

JUSTICE 1 COMMITTEE

Wednesday 31 January 2007

Session 2

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JUSTICE 1 COMMITTEE

† 7th 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)
Neil MacLennan (Scottish Executive Justice Department)
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 5

† 6th Meeting 2007, Session 2—held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 31 January 2007

[THE CONVENER *opened the meeting at 10:04*]

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 seventh meeting in 2007 of the Justice 1 Committee. No apologies have been received—all members of the committee are here. I apologise for the meeting starting late. We were considering correspondence that we have received since our previous meeting.

Agenda item 1 is subordinate legislation. I welcome to the meeting the Deputy Minister for Justice, Johann Lamont, and her officials, George Burgess, Neil MacLennan, Iain Moore and Rosemary Whaley, and thank them for coming to discuss the draft order.

Our purpose is to continue last week's line of questioning in order to ensure that we understand the intention behind the draft order and clarify what it means. I thank the minister for her letter to the committee, which has been extremely helpful. I invite her to comment on it before members ask questions.

The Deputy Minister for Justice (Johann Lamont): I will be brief.

As the committee will recall, the purpose of the draft order is to update the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 (SSI 2003/231). On 24 January, I attended the committee's meeting to discuss the proposed amendments, about which the committee had questions, particularly on fire and rescue service staff and the European Union procurement directive.

The committee wrote to me on 25 January to seek clarification of certain matters. I responded by letter to the committee's questions on 29 January. I hope that that letter clarifies the policy and that it has eased any concerns that members may have had about the two policy areas.

I am more than happy to answer questions.

The Convener: The two key issues that arose were fire and rescue service staff and the EU procurement directive, but there are other issues

that have not been previously considered. We will discuss fire and rescue service staff first.

Mr Bruce McFee (West of Scotland) (SNP): Good morning, minister. Thank you for clarifying issues that were raised last week.

Paragraph 4 of page 2 of your response to the committee states:

"It is difficult to predict the decisions that will be taken by employers, and precisely what the effects will be."

That is fair. However, the paragraph then states:

"The draft Order enables Fire and Rescue Authorities and Joint Fire and Rescue Boards to ask for spent conviction information, should they so wish."

Does that square with the policy intent in paragraph 11 of the Executive note on the draft order, which we received last week? That paragraph states:

"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."

Johann Lamont: My letter responds to the committee's concerns about current members of staff. Employers will be allowed to make a judgment on whether they want to seek such information about employees, to which they can then react. In relation to transition and the group that you were concerned about, the process is as laid out before you.

Mr McFee: Is the policy intention to ensure that, from the day on which the draft order comes into force, anybody who wishes to join the fire and rescue service will require to go through that process?

Johann Lamont: Yes.

Mr McFee: So fire boards will have no discretion—

Johann Lamont: An employee will be obliged to make a disclosure—they will be obliged to say what their spent convictions are. It will then be for the employer to decide what that information signifies to them as an employer.

Mr McFee: I find the issue difficult. I accept the arguments for introducing the order, which are fair, but I am sitting here with your response, which states:

"The draft Order enables Fire and Rescue Authorities and Joint Fire and Rescue Boards to ask for spent conviction information, should they so wish."

However, from what you have said and from what is stated elsewhere, there will be a requirement to disclose information. Paragraph 11 of the Executive note states:

"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."

A requirement to disclose information will therefore exist. However, as I said, your letter states:

"The draft Order enables Fire and Rescue Authorities and Joint Fire and Rescue Boards to ask for spent conviction information, should they so wish."

Could Strathclyde, for example, decide to ask those questions of everyone, but Lothian decide not to?

Johann Lamont: My officials can correct me if I am wrong, but my understanding is that the question would be asked of someone who was moving into a slightly different kind of job. It is recognised across the fire service that disclosure is a requirement for new employees. In the case of current employees, if they were not moving into work with vulnerable groups other than children, it would be a matter of judgment. I do not think that there is as much of a difficulty with this as you seem to suggest.

The order recognises the very thing that you are concerned about—the transitional period. I assume that it would be clear to somebody who was applying for a job with the fire service that they should disclose any convictions. There is a separate issue about people who are currently working in the fire service. You will recall that both the fire service and the Fire Brigades Union recognise that it would be more straightforward for disclosure to be required of all staff, across the board, when they are first employed. There is a different procedure for disclosure when people are going to work with vulnerable children.

Mr McFee: I think that the confusion has arisen from what we have in front of us as being the policy intent of the order. The policy intent is absolutely clear in terms of new employees—at least, it is clear in the Executive note, which states that disclosure will be a requirement. The next sentence states:

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

Johann Lamont: We are clear about the policy intent of the order and what the order does. My letter addresses the issue to do with current staff, which you flagged up last week.

Stewart Stevenson (Banff and Buchan) (SNP): For clarity, can you confirm that, at present, employees in the fire and rescue service are required to disclose more serious convictions that do not fall under the spent convictions legislation?

Johann Lamont: Yes.

Neil MacLennan (Scottish Executive Justice Department): Obviously, it is for employers to decide what they want to do in relation to existing

staff. Yesterday, Strathclyde fire and rescue, our biggest fire and rescue service, told me that it already puts its staff through standard and enhanced disclosures when they are going to work with children. Those protective measures are already in place.

Stewart Stevenson: Fine—I understand that, but it was not what I was asking about. I asked whether it is a working practice of employers or a legislative requirement—it might be either, although I suspect it to be the former—that everyone who goes to work for the fire and rescue service is required to disclose their convictions at the beginning of their employment. Currently, that would exclude disclosure of spent convictions.

Neil MacLennan: As I understand it, yes, although I am not a chief fire officer. However, Strathclyde fire and rescue told me yesterday that it asks people who apply to join the service to sign an undertaking in relation to previous convictions, including spent convictions.

Stewart Stevenson: Is it your expectation that, although it is for individual fire and rescue services to decide whether to do that, they will all have been doing so because it is good employment practice?

Neil MacLennan: Yes. That is correct. What we are trying to do in the order is put the onus on the prospective employee to be honest and up-front in what they say. Strathclyde fire and rescue says that, although it gets each new employee to sign that undertaking, should the employee attempt to mislead it, that can lead to uncertain territory. The order puts the onus back on the employee to be honest.

Stewart Stevenson: Yes, but we are now extending what must be disclosed to spent convictions. I was not trying to move into new territory, but to close off an area of discussion so that we are quite clear about what we are focusing on.

Dr George Burgess (Scottish Executive Justice Department): Your initial question referred to the most serious convictions. Offences that result in a custodial sentence of more than two and a half years will never be spent—they have always been available for disclosure. Shorter custodial sentences and community sentences can become spent at some point, but those that are unspent would have to be disclosed.

10:15

Stewart Stevenson: Let us be absolutely clear: I was not talking about disclosure through Disclosure Scotland, which is a comparatively modern process; I was talking simply about disclosure to employers.

When I employed people, one of the questions I asked was, "Do you have any convictions?" If they lied, I had the right under employment law to fire them. I was simply seeking confirmation that that good practice prevails in the fire service so that we can move on from worrying about that. I think that I am satisfied about that. Thank you.

The Convener: I want to go back to Bruce McFee's point about existing staff so that we are clear about that. Does the draft order allow fire authorities to decide not to ask existing staff to declare spent convictions?

Dr Burgess: Nothing in the order requires questions to be asked. Under the Protection of Children (Scotland) Act 2003, there is a requirement for questions to be asked of those who work in child care positions, but nothing in the draft order imposes such a requirement. It allows, but does not require, the authorities to ask questions.

The Convener: I just wanted to be clear about that. The central question for the committee last week was whether the disclosure of a spent conviction by an existing member of staff will be a ground for dismissal. In your letter, minister, you state that the matter has to be seen in the context of employment law in general, under which employers have to be seen to be reasonable. It is helpful that you have set that out. It is not your intention that information about a spent conviction will, in itself, be a ground for employers such as fire authorities to sack people.

Johann Lamont: I am not a lawyer and I would be reluctant to give anybody advice, but my understanding is that there is a test of fairness. The test would be, in the first place, whether a dismissal had taken place, and then whether the dismissal was fair.

Somebody might have been working in the fire service for 30 years, but because the job is changing, their employer might want them to consider doing some work in schools or old folks' homes. If it was established that they had a spent conviction, would it be fair to dismiss that person, even though there was sufficient work for them to do without their getting involved in the new work? That would be the test.

Some of the implications and decisions around the order are consequential on other policy decisions—which the Parliament has signed up to elsewhere—and the changing nature of jobs. There have been changes in other professions as well. When people move from one area of work into another, the question becomes how employers work with a workforce whose jobs are changing. The FBU and the fire service recognise that. The way in which the transition is handled is a personnel matter. It is not a matter of employers

saying, "Oops. We've discovered that you have a spent conviction, so we can huckle you out the door."

My understanding is that the test of fairness would apply in any employment tribunal. Ultimately, it would be the tribunal's decision, which we cannot second-guess. However, such a dismissal, in the way that I think of the test myself, does not seem to me something that would be seen as fair.

The Convener: That is helpful. As you suggest, the draft order spans the work of Scottish Executive departments in relation to work with children and vulnerable adults. You might not be able to answer my next question, but I will put it to you anyway.

If it was revealed that someone had a previous conviction from when they were 17—I do not know which offences are covered, but let us say that they have a spent conviction for assault—would they be banned from working with children and vulnerable adults?

Johann Lamont: I think that there would be implications, but I do not know the detail of the protection of children legislation. There are strict criteria around that.

I suppose that there has been a move towards disclosure at the point of employment because there is recognition in the service that there is no longer a hard-and-fast distinction. There are obligations in relation to the protection of children and we are dealing with legislation on vulnerable adults at the moment—that is relevant too.

However, the draft order is about giving employers more information. If an employee had a conviction for an assault on a young person or an elderly person, disclosure of that fact would give an employer more information than if the employee had simply been in a rammy with their pal outside the pub. I appreciate that I am not using technical legal language, but there are firm rules about some aspects—the legal people will be able to give you more information on those. The draft order is about giving employers information and the opportunity to reflect on it.

Dr Burgess: No spent, or unspent, conviction bars a person from work of itself. However, the Protection of Children (Scotland) Act 2003 and the Protection of Vulnerable Groups (Scotland) Bill, which is going through the Parliament at the moment, both contain the power for ministers to maintain lists of disqualified people. Conviction could result in the person who is convicted getting on to the list of disqualified people, but it is that disqualification that would bar them from being employed.

The Convener: I suppose that the purpose of the draft order is to give an employer the maximum amount of information about somebody who is not on the list of disqualified people so that they can make a judgment. Employers should not read it as a blanket ban that bars from work everyone who has a conviction.

The job of a firefighter is changing. As has been described, firefighters are doing more preventive fire safety work, which means that more of them will work in schools and with vulnerable adults. An employer might dismiss someone on the ground that they could not fulfil all the duties of the post because we are not happy with them going to talk to children or vulnerable adults. I am a wee bit worried that that could be an indirect effect of the order.

Johann Lamont: That is to do with a workforce in transition. Let us take the example of somebody who was in a typing pool during the very quick shift over to using computers and e-mail. Would it be a ground for dismissal if they were not capable of using that new technology? It seems to me much more a personnel matter and a matter of training and working with staff. However, there has to be some response if, because a job is changing, a post holder comes up against vulnerable groups. We are more anxious about that. The measure that we are debating is a consequence of the legislation that the Parliament passed on the role of the fire service.

The Convener: I do not question your response, but I would like employers to deal with such situations by trying to redeploy people within the service. The problem is that the draft order talks about grounds for dismissal. That is why I want to explore how employers are expected to deal with the matter.

Neil MacLennan: Community education is a small part of a firefighter's responsibilities. Fire and rescue services have assured me that, in the event that there were confidence issues relating to an individual's ability to work with certain groups, every effort would and could be made to find them other duties within the service. A lot more goes on than the work that we are talking about today.

Stewart Stevenson: It strikes me that the overwhelming majority of spent convictions fall outside the ambit of the draft order. For example, a speeding conviction is a criminal conviction, and a parking offence is a criminal conviction in Glasgow, although not in Edinburgh.

Johann Lamont: That is because it is not possible to find a parking space in Edinburgh.

Stewart Stevenson: Indeed. I think it is because parking attendants in Edinburgh do not operate as part of the police but parking wardens in Glasgow do.

Nonetheless, if someone were to fail to disclose such convictions, it would seem, *prima facie*, to create the opportunity to dismiss them. It would be useful if the minister would give some indication as to how such disclosure will work in practice, because I suspect that many people will not twig that some convictions that can be spent—which are not as uncommon as perhaps they should be—are criminal convictions.

Johann Lamont: The test of fairness would apply. To a lay person like me, it seems that a parking conviction is an entirely different matter from a conviction for reckless driving, speeding or drunk driving, disclosure of which might give an employer more food for thought. However, that is the kind of information that enables an employer to make a decision. As I said, the test of fairness would come into play.

Margaret Mitchell (Central Scotland) (Con): Thank you for your letter, which answers all my questions on EU procurement. I understand that the intent behind the draft order is to ensure that any contracting authority is made fully aware of—

The Convener: May I stop you there? I want to ensure that all our questions on fire and rescue service staff have been answered before we move on to procurement.

Margaret Mitchell: Sorry.

The Convener: The answer to this question might be in the papers; I apologise if I have missed it. When a spent conviction is disclosed to an employer, how much confidentiality is there? Who gets the information and how is it protected?

Johann Lamont: I suppose that data protection legislation applies to all personal information. Perhaps one of the officials can respond.

Rosemary Whaley (Scottish Executive Legal and Parliamentary Services): I understand that most information would be sought via Disclosure Scotland, through the various levels of certificate that are available. Part V of the Police Act 1997 governs the operation of Disclosure Scotland and specifies the offences that might be committed if there is inappropriate disclosure of sensitive, confidential information such as we are discussing.

The Convener: If there are no more questions on fire and rescue service staff, we will move on to procurement.

Margaret Mitchell: I have two brief questions. First, will the minister confirm that the list of relevant offences in annex B to her letter is definitive?

Secondly, I was curious about "the common-law offence of uttering",

which is in the list. It is some time since I studied law. What constitutes that offence?

Johann Lamont: The answer to your first question is yes.

I do not know what the common-law offence of uttering is, but I have no doubt that I have committed it at some point.

Dr Burgess: I am not a lawyer, but I understand that uttering is the presentation of a false document as though it was real.

Margaret Mitchell: That makes sense, thank you.

Mike Pringle (Edinburgh South) (LD): I am not a lawyer either, but I knew that.

The Convener: We are all impressed.

If there are no further questions, do you want to add anything, minister?

Johann Lamont: I reiterate that the draft order is relatively straightforward, although we have spent a bit of time on it. It responds to existing policy and to legislation that the Parliament has already passed, so it can be supported on that basis.

Motion moved,

That the Justice 1 Committee recommends that the draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2007 be approved.—[*Johann Lamont.*]

Motion agreed to.

The Convener: I thank the minister and her officials for coming to the committee to discuss the draft order again. Although it is straightforward, it was important to clarify matters.

Johann Lamont: It was a pleasure, as ever.

The Convener: We know you mean that.

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

The Convener: Item 2 is also subordinate legislation. The committee has received a response from the Deputy Minister for Finance, Public Service Reform and Parliamentary Business on the regulations, which are subject to the negative procedure. The minister concedes that there are a number of errors in the regulations, so he intends to revoke them and lay new regulations.

Mike Pringle: That is a good decision.

The Convener: The committee made it pretty clear that although we did not want to hold up the regulations, which are not controversial, they contained so many errors that they needed to be redrafted. We welcome the minister's response.

That ends our public business. We move into private session to consider further our draft report on our Scottish Criminal Record Office inquiry.

10:30

Meeting continued in private until 13:12.

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