



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 15 May 2012

Session 4

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JUSTICE COMMITTEE

17th Meeting 2012, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Jenny Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)

*John Finnie (Highlands and Islands) (SNP)

*Colin Keir (Edinburgh Western) (SNP)

Alison McInnes (North East Scotland) (LD)

*David McLetchie (Lothian) (Con)

*Graeme Pearson (South Scotland) (Lab)

*Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 15 May 2012

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 17th meeting in 2012 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices completely, please, as they interfere with the sound system even when they are switched to silent.

I have apologies for absence from Alison McInnes, who has an important appointment elsewhere.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take item 5 in private?

Members *indicated agreement.*

Criminal Cases (Punishment and Review) (Scotland) Bill: Stage 2

10:01

The Convener: Item 2 is stage 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill. The stage 2 proceedings today are the first and only such proceedings on the bill. I welcome the Cabinet Secretary for Justice and his officials.

Members should have copies of the bill, the marshalled list and the groupings of amendments for consideration.

Sections 1 and 2 agreed to.

Section 3—Exception to non-disclosure rule

The Convener: Amendment 1, in the name of the cabinet secretary, is in a group on its own.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 1 provides that, where the Scottish Criminal Cases Review Commission has determined under the framework in the bill that it is appropriate in the whole circumstances for information that relates to a case to be disclosed, that disclosure

“is not prevented by any obligation of secrecy or other limitation on disclosure ... including any such obligation or limitation imposed by, under or by virtue of any enactment”.

The amendment explicitly provides that that general override does not apply to any court interdict or other court order. In other words, if a court’s decision is that information should not be disclosed by the commission, that information cannot be disclosed, even if the commission considered that it was appropriate to disclose it. The amendment addresses a concern that the Scottish Criminal Cases Review Commission expressed in its evidence to the committee that the bill as introduced did not provide the necessary authority for it to disclose information that is covered by legal professional privilege.

It is important to note that the effect of amendment 1 is not that any such obligations will be treated as if they do not exist; rather, the amendment is intended to ensure that such obligations do not constitute an absolute bar to disclosure. The commission would have to consider those obligations and weigh them in the balance before it reached a conclusion on whether it was appropriate to disclose information. In doing so, the commission is required to take account of any representations that it receives from an affected person or another interested person regarding the decision to disclose information. The fact that information is covered by legal professional privilege or that a duty of confidentiality or a statutory duty of non-disclosure

applies to the information may be considered by the commission to be a factor that argues against disclosure. However, amendment 1 ensures that that does not represent an absolute barrier to the release of information.

It is important to consider the effect of section 101 of the Scotland Act 1998. Amendment 1 does not affect any restriction or limitation on disclosure that is imposed by any reserved legislation. Members will be well aware that the Scottish Parliament cannot legislate on matters that are outside its competence. All acts of the Scottish Parliament require to be read in the context of section 101 of the Scotland Act 1998, which provides that they are to be read in a way that is consistent with the devolved competence of the Parliament. As such, amendment 1 does not affect any obligations of secrecy or other limitation on disclosure relating to reserved matters, such as the Official Secrets Acts.

I move amendment 1.

Amendment 1 agreed to.

The Convener: Amendment 2, in the name of the cabinet secretary, is grouped with amendment 3.

Kenny MacAskill: Amendment 2 is a minor technical amendment that is intended to improve the drafting of new section 194N(1) of the Criminal Procedure (Scotland) Act 1995, on the framework for the consideration by the commission of the release of information. It is intended to avoid any inadvertent implication that a third party can cause—that is to say, require—the commission to consider the question whether it is appropriate to disclose information that relates to a particular case. The policy intent is to provide the commission with a power rather than a duty to consider disclosing information relating to a case that it has referred to the High Court and which has subsequently been abandoned.

During stage 1 scrutiny of the bill, it was noted that there have been only three commission cases in 13 years that would trigger the framework in the bill. We expect there to be only rarely a significant public interest in the disclosure of information that relates to triggered cases, and we do not wish to impose unnecessary costs on the commission by requiring it to consider the disclosure of information in cases in which there is no public interest in doing so.

The bill provides that, where the Lord Advocate has obtained information directly or indirectly from a foreign authority, the commission is required to obtain the consent of that authority before releasing that information. Such an approach will ensure that our international obligations are respected and that foreign authorities retain control over disclosure of their information.

Amendment 3 is a minor technical amendment that seeks to apply the same requirement that applies to foreign authority information obtained by the Lord Advocate to information obtained from foreign authorities by the commission in the course of its own investigations. Whether the commission obtains the information directly or indirectly, amendment 3 seeks to ensure that the foreign authority's consent will be required. It is worth putting on the record that, with the United Kingdom Government, we are continuing to consider this area of the bill to ensure that we are satisfied that the bill fully respects our international obligations and that the commission will have to get consent from foreign authorities to disclose information received from them, irrespective of the route by which the commission obtains that information. If necessary, we might revisit this area at stage 3.

I move amendment 2.

Amendment 2 agreed to.

Amendment 3 moved—[Kenny MacAskill]—and agreed to.

Section 3, as amended, agreed to.

Sections 4 to 6 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the cabinet secretary for that rather swift performance.

Subordinate Legislation

Bankruptcy Fees etc (Scotland) Regulations 2012 (SSI 2012/118)

10:06

The Convener: Item 3 on the agenda is consideration of a negative instrument. Although the Subordinate Legislation Committee has not drawn the Parliament's attention to the regulations on any grounds within its remit, members will see in the annex to paper J/S4/12/17/1 correspondence that has been received from Citizens Advice Scotland. Members will also have received a letter from Money Advice Scotland.

Do members have any comments?

Jenny Marra (North East Scotland) (Lab): It might be useful to postpone consideration of the regulations and ask the relevant minister—Fergus Ewing, I believe—for the reasons why under the proposals, which I understand will specifically affect low-income, low-asset people filing for bankruptcy, the fees will double from £100 to £200.

Humza Yousaf (Glasgow) (SNP): I do not disagree with Jenny Marra's point but do we have to postpone consideration of the regulations? Do we not have 40 days to seek clarification in writing?

The Convener: As members appear to have concerns, I should perhaps note that the committee has a couple of options.

Humza Yousaf: I think that it would be good to seek clarification in writing.

The Convener: We can either write to the minister in question—it is indeed Fergus Ewing—and ask him to respond, or call him to give evidence at our next meeting. There is another option, but those are the first options we should consider. The clerk has also informed me that, if we decide to call the minister, he will have to come next week.

Graeme Pearson (South Scotland) (Lab): How much pressure is on next week's meeting?

The Convener: It does not matter—we can still call him.

Graeme Pearson: I was just wondering whether we had a lot of work on.

Peter McGrath (Clerk): No.

The Convener: Do members want to call Mr Ewing to give evidence at next week's meeting?

Jenny Marra: Yes. It would be good to clear the matter up.

Roderick Campbell (North East Fife) (SNP): I agree that we should call the minister, but I note that paragraph 6 of the Executive note says:

“the rate charged covers, so far as possible, the actual cost of delivering the functions undertaken”.

I would like a bit more clarity from the minister as to whether the £200 accurately reflects the cost.

The Convener: As your point is now on the record, we can put it to the minister.

Graeme Pearson: As I read the papers, a number of questions arose in my mind. Some groups obviously have reservations as to whether the people who will have to pay the fee will be able to afford it.

The first question for me is: what is the purpose of the £100 fee to begin with? Did it initially cover the cost? Is a fee, whether it be £100, £200 or whatever, necessary? How much is raised from a fee of £100? How much is it anticipated will be raised from a fee of £200? If the fee were abandoned, what would be the impact or downside? I do not have expert knowledge in this area, but if the people who are least able to bear the brunt of a £100 fee are the ones who face the prospect of the doubling of that fee, that is a real concern. We should understand why the fee exists in the first place and what the implications are for the future.

The Convener: Does anyone else want to ask questions for the record, which we can alert the minister to?

John Finnie (Highlands and Islands) (SNP): The equality impact statement is said to be among the papers—if it is, I cannot see it.

Graeme Pearson and Jenny Marra have referred to low-income people, who are likely to be affected by the regulations. From my personal experience, there is often a gender aspect to the issue, in that it affects women with children whose fathers are absent—and there are all the complications that go with that. Can we get some more clarity around the equality aspects?

The Convener: We will obviously wish to speak to the minister, who now knows what has been said as it is on the record.

It is possible for a member to lodge a motion to annul the regulations, which could be moved at next week's meeting—or not, depending on what the minister has to say. If members want to cover their backs and say that we do not want the regulations, it is up to them to lodge a motion to annul. As we have heard, it would have to be moved next week.

Roderick Campbell: How much notice do you have to give to lodge a motion to annul?

The Convener: You have to do it so that it is in the *Business Bulletin* in time. It would have to be lodged on Monday to be in the *Business Bulletin* on Tuesday.

Roderick Campbell: Is it not a slight difficulty that a motion has to be lodged before we have heard from the minister?

The Convener: It is a belt-and-braces approach. I am just giving members advice. It is possible to lodge the motion to annul and not move it. Such motions can also be withdrawn. All I am saying is that, in fairness, if members are not content, it is possible to lodge a motion to annul.

By lodging a motion, a member gives notice that there is an issue, but a motion can be lodged and then leave to withdraw can be sought. Technically, members still have that belt and braces.

Jenny Marra: In that case, is it possible to move a motion to annul today?

The Convener: No. You must lodge the motion and give notice.

Jenny Marra: The motion must be lodged outwith the committee.

The Convener: Yes. It would be a proper motion, so it would have to be lodged. It would appear in Tuesday's *Business Bulletin* and would be on our agenda. It is possible that you might feel, after hearing the minister's evidence, that you are okay with the regulations, or the minister might decide to do something else—I am not pre-empting him; I do not know what he will do—but you will have covered yourself if you are not content with what is going on.

**Act of Adjournal (Criminal Procedure
Rules Amendment) (Miscellaneous) 2012
(SSI 2012/125)**

**Act of Sederunt (Rules of the Court of
Session Amendment No 2)
(Miscellaneous) 2012 (SSI 2012/126)**

The Convener: Item 4 is consideration of two instruments that are not subject to parliamentary procedure. The Subordinate Legislation Committee has not drawn the Parliament's attention to either instrument on any grounds within its remit. As members have no comments, are we content to note the instruments?

Members *indicated agreement.*

10:13

Meeting continued in private until 10:37.

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