



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 30 September 2014

Session 4

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JUSTICE COMMITTEE
24th Meeting 2014, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)

*Roderick Campbell (North East Fife) (SNP)

John Finnie (Highlands and Islands) (Ind)

*Alison McInnes (North East Scotland) (LD)

*Margaret Mitchell (Central Scotland) (Con)

*John Pentland (Motherwell and Wishaw) (Lab)

*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenny MacAskill (Cabinet Secretary for Justice)

Tansy Main (Scottish Government)

John McCutcheon (Scottish Government)

Alastair Smith (Scottish Government)

Stella Smith (Scottish Government)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Justice Committee

Tuesday 30 September 2014

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the Justice Committee's 24th meeting in 2014. I ask everyone to switch off mobile phones and other electronic devices as they interfere with broadcasting even when switched to silent. We have received apologies from John Finnie.

Under agenda item 1, the committee is invited to consider items 8, 9 and 10 in private. Item 8 is consideration of our approach to the Assisted Suicide (Scotland) Bill; item 9 is consideration of our approach to budget scrutiny; and item 10 is consideration of evidence heard on the Criminal Justice and Courts Bill legislative consent memorandum. Do members agree to take those items in private?

Members *indicated agreement.*

Criminal Justice and Courts Bill

10:00

The Convener: Agenda item 2 is an evidence-taking session with the Cabinet Secretary for Justice on the legislative consent memorandum to the Criminal Justice and Courts Bill. The purpose of this session is to inform our report on the LCM, which will be considered at our next meeting.

I welcome to the meeting the cabinet secretary, Kenny MacAskill, and the following Scottish Government officials: Tansy Main, head of the police workforce sponsorship team—I did not know that there was such a thing, and I am intrigued to know what it is; John McCutcheon, policy officer, youth justice and children's hearings unit; and Elizabeth Blair, senior principal legal officer, directorate of legal services. I invite the cabinet secretary to make some opening remarks.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you, convener.

I welcome this opportunity to discuss the draft legislative consent motion on the United Kingdom Criminal Justice and Courts Bill. It deals with two amendments by the UK Government that relate to Scotland.

The first amends the Rehabilitation of Offenders Act 1974 to enable Scottish ministers to set out exclusions, modifications and exceptions to the general rules in that act that relate to alternatives to prosecution in reserved areas in the same way that they relate to conviction.

That amendment, which was considered and agreed to at committee stage in the House of Lords on 14 July 2014, is intended to resolve a legislative competence issue that came to light in the course of the implementation of the Children's Hearings (Scotland) Act 2011. The Scottish Government encountered a difficulty with part of the package of reforms relating to the treatment of children for the purposes of the rehabilitation of offenders and disclosure, and our objective is to ensure that in certain circumstances people who apply for jobs that involve children or vulnerable groups must disclose specific offences that they committed as children, even if they are spent. Such offences, which will be specified separately in an order to be made under the Police Act 1997, consist of those of a serious sexual and serious violent nature.

During the stage 2 debate on the Children's Hearings (Scotland) Bill, the then Minister for Children and Young People indicated that the offences to be included in the order under the 1997 act would comprise only those of a serious violent and serious sexual nature. However, to

achieve that, the Scottish Government needs to exercise powers in schedule 3 to the 1974 act to set out exclusions, modifications and exceptions to the general rules relating to spent alternatives to prosecutions that are given by children's hearings. Those powers can be found in paragraph 6 of schedule 3 and section 7(4) as applied by paragraph 8 of schedule 3 to the 1974 act and have the same effect in relation to alternatives to prosecution that the powers in sections 4(4) and 7(4) of the 1974 act have in relation to convictions. Scottish ministers already have the power to legislate in respect of exceptions and exclusions relating to spent convictions in reserved areas because the Secretary of State for Justice's executive functions in sections 4(4) and 7(4) of the 1974 act in relation to convictions were transferred to the Scottish ministers in 2003 by an order made under section 63 of the Scotland Act 1998.

The difficulty to which I have referred relates to the Scottish ministers' lack of competence to make an order under schedule 3 to the 1974 act setting out exclusions and exceptions to the general rule that spent alternatives to prosecution from children's hearings do not need to be disclosed. The order that we have in mind would specify the types of employment that are excluded from the 1974 act and where disclosure of spent alternatives to prosecution is required. Some types of employment, such as registered pharmacist, doctor, nurse, midwife and firearms dealer, fall within reserved areas, and the legislative competence issue stems from the insertion of schedule 3 to the 1974 act by an act of the Scottish Parliament—the Criminal Justice and Licensing (Scotland) Act 2010. That means that the enabling powers in schedule 3 are subject to the limitations of devolved competence with regard to the Scotland Act 1998 and cannot be used to make provision on reserved matters.

In this case, the relevant provisions are sections 29(2)(b) and (c) of and schedule 4 to the Scotland Act 1998. Section 29(2)(b) provides that a provision is outside the legislative competence of the Scottish Parliament if it relates to reserved matters, and section 29(2)(c) provides that a provision is outside the legislative competence of the Scottish Parliament if it is in breach of the restrictions in schedule 4, which imposes various restrictions preventing the Scottish Parliament from modifying various enactments or rules of law such as the law on reserved matters.

The solution is for the Criminal Justice and Courts Bill to insert a new paragraph into schedule 3 to the 1974 act to make it clear that Scottish ministers can exercise the powers in paragraph 6 and section 7(4) as applied by paragraph 8 of schedule 3 in relation to reserved matters without being restricted by section 29 of the Scotland Act 1998. A transfer of functions similar to that carried

out in 2003 for convictions cannot be done in this instance because the relevant powers were conferred on Scottish ministers by an act of the Scottish Parliament instead of on a minister of the Crown by a Westminster enactment. Primary legislation at Westminster is the most direct and comprehensive mechanism for conferring full executive competence on Scottish ministers and will, in respect of alternatives to prosecution, ensure parity with their powers in relation to convictions.

The second amendment from the UK Government that extends to Scotland relates to the offence of police corruption. In recent years, a number of high-profile incidents relating to the conduct of the police south of the border has badly damaged the reputation of some English and Welsh forces; the Metropolitan Police, in particular, has been under immense scrutiny following the Stephen Lawrence inquiry—and the subsequent Ellison review—and plebgate. In her oral statement to the Westminster Parliament on 6 March 2014, the Home Secretary announced her intention to introduce a new offence of police corruption, which will supplement the existing offence of misconduct in public office and focus clearly on those who hold police powers. The offence will apply to police officers in the 42 forces in England and Wales, the British Transport Police, the Civil Nuclear Constabulary, the Ministry of Defence police and National Crime Agency officers who have been designated by the director general as having the powers and privileges of a constable.

I make it clear that this new police corruption offence will not apply to Police Scotland officers, who are already covered by a statutory offence under section 22 of the Police and Fire Reform (Scotland) Act 2012 regarding neglect or violation of duty by a constable of the Police Service of Scotland. However, the UK Government now wishes the new offence to be extended to officers of the reserved forces wherever they operate in the UK. The majority of the functions of the BTP, CNC and MDP are connected either directly or indirectly with the reserved matters on which each of them was established, and on that basis Westminster can determine that officers in those forces who are in Scotland are covered by the new offence and that there is no role for this Parliament in that respect.

However, National Crime Agency officers are engaged in activities in Scotland that are substantially devolved. For example, one of the principal roles of NCA officers based in Scotland is to complement wherever possible the investigations of Police Scotland and other Scottish law enforcement partners where the span of criminality extends into England and Wales and on to European and international jurisdictions. A

legislative consent motion is therefore needed if there is to be consistency with other reserved forces and within the NCA.

I ask the committee to support the legislative consent motion.

The Convener: Well done, cabinet secretary. [*Laughter.*]

Moving from the reserved areas where the powers are required, what other changes are being made to the Rehabilitation of Offenders Act 1974? Are other professions being added to the list of the professions where individuals must disclose certain previous offences, notwithstanding timescales?

Kenny MacAskill: The changes cover alternatives to prosecution, because that is where the gap is; we are already covered with regard to convictions. There are two types of ATP: the fixed penalties that a police officer can give out and other penalties that the Crown might give out. The amendment gives us the ability to ensure that alternatives to prosecution are addressed with regard to professions in reserved areas on the issue of serious violent and serious sexual offences.

The Convener: If, for example, a schoolteacher had previously been given an alternative to prosecution, that would continue to have to be disclosed in any application.

Kenny MacAskill: Yes. I will defer to official wisdom, but—

The Convener: I am not picking on schoolteachers in particular.

Kenny MacAskill: One analogy might be with a fiscal order that had been given to somebody such as a pharmacist, which would be classified as an alternative to prosecution. That profession is reserved, but we would wish to ensure that whatever order had been given would not be spent for Disclosure Scotland's purposes when the person was applying to do—

The Convener: I call Alison McInnes and then Margaret Mitchell to ask questions. Do you have technical questions about the various sections of the various acts, Alison?

Alison McInnes (North East Scotland) (LD): No.

The Convener: So, you are going to surprise me.

Alison McInnes: I will leave that to the cabinet secretary.

Would it not be extremely rare for an alternative to prosecution to be handed down for a serious sexual or serious violent crime?

Kenny MacAskill: Yes, that would be rare but, as we seek a greater use of direct measures, there are scenarios where fiscal fines, fiscal work orders and so on might be given. A child will not necessarily receive a very serious sentence.

I recall from the debate some five years ago that some such things can indicate a propensity. Although the tariff that is imposed might not, by its nature, necessarily flag up an issue for an adult, it could indicate underlying issues, and such information should perhaps be available if we are operating in an area where we are looking for care and protection. That, I think, was the assurance that was given by my predecessors when we debated the matter previously.

Alison McInnes is right: such measures are rare in relation to serious violent and serious sexual offences. As regards children, we made a specific exclusion to ensure that it is possible for things to be flagged up at a later date, on the basis that some offences trigger a potential—if not necessarily a probability. That is why the information should be there. Cases involving a child might well get dealt with in a different manner from those involving an adult, but it is important to have the information.

Margaret Mitchell (Central Scotland) (Con): I understand that the proposed new police corruption provisions under the UK bill carry a sentence of a maximum of 14 years, yet under the Police and Fire Reform (Scotland) Act 2012, neglect or violation carries a maximum sentence of only two years. Do you have any comments on that?

Kenny MacAskill: We also have common-law offences. If a police officer is involved in corruption or has been corrupted by others—we have seen such charges—other offences are available to the Crown.

The basis of our legislation is that it is a neglect of duty if an officer has not carried out the appropriate action and has not upheld the office of constable. If they are inveigled into more criminal activities, they will be dealt with through other charges relating to fraud, embezzlement, public corruption or whatever it might be. The Crown and the Government are considering whether there is any requirement in that regard.

We already have a separate common-law system. The regulations under the Police Act 1997 simply ensure that the good office of constable is upheld. If officers get involved in criminality, we find that the Crown will prefer to charge under a separate offence.

Margaret Mitchell: So you do not have any practical concerns that National Crime Agency police officers who operate in Scotland and Police Scotland officers would effectively be operating

under different legislative frameworks in respect of corruption and the neglect or violation of duty.

Kenny MacAskill: I do not have any qualms about that. I think that the Crown is perfectly satisfied with what we are proposing, as are the police. Those who hold the office of constable are held to account by the Police Service of Scotland. As far as charges are concerned, if they neglect or fail to uphold their office, they are dealt with. On the few occasions on which officers go beyond that and get into active criminality, we have sufficient statutory and common-law arrangements to deal with that.

10:15

The number of NCA officers who operate in Scotland is small. It is appropriate that there should be the extension of the powers that the Home Secretary wishes, but I think that we deal with the police service in Scotland differently, and the Crown will address both issues through different legislation.

Roderick Campbell (North East Fife) (SNP): What timescale is the Scottish Government working to in terms of making an order under the Rehabilitation of Offenders Act 1974 to deal with the loophole?

Kenny MacAskill: Obviously, we have gone out to consultation and we are looking to address matters. However, there has been a decision of the Supreme Court down south, the effects of which we are considering, so I am not able to give you a precise timetable. Suffice it to say that we are seeking to act on the situation as expeditiously as possible. That is the case not simply in relation to the issue that has been flagged up by the Supreme Court with regard to alternatives to prosecution, which is of greater significance south of the border than here, where we have taken a different view, but in relation to what we have to do with regard to the rehabilitation of offenders, as we realise that we are perhaps behind the curve in that regard.

It is work in progress. We are seeking to deal with the matter across the board and as expeditiously as possible.

Elaine Murray (Dumfriesshire) (Lab): The first amendment is a technical measure, so it was not subject to public consultation, but relevant stakeholders were informed. Who were those stakeholders? Did any express a view or concern that we ought to be aware of?

John McCutcheon (Scottish Government): We had informal discussions with various child protection groups, and no such issues were raised. We were dealing with a technical issue that was designed only to put alternatives to

prosecution from children's hearings on the same basis as spent convictions.

Elaine Murray: With regard to police corruption, were any views expressed by, for example, Police Scotland or the Scottish Police Federation?

Tansy Main (Scottish Government): We have consulted Police Scotland's counter-corruption unit, and it is content with the proposals. We have also consulted the Scottish Police Federation and the Association of Scottish Police Superintendents, and they are also content, because the offence does not affect their officers and members.

The Convener: That is us done—this is only an evidence-taking session; we are not going beyond that. I thank the officials for their attendance and suspend the meeting for a minute to allow new officials to come to the table.

10:17

Meeting suspended.

10:18

On resuming—

Subordinate Legislation

Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [Draft]

The Convener: Item 3 on the agenda is consideration of an instrument that is subject to affirmative procedure. The cabinet secretary has stayed with us for this agenda item, but is joined by new officials. I welcome Stella Smith, who is the legal services team leader in the civil law and legal system division, and Alastair Smith, who is a solicitor in the directorate for legal services. You two are not related, are you?

Alastair Smith (Scottish Government): We are not.

Stella Smith (Scottish Government): No.

The Convener: You do not need to say it so quickly; it is fine.

I ask the cabinet secretary to make a statement in advance of the debate on the instrument.

Kenny MacAskill: I am pleased to be here today to assist the committee in its consideration of the instrument.

When the Scottish Legal Complaints Commission was created in 2008, schedule 1 to the Legal Profession and Legal Aid (Scotland) Act 2007 stated that the board would consist of a total of nine members. That number would be made up of five non-lawyer members, including the chair, and four lawyer members. Paragraph 2(7) of schedule 1 to the act allows for Scottish ministers to amend, by order, the number of members and the composition of the board.

The Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2010 increased the size of the board from nine members to 12. The reason for that increase was that the periods of appointment of all the board members came to an end at the same time. Increasing the numbers on the board allowed retirements to be staggered which, in turn, allowed the commission always to retain a number of experienced members.

The 2010 amendment has successfully staggered the periods of appointment, so that situation should not arise again. However, in the intervening years, through the retirement of members, the size of the board has decreased once more to nine members. That is, of course,

the number of members that Parliament originally provided for in the 2007 act.

I am satisfied that the commission is able to function well with a nine-member board and that a larger board is not required, but it is appropriate to ensure that the board's composition matches the requirements of the 2007 act, so the order will bring the statute back into line with current practice.

I hope that that is useful to the committee. I am happy to take any questions.

Alison McInnes: What the cabinet secretary has just said makes it all much more understandable, but that was not mentioned in the policy note at all. The policy note says:

"The Board is currently operating ... with 9 members and ... 12 members are not required or affordable for the organisation."

I was certainly concerned that we were somehow not complying with the legislation for reasons of affordability, but the cabinet secretary has said that that is not the case any more.

Kenny MacAskill: I do not think that it is a question of affordability. The board is operating. Members of the committee will have noted the ongoing debate between the profession and the Scottish Legal Complaints Commission about how much should be charged and so on, but the basis of the instrument is that the board can operate fine with nine members.

Obviously, there was a gap in the legislation when it was enacted in 2007; I remember its coming before me. We had to increase the board's size, because there would otherwise have been a commission with very inexperienced members. The board was expanded to deal with the oversight of that problem not being factored in at the time, so that we could get a smooth transition. However, on balance, the board clearly operates with nine members, and the committee might find that the profession would object to any increased costs. Costs in all walks of life are clearly important at the moment.

The order is not financially driven as such; the aim is to ensure the correct balance and to get us back to where Parliament wanted to be in 2007. Perhaps Parliament did not frame the legislation as well as it should have to allow for transition.

Alison McInnes: That is helpful.

Margaret Mitchell: That gets nearer to what I understood to be the case, which was that the order replaces an order that was laid in June 2014. That order was withdrawn because it incorrectly stated the number of legal and lay members of the board, which arose due to a misunderstanding between the Scottish

Government and the Scottish Legal Complaints Commission. Was that error just regarding the number of members of the board, or was it also about the composition in respect of the numbers of lay and professional members?

Kenny MacAskill: I think that there was just an error in the balance between lay and legal members and that there was nothing more to it than that. The Scottish Legal Complaints Commission is working very harmoniously. There are always challenges and tensions between it and the profession, given the nature of the job that it has to do, but there was a human error, and the appropriate changes have been made.

As I said, the aim is to get us back to where we probably should—I say with hindsight—have been in 2007, had we managed to stagger the membership of the board. That was not done, so we were required to expand the membership in 2010 so that there could be a continuation and people with experience would run on. The error occurred in 2007. We wish that it had not occurred, but the right thing was done to get the commission through the period and ensure that it had stability and experience. We have that stability and experience, and nine members operate perfectly harmoniously and well.

Margaret Mitchell: For the avoidance of doubt, is the composition of the board five lay members and four professional members?

Kenny MacAskill: Yes, including the chair.

The Convener: Thank you very much. That ends the questions.

Item 4 is the debate on the draft Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014. I invite the cabinet secretary to move motion S4M-10964.

Motion moved,

That the Justice Committee recommends that the Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [draft] be approved.—[*Kenny MacAskill.*]

The Convener: Do members wish to speak?

Members: No.

Motion agreed to.

The Convener: We are required to report on all affirmative instruments. Is the committee content to delegate to me authority to sign off our report?

Members indicated agreement.

The Convener: Thank you. I thank the cabinet secretary and his officials for their attendance.

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2014 (SSI 2014/220)

The Convener: Item 5 is consideration of an instrument that is subject to negative procedure. The Delegated Powers and Law Reform Committee considered the order at its meeting on 19 August and agreed that it did not need to draw Parliament's attention to the order on any ground within its remit.

Do members have any comments on the order?

Members: No.

The Convener: I think that it represents an excellent move forward for rural areas, with the extension to include Mull and Iona Community Trust. I had not realised that the approach means that the first call from a housing association sale is sale back to the housing association, which protects the integrity of an island community.

Is the committee content to make no recommendation on the order?

Members indicated agreement.

Victims and Witnesses (Scotland) Act 2014 (Commencement No 2 and Transitional Provision) Order 2014 (SSI 2014/210)

The Convener: Agenda item 6 is consideration of an instrument that is not subject to any parliamentary procedure. The Delegated Powers and Law Reform Committee considered the order at its meeting on 12 August and agreed to draw Parliament's attention to it.

Under the arrangements that the DPLR Committee negotiated with the Scottish Government for the management of commencement orders that contain complex transitional provisions—as this one does—the Government agreed that such instruments will be accompanied by a policy note to assist the DPLR Committee in its scrutiny, and that it will aim to allow at least 40 days between an instrument's being laid and its coming into force.

In this case, only 19 days were allowed and the policy note did not adequately explain the policy intention behind the order. The DPLR Committee has therefore written to the Government and to the Standards, Procedures and Public Appointments Committee about the procedure for scrutiny of commencement orders that contain complex transitional provisions.

Are members happy to endorse the DPLR Committee's concerns?

Members indicated agreement.

The Convener: Do members have any other comments on the order?

Members: No.

The Convener: It does seem remiss, does it not? A whole lot of stuff is now coming into force that is really quite substantial. Many people do not understand that the sections of an act of Parliament do not all come into force at the same time, so it is important to know when they come into force and why. I think that it is a very reasonable point.

European Union Opt-out

10:27

The Convener: We move on to item 7. Members have received an update from the Minister for Community Safety and Legal Affairs on the current negotiations arising from the UK Government's decision to opt out of all police and criminal justice measures that were adopted prior to the Lisbon treaty. The letter provides further details of recent changes to the list of measures that the UK is proposing to opt back in to, and it states that the Scottish Government is content with the UK Government's interpretation of how any transitional arrangements might be determined.

Before I ask other members whether they have any comments, I ask Roderick Campbell for his comments, as he is our EU reporter.

Roderick Campbell: I record our thanks for the briefing that we had on the matter from Scottish Government officials, which really clarified things.

The only comment I will make is that I am satisfied that the UK Government is intent on doing the best that it can to avoid transitional measures being necessary, but I hope that the UK Government will continue to liaise with the Scottish Government so that we know what is going on. I hope that the situation will be resolved by the end of November.

The Convener: Are there any other comments?

Members: No.

The Convener: As previously agreed, we now move into private session.

10:28

Meeting continued in private until 11:08.

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