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LOCAL GOVERNMENT BILL

Briefing for Report Stage

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Open Meetings, Access to Information and Disclosure Offences

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Introduction

The government has made further progress in responding to criticism that the Local Government Bill will allow new ‘executive’ structures to meet in private. The most recent draft regulations (a) improve the public’s rights to see papers relating to forthcoming decisions and (b) require executives to meet in public when taking ‘key decisions’. These are welcome changes.

However, they still do not go far enough. We are concerned that:

- Executives will be able to meet in secret to *discuss* key decisions. We understand the intention is that only the meeting at which the decision is actually *taken* will have to be open to the public.
- Authorities will be given significant discretion to determine what constitutes a ‘key decision’. Decisions deemed *not* to be key decisions, can be taken in private and reports do not have to be publicly available in advance.
- Authorities will vary in the degree to which they delegate decisions to individuals – the more decisions are delegated, the less meetings, and the less public access to them will take place.
- The provisions on advance access to reports relating forthcoming decisions of individual executive members appear to be weak. Reports do *not* have to be available at least 3 days in advance. Where decisions are based on *draft* reports, no advance disclosure is required.
- Other Parts of the bill create new offences relating to the disclosure of information, which are drafted unnecessarily widely.

These points are addressed by a series of all-party amendments¹ which would:

¹ Tabled by Mark Fisher, Don Foster, Richard Shepherd, Tony Wright, David Davis and Adrian Sanders.

- **Require *all* meetings of executives to take place in public, subject to the existing rules governing meetings of councils and their committees**
- **Limit the scope of the proposed disclosure offences.**

Other aspects of the government’s proposals are welcome and are not affected by the all-party amendments. These include:

- **The requirement for executives to produce ‘forward plans’ giving advance notice of forthcoming key decisions.**
- **The duty on executives to publish reasons for decisions and descriptions of alternative options considered and rejected.**

Open meetings

At present, most local authority decisions have to be taken at meetings of the full council or its committees. These have to meet in public unless ‘confidential’ or ‘exempt’² as defined in the Local Government Act 1972 is involved. Where meetings are open, various papers must be publicly available at least three clear days in advance. 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 them.

Will discussion of ‘Key decisions’ be open?

The bill originally allowed executives to decide to hold all their meetings in private. New draft regulations, introduce a requirement to hold some meetings in public.³ Draft regulation 3 would requires a meeting to be in public:

“if it is a meeting at which consideration is to be given to a matter in relation to which a decision taken at the meeting would be a key decision.”

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.

³ *Draft Local Government Executive Arrangements (Decisions, Documents and Meetings)(England) Regulations*. DETR, 3 July 2000.

This move towards more openness is welcome. However, we are concerned at the apparent ambiguity of the drafting. At first sight it appears to mean that a meeting which *discusses* matters relating to a key decision would have to be public. However, we understand that the government intends it to have a much more limited meaning and apply *only to meetings at which a key decision is to be made*. A meeting which merely *discusses* a forthcoming key decision could then be held in private. This would be an unnecessarily restrictive approach. *The minister should be asked to clarify this provision.*

Executives may frequently *discuss* forthcoming decisions which are delegated to individual members or officers. In this case, no decision-making meeting – to which the public would have access - would ever take place. According to the minister, an executive may:

“meet as a group of executive members, each of whom will have personal responsibility for an area of decision taking.”⁴

Such meetings would apparently be private under the draft regulations.

What are ‘key decisions’?

The lack of clarity is further compounded by uncertainty over what will constitute a ‘key decision’. A ‘key decision’, according to regulation 15, is a decision of the executive which in the opinion of the decision-taker, is likely to result in -

- ‘(a) the instigation or cessation of an activity, which –
 - (i) has a material effect beyond the internal workings of the local authority; or
 - (ii) has a significant effect on the authority;
- (b) the incurring of expenditure, or the making of savings, by the authority which are likely to be –
 - (i) in excess of such amount as is specified by the authority for the purposes of this paragraph; or
 - (ii) controversial by reason of representations made, or likely to be made, to the authority by persons resident within the authority’s area; or
- (c) the authority incurring a contractual obligation in excess of such amount as is specified by the authority for the purposes of this sub-paragraph’

⁴ Hilary Armstrong MP, Minister of State for Local Government and the Regions, Standing Committee A, 23/5/00, col. 269

This is a wide-ranging definition. However, there is clearly scope for disagreement as to what constitutes a ‘material’ or ‘significant’ effect on or beyond an authority. In particular, there is also scope for different levels of expenditure or contractual obligations to be specified by different authorities. A decision to spend, say, £50,000 might be considered the threshold for a ‘key decision’ by one authority whereas it might be set at £100,000 by the adjacent authority. This could lead to substantial arbitrary variations in practice between authorities, with those less keen on scrutiny deliberately choosing high threshold figures. *We question why it is necessary to permit this degree of discretion in deciding what constitutes a ‘key decision’.*

This discretion over what constitutes a ‘key decision’ has another important consequence. Where an individual executive member takes a key decision, the public is entitled to see any final report relating to it at least three clear days in advance. But this advance access does *not* apply to decisions which are *not* key decisions.⁵

Access to documents before meetings

Under the 1972 Act reports and background papers for meeting of a council or its committees must be publicly available at least three clear days before the meeting. The bill originally contained no equivalent provision for decisions of executives. Some pre-decisional disclosure is now proposed. In particular:

- Executives must publish ‘forward plans’ with details of key decisions due to be taken in the coming four months,⁶ the documentation available about them, and the proposed consultation arrangements. These are welcome proposals.
- For meetings which *are* held in public, reports, agendas and background papers must be made available three clear days in advance;⁷
- Reports relating to decisions taken by individual executive members must be publicly available in advance.⁸

⁵ Draft regulation 10(2)

⁶ Draft regulation 20(2)

⁷ Draft regulations 5 and 8

⁸ Draft regulations 10(1) and (2) state:

The third of these provisions, in draft regulation 10, appears to contain two shortcomings.

No fixed time period

First, it does not require reports to publicly available three clear days before the decision is taken. No specific time for making the report public is specified at all. The decision taker would be required to leave three clear days between receiving the report and taking the decision – but is *not* required to make the report public at that time. The report would have to be provided to the chair of the scrutiny committee ‘as soon as reasonably practicable’. The person who prepared the report would have to ensure that ‘sufficient copies are available to meet every request for a copy of it.’⁹ This may refer to making the report public – but if so there is no reference at all to *when* it should be made public.

Draft reports

Second, if decisions are taken on the basis of *draft* reports, the draft report does not have to be made public before the decision at all. This could allow authorities to circumvent the advance disclosure requirements by circulating draft reports, which are never quite finalised – and therefore not subject to advance disclosure.

Access to documents after decisions

After decisions have been taken, executives will be required to publish a statement of the decisions taken, the reasons for them and any alternative options considered and rejected. These welcome provisions apply to decisions taken at public or private meetings and those taken by individual executive members.¹⁰ Reports and background papers relating to decisions also have to be made public.

Information which is ‘exempt’ or ‘confidential’ under the terms of the Local Government Act

“10. (1) Where an individual member of a local authority executive – (a) receives a report which he intends to take into consideration in his determination of any matter; and (b) the determination of that matter would constitute a key decision - the determination shall not be made unless at least three clear days have elapsed since the day on which he received the report.

(2) Subject to paragraph (8), where a report, other than a report that is available only in draft form, has been submitted to an individual member with a view to its consideration in the making of such a determination as is mentioned in paragraph (1), the person who prepared the report shall (a) as soon as reasonably practicable, supply a copy of it to the chairman of every relevant overview and scrutiny committee; and (b) secure that sufficient copies are available to meet every request for a copy of it.”

⁹ Draft regulation 10(2)(b)

¹⁰ Draft regulations 6, 7(2)(a) and 10(3)

1972 can be withheld. However, a new category of exemption is created: “advice from political advisers” can also be withheld.¹¹

At present, political advisers¹² 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 may be undermining its own claim that the new arrangements will provide greater transparency and accountability than at present.**

THE VALUE OF OPEN MEETINGS

The minister has argued that “Committee meetings may be open to the public, but too often that is not where real decisions are made.”¹³ 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.”¹⁴

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

¹¹ Draft regulation 7(3)(c)

¹² Appointed in pursuance of s.9 of the Local Government and Housing Act 1989

¹³ Letter from Hilary Armstrong MP, Minister for Local Government and the Regions, to Charter88, 22 March 2000

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."¹⁵ It added:

"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."¹⁶

THE ALL PARTY AMENDMENTS

1. OPEN MEETINGS

All-party amendments 82 to 89

These amendments require meetings of executives and their committees to be open to the public unless confidential or exempt information is involved. These meetings would then be subject to the same rules that presently apply to meetings of a council and its committees under the 1972 Local Government Act. The key amendment is Amendment 83: the remainder are largely consequential.

¹⁴ *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

¹⁵ *Public Access to Information: An evaluation of the Local Government (Access to Information) Act 1985*, para 8.15

¹⁶ *Public Access to Information: An evaluation of the Local Government (Access to Information) Act 1985*, para 8.16

2. ADVANCE NOTICE OF DECISIONS AND ACCESS TO PAPERS

All-party New Clause 5 & amendments 85, 91, 92 & 94. Government New Clause 11.

These amendments retain – and extend - the public’s existing rights to see papers before decisions take place. Under existing legislation, agendas, reports and background papers relating to matters due to be discussed in public must be publicly available at least three clear days in advance of the meeting.

The amendments apply this requirement to *all* decisions due to be taken by executives or by individual members or officers.

They also extend the period of advance notice from *three* clear days to *five* clear days. This extended period would apply both to executives and to meetings of the council and its committees.

Experience of the existing 3 day rule indicates that this period is often inadequate for people to digest and respond to officers’ reports.

All-party *Amendment 94* provides an alternative approach, permitting the Secretary of State by order to extend the 3 day period in existing legislation. **The government has accepted this approach. Its *New Clause 11* is a slightly more comprehensive amendment on similar lines.**

However, the fact that this power to extend the period exists is no guarantee that it will be used. It may be helpful to seek an indication of the government’s intentions.

3. BACKGROUND PAPERS

All party amendment 93 and Government New Clause 9

Government new clause 9 adopts the thrust of all-party Amendment 93, which makes a slight change to the arrangements for access to background papers. Under the 1972 Act, officers must draw up and make public a list of the background papers they relied on when preparing a report. However, this list can be kept separate from the actual report. A member of the public who obtains the report may find no reference in it to the existence of the background papers or fact that there is a right of access to them.

The amendments require officers to include the list of background papers in the reports

themselves, making the existence of these materials much more transparent.

5. AFFIRMATIVE RESOLUTIONS

All-party amendment 90

At present, the regulations under clause 21 are made by the negative resolution procedure. Ministers have argued that “the regulations under clause 21 will be largely technical and more appropriate to negative resolution”.¹⁷

In our view, this is clearly not the case. We believe that the rights described in the draft regulations are of substantial importance and deserve as much scrutiny as those for elections and referenda (made under clauses 42 and 43) which are subject to the affirmative procedure. Amendment 90 provides this.

PROHIBITIONS ON DISCLOSURE

Other, unrelated, parts of the bill include two restrictions on the disclosure, both of which create new offences relating to the disclosure of information. Amendments 206-7 and 221 would limit or delete these restrictions.

Clause 60 – Disclosures by Ethical Standards Officers

Clauses 54 to 59 establish a Standards Board which will employ Ethical Standards Officers (ESOs) who will supervise compliance with a code of conduct issued by the Secretary of State.

Clause 60(1) permits an ESO to disclose information for certain limited purposes. Clause 60(2) allows the Secretary of State or a local authority to serve a notice on the

ESO that in their opinion disclosure of any specified information or class of information ‘would be contrary to the public interest’. Any person who then discloses such information would commit an offence under clause 60(4) and could face up to 2 years imprisonment.

The drafting of this provision gives rise to considerable concern.

First, the power of the Secretary of State, or local authority, to issue a notice prohibiting disclosure is almost completely unlimited. *It is not apparently limited to otherwise confidential information which the ESO has obtained by use of his statutory powers.* It can apply to any information, however obtained, including information which was obtained from public sources. The only minimal constraint is that it is information whose disclosure in the authority’s “opinion” would be “contrary to the public interest”.

Second, once notice has been given, not only the ESO but ‘any person’ commits an offence by disclosing it. The offence is not limited to disclosures made by people to whom the ESO has communicated the information for the purpose of his functions. *It may be committed by literally anyone who has information of the specified description, regardless of how they obtained it.* The offence may therefore be committed by councillors, staff or even members of the public who happen to have information of the kind specified in the notice, even if they obtained it lawfully, from public sources.

Third, the offence is committed regardless of whether the disclosure is potentially harmful. The only test is that in the authority’s “opinion” disclosure would be “contrary to the public interest”. Government policy since the 1993 *Open Government* white paper has been that new offences involving the disclosure of information should wherever possible involve explicit tests of harm.¹⁷ Even the Official Secrets Act 1989 applies only to disclosures are shown to be ‘damaging’, for example, to the security services, or to defence or international relations etc.

Fourth, there is no defence of any kind to charges of an offence. Again, the Official Secrets Act provides a defence that the defendant did not know and had no reasonable cause to

¹⁷ Beverley Hughes MP, Parliamentary Under Secretary of State, DETR, Standing Committee A, 20/6/00

¹⁸ ‘The Government proposes to assess the case for harm tests in all future legislation on disclosure, and to review existing provisions as and when legislative opportunities arise. The presumption will be in favour of inclusion of a harm test unless there are compelling public interest arguments against it.’ *Open Government, Cm 2290, July 1993, paragraph 8.40*

believe that the information was information to which the Act applied. No such defence is available to someone charged under clause 60(4).

Finally, this provision apparently allows a local authority to prevent an ESO disclosing information for the purpose of criminal proceedings or any other function mentioned in clause 60(1). *We cannot understand why such an extraordinary power should exist at all.*¹⁹

Amendment 221 would remove this offence by deleting clauses 60(2) to 60(4).

Clause 92 – Disclosures relating to benefits

Clause 91 allows information relating to the payment of certain benefits (income support, jobseeker’s allowance and housing benefit) to be exchanged between various authorities. Clause 92 creates an offence relating to the unauthorised disclosure of such information in a form which identifies ‘any particular person’.

In law, the term ‘person’ includes both an individual and legal entities. Thus the offence is not limited to disclosures about identifiable benefit claimants or recipients, where the case for preventing disclosure in the interests of privacy is clear. **It could also be committed by revealing information about hotels, hostels or housing associations which has been communicated under clause 91.**

It would be an offence to identify a hotel at which housing benefit recipients had lived, if that information was obtained under clause 91 – though not if the same information had been provided to the authority directly by the hostel itself.

A disclosure that £500,000 had been paid to the Dorchester Hotel to accommodate people in receipt of housing benefit would be an offence, even if the identity of the people concerned was not revealed.

The offence might be more justifiable if applied where disclosures caused commercial harm to the organisation concerned. But this offence could be committed by making an entirely

innocuous disclosure, which caused no harm to anyone.

Amendments 206 to 207 would restrict the offence to that of making an unauthorised disclosure of information about an *identifiable individuals*, thereby avoiding criminalising a disclosure which merely refers to an organisation or hostel without any breach of privacy.

¹⁹ We understand that this provision is based on section 32 of the Local Government Act 1974. However, that section creates no offence. It merely establishes that a Local Commissioner is not *authorised* to disclose the information in question