’s comments have been helpful, and we are clear about our point of concern. I do not think that we should deal with the motion until that point has been clarified. We have some timetabling issues next week, but the minister will need to come back at least to move the motion on the draft order before the committee can vote on it. I know that we have some accommodation problems next week, so we will liaise with the minister and try to resolve that.

Johann Lamont: I am at your service if you need to organise a meeting so that I can provide information on which the committee can reflect and make a decision. It is a matter of where and when the committee wishes to meet—we will ensure that we are there.

The Convener: Thank you.

Mike Pringle: It is my understanding that we cannot meet in public session next week. No committee rooms are available on Tuesday and Wednesday because the Parliament is being used as a conference centre as opposed to what it should be used as, which is a parliament. There might be an issue about that, but I understand that only committees that meet in private can meet next week because we do not have the facility to record the meetings. As I said, next week the Parliament is not a parliament but a conference centre.

The Convener: Mike Pringle has cleverly got on the record some members’ feelings about events next week, which is fair enough.

Minister, we will liaise with you and your office to find somewhere where we can record what should be short proceedings, and we will ensure that you are happy with the arrangements. Thank you for your contribution this morning. I also thank your officials for coming.

Johann Lamont: Thank you.

Police (Injury Benefit) (Scotland) Regulations 2006 (SSI 2006/610)

The Convener: Under item 2, the committee is invited to consider the Police (Injury Benefit) (Scotland) Regulations 2006. Members have a note from the Subordinate Legislation Committee keeping them up to date with its report on the regulations.

Stewart Stevenson: I hope that the Deputy Minister for Finance, Public Service Reform and Parliamentary Business will withdraw the regulations. He can re-lay them so that they will still come into force on the date on which they are currently due to come into force. I suggest that because the Subordinate Legislation Committee, as it always so comprehensively does, has identified a number of drafting defects. They are not simple, limited defects. In the Executive's response to that committee, it acknowledges six significant errors. For example,

"the reference to 'regulation 55(5)' in regulation 24(2) is incorrect in both its reference to 'regulation' and the actual section stated."

The Executive also says:

"In regulation 25(2), we confirm that 'under this paragraph' ought to have referred to paragraph (1) ... We confirm that regulation 28(4)(i) ought to have referred to paragraph 6 ... The references in Schedule 2 ought to have been made to paragraph 8(3).

The response continues:

"This reference ought to have been 'for the purposes of paragraph 6'",

when the reference in paragraph 7 of schedule 3 was

"for the purposes of subparagraph (1)".

The Executive also confirms that

"the reference in Schedule 3 ought to have been to paragraph 8(4)"

when the reference in the regulations is to paragraph 8(5).

The regulations are atrociously drafted. If we allow them to pass, that will set a low water mark for the quality of secondary legislation that we deal with.

I hope that the committee can agree that we should say to the minister that he should redraft the regulations and re-lay them. Otherwise, the only option with which we will be left—which I am prepared to pursue, if the minister does not respond positively to my suggestion—is to move that nothing further be done with regard to the regulations.

Mr McFee: I agree whole-heartedly with what Stewart Stevenson has just said. The regulations have been sloppily drafted—the Subordinate Legislation Committee flagged up the matter at its meeting on 16 January. The Executive has acknowledged the mistakes and has said that it intends to rectify the mistakes in the regulations by attaching amendments to another SSL.

Stewart Stevenson: On another topic.

Mr McFee: Yes, on a completely different subject. The other instrument also relates to the

police—that is about the only thing that the two instruments have in common.

For the committee or the Parliament to recommend the regulations would be, frankly, a dereliction of duty. Unintended and unforeseen mistakes are one thing—they happen in life. However, when six significant errors in a very small statutory instrument have been clearly pointed out, it would be ludicrous to continue with it, even if we accept that all those mistakes will be corrected sometime in the future. I hope that the minister will take the opportunity to have the regulations redrafted before they are presented again to the committee for a decision.

The Convener: Is anyone otherwise minded?

Mike Pringle: I agree entirely.

The Convener: It is pretty clear that the committee would prefer the regulations to be withdrawn and properly drafted before they come before us again. I ask the clerk to remind me how we can suggest that.

Callum Thomson (Clerk): If the committee wishes to pursue that action, the best thing to do is for the convener to write to the relevant minister, stating the committee's views and inviting him to withdraw the instrument. If, for whatever reason, the minister is unwilling to do so, as Mr Stevenson points out, a member can lodge a motion to annul the instrument. That would mean that the committee would have to deal with the matter again, next week.

The Convener: What is the deadline for lodging a motion to annul the regulations?

Stewart Stevenson: The regulations will come into force on 1 February.

Callum Thomson: The deadline for the committee to report to Parliament on the regulations is 5 February.

Mike Pringle: So the matter will have to be dealt with by then.

Callum Thomson: It will need to be resolved next week.

Mike Pringle: But we cannot meet in public next week.

Callum Thomson: We hope to be able to make that possible.

Mr McFee: What is the deadline for members lodging a motion to annul the instrument?

Callum Thomson: I defer to members on that.

The Convener: The matter will be discussed at next week's committee meeting. I guess that we could accept a motion before that deadline, but the

minister may agree to withdraw the regulations before that is necessary.

11:13

Meeting continued in private until 13:20.

Callum Thomson: Indeed.

Stewart Stevenson: I suspect that a motion would need to be lodged by 4.30 on the day before the meeting.

The Convener: That ends our public meeting. We will continue the meeting in private to discuss item 3, which is our Scottish Criminal Record Office inquiry.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Friday 2 February 2007

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop

**53 South Bridge
Edinburgh EH1 1YS
0131 622 8222**

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

Blackwell's Scottish Parliament Documentation
Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

Scottish Parliament

RNID Typetalk calls welcome on
18001 0131 348 5000
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers