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LOCAL GOVERNMENT BILL

Clause 21 - Access to Information

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ACCESS TO INFORMATION

Introduction

This paper deals with the amendments to clause 21 of the Local Government Bill and New Clause 15 proposed by Don Foster MP and Adrian Sanders MP. The amendments seek to ensure that the change to the new executive structures do not weaken the public's existing rights to information about local authority decisions.

The bill has been severely criticised for allowing decisions which local authorities presently have to take at open meetings to be taken by closed meetings of executives. The government remains unwilling to require executives to meet in public, but has published alternative disclosure of information proposals. Some of these are helpful, and move towards meeting the concerns that have been expressed. But they still do not ensure that all existing rights will be preserved. Many important decisions could still be taken in greater secrecy than at present. The amendments seek to ensure that existing rights are preserved, while retaining helpful elements of the government's new proposals.

The existing system

At present, most important local authority decisions have to be taken at meetings of the full council or its committees. The Local Government (Access to Information) Act 1985 inserted new access provisions into the Local Government Act 1972.¹ These require meetings to be open to the public, except where 'confidential' or 'exempt'² information is involved. Where

¹ Part VA of the Local Government Act 1972, consisting of sections 100A-100K and Schedule 12A apply to England and Wales. Equivalent provisions for Scotland were inserted into Part IIIA of the Local Government (Scotland) Act 1973 as sections 50A-50K and Schedule 7A.

² "*confidential information*" is defined in Section 100A(3) of the Local Government Act 1972. It covers information supplied in confidence to an authority by central government and information whose disclosure is prohibited by statute or by a court order.

"*exempt information*" is defined in Section 100I and Schedule 12A of the Local Government Act 1972. It includes information whose disclosure would affect the privacy of individuals, financial negotiations, discussions of proposed enforcement action and similar matters.

meetings are open, the agenda, officers' reports and background papers must be publicly available at least three clear days in advance. These papers, along with minutes, must also be available for inspection and photocopying after the meeting. These provisions will continue to apply to meetings of a council and its committees, after the new bill becomes law. However, the new executives will not be bound by these provisions.

The new proposals

Following the recent publication of these draft regulations and guidance, a clearer picture of the government's proposals is now available.³ These envisage that:

- **Executives will be able to hold all their meetings in private if they wish.** Clause 21(1) of the bill merely states: "Meetings of a local authority executive, or a committee of such an executive, are to be open to the public or held in private". Regulations under clause 21(9) *could* require some or all meetings, or parts of them, to be public. The draft regulations do not do so.⁴
- **Where an executive *decides* to meet in public, the regulations lay down a set of provisions largely identical to those of the 1972 Act.** These include the requirement that agendas, reports and background papers must be publicly available at least three days beforehand.
- **After decisions have been taken, a record of the decision, the reasons for it and any alternative options considered will have to be published.** These requirements will apply to all meetings of the executive, public or private, and to decisions taken by individual executive members. There is a suggestion that similar requirements will apply to officers.⁵
- **Councils will be required to adopt mandatory standing orders, requiring executives to publish a 'forward plan' of forthcoming decisions.** It is envisaged that these plans will be updated monthly. Papers relating to forthcoming decisions will be given to the

³ *The Local Government Bill, Second consultative drafts of proposed guidance and regulations on new constitutions for councils.* DETR, May 2000. These can be read on the Internet at <http://www.local-regions.detr.gov.uk/consult/newcon/index.htm>

⁴ Draft *Local Authority Executive Arrangements (Access to Meetings and Documents) Regulations [2000]*, published in the consultation paper cited in footnote 3 above.

⁵ This is referred to the draft guidance issued for consultation by the government [paragraph 10.20], but it is not clear whether it will remain in guidance or be required under the proposed standing order.

scrutiny committee when they are submitted to a member of the executive in a final form.⁶ Once a *final* document is provided to an executive member it could then be obtained by the public, subject to the rules on exempt information.

These arrangements contain several positive elements. The requirement to keep records of decisions, reasons for them and rejected alternatives is a helpful addition to existing requirements. The longer advance notice given by forward plans is also welcome.

Shortcomings

However, these arrangements still do not compensate for the rights that are to be lost. In particular, because:

- **Many decisions previously taken at open meetings will be taken in private – either at closed meetings, or by individual members or officers.** Being able to observe the meeting itself allows the public to see whether and how their concerns have been addressed and helps to keep decision takers themselves accountable. The new arrangements will permit greater involvement of unelected and unaccountable political advisers in decision taking, with executives permitted to excise their contributions from all published documents.
- **Although papers for meetings should be circulated longer in advance than at present, these requirements could be circumvented.** Reports and background papers will only be publicly available once they are circulated in *final* form. Executives meeting in private could avoid disclosure by circulating *draft* papers, which would not have to be made public. The report could be finalised only at the last minute, allowing even *less* than the present three days advance access.
- **Because many of the new rights will be based on standing orders, not legislation, it will no longer be an offence to deliberately obstruct a member of the public seeking to exercise these rights.**

⁶ The government proposes to use its powers under section 20 of the Local Government and Housing Act 1989 to issue regulations requiring all local authorities to adopt a mandatory standing order which would require the authority to issue a ‘forward plan’. The plan should contain the executive’s “programme of work including the key decisions it intends to take in, say, the coming 4 months” [para 10.6]. It would have to state “how the executive intends to involve local stakeholders in the decision making process” [para 10.7], and would have to be updated each month on a rolling basis. It would also have to be supplied to the relevant overview and scrutiny committee “at least two weeks in advance of the period covered by the plan” [para 10.6]. They are not prevented from taking urgent decisions with less notice [para 10.12]. *Draft guidance: new constitutions and councillors’ allowances*. DETR, May 2000

The amendments

The amendments would:

1. Require local authority executives to meet in public.
2. Require access to papers to be given at least 3 days before decisions, whether these are taken by executives or by individual members or officers.
3. Extend the bill's duty to record decisions, reasons for them and the alternative options, to the decisions of officers and those of the full council and its committees.

1. Open meetings **Amendments 258, 259, 265, 266 and 267**

Amendment 258 requires meetings of executives (and its committees) to be open to the public unless confidential or exempt information is involved. Executives would be subject to the same rules on open meetings as presently apply to meetings of a council and its committees. The amendment does this by replacing clause 21(1) with a new provision making meetings of executives subject to Part VA of the Local Government Act 1972. The remaining amendments in this group are largely consequential.

Amendment 259 deletes clause 21(2) which gives executives discretion to meet in private subject to regulations issued by the Secretary of State under clause 21(9)(a). **Amendment 265** deletes clause 21(8), since the proposed regulations on access to meetings would then become superfluous. **Amendments 266** and **267** delete clauses 21(9)(a) and 21(10) which would also become redundant.

2. Advance notice of decisions taken by individuals

New clause 15

Under the bill, many decisions which are now taken by committees meeting in public will be taken by individual executive members or individual officers.⁷ **New Clause 15** seeks to retain the public's existing rights to the relevant papers at least three clear days in advance of such decisions. A decision could *not* be taken (except in cases of urgency) by a member or officer unless three days notice of it had been given. Various other particulars would have to be

⁷ Sections 13(2)(b)(iv), 13(3)(b), 13(4), 13(5), 14(2)(d), 14(4)(b)(iv), 14(5)(b), 14(6), 14(7), 15(2)(b)(ii), and 15(3) all permit the different forms of executive to delegate the discharge of functions of the executive to officers of the authority.

included in the notice, including a list of the relevant reports and background papers. These would be subject to the existing disclosure provisions of the 1972 Act, and therefore have to be publicly available at least three days beforehand.

The new clause does not replace the proposed ‘forward plans’, which should lead to earlier access, but retains a *minimum* statutory requirement of at least 3 days. This provides a safeguard against the possibility that, by circulating *draft* papers until the last moment, the actual period of public access could be reduced to *less* than three days. The minimum 3 day period will remain as a *statutory* requirement which could not be undercut by the proposed standing order.

3. Reasons and alternative options

Amendments 332 and 261-264

For decisions taken by the executive or executive members the decision, the reasons for it and any rejected options would have to be recorded and (subject to exemptions) made public.⁸ These amendments extend the same requirements to decisions taken by *individual officers*. This requirement, which is not present in the current legislation, is also extended to the *full council* and *any committee* which continues to meet along ‘traditional’ lines.

Amendment 332 requires a record to be kept of decisions taken by executives, officers, the full council and any committees. It also requires them to keep a record of the reasons for them. It further requires them to record any alternative options considered and rejected in the course of taking the decision. The amendment restates and consolidates the existing provisions of clauses 21(3) and 21(4) which require such records to be kept for decisions taken (a) at meetings of executives or their committees and (b) by individual members. However it extends these duties to officers (which the draft guidance appears to suggest might be introduced as a standing order) and council meetings.

Amendments 261 and **262** delete clause 21(4) and 21(5) which are now redundant, as their provisions have been incorporated in Amendment 332. **Amendment 263** makes a consequential amendment to clause 21(6).

Amendment 264 deletes clause 21(7), which permits the Secretary of State to make regulations preventing the disclosure of prescribed information. Such regulations would not be necessary in light of **Amendment 258** and **New Clause 15** which applies the existing provisions in the Local Government Act 1972 to all such information. As a result, information could only be withheld if it was ‘confidential’ or ‘exempt’ within the meaning of the 1972 Act.

⁸ Sections 21(3)-(5) and Draft *Local Authority Executive Arrangements (Access to Meetings and Documents) Regulations [2000]*, paragraphs 5 and 12.

The value of open meetings

The government's case for allowing executives to decide to meet entirely in private was set out during the Commons second reading debate:

“Ms Armstrong: Some people have asked why the Bill does not insist that executives meet in public. The executive is not a committee; individual members will be given the right to take decisions. Indeed, at present many decisions are delegated to officers. A formal event, such as a public meeting, does not make an arrangement transparent or accountable. If we are honest, we all know what really happens. Frequently, a political group meets to debate the options and to take decisions; often, there are not even minutes of the meeting. If minutes are taken, they are certainly not made public. The meetings are not open or accountable. The committee then formally takes a decision, often without even revealing which options were considered. That is what happens at present; it is not open and transparent.”⁹

The minister believes that “Committee meetings may be open to the public, but too often that is not where real decisions are made.”¹⁰ However, it is not clear that openness of meetings is the cause of this. An assessment of the effect of the open meetings requirements published in 1995 by the Department of the Environment and the Policy Studies Institute concluded that:

“There is no real evidence that any more decision-making takes place in political group meetings or informal settings than had previously been the case. The opposite view, that the Act had led to more business being discussed openly, was much more widely held [by members and officers]. This was a result of both the reduction in closed sessions, and the opening of sub-committees to the public.”¹¹

It may therefore be wrong to assume that openness necessarily drives the real decision-making processes underground, even if some parts of it will always take place in private. In any event, it will be impossible to prevent members of the executive meeting in informal circumstances to discuss issues and effectively take decisions outside of a formally minuted setting.

The right of the public to be present when decisions are taken is, according to the Policy Studies Institute's report, “of significant value to different people on different occasions.”¹² It added:

⁹ *HC Debates*, 11 April 2000, column 210

¹⁰ Letter from Hilary Armstrong MP, Minister for Local Government and the Regions, to Charter88, 22 March 2000

¹¹ *Public Access to Information: An evaluation of the Local Government (Access to Information) Act 1985*, Jane Steele, pub. Policy Studies Institute & the Department of the Environment, 1995 (ISBN 0 85374 666 4) para 4.8

¹² *Public Access to Information: An evaluation of the Local Government (Access to Information) Act 1985*, para 8.15

“Meetings are valued by established groups and associations, by groups campaigning or lobbying on a specific issue, and by individuals pursuing their own particular ‘cases’ or issues of personal interest. They are valued because they give all these groups the opportunity to make representations before the meeting, to make their interest known by being present at the meeting, and to observe the debate and decisions that take place. These are all valid uses of the Act, which do reinforce the accountability of local government.”¹³

The requirements for disclosure of minutes and papers after meetings will not compensate people for their loss of the right to be present at meetings. Minutes of proceedings are just that. They do not record what was said, what the questions to officers or their answers were, or give the flavour of the debate on an issue. Individual members of the public and representatives of community organisations highly value attendance at meetings for this reason. Councillors value the attendance of these groups so that in the adjournments during the course of meetings they can meet with them to sound out their approach to an issue and perhaps temper their own response to an officer’s report. **The loss of rights to attend decision taking meetings must surely result in what the government feared when it said that “Opaque and unclear decision taking weakens the links between local people and their democratically elected representatives.”¹⁴**

It is sometimes suggested that no-one comes to meetings which are open to the public at present. This is not in fact the case. The Policy Studies Institute report reveals an average attendance at council meetings of ten or more members of the public was reported by 37% of authorities. London boroughs reported the highest attendance, with 89% of them having an average attendance of ten or more at meetings.¹⁵

In any event, even if there is only one journalist present, the press report ensures that that entire community benefits from the opportunity to view the proceedings at decision taking meetings.

A number of local authorities have already established executive arrangements voluntarily.

¹³ *Public Access to Information: An evaluation of the Local Government (Access to Information) Act 1985*, para 8.16

¹⁴ *Local leadership, local choice*, Cm 4298 March 1999, paragraph 1.15

¹⁵ *Public Access to Information: An evaluation of the Local Government (Access to Information) Act 1985*, para 5.6

Some of these meet in private in the way the bill permits, but others have decided to hold their meetings in public and have done so effectively. There is no good reason why we should be going backwards on this issue.

Scrutiny committees

Allowing authorities to transfer such decisions to private meetings is likely to have both a practical and a symbolic impact on relations between the authority and the public. The government argues that this will be more than compensated for by the role of the overview and scrutiny committees created under clause 20. These committees will meet in public, under the 1972 Act's open meetings provisions.¹⁶

We welcome the establishment of scrutiny committees. However, there will be limits to what they can achieve. Like parliamentary select committees, which are able to monitor just a small part of government's activities, they will not be able to monitor all executive decisions. Moreover, access to the proceedings of the scrutiny committees cannot compensate for the lost access to proceedings of the decision-taking body itself.

Prior access to papers

Where an executive *decides* to meet in public, the draft regulations impose a set of rules largely identical to those under the 1972 Act. However, executives will be free to hold all their meetings in private if they wish. In this case, the public's rights will be weaker.

First, the existing statutory right to see papers at least three clear days beforehand will be replaced by what may be a less specific requirement, in standing orders, to publish papers when they are finalised. The guidance indicates the intention is that papers will be made public significantly earlier than at present. This is welcome. However, we are concerned that it could be circumvented.

The guidance states that papers will only have to be disclosed when they are 'finalised'.¹⁷ This suggests that *drafts* could be circulated without having to be disclosed. Unless there is a clear requirement to make reports public at a set time, executives could deliberately rely on draft reports, to which minor changes were made from time to time, to avoid public

¹⁶ Clause 20(9)

¹⁷ *Draft guidance: new constitutions and councillors' allowances*, paragraph 10.14

disclosure. The result could be that there will be *less* than three days notice of the detailed proposals, which will then be decided at closed meetings. This would represent a substantial weakening of existing rights and clearly undermine the ability of the public and scrutiny committees to hold the executive to account.

The fact that these disclosure duties would be based in *standing orders* not *legislation* is a further cause for concern. The 1972 Act makes it a criminal offence for anyone to intentionally obstruct a member of the public seeking to exercise a right of access under that Act.¹⁸ This offence is retained in relation to those rights provided for under the draft regulations.¹⁹ But many of the new disclosure provisions would result from the proposed mandatory standing order, not from regulations. *It would not be an offence to obstruct someone seeking access to documents which should be available under the standing order.* The present deterrent against abuse would therefore be lost. The fact that the penalty for obstruction is low - a fine not exceeding level 1 on the standard scale (presently £200) - is not the point. The fact that officers or councillors could acquire a criminal record by willfully denying people their rights is a powerful sanction which should not be removed.

Post decisional access to papers

Where a meeting is held in private, the regulations require that after the event, various materials including the agenda, minutes, reports and background papers should be published. Information which is 'exempt' or 'confidential' could be withheld, and these terms are given the same definitions used in the Local Government Act 1972.

However, there is one important addition. The information published after a private meeting need not include 'advice from political advisers'.²⁰

At present, political advisers²¹ are not able to participate in the formal meetings, but may be involved in the discussions of political groups beforehand. The government's case for allowing executives to meet in secret appears to rest on recognising and formalising the political dimension of decision taking. **However, by formally encouraging the involvement of political advisers – but allowing all traces of their advice to be deleted from the published record – the government is undermining its own claim that the new arrangements will provide greater transparency and accountability than at present.**

¹⁸ Section 100H(4) of the Local Government Act 1972

¹⁹ Draft *Local Authority Executive Arrangements (Access to Meetings and Documents) Regulations [2000]*, paragraph 15(4)

²⁰ Draft *Local Authority Executive Arrangements (Access to Meetings and Documents) Regulations [2000]*, paragraph 8

²¹ Appointed in pursuance of s.9 of the Local Government and Housing Act 1989

Part of the government's argument is that by formally legitimising the role of political advice, actual responsibility for decisions will become clearer. But even this may not happen. In many authorities, some influential members may choose not to become part of the executive, with all the likely implications of being a 'full-time' councillor. They are likely to seek to retain their influence by exerting it at meetings of their political group, which may therefore continue to exert substantial control over decisions, outside the formal decision-making structures. The new executives may still find themselves 'rubber stamping' decisions taken in party groupings, but because they themselves meet in private, the outcome may be even less transparency about how decisions have been reached.

Conclusion

The government are right when they say, "Modern councils succeed when they put people first, when they work and take decisions in a culture of openness and accountability to local people. They succeed when there is trust between them and their local community."²² Its proposals go some distance towards this. But confidence in the new executive structures will be undermined in the eyes of the public and the local media if they are accompanied by an increase in meetings held in secret.

The evaluation of the existing open meetings provisions by the Policy Studies Institute concluded that they had been "effective", and had "proved to be very important in establishing minimum standards, ensuring consistency and even in challenging attitudes previously in favour of secrecy within authorities."²³ The Bill cannot be allowed to reverse such progress.

²² *Local leadership, local choice*, Cm 4298 March 1999, paragraph 1.3

²³ *Public Access to Information: An evaluation of the Local Government (Access to Information) Act 1985*, Jane Steele, pub. Policy Studies Institute & the Department of the Environment, 1995 (ISBN 0 85374 666 4) para 8.25