

JUSTICE COMMITTEE

Tuesday 15 January 2008

Session 3

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JUSTICE COMMITTEE

† 1st Meeting 2008, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stuart McMillan (West of Scotland) (SNP)
*Margaret Smith (Edinburgh West) (LD)
*John Wilson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
Marlyn Glen (North East Scotland) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Shona Robison (Minister for Public Health)

THE FOLLOWING GAVE EVIDENCE

Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 5

† 14th Meeting 2007, Session 3—held in private.

Scottish Parliament

Justice Committee

Tuesday 15 January 2008

[THE CONVENER *opened the meeting at 10:18*]

Criminal Justice and Immigration Bill

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I apologise for the change of venue, which has been caused by an ingress of water in committee room 6. I appreciate that witnesses and the public might find this room less satisfactory, but we will just have to get on with it.

Belatedly, I would like to wish everyone a happy new year.

The committee, as usual, has a full turnout, therefore there are no apologies.

Item 1 relates to the Criminal Justice and Immigration Bill, which is United Kingdom Parliament legislation. I refer members to the legislative consent memorandum LCM (S3) 7.1, which has been lodged by the Cabinet Secretary for Justice, Kenny MacAskill, and to a note by the clerk, which is paper J/S3/08/1/1.

For the record, I will explain that, in relation to any UK Parliament bill that makes provision that applies to Scotland for any purpose that is within the legislative competence of the Scottish Parliament, a minister must lodge a legislative consent motion seeking the consent of the Scottish Parliament for the relevant provisions of the bill. Prior to the lodging of such a motion, a minister must lodge an associated memorandum that the relevant committee must consider and report on.

I welcome Kenny MacAskill, the Cabinet Secretary for Justice, and George Burgess, the head of the criminal law and licensing division of the Scottish Government. I invite Mr MacAskill to speak to the memorandum.

The Cabinet Secretary for Justice (Kenny MacAskill): A belated happy new year to you and all members, convener. I thank you for the opportunity to present to the committee the legislative consent memorandum on the Criminal Justice and Immigration Bill. Members have the memorandum before them and I do not intend to repeat its content at length.

The three areas of the bill in relation to which we are seeking the consent of the Parliament—Serious Fraud Office powers to tackle foreign bribery and corruption; violent offenders; and the

repatriation of prisoners—can all be characterised as helping the UK Government and Parliament to ensure that the bill is effective.

We want to do what we can to assist the Serious Fraud Office to undertake effectively its investigations into bribery and corruption cases involving serious fraud. The Serious Fraud Office does not investigate such offences committed in Scotland. However, in deciding whether to mount an investigation in relation to offences in England and Wales, it might need to rely on information that is held in Scotland. It is appropriate, therefore, that the special investigatory powers in the Criminal Justice Act 1987 are available to it.

The bill introduces violent offender orders for England and Wales. The UK and Scottish Governments wish to avoid the loophole that would exist if breaching such an order was not an offence in Scotland. A similar approach was taken in relation to serious crime prevention orders in the Serious Crime Bill this time last year.

The amendments to the Repatriation of Prisoners Act 1984 and related legislation will allow the UK to ratify the additional protocol to the Council of Europe convention on the transfer of sentenced prisoners. They will allow prisoners to be transferred without consent in limited circumstances—a change that has already been made for other parts of the UK and which has now been replicated for Scotland—and will deal with cases in which a prisoner has fled from one state to his own state by enabling the sentence to be executed in his home state. I do not expect either of those matters to be significant practical issues in Scotland. However, foreign national prisoners are a more significant issue in England and Wales and, by allowing those amendments to be made to the bill, we will allow the UK to ratify the additional protocol and benefit from its provisions.

In the memorandum, we note amendments to the provisions in the bill that establish a new commissioner for offender management and prisons. We welcome those changes, which will ensure that immigration detention premises and immigration custody activity in Scotland come under the remit of the commissioner, while ensuring that the Lord Advocate's primacy in relation to criminal prosecution and the investigation of deaths is respected. I note that those amendments were made by the House of Commons at report stage of the bill on Wednesday 9 January. The bill will now pass to the House of Lords.

I am happy to answer any questions.

Bill Butler (Glasgow Anniesland) (Lab): I extend to the cabinet secretary good wishes for the coming year.

The Government is proposing to the committee a perfectly sensible use of the legislative consent

memorandum procedure, but I have one question. The memorandum states that the Scottish Government is not proposing to introduce provisions in respect of violent offender orders through the bill. Are there any plans to initiate primary legislation so that violent offender orders are available in Scotland?

Kenny MacAskill: We take the same view that we take in relation to serious crime prevention orders: we should see how they work, and if they work well we will consider them. The legal term would be “the jury’s out”. We do not rule anything in or out; we will wait to see whether the orders are effective.

Bill Butler: Will you closely monitor the situation in that regard?

Kenny MacAskill: As with all such matters, we will keep a sharp eye on what happens. As the convener knows, we are monitoring the situation in relation to the monitoring of sex offenders. We will see how that develops. We want to find out whether serious crime prevention orders work in practice. As is always the case, it is possible for the theory to be great but for the practice and delivery to be not so good. However, if the orders are effective, we will be prepared to consider having them in Scotland.

Margaret Smith (Edinburgh West) (LD): Are you content that the Lord Advocate’s role in the investigation of deaths and criminal investigations will be safeguarded effectively by the amendments that have been lodged recently?

Kenny MacAskill: Absolutely. The bill affects the interface between reserved matters, such as immigration, and matters that are normally within the domain of the Lord Advocate and the Scottish system. However, we are absolutely satisfied that primacy remains with the Lord Advocate and that she—or whoever follows her—will deal with matters in the normal course of events.

The Convener: Under rule 9B.5 of standing orders, the committee is required to report on the memorandum. It need only be a short report confirming that the committee is content. Is the committee content?

Members indicated agreement.

The Convener: I thank the minister for his attendance.

10:25

Meeting suspended.

10:26

On resuming—

Subordinate Legislation

Emergency Workers (Scotland) Act 2005 (Modification) Order 2008 (Draft)

The Convener: The ministers and witnesses have now changed over, so we can turn to the next item on the agenda, which is subordinate legislation. The draft Emergency Workers (Scotland) Act 2005 (Modification) Order 2008 is subject to the affirmative procedure.

This is the first time that the Minister for Public Health, Shona Robison MSP, has appeared before the Justice Committee. I welcome her to the meeting. She is accompanied by Claire Brennan, who is interim head of the staff governance unit of the Scottish Government’s health workforce directorate; Kathleen Preston, who is a solicitor in the Scottish Government’s solicitors health and community care division; and Andrew Ruxton, who is a solicitor in the Scottish Government’s solicitors criminal justice, police and fire division.

I refer members to the draft order, paper J/S3/08/1/2, which is a cover note on the draft order, and the submission from Optometry Scotland. I invite the minister to speak to the draft order and to move motion S3M-1034.

The Minister for Public Health (Shona Robison): Thank you very much, convener. It is a pleasure to be here.

The Emergency Workers (Scotland) Act 2005 currently makes it an offence to assault, obstruct or hinder doctors, nurses and midwives who work in hospitals or anywhere else whenever they are responding to an emergency. It also makes it an offence to assault, obstruct or hinder ambulance workers, police officers and firefighters whenever they are on duty. It does not cover doctors, nurses and midwives who work in the community, unless they are responding to an emergency. We consider that to be a serious omission. Those staff, who have been specifically trained to deal with medical emergencies, undertake extremely valuable work in our communities. Their intensive training enables them to exercise the professional judgment that is necessary for appropriate intervention in emergency situations, in which they provide crucial assistance. They frequently deal with situations that involve serious injury, illness or death. Their specialist knowledge and the nature of their duties set them apart from other health workers, and obstructing or hindering their work can have extremely serious consequences for the people whom they are helping.

I am sure that all committee members are aware that a mindless minority thinks—sadly—that it is acceptable to abuse and attack those health workers. Such people ignore the vital service that those workers provide and the terrible impact that that abusive behaviour can have on staff morale and patient safety. Recent incidents have highlighted the vulnerability of those health workers in particular.

The purpose of the draft order is to extend the scope of the Emergency Workers (Scotland) Act 2005 so that doctors, nurses and midwives are covered whenever they are on duty. Doing so will mean that if they are assaulted, hindered or obstructed in carrying out their duties, action can be taken under the act against the perpetrator.

Violence, aggression or abusive behaviour towards our emergency health workers is abhorrent. The amendments that are outlined in the draft order send out the clear message that such behaviour is unacceptable and will not be tolerated. They also fulfil our commitment to extend the protection that is available to emergency health workers who operate in a community setting, and acknowledge the important contribution that they make.

I move,

That the Justice Committee recommends that the draft Emergency Workers (Scotland) Act 2005 (Modification) Order 2008 be approved.

10:30

The Convener: Few of us would disagree with what you have said, minister, but you will be aware that the committee has received representations from optometrists and physiotherapists. Should I assume that they have not been included in the proposals because their work is not emergency work?

Shona Robison: Yes. The Emergency Workers (Scotland) Act 2005 is quite tightly drawn. Those who are covered by it must come under its definition of emergency workers. You are correct to say that the workers whom you mentioned do not come under its auspices. However, they would be covered if they assisted someone who was covered by the legislation in dealing with an emergency and they would, of course, be covered by the common law on assault if they were assaulted in carrying out their work.

The Convener: I recollect that the basic purpose of the original legislation was to give emergency workers the same protection that police officers have under the Police (Scotland) Act 1967, which means that, on summary conviction, a person can be sent to prison for a maximum of nine months if they commit an offence of the type in question. Bearing in mind

that summary sentencing powers have been increased so that sentences of 12 months can be imposed, will we be giving emergency workers less protection than the rest of society?

Shona Robison: In December, the penalties under the 2005 act were increased to a 12-month sentence and/or a fine of £10,000. I am not sure whether committee members know that.

The Convener: I did not know that. Obviously, that obviates the potential difficulty, but the penalties for common-law assault, for example, will be the same as the penalties under the act.

Shona Robison: A serious common-law assault can, of course, result in a life imprisonment conviction. As you said, we are talking about summary cases and abusive behaviour that is short of assault but which nevertheless damages workforce morale. Such behaviour has been taken seriously and has been successfully prosecuted under the act; indeed, I can share with members information about the success of the 2005 act so far, if you wish, convener. In the light of that success, we want to ensure that we extend the scope of the act to include doctors, nurses and midwives who work in the community and whom we know from evidence are subject to abusive behaviour. Would you like me to share information about the success of the act?

The Convener: I do not think that there is any need to do so. Nobody doubts that additional protection should be made available to those whom you have mentioned, but it now appears that everybody is in the same position, because there can be a 12-month sentence on summary conviction for assault or breach of the peace. Obviously, the Lord Advocate would seek to indict more serious offences. As you properly said, life imprisonment would be the ultimate penalty.

Margaret Smith: The minister offered to give us more of a picture of what has happened since the 2005 act was passed. I would like to take up that offer. I was one of the people who were involved with the legislation. There were fairly tortuous discussions about where it should apply and whether somebody who was carrying an organ across a hospital car park would be protected by it. It would be useful to know what has happened.

I also have a question. What evidence—if any—is there from the period during which the act has been in force that shows that a change is needed? When the Emergency Workers (Scotland) Bill was being considered, your colleague Stewart Stevenson suggested what you have suggested, but the Justice 1 Committee did not accept his proposal. Is there any evidence from the period during which the act has been in force that makes you think that we should embrace such a proposal now?

The Convener: In order that we can justify Margaret Smith's tortuous examination of the original proposals, can the minister give examples?

Shona Robison: Okay. Enough time has passed since the legislation came into force to allow us to consider its success and the potential benefits of extending its scope to cover other staff. That is an important point.

I will share some information on the success that has been achieved so far. According to the most recent figures, 1,256 charges have been laid under the 2005 act, of which 1,008 have led to prosecution and, thus far, 594 convictions. A further 218 cases are on-going. Seventy-five per cent of cases that have led to prosecution have resulted in convictions, which is a very high number indeed. I suggest that that shows the success of the act.

We believe that it is necessary to cover those doctors, nurses and midwives who work in the community. I did the annual reviews in a number of health board areas, talked with staff and looked at some of the in-depth staff surveys that health boards regularly carry out. The picture of aggression and violence is very worrying, and the evidence suggests that nurses are particularly vulnerable. The media have recently highlighted some examples to show all too clearly how vulnerable general practitioners working in the community are. We believe that the 2005 act should be as successful for those working in the community as it has been for those working in a hospital setting and responding to emergencies there.

It is important to highlight the 75 per cent success rate, first, to let anyone thinking of indulging in such aggressive or violent behaviour know that they have a high chance of being prosecuted and convicted, and, secondly, to send a message to staff that we want them to record the incidents that take place—we know that there is an underreporting and underrecording of incidents—and that we want those incidents to be referred and taken further. That success rate should give encouragement to staff to do just that. I hope that the message will be that they are not referring incidents in vain, and that referring incidents has a high chance of leading to a conviction of the person who indulged in the behaviour.

Margaret Smith: I welcome the statistics that the minister has given us. Those of us who were on the Justice 1 Committee during scrutiny of the Emergency Workers (Scotland) Bill hoped that charges would be brought against people. The minister said that that would have a deterrent effect on those who are mindless enough to think

that aggressive and violent activities are those that they should be indulging in.

I do not know if it is too early to see whether or not there has been any improvement in the underreporting of violence against staff. You are saying that staff surveys have particularly highlighted the position of nurses and GPs in vulnerable situations. I do not disagree with that, nor would I diminish its importance. However, the main focus of the 2005 act was on emergency workers in emergency situations. Is there not a risk that, by moving to acknowledge the vulnerability of staff working in the community, we are moving away from the intended main focus of the legislation?

Shona Robison: I will cover the point about the figures first. There will probably continue to be an increase in the number of reported incidents. In some ways, that is a good thing—we want people to report. I am more concerned by underreporting. I do not want people to think that aggression and abuse are part of their daily working lives. They should not be for anybody, let alone our health workers. It is what we do about the increase in the figures that is important. We need to ensure that as many cases as possible go through to prosecution and, ultimately, conviction.

You made a point about the focus of the 2005 act. It is tightly drawn, defining those who are deemed to come within an emergency ambit. As you were involved in this yourself, you will be aware that the bill was extended to all those doctors, nurses and midwives working in a hospital setting. There is a certain logic to extending the provisions to doctors, midwives and nurses who are working in a community setting. It is unfinished business, if you like, and we want to address that today.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): We have had a number of briefings from organisations representing groups of health care professionals, including physiotherapists and optometrists. We have also had a briefing from Unison, which believes that the order has been drafted in haste and misses an opportunity to get the legislation to cover all public sector workers in the performance of their duties. Will you comment on that? Why did the Government not consult on the proposal?

Shona Robison: I am aware of the Unison briefing. We made a manifesto commitment on the matter, believing it to be unfinished business as part of the legislation. I have argued that consistently. The groups of staff that Unison mentions would be covered by the 2005 act only if they were responding to an emergency. Other than that, they would be outwith the scope of the 2005 act. To cover all the workers who are suggested by Unison—including, for example,

housing workers and traffic wardens—we would have to introduce new primary legislation rather than extend the act. As I said, those groups could not be covered under the 2005 act.

If there are groups of workers who believe that there is a case to be made for them, I would say that my door is always open and I am prepared to have further discussions about the matter. In fact, I am meeting Unison representatives on 4 February, and I am sure that the issue will arise. Most people in this room will appreciate that a number of recent cases have highlighted the particular vulnerability of people who work in the community. We can do something about that today, under the existing legislation. We want to do something as quickly as possible; that is why I am here.

Cathie Craigie: You have not answered my point about consultation. The ethos of the Scottish Parliament is based on an understanding that, when we introduce legislation, we can demonstrate that we have consulted the public. Why was there no consultation on the draft order? I am sure that there is a lot of opinion around. It might have been of assistance had dialogue taken place with the trade unions and professional organisations that represent workers.

Shona Robison: You are right to mention that there is a body of opinion out there, and many of the arguments have already been rehearsed—they were well rehearsed when the Emergency Workers (Scotland) Bill was going through Parliament. As I said, we believe that it is time for action and we can take action now. You are right to say that there is a further debate to be had about whether other public sector workers should have further protection, but that would require primary legislation. I am prepared to have that debate, and I am prepared to listen to people's views. I will do that with Unison soon.

The order represents an opportunity to extend the 2005 act as far as it should and can go, given how tightly the definition of “emergency” was framed. I believe that we can put right today an omission that was well debated when the bill was scrutinised.

Bill Butler: I welcome the figures that you have given the committee regarding conviction rates. Along with Margaret Smith and other former Justice 1 Committee members, I had the pleasure of interrogating the bill that eventually became the Emergency Workers (Scotland) Act 2005. The decision was taken not to include the sets of workers that you argue should be included by means of the draft modification order that is before us.

We made a fine distinction at the time. However, I think that there is a rationale, as you have said,

to protect workers in a community setting, which is basically what the modification order does. Is the Government minded to modify the act by extending it further, not to other public sector workers, because that would involve a raft of other services, but to other health professionals, such as physiotherapists and optometrists? Is there not a danger that, if we do that, the act will be too widely drawn rather than too narrowly drawn?

10:45

Shona Robison: The information that we have been given is that the 2005 act's definition of “emergency” is quite tightly drawn and therefore that we cannot simply include a lot of new workers in the act. Of course, doctors, midwives and nurses who are working in the community come under that definition because they could be dealing with something routinely that then turns into an emergency. Therefore, they are covered under the strict definition in the act and, as I said, it is logical to extend the cover that applies to doctors, midwives and nurses wherever they are working in a hospital setting to those who are working in a community setting. However, if a physio or any other allied health professional was assisting someone else in an emergency, they would be covered by the act.

You make a good point. The act was tightly drawn for a reason and there was great debate about it at the time. Today's extension will complete what the act was intended to cover. Not covering the staff in the community was an omission. The order will complete the act's scope and push its boundaries as far as it can go, but I do not believe that it can go any further than that.

Paul Martin (Glasgow Springburn) (Lab): Are there any statistics on reported attacks on registered midwives, registered nurses and registered medical practitioners?

Shona Robison: Are you asking about convictions?

Paul Martin: No—about reported incidents.

Shona Robison: The prosecutions that have been brought under the 2005 act are not broken down into staff groupings because the information is in an operational database. I asked that question myself, because I would have been interested to know the breakdown of staff, but the information is not available at the moment.

We have a bit of an issue with data collection on the matter. Back in 2005, data were collected on a national basis but, after that, the process was changed to data being collected health board by health board. Each health board might do that in a slightly different way, so there are issues with the figures' accuracy and consistency. I want to

ensure that we address that issue and, at the moment, we are considering ways of improving the quality of the data and getting a more accurate picture of exactly what is going on in relation to violence and abuse towards our staff.

Paul Martin: I have a constructive point to make on that. Long before the Emergency Workers (Scotland) Act 2005, I lodged an amendment to the Criminal Justice (Scotland) Bill to enable that legislation to cover attacks on emergency workers, so I am not opposed to the principle. However, I return to Cathie Craigie's point about Unison's accusation that the order was drafted in haste. Surely we should have the statistics. I would be interested in them and would be very concerned if there were significant figures for attacks on midwives; on the other hand, I am sure that the profession would not want a picture to be presented of reported attacks on midwives if such attacks are not happening. A consultation would have allowed for the collection of those statistics and for a more informed debate on whether the extension is needed. I am not speculating either way about that need, but I would have welcomed more specific statistics on the three categories of staff that are covered in the order—registered medical practitioners, registered nurses and registered midwives.

Shona Robison: We know that 28 per cent of overall respondents to the most recent national health service staff survey—the 2006 survey to which I referred earlier—have personally experienced a violent or aggressive incident and that nurses are the staff group most likely to experience such incidents, so there is evidence. All I am saying is that we need to get better at collecting the data throughout Scotland.

A picture has emerged in a number of surveys over the piece. For example, the British Medical Association has done surveys. A recent survey highlighted the fact that one doctor in three had experienced some form of violence in the past year. Evidence exists but, as a health service, we need to get better at ensuring that the statistical information that we gather on an on-going basis enables us to examine trends and determine whether the act is beginning to address and reduce violent incidents by changing public attitudes. We need to have good information to be able to do that.

John Wilson (Central Scotland) (SNP): Does the minister agree that part of the problem with gathering data is the reporting by staff? The data will only be as good as the number of reports that are received and, if staff do not feel that the reports that they make are being logged or collated, we may be working with grossly inaccurate figures.

Shona Robison: There is a huge responsibility to overcome any culture that accepts violence or

aggression as part of the work that one is expected to do in any workplace. That culture exists in certain areas and managers have a huge responsibility to ensure that they give their staff the message that they want them to record every single incident that occurs so that we can get an accurate picture. The 75 per cent conviction rate in prosecutions under the act sends an important message—which we will attempt to get out to managers and which they need to tell their staff—that it is absolutely worth while not only to report incidents, but to enable them to be taken further. That will send a message not only to staff but to the public that aggressive and violent behaviour towards staff will not be tolerated but will be pursued if anyone indulges in it.

Important cultural changes are still to take place, and we need to encourage them.

John Wilson: I was struck by your comment that, prior to 2005, the information was collected centrally but it is now collected by individual health boards. Will you issue ministerial guidance to health boards on how to collect that information so that we can ensure that they all collect it at the same level?

Shona Robison: We are considering ways of standardising data collection in order to collect more robust national data. We want the information that we have from each health board to be based on the same criteria and to be equally accurate. We are working actively to do that and to ensure that we get an accurate picture.

John Wilson: I am picking up some concern that other workers in the health service and more widely are excluded from the modification order. If evidence was to come forward that other workers in the health service or, following your meeting with Unison in February, other workers in the public sector were suffering the same level of abuse and attack, would you and your ministerial colleagues introduce legislation to rectify any problems that may exist?

Shona Robison: I reiterate that it would not be possible to do that under the 2005 act because it is tightly drawn, but what I said earlier stands: if there are particular arguments that other public sector workers are not getting the protection that they should have, I will consider them. However, I point out that other changes have been made since the 2005 act. For example, social workers have been given additional protection under the Adult Support and Protection (Scotland) Act 2007, which makes it an offence for a person to obstruct another person who is going about their duties under that act. That applies to social workers, so progress has been made for that group of staff.

My door is open—I am happy to hear from Unison and others on whether primary legislation

is required. I am not minded at the moment that that is necessary, but I am prepared to listen to the arguments.

The Convener: A number of issues have arisen, the first of which is that, by whatever standards the registration and statistics are drawn, it is still depressing and deplorable that almost 1,000 people in Scotland have been convicted of assaulting emergency workers since the act was passed. That must concern us all.

The secondary aspect is that, clearly, we wish everyone to receive the maximum amount of protection possible while they are performing their duties. I am a little bit uneasy that someone who is convicted under the existing legislation—and the extended legislation if the committee is so minded—would face a maximum sentence of nine months, whereas under common law, if the fiscal were to go down that route, a sentence of 12 months might be imposed. That needs to be considered and, if necessary, the existing statute should be amended to increase the penalties. On that basis, I invite the minister to sum up.

Shona Robison: I reiterate that since 10 December 2007, the maximum penalty is 12 months' imprisonment or a £10,000 fine, or both, under the Emergency Workers (Scotland) Act 2005. I welcome that.

A number of issues have been raised today. The main point, in summary, is that we recognise that staff in the public sector—and indeed the private sector—should be able to go about their business without facing aggression and abuse from those who are using their services. Those who are working in the health service in the community carrying out the duties of a doctor, midwife or nurse are particularly vulnerable to abusive behaviour and should be accorded the same protection as they would be if they were working in a hospital setting. That measure will put right something that was omitted when the 2005 act was passed.

I take your point that the high level of prosecutions and convictions is alarming. On the other hand, I would rather that the people who behave in this way actually feel the force of the law and that we can say that the legislation has been successful. When the legislation applies to those doctors, nurses and midwives who work in the community, they will be afforded the same level of protection and I am sure that that will be reflected in the statistics that are produced over the next few months.

The Convener: Thank you.

Motion agreed to.

That the Justice Committee recommends that the draft Emergency Workers (Scotland) Act 2005 (Modification) Order 2008 be approved.

The Convener: I thank the minister and her team for their attendance.

10:58

Meeting suspended.

11:00

On resuming—

Police (Promotion) (Scotland) Amendment Regulations 2007 (SSI 2007/528)

Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2007 (SSI 2007/533)

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2007 (SSI 2007/535)

Licensing (Vessels etc) (Scotland) Regulations 2007 (SSI 2007/545)

Act of Sederunt (Fees of Sheriff Officers) 2007 (SSI 2007/550)

The Convener: Item 3 is also subordinate legislation. There are six instruments for consideration under the negative procedure. Members have the papers before them.

Members have no comments on the first five instruments. Are we content to note them?

Members indicated agreement.

Licensing (Fees) (Scotland) Regulations 2007 (SSI 2007/553)

The Convener: Members will be aware that concern has been expressed about these regulations, on which representations have been received from the licensed trade. The committee has until 28 January to consider the regulations. Therefore, if members are so minded, we are in a position to take evidence on the regulations from the cabinet secretary at next week's meeting. However, I highlight the fact that any member who wishes to lodge a motion to annul the regulations will need to do so at the chamber desk before that meeting.

Margaret Smith: We all received representations from the trade, including from the Scottish Beer and Pub Association. For my part, putting those issues to one side, I am concerned about the way in which the matter has been handled. The regulations were laid at the 11th hour. In effect, the committee is in a fait-accompli situation where a delay would have an impact. We should ask the cabinet secretary next week—and we should ask our clerks—what the impact would

be of our trying to delay the regulations while the key issues are considered. We want to consider a number of issues further, so I suggest that we take evidence from the cabinet secretary next week.

The trade has clearly outlined its concerns, but there is also an issue about the handling of the matter. The regulations went out to consultation on the back of research that cost the public purse thousands of pounds. The consultation was undertaken on the basis that the fees would double, but by the time the regulations were laid the fees had doubled again. In effect, the fees quadrupled without the trade or anyone else who was party to the consultation being told that there had been a substantive change.

There are also some omissions. For example, there do not appear to be fees for the transfer of licences. We are told in the paperwork from the Government that it is trying to take an equitable approach, yet the regulations deal with private clubs in a different way, which in effect requires the trade to cross-subsidise them.

There are issues about both the fees and the policy, but there are also concerns about the way in which the regulations were consulted upon and, therefore, the position that the committee has been put in. Many questions exist, so it is regrettable that, if we annulled or knocked back the regulations, I understand that that would have an impact on the time that is specified for bringing the regulations into force.

It could be argued that the fees for publicans and traders whose premises have lower rateable values are not large—none of us would argue that they are—but they are being introduced in the context of other issues for the trade and the fact that we still await further indications from the cabinet secretary of what will happen under the polluter-pays direction of travel that he has adopted. This is a period of flux and change for the trade and I share its concern about how it has been treated in relation to the regulations. I would like the cabinet secretary to appear before the committee to answer our questions.

Paul Martin: My view has always been that the trade should meet the costs of regulation and that fees should reflect that. However, we should refer to the trade on such costs and ensure that whatever fees local authorities charge are intended only to regulate and not to profit from the market.

We require further information on several aspects of the regulations. Consultation of various licensing stakeholders took place from June to September 2007 and I would welcome sight of the responses. If local authorities raised substantial concerns about the level of fees, the committee must reflect on that. If local authorities did not say

that fees were required to be significantly increased, that would raise the question of why we have reached the present stage. We also need a more detailed paper on the research that has been undertaken on fees both previously and more recently and which resulted in the Government's proposal to double fees.

I have always been firm on ensuring that the licensed trade meets its responsibilities, but the Government also has a responsibility to be fair to the trade, which it does not appear to have been in the regulations. The cabinet secretary will have his opportunity to respond to that.

Bill Butler: I agree with Paul Martin. I think that we all agree that the trade should meet the cost of regulation—there is no argument about that. As Paul Martin and Margaret Smith said, a variety of questions needs to be put to the cabinet secretary. I would welcome the committee inviting him to come along to answer the concerns.

I do not know whether it is possible, but could we ask the cabinet secretary or his officials to write to tell us why, when the regulations were laid on 10 December 2007, the fees were double those that had been consulted on? That would mean quadrupling fees, as Margaret Smith said. I would appreciate seeing the rationale for that, which we do not have. If we had that reasoning, we would be better able to interrogate the cabinet secretary with some specificity.

The Convener: We will write to ask for that information.

It would be useful for the paper that the clerk will produce to contain comparators—to show how much a public house at the lower end of the scale pays now and how much it would pay under the regulations and to extrapolate that to a three-year figure, bearing in mind that renewals will not be the issue that they once were. That would give us a balanced comparison.

Nigel Don (North East Scotland) (SNP): As we are asking for specific information, can we also ask for guidance on the new licensing standards officers that are introduced under the Licensing (Scotland) Act 2005? The regulatory impact assessment points out that there must not be a funding gap for those. This may show my own ignorance, but I would like some idea of how many such officers people think that there should be, what they will do and how much that will cost.

The Convener: It is not a question of your ignorance but that you were not a member of the Parliament when the legislation was considered by the then Local Government and Transport Committee about three years ago. I am sure that the relevant papers would have been submitted at that time. We can probably rely on the good

offices of the clerk to ensure that you are provided with copies of anything useful in that respect.

Nigel Don: My point is that we perhaps need an update on how many licensing standards officers councils think that they might need. Councils might now have a better view of those costs, on which they could only speculate three years ago.

The Convener: We should be able to compare the situation when the legislation was passed with the likely situation today, given that local authorities have now taken on staff to ensure that they have the appropriate number of licensing standards officers. That calculation should be fairly simple once we have the information. Are you satisfied that we ask for that?

Nigel Don: Yes.

Cathie Craigie: I agree with the concerns that colleagues have raised. I seek clarification on what the convener said in his opening comments about the requirement to lodge a motion to annul with the chamber desk prior to our next meeting. What status would such a motion have if our questions were answered when we hear from the minister and other interested parties? Could the motion then be withdrawn?

The Convener: Once such a motion was lodged with the chamber desk, the motion would become the property of the committee. On the basis of the motion, we would then have to decide at the conclusion of next week's deliberations either to accept or to reject the regulations. However, if the member who lodged the motion was generally satisfied that the cabinet secretary's assurances were acceptable, the motion need not be moved. As such, the motion would automatically fall.

Margaret Smith: Nigel Don asked how many licensing standards officers will be required and what they will cost. I understand that, as part of the research that was undertaken, licensing authorities were asked what they thought their costs would be under the new regime. I think that I am right in saying that those costs would have included the cost of taking on licensing standards officers. Clearly, as Paul Martin pointed out, we need a better understanding of what the research actually covered. That would probably pick up that point.

Another small matter is that somewhere in the paperwork that we received—I have been unable to find the reference again—the Government uses phraseology about the need for fees to have a relationship to the costs involved. Although I accept the point that local authorities need to cover their costs through the fees, the phraseology used is a little bit less clear. Rather than provide licensing authorities only with the ability to cover their costs, the regulations may give a degree of flexibility that allows them to raise funds that more

than cover their costs. Perhaps the clerks could check that out for us.

Further to Cathie Craigie's question, I suggest that it would be prudent for us to lodge a motion to annul, which I hope need not be moved once we have had the evidence session next week. Perhaps the convener could give some thought to lodging such a motion on behalf of the committee to ensure that we have that opportunity.

11:15

The Convener: I will give that some thought but, of course, another option is open to the committee, which is that if we are not satisfied at the end of our deliberations, we can simply reject the regulations.

Margaret Smith: I am seeking a way forward that does not necessarily lead us to the nuclear option, because people often step back from that. If we take on board some of the issues, but we do not accept what the minister says to us next week, we want a range of options to be available to us. I hope that by the time we get to next week, we do not have to take any of those options and that we can simply step back and accept what the minister says.

The Convener: I will reply to that in a second.

Nigel Don: Just to help Margaret Smith out, I suspect that she was looking at regulation 13, which includes the phrase:

"are likely to be broadly equivalent to the expenses".

I am grateful to Margaret Smith for bringing that up because if we are going to pick over the regulations, it might be useful if someone told us what that phrase actually means in statute. I do not know whether it is a typical term.

Paul Martin: Would it be appropriate for the committee to take evidence from the Convention of Scottish Local Authorities or some other representative body of the licensing authorities, so that we are aware of the strength of feeling about the case for capping the fees at a higher level? If the minister wants to make a case on behalf of the licensing authorities, that is up to him, but it would be helpful to hear from them either in writing or through taking oral evidence.

Bill Butler: Having heard what Paul Martin said, I think that it would be sensible to ask COSLA for some written evidence, so that that is before members and therefore need not take up any time during our next meeting.

I have a question for the clerks, convener. Margaret Smith talked about a range of options. I might be wrong—it would not be the first time—but there is not really a range of options. A motion to annul has the same effect as voting down an

instrument. If we really feel that we are not persuaded by what the cabinet secretary has to say, we can take the nuclear option, although I hope that we will not have to. There is nothing additional to be gained by lodging a motion to annul. I ask the clerks to let me know whether I am correct.

Douglas Wands (Clerk): For a negative instrument, either the committee can simply note the instrument as made, and it would pass through the Parliament, or a motion to annul can be lodged. If it is agreed to by the committee, that motion would then require the Parliamentary Bureau to schedule some time in the chamber for the full Parliament to consider the instrument. If a motion to annul is lodged by a committee member, the committee would require to consider it at its next meeting with the involvement of and a contribution from the relevant Scottish minister. The committee would then reach a decision on the motion at the end of the debate.

Bill Butler: That would give the committee greater ability to interrogate the cabinet secretary and use parliamentary procedure rather than simply voting down the regulations.

Douglas Wands: Yes, indeed. In fact, the only way to vote down the regulations is to lodge a motion to annul.

Bill Butler: I am grateful. That clears it up, convener.

The Convener: That was a useful contribution, and it enables me to come back to Margaret Smith's point. A motion to annul would be the best way of proceeding because the matter is controversial and, at the end of the day, it might be one on which the full Parliament should make a determination.

Bill Butler: On that point, are you saying that, as convener of the committee, you would be willing to lodge a motion to annul the regulations, which we could keep in our back pocket, but which we hope would not have to be moved?

The Convener: The problem is that, if I were to do that, I would be committing myself in advance of hearing what the minister has to say.

Bill Butler: With respect, convener—

The Convener: I know what you are coming to. To some extent, I am thinking aloud, which I am entitled to do. As I see it, we can arrive at a determination in two ways. First, the committee can consider the representations that are made next week and then vote against the regulations, in which case there would be no further option. However, if a motion to annul were lodged, the matter would go back to the Parliament. That is obviously the preferred option and I will ensure that an appropriate motion is lodged.

John Wilson: Would it help if, rather than your lodging such a motion, the deputy convener was prepared to do so? That would free you up to convene the meeting.

The Convener: Any member can lodge a motion to annul.

John Wilson: Any member can do so, but the deputy convener could take responsibility for lodging the motion on behalf of the committee.

The Convener: Is Mr Butler prepared to take that responsibility?

Bill Butler: I am prepared to discuss with you which of us would be the most appropriate member to lodge the motion. I do not have a problem with that. The main objective is to do what serves the committee and, ultimately, the Parliament best.

John Wilson: I am just proposing that you follow a guide that I use in public life for the chairmanship of meetings, convener. That would be fairer on you.

The Convener: Your point is well made.

Bill Butler: I follow that same guide. It is by Citrine and it is very good.

The Convener: There is general agreement that there is concern about the regulations. *[Interruption.]* I am sorry, does someone else have a comment?

John Wilson: I want to address the point that was made about the fees that the regulations seek to set. I note the comment that the cabinet secretary made at the foot of his letter to the committee, where he talks about calling on the Accounts Commission to investigate the fees that boards set, so there is a back-up as regards the fees that will be applied. The Licensing (Scotland) Act 2005 said that boards should only set fees that allow them to recover their costs and should not profit from fees that are excessive.

The Convener: That is perfectly correct, but it is perhaps more a matter for next week's meeting.

Paul Martin: I am sorry to labour the point, but in relation to John Wilson's point about the independence of the convener, my understanding is that a committee convener can move any motion or amendment that they wish to. When the convener considers the matter offline, after the meeting, he should be clear that if he were to move a motion to annul the regulations next week, that would not present a difficulty as regards his convener'ship.

The Convener: A problem would arise if, once I had listened to the arguments, I did not wish to move the motion. At that stage, it would be up to

another member to move it. That would seem to resolve that difficulty.

Do members have any other points, before I try to pull together the threads of our discussion?

Bill Butler: You should pull together the threads of the discussion.

The Convener: First, it is agreed that consideration of the regulations be continued next week, when we wish to take evidence from the Cabinet Secretary for Justice. We will also seek written evidence from COSLA. The decision on who should lodge a motion to annul is remitted to me and the deputy convener, with the agreement of the committee that such a motion will be lodged, for use in the event of the committee not being satisfied. Is that a reasonable summing up of the situation? Margaret Smith clearly thinks not.

Margaret Smith: There is just one omission, which relates to the technicalities. We have received substantial representations from the trade. If we are to ask for written evidence from COSLA, we could keep ourselves right by asking the trade whether it is content for the written submissions that it has made to us so far to stand or whether it would like to add to them. We should ensure that there is a balance. The trade might have some thoughts on what has transpired today, for example. I would much prefer us to go into next week's meeting in the knowledge that there was a proper balance in the evidence that we had taken from COSLA and the trade and what we were to hear from the minister. That is one small additional suggestion.

The Convener: We will ask the trade whether it wishes to supplement the written evidence that we have already received. Is that agreed?

Members *indicated agreement.*

The Convener: That concludes the public part of the meeting. I thank the members of the public for their attendance and ask them to withdraw.

11:25

Meeting continued in private until 12:38.

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