



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Fourth Progress Report

Eleventh Report of Session 2006-07

*Report, together with formal minutes and
appendices*

*Ordered by The House of Lords to be printed 26 March 2007
Ordered by The House of Commons to be printed 26 March
2007*

**HL Paper 83
HC 424**

Published on 30 March 2007
by authority of the House of Lords and
the House of Commons London:
The Stationery Office Limited
£10.00

Bills and other documents drawn to the special attention of both Houses

1 Local Government and Public Involvement in Health Bill

Date introduced to first House	12 December 2006
Date introduced to second House	
Current Bill Number	HC Bill 77
Previous Reports	None

Background

1.1 This is a Government Bill introduced into the House of Commons on 12 December 2006. The Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the Convention rights at paragraph 467. The Bill completed its Committee stage on 8 March 2007.

The effect of the Bill

1.2 The main purpose of the Bill is to give effect to the Government's proposals for reform of the local government system in England, set out in the local government white paper *Strong and Prosperous Communities*,¹ and of the current arrangements for patient and public involvement in the provision of health and social care services.

1.3 Most of the Bill does not, in our view, raise any significant human rights issues. Part 10 of the Bill, however, which gives effect to the Government's proposals for reform of the regime relating to ethical standards of conduct for local government, contains one provision which in our view does raise a significant human rights issue.

The scope of the code of conduct for local councillors

1.4 The Local Government Act 2000 introduced a new ethical framework for local government, including a statutory code of conduct for local councillors policed by the Standards Board for England.² The Act imposes a duty on councillors to give a written undertaking to observe the code of conduct "in performing his functions".³ The current model code of conduct provides that a councillor must not in his or her official capacity "or any other circumstance" conduct himself or herself in a manner which could reasonably be regarded as bringing his or her office or authority into disrepute.⁴

¹ Cm 6939.

² Sections 49-52 Local Government Act 2000.

³ Section 52 Local Government Act 2000.

⁴ Para. 4 of the Model Code of Conduct for Local Authority Members.

1.5 The Bill provides for the extension of codes of conduct for local authority members to apply to conduct other than in the performance of their official functions as members.⁵ It amends the relevant provisions of the Local Government Act 2000 to provide that the principles which govern the conduct of members and the provisions of the code of conduct which they are required to follow include principles and provisions which are to “apply at all times” to a member or co-opted member.⁶ The Bill would also remove the words “in performing his functions” from the provision of the Local Government Act 2000 which imposes the duty to comply with the code of conduct.⁷

1.6 On the face of it this would mean that local authority members are subject to regulation of their conduct, including by sanctions such as suspension or disqualification from being a member, outside their performance of their functions as a member and therefore, by necessary implication, in their private life.

1.7 The Explanatory Notes to the Bill state that “it is possible” that this provision may engage Articles 8 and 10 of the Convention, but assert that the clause “is considered to be capable of being exercised compatibly with the rights set out in the Convention.”⁸ The Notes say nothing more about the reasons for introducing the provision, other than that it is being introduced “following comments made by the court in a recent case (*Ken Livingstone v the Standards Board for England*)”.⁹

1.8 In our view there is no doubt that the Bill’s proposed extension of the scope of the conduct of local authority members that may be covered by codes of conduct engages members’ right to respect for their private life in Article 8 ECHR and their right to freedom of expression in Article 10 ECHR. The effect of the changes will be that sanctions can be applied to a member in respect of actions taken or statements made in their private life. The provision therefore has the potential to give rise to breaches of Articles 8 and 10 ECHR in practice. For the reasons we have frequently given in previous reports, we do not consider adequate the statement in the Explanatory Notes that the power is capable of being exercised compatibly with Convention rights. Such reliance on sections 3 and 6 of the Human Rights Act would render parliamentary scrutiny for human rights compatibility virtually meaningless. Where a statutory power engages Convention rights and is so wide that it gives rise to a risk of being exercised incompatibly with those rights, we want to know more about the Government’s reasons for its confidence that the power will not be so exercised in practice. Our Chair therefore wrote to the Minister on 23 January 2007 asking for the Government’s reasons for introducing the change, and for a more detailed explanation of why in the Government’s view the interference with the Article 8 and 10 rights of local authority members is justified.¹⁰ We asked for a response by 5 February 2007.

1.9 We regret to report that, more than six weeks after the date by which we requested a response, and despite several reminders, we still have not received a response from the Minister to our short inquiry. We cannot recall a previous occasion on which a letter

⁵ Clause 141.

⁶ Clause 141(1)-(3), inserting new provisions into ss. 49-51 of the Local Government Act 2000.

⁷ Clause 141(4), amending s. 52 of the Local Government Act 2000.

⁸ EN paras 330 and 467.

⁹ EN para. 467.

¹⁰ Appendix 1.

from us has effectively been ignored by a Minister. The proper performance of our function of scrutinising bills before Parliament for human rights compatibility depends on Government departments responding to our inquiries as fully and promptly as possible to enable us to report to Parliament in good time. We now have no alternative but to report on this Bill without the benefit of the Minister's response to our questions. We draw this matter to the attention of each House.

1.10 In the absence of a response from the Minister, we have sought to find the answers to our questions from other sources. In January 2005 the Committee on Standards in Public Life considered the question in its Tenth Report in which it made a number of recommendations about the ethical framework for local government.¹¹ The Committee pointed out that in England and Wales the code of conduct applies mainly to members acting in their official capacity but also appeared to concern conduct in private life, and that this raised difficult and contentious issues. It recommended that the phrase "in any other circumstances" should be removed from the model code of conduct for local authority members so as to make a clear distinction between private and official conduct, and that private conduct that is wholly unrelated to an individual's official capacity should fall outside the ethical framework.

1.11 The Government rejected this recommendation. In December 2005 it published a discussion paper, *Standards of conduct in English local government: the future*, in which it said:

"We believe that councillors should set an example of leadership to their communities, and that they should be expected to act lawfully even when they are not acting in their role as members. We do not agree therefore that the code should be amended so as only to refer to actions by members in their official capacity and not their private lives. Following its review of the code, the Standards Board has, however, recommended that the current rule should be amended to provide that **certain behaviour outside official duties should continue to be regulated, but that this should be restricted only to matters that would be regarded as unlawful**. We accept this proposal, since it would balance the need for members to continue to set an example to their communities, and the need to exclude from proscription actions of which certain people might merely disapprove."¹²

1.12 In the recent case involving the Mayor of London,¹³ who accused a journalist who he knew to be Jewish of being "like a concentration camp guard" as he left an official reception, the Adjudication Panel for England had found that the Mayor had failed to comply with the Code of Conduct of the Greater London Authority, even though he was not at the time fulfilling his official duties, and should be suspended for four weeks. The High Court, however, allowed the Mayor's appeal on the basis that the code of conduct did not apply because the Mayor had not been acting in his official capacity as Mayor when he made the relevant remarks to an Evening Standard journalist, and the code did not extend to regulating the Mayor's private conduct.

¹¹ Committee on Standards in Public Life, *Tenth Report, Getting the balance right: implementing standards in public life*

¹² *Standards of conduct in English local government: the future*, ODPM, 15 December 2005, at p. 28.

¹³ *Ken Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin) (19 October 2006).

1.13 The High Court held that the words “in performing his functions” covered activities that were apparently within the performance of a member’s functions, and applied to a member who misused his position as a member even when not acting in his official capacity. However, it did not cover conduct in the member’s private life: the High Court held that if it is thought appropriate to subject members to a code which extends to conduct in their private life, Parliament should spell out what is covered.¹⁴ Since the remarks to the journalist were not made in the performance of the Mayor’s functions, the Code of Conduct did not apply and the Adjudication Panel had therefore been wrong in deciding that he had failed to comply with it.

1.14 In reaching this conclusion, the High Court held that the restraints on freedom of expression imposed by the code of conduct to uphold proper standards in public life were in principle capable of justification under Article 10(2) ECHR, but those restraints should not extend beyond what is necessary in order to maintain those standards. In the Court’s view, to interpret the code as extending to the conduct in question was not necessary in a democratic society. Collins J. made clear that in his view the link between the conduct in question and his membership of the authority was necessary: “it is important that the flamboyant, the eccentric, the positively committed – one who is labelled in the somewhat old fashioned terminology, a character – should not be subjected to a Code of Conduct which covers his behaviour when not performing his functions as a member of a relevant authority.” The judge accepted that the result of this construction of the Act and the Code is that unlawful conduct is not necessarily covered by the Code: “Thus a councillor who shoplifts or is guilty of drunken driving will not if my construction is followed be caught by the Code if the offending had nothing to do with his position as a councillor.”¹⁵

1.15 In its *Consultation on Amendments to the Model Code of Conduct for Local Authority Members*, issued in January 2007, the Department for Communities and Local Government says that it is in response to this case that the Government has decided to amend the Local Government Act 2000 in the current Bill “so that behaviour in a private capacity might be included within the remit of a code of conduct.”¹⁶ It says that the case casts some doubt on the ability of the code of conduct to proscribe behaviour of members in their private capacity, and is based on a narrower interpretation than that previously applied by the Government. Until this decision, the Consultation Paper says, the Government had assumed that it was possible to take a wider view of what private conduct could be relevant, including actions not necessarily to do with the member’s position as a councillor, but which may affect the member’s reputation and electors’ confidence in him or her. The Consultation Paper says that if the provisions in the Bill are enacted, “Ministers are currently minded to provide that only private behaviour for which the member has been convicted by a court should be proscribed by the code of conduct, ... and not behaviour falling short of a criminal offence.” This is reflected in the draft model code of conduct which is appended to the Consultation Paper, which expressly provides that the conduct which could reasonably be regarded as bringing a member’s office or authority into disrepute “may include a criminal offence”.¹⁷

¹⁴ [2006] EWHC 2533 (Admin) at paras 29-30.

¹⁵ *ibid.* at para. 30.

¹⁶ DCLG Consultation, January 2007, at p. 9.

¹⁷ Para. 4(2) of the draft model code of conduct.

1.16 In proceedings before the Public Bill Committee, the Minister confirmed that the Government's policy objective in seeking to amend the Local Government Act 2000 is only to encompass within the code of conduct instances where members acting outside their official duties receive a criminal conviction.¹⁸ He said "We are trying to say that the code of conduct should not cover a councillor's private life, with the caveat that if a criminal conviction was involved, that should be taken on board by the standards committee." In the Government's view, conduct in a member's private capacity that has resulted in a criminal conviction should be covered by the code of conduct, and the purpose of the provisions in the Bill is to ensure that the necessary enabling powers are provided to enable the code to achieve this. However, the minister was unequivocal that "I am not proposing that the model code should cover any aspect of a member's conduct outside his or her role on the council other than that resulting in a criminal conviction."

1.17 We welcome the Government's clarification that its policy objective is confined to enabling the model code of conduct to cover criminal convictions. However, although this reduces the likelihood of the provisions in question leading to breaches of the Article 8 and 10 rights of members, it does not remove the risk of incompatibility to our satisfaction. Two problems remain.

1.18 First, the Government's limited intention is not reflected on the face of the Bill itself. As the Bill stands, it provides for a power which on its face is capable of being exercised so as to make the code of conduct apply to any private conduct of a member, which would be highly likely to give rise to breaches of members' rights to privacy and freedom of expression under Articles 8 and 10 ECHR. The Government's current intention may be only to use that power to provide that private behaviour resulting in a criminal conviction will be covered by the code, which is less likely to result in such breaches, but there is nothing in the Bill to confine the power in this way.

1.19 Indeed this has been acknowledged by the Minister in the course of the Public Bill Committee proceedings, when he said that he was conscious that after reading the explanatory notes and the clause Members of Parliament "will have the impression ... that we are trying to do the opposite of what we are really trying to do."¹⁹ According to the Minister's explanation to the Public Bill Committee, "the law has to be widened and clarified so that the code can be narrowed". We do not understand the Minister's puzzling explanation. The effect of the provision in the Bill is to widen the scope of the code of conduct from that which currently stands following the decision of the High Court in the *Livingstone* case. **We see no reason why the Bill should not expressly state on its face the exact extent to which the code shall apply to private conduct by members, for example by providing that the only private conduct to which the code applies is conduct which has resulted in a criminal conviction. There is no reason, legal or otherwise, why such a limitation should only be contained in the code. On the contrary, in our view, there are very good reasons why such a limitation should be on the face of the Bill, to make it less likely in practice that the power will be exercised incompatibly with Articles 8 and 10.**

1.20 The second problem which remains is that the Government appears to intend that any criminal conviction, however minor, should be capable of counting as conduct which

¹⁸ House of Commons Public Bill Committee, 1 March 2007, col. 420.

¹⁹ House of Commons Public Bill Committee, 1 March 2007, col. 419.

could reasonably be regarded as bringing a member's office into disrepute. This would mean, for example, that a speeding ticket or other regulatory offence of a minor nature would be within the scope of the code of conduct. **We agree with the view of the Committee on Standards in Public Life that only private conduct resulting in a criminal conviction which is relevant to the member's official duties should be within the scope of the code of conduct.**

1.21 In the light of the above, we recommend that in order to minimise the risk of incompatibility with members' rights to privacy and freedom of expression under Articles 8 and 10 ECHR, the Bill should be amended to provide on its face that private conduct shall be within the scope of the code of conduct only where it results in a criminal conviction which is relevant to the member's official duties.