

HEALTH AND SPORT COMMITTEE

Wednesday 4 November 2009

Session 3

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HEALTH AND SPORT COMMITTEE

28th Meeting 2009, Session 3

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Ross Finnie (West of Scotland) (LD)

COMMITTEE MEMBERS

Helen Eadie (Dunfermline East) (Lab)

*Rhoda Grant (Highlands and Islands) (Lab)

*Michael Matheson (Falkirk West) (SNP)

*Ian McKee (Lothians) (SNP)

*Mary Scanlon (Highlands and Islands) (Con)

*Dr Richard Simpson (Mid Scotland and Fife) (Lab)

COMMITTEE SUBSTITUTES

Joe FitzPatrick (Dundee West) (SNP)

Mr Frank McAveety (Glasgow Shettleston) (Lab)

Jamie McGrigor (Highlands and Islands) (Con)

Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Assistant Chief Constable Andrew Barker (Association of Chief Police Officers in Scotland)

David Roderick (Society of Chief Officers of Trading Standards in Scotland)

Danielle Rowley (Scottish Youth Parliament)

David Woodrow (National Federation of Retail Newsagents in Scotland)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Thornton

ASSISTANT CLERK

Seán Wixted

LOCATION

Committee Room 1

Scottish Parliament

Health and Sport Committee

Wednesday 4 November 2009

[THE CONVENER *opened the meeting at 10:04*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the Health and Sport Committee's 28th meeting in 2009. I remind everyone to switch off mobile phones and other electronic equipment. Helen Eadie has sent her apologies—she is still unwell.

Agenda item 1 is a decision on whether to consider in private our draft report to the Finance Committee on the Scottish Government's 2010-11 budget proposals under item 3 today and at future meetings, as is our normal practice. Do we agree to take that in private?

Members *indicated agreement.*

Tobacco and Primary Medical Services (Scotland) Bill

10:05

The Convener: Item 2 is an evidence session ahead of our stage 2 scrutiny of the bill. Members will recall that, among the recommendations in the committee's stage 1 report, the committee called on the Minister for Public Health and Sport to consider whether the position of minors with regard to purchasing tobacco should be brought into line with the position of minors in respect of alcohol. The committee recommended that the bill be amended to criminalise proxy purchasing and found persuasive arguments in favour of giving the police powers—comparable with those that relate to alcohol—to confiscate tobacco from under-18s.

Members have to hand the amendments on those matters that have been lodged for stage 2 consideration, which appeared in yesterday's *Business Bulletin*. They are amendment 7, in the name of the minister; amendment 8, in the name of Michael Matheson; and amendments 9 and 10, in the name of the minister. We will focus on them today.

The session's sole purpose is to take evidence on those amendments, now that we can see what the provisions might look like. There will be time to spare for any further amendments in the light of today's session to be lodged before Friday's deadline. The deadline for all stage 2 amendments is 12 noon on Friday, but if they can be lodged sooner—[*Interruption.*] I beg members' pardon—that is the deadline for amendments to part 1. What is part 2?

Douglas Thornton (Clerk): Primary medical services—

The Convener: Yes, but what is the deadline? [*Interruption.*] This is a cautionary tale about having the microphone on all the time.

We will consider today only the amendments that I listed and I caution members that we will not revisit other issues that we considered and reported on in our stage 1 report.

With that all said and—I hope—no more mistakes from the convener, I welcome David Woodrow, who is a member of the National Federation of Retail Newsagents in Scotland. He is standing in for James Maitland, the chairman of the federation's legal and parliamentary committee, who has had to cancel his appearance because of problems with rail services from Aberdeen. I do not know whether cows are on the line, but I am sure—

David Woodrow (National Federation of Retail Newsagents in Scotland): The line is not there at the moment.

The Convener: The line is not there; it is under water. Well, there we are—fish are on the line.

I welcome David Rowley—I apologise; it is Danielle Rowley—who is a member of the Scottish Youth Parliament and is the deputy convener of its justice committee; David Roderick, who is chairman of the Society of Chief Officers of Trading Standards in Scotland; and from the Association of Chief Police Officers in Scotland, Andrew Barker, who is the assistant chief constable with Fife Constabulary; and Gordon Hunter, who is an inspector in the police licensing section of Lothian and Borders Police. I ask the witnesses to indicate to me when they want to respond to a member's question and I will call them. I will call everybody who wants to speak, but witnesses should not feel obliged to speak if they do not need to—I know that that will not happen.

Mary Scanlon (Highlands and Islands) (Con): We have just received at the last minute a report from Young Scot, so I have—obviously—not read it all. However, I am slightly surprised that page 7 refers to

“a vote of the day with 53 percent of young people agreeing that young people under 18 should face criminal charges”.

The chart on that page shows that, in another vote, 58 per cent of those surveyed thought that under-18s should face criminal charges for trying to buy cigarettes.

I would have thought that the figure would be higher than 58 per cent. We are all in favour of such a provision and we think that people throughout Scotland are in favour of it. I am surprised that only just over 50 per cent of young people think that the proposal is reasonable. Will Danielle Rowley say a bit more about that?

Danielle Rowley (Scottish Youth Parliament): A lot of confusion is felt, because many young people think that it is already illegal for under-18s to purchase cigarettes. Young people thought that it should be illegal for under-18s to buy cigarettes but that the burden should not fall entirely on them—it should be shared between those who try to buy cigarettes and those who sell cigarettes.

Mary Scanlon: I still think that the figure should be much more than 58 per cent. Do young people understand the consequences of tobacco smoking at an early age and the other related issues?

Danielle Rowley: A lot of them do, but many of the young people who responded to our survey said that they want more education. When I was at school, there was not enough education on smoking. I do not smoke, but many people of my age do. There is a lot of information out there

about the dangers, but it is still not enough. Not enough is done to tackle smoking and show people that it is not difficult to avoid.

The Convener: I want us to keep to the issue of whether it should be an offence. I appreciate that the issue of education comes into it, but I want us to keep our discussions focused on the amendments.

Rhoda Grant (Highlands and Islands) (Lab): I have a brief supplementary question. You said that we should ensure that the responsibility is shared between retailers and young people. In my view, that is what the amendments do. At present, it is illegal for retailers to sell tobacco to under-18s, but it is clear from the evidence that we took at stage 1 that it is not illegal for someone who is under 18 to try to buy tobacco, for them to possess it, or for someone to buy it on their behalf. Do the amendments strike the right balance or should we be looking at something else?

Danielle Rowley: They strike the right balance. If proxy purchasing becomes illegal, that will also be a correct move. Adults have a responsibility to look after our young people and should not buy them cigarettes. The proposals will create a more even balance.

David Woodrow: The National Federation of Retail Newsagents in Scotland does not want to criminalise young people, but, as Danielle Rowley said, the responsibility should be shared between retailers and those young people who attempt to purchase tobacco. We propose that the penalty for being charged should simply be education. The young person should get a package of education, with their parents, and that would be the penalty.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): I am more interested in the practicality of the proposals on proxy purchasing and purchasing by under-18s. We probably all agree with them, but I am concerned about whether it will be practical to confiscate paraphernalia and whether the criminalisation of proxy purchasing could be implemented effectively.

I also have a small question on amendment 7, but I will come back to that.

The Convener: Right, so the concerns that you mentioned are about amendments 8 and 9.

Assistant Chief Constable Andrew Barker (Association of Chief Police Officers in Scotland): There are issues about the proxy purchasing of tobacco, as there are in relation to alcohol, but the amendments strike the right balance. It should be an offence to purchase tobacco on behalf of young people. We face challenges in enforcing the law on the major problem of the proxy purchasing of alcohol for young people, but we can counter the problems. If

there are problems with particular premises, we can use surveillance and other techniques to enforce the law. I accept your point that the proposals would be difficult to enforce, but that should not preclude our trying to pursue those who sell tobacco to under-18s.

Dr Simpson: People are concerned about criminalising youngsters. In amendment 7, subsection (4) states:

“A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 1 on the standard scale.”

I wonder whether, instead, we should take the approach that has been used in Fife in relation to alcohol, which diverts under-18s and requires them to undertake an education process instead of paying a fine. Would it be appropriate to lodge a further amendment to that effect?

The Convener: Could I get some help on that from one of the witnesses from the police? When the amendment says

“is liable on summary conviction to a fine”,

does that mean that a fine would be mandatory?

Assistant Chief Constable Barker: A fine would not be an absolute requirement. As Dr Simpson said, there are alternatives to prosecution.

The Convener: So the sheriff could decide, or the justice—

10:15

Assistant Chief Constable Barker: It is unlikely that it would go to a sheriff. There is the alternative of fixed penalties, whether those are fiscal or a diversion to other forms of disposal. For example, there is a scheme in Fife for people who are issued with a fixed-penalty notice for antisocial behaviour. With the agreement of the Crown we are diverting them to an education scheme. If they complete it and do not offend again, the penalty will be waived. There are alternatives; a fine is not mandatory.

The Convener: That is helpful and it takes care of Ian McKee's question about someone being automatically criminalised.

Ian McKee (Lothians) (SNP): Even if the penalty is waived, is the person not still criminalised?

Assistant Chief Constable Barker: No. It is possible, particularly with antisocial behaviour, to issue fiscal fixed-penalty notices that are not necessarily a conviction; it is not a recorded conviction.

Ian McKee: So the person has committed an offence.

Assistant Chief Constable Barker: They have committed an offence, but it is dealt with in an alternative way.

Ian McKee: So it does not hang around them.

Assistant Chief Constable Barker: That is right.

Ian McKee: Thank you. I do not need to ask my question.

The Convener: Things like a warning letter from the fiscal or—

Assistant Chief Constable Barker: It is not a conviction.

The Convener: I understand that. That is the kind of thing that you are talking about.

Assistant Chief Constable Barker: What I am saying is that, as Dr Simpson said, there are alternatives. That might be a scheme on the dangers of smoking, similar to the one that we are using in Fife for drink. We say that we will not necessarily convict a person for their first offence related to alcohol consumption; instead, we will give them the option of looking at their lifestyle and at the damage that they are doing and, if they complete the course, we will not enforce the penalty.

Ross Finnie (West of Scotland) (LD): I followed the options available to fiscals as to what they might do, which would avoid the trap to which Dr Simpson referred, but can we be absolutely clear that if the fiscal brings the offence under this proposed new section in the Tobacco and Primary Medical Services (Scotland) Act, as it would be, that would not constitute a criminal offence?

Assistant Chief Constable Barker: If the fiscal took it fully through to a prosecution it would be an offence, but there are alternatives available to the fiscal.

The Convener: I think that that is the case, Ross. The amendment says “on summary conviction”, but the fiscal might not take it before the court; they might decide that that was not in the public interest.

Ross Finnie: That is not quite an answer to Ian McKee's question.

Dr Simpson: Convener, if I may I invite the committee to comment as well as the witnesses. We are trying to explore a system that supports young people who are trying to purchase cigarettes. It should be a system that prevents them from purchasing cigarettes and makes it illegal for them to do so. However, if the young person is a smoker—we know that 12 per cent of boys aged 15 and 18 per cent of girls aged 15 smoke—and they attempt to purchase cigarettes, we want to get them into smoking cessation rather

than criminalise them. That should be the thrust of what we are doing. I wonder whether Danielle Rowley agrees with that. Rather than the legislation having only a bare statement about summary conviction and so on—although I appreciate that that has to be there—the alternatives should be spelled out more clearly. Christine Grahame is the lawyer, so I bow to—

The Convener: It is a long time since I practised. I do not think that the alternatives are in specific statute. The discretion of the justice or of the sheriff is always there, unless the legislation says “must be brought” and “must have a summary conviction”, in which case it is mandatory. The option of bringing a case before the court is always available to a fiscal, particularly in youth offending matters. That is exactly where such alternatives fit in, but it is not in statute.

Dr Simpson: I understand that, but I wonder whether the emphasis is wrong. We are saying, “The penalty is this and you may use alternatives.” Should we not be saying, “You should do X and if there are repeated offences, the penalty should be this”?

Michael Matheson (Falkirk West) (SNP): From my experience on the Justice Committee, when it comes to the creation of offences, they must be based in the legislation, but subsequent guidance is issued to fiscals by the Lord Advocate on how they should apply that legislation when they are considering a referral. The guidance could be clear that, for a first offence, they should be looking to refer on to a smoking cessation programme or whatever it may be, but that is not a matter for legislation; it is a matter for the guidance that is issued to the fiscals.

The Convener: I like it when the committee members give each other evidence; the witnesses may go now.

It is an important issue. Discretion is usually in the hands of whoever is on the bench and it is even in the hands of the police, as well as in the hands of the fiscal at all levels.

David Woodrow: It is an adage in our federation that young people access cigarettes from a variety of places. We fully support the message of getting young people to stop smoking.

I will describe one situation that is relevant to education. If a family buys a 200 pack of cigarettes at the beginning of the week, how closely do they record where they are being used? We understand that a lot of young people access cigarettes from the home. It should not just be a matter of taking the young person to task; it is also about the people who are immediately responsible for them—parents, guardians or whoever—and they should get involved in education. If someone lives in a home where smoking is the norm, education is important.

The Convener: We appreciate that. The committee is well aware of that point, but we are focusing on whether the amendments do what they say on the tin, or whether they might have unintended consequences.

Mary Scanlon: I have a point about amendment 9. I am sorry that we did not get your paper in advance, Danielle, as it is a good paper. It would have been nice to have had a wee bit time to look over it. On page 15, in response to the question whether the police should

“have the power to confiscate cigarettes ... from a young person who is under the age of 18”,

53 per cent of the young people asked said no.

The evidence from David Roderick of the Society of Chief Officers of Trading Standards in Scotland says:

“The Society would see these proposed measures as a matter for Police enforcement and not trading standards services.”

I am worried about whether that is passing the buck, and about how things work between one organisation and another. We are often told that the police do not take antisocial behaviour and various other things seriously.

According to the bill’s financial memorandum,

“Trading Standards Officers are responsible for reporting cases to the Procurator Fiscal ... for selling tobacco to under-18s with a maximum fine of £2,500.”

Is the situation not getting a bit messy? I am trying to imagine what happens if an under-18 goes into a shop to buy cigarettes. How do the police suddenly appear to prosecute and confiscate? Does the shopkeeper have to close the shop and keep the person there until a policeman arrives? That could be a long time in the Highlands. I am trying to imagine how the arrangements will work, and work well.

The Convener: Was that question about amendment 7 or amendment 9?

Mary Scanlon: Amendment 9, “Confiscation of tobacco products from persons under 18”.

The Convener: But that is “in a public place”, not in a shop.

Mary Scanlon: Yes. I also want Danielle Rowley to speak about page 15 of her written evidence, which says that 53 per cent of under-18s do not think that the police should have that power, and I am asking about the trading standards evidence, which says that it is

“a matter for Police enforcement”.

I am exploring how the two agencies will work together on that issue.

The Convener: To make it clear, within shop premises, it is a matter for trading standards; in public places, it is the police who would be involved, as it would involve a criminal offence. Is that correct? I am looking at Mr Roderick and Mr Barker. I invite Mr Roderick to clarify the matter.

Mary Scanlon: We should look at the evidence.

David Roderick (Society of Chief Officers of Trading Standards in Scotland): Trading standards only deals with traders; we do not tend to deal with individuals, certainly when it comes to offences. The example that I provided in my written evidence shows how the situation with tobacco purchasing is similar to that of the possession of adult fireworks by an under-18 person. That is already a police matter—local authorities are relieved of the duty to enforce that aspect. We view the proposals before us as similar. Trading standards will deal with the seller of the product, not the purchaser.

Assistant Chief Constable Barker: I echo those thoughts. The proposals before us about possession and sale are similar to the existing provisions for alcohol. We have worked very well with trading standards officers for many years, and I do not see the proposals before us making things any different.

The Convener: The point about harassment has been made on behalf of the young people's organisations. In my own youth, my relationship with the police was not always happy.

Members: Oh.

The Convener: We were just noisy youngsters, and that is sometimes what you get. I do not know whether much has changed over the decades—we will not say how many decades, Ms Rowley. Let us deal with your point about harassment. Do you wish to say something about that? I want to ask Mr Barker about this from a practical point of view. The amendment says:

"the constable may require the person to surrender the tobacco product".

Will that cause you great difficulties—although the word "may" is used, so it is discretionary—in trying to build relationships with young people over bigger things?

Assistant Chief Constable Barker: The word "harassment" is a problem for us, as we react to an awful lot of the behaviour you describe. Mary Scanlon commented that we do not take antisocial behaviour seriously, but I counter that: we take it very seriously. A huge proportion of our time is spent in dealing with antisocial behaviour and trying to address those issues, particularly in relation to young people and drink.

Dealing with tobacco would not be greatly different to the position with regard to alcohol. If we are dealing with a group of young people and alcohol is involved, we confiscate it. If the impetus of the bill is to try to reduce smoking among young people, and we encounter young people who are in possession of tobacco products, we will seize those products. In reality, we will probably not proactively seek those situations on the street, but if we are dealing with them, we will confiscate products. That is where the power becomes extremely useful, in the same way as the powers that relate to alcohol.

Similarly, we will—as I said—proactively target shop premises in relation to alcohol sales if we have intelligence about those premises, which is another situation in which the confiscation powers become very useful.

Danielle Rowley: The reason why a majority of young people disagree with the proposal is because it would weaken their relationship with the police. Perhaps the police could advise young people where to go to stop smoking, rather than just taking the cigarettes off them.

Another point is that not everyone over the age of 18 carries ID on them all the time. Since I had my bag stolen last year, I never carry ID when I go to a pub. If I smoked, and happened to be stopped by a police officer in the street who thought that I was under 18—I know that I look a bit young—and who then confiscated my cigarettes, for which I had paid £5 or whatever, I would not be happy. The proposal might therefore be a problem for those who are over 18 but who look younger than they are.

Mary Scanlon: With regard to Andrew Barker's point, a criticism is often made that there is not enough enforcement of existing laws. Are you satisfied that the level of your partnership with trading standards has led to a robust level of prosecutions and deterrents for retailers who sell cigarettes and tobacco to under-18s? Is it working well?

Assistant Chief Constable Barker: At present, it is not unlawful—

Mary Scanlon: I refer to existing laws, rather than laws that have not come into force yet.

Assistant Chief Constable Barker: We could use existing laws as an example. For instance, the test-purchasing schemes for age-restricted products have been very successful. I keep returning to the issue of alcohol, because that is the best comparison; a strong relationship has been built in that area. I will say honestly that we will probably not proactively target premises unless we have information in that regard. That is something that the industry would seek—we will not target premises for checks unless, similarly to

the test-purchasing scheme for alcohol, there is information that those premises are offending.

My response to Danielle Rowley's point is that it becomes a problem if we veer away from being able to take such action. It would take away our power to enforce anything, and we would not be able to challenge people in relation to possession of alcohol or whatever else. I sympathise with Ms Rowley on the issue of confiscating something for which someone might have paid £5—it is unfortunate if they have bought it legally—but if we want to enforce the law, that is the only way that we can go.

Ian McKee: In amendment 9, subsection (6) states:

"The constable may dispose of any tobacco product or cigarette papers surrendered to the constable in such manner as the constable considers appropriate."

That seems, on the face of it, quite a wide-ranging provision. The constable could sell the product.

Dr Simpson: They could smoke it.

Assistant Chief Constable Barker: That is a matter that forces will have to address with regard to standard operating procedures. I am starting to sound like a broken record, but we have in place exactly the same type of procedures in relation to alcohol. When an officer seizes a large carry-out on the streets, the question that is always asked is what the officer does with it. In many cases, they dispose of it in front of the people who were in possession of it, but we have all seen the photographs of the large hauls of drink that have been taken to various police offices. Please be assured that we have very tight processes to ensure that those are properly disposed of and that there is no impropriety.

The Convener: You would obviously have to retain the seized goods if, as Ms Rowley said, the person says, "I am actually over 18 but I do not have ID and I challenge you on that." They could come down to the police station with their ID.

Assistant Chief Constable Barker: That is how it works for alcohol: we retain the goods and, if they can prove that they are 18, they will get the goods back.

The Convener: We have exhausted the questions. I thank the witnesses for coming along, and for their written evidence. We move into private session for item 3.

10:30

Meeting continued in private until 12:00.

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