JUSTICE COMMITTEE

Tuesday 1 September 2009

Session 3

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CONTENTS

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JUSTICE COMMITTEE
22nd Meeting 2009, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Angela Constance (Livingston) (SNP)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

George Burgess (Scottish Government Criminal Justice Directorate)
Kenny MacAskill (Cabinet Secretary for Justice)
Denise McKay (Scottish Government Legal Directorate)
Tony Rednall (Scottish Government Criminal Justice Directorate)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 1 September 2009

[THE CONVENER *opened the meeting at 16:03*]

Subordinate Legislation

Knife Dealers (Licence Conditions) Order 2009 (SSI 2009/217)

The Convener (Bill Aitken): Good afternoon, ladies and gentlemen. I open the meeting by reminding everyone to switch off their mobile phones and expressing the wish that everyone had a pleasant summer. There are no apologies because, as usual, there is a full turnout of the committee.

Item 1 is consideration under the negative procedure of two Scottish statutory instruments on knife dealers. Members' attention is drawn to the cover note on the first order, which is paper 1. The Subordinate Legislation Committee initially questioned the powers that were used to make the order, but it was satisfied with the response that it received. Do members have any comments?

Robert Brown (Glasgow) (LD): If I understand it, the licensing regime comes into force on 1 September—that is, today.

The Convener: That is correct.

Robert Brown: I wonder whether, in relation to both the order that we are discussing and the next one, there is any hangover point. The regime comes into force today, but we are dealing with the orders today as well. Does that create any problems with councillors' ability to deal with licensing?

The Convener: My understanding is that it does not. Albeit that we are dealing with the matter only today, the regime will have taken effect.

Robert Brown: Thank you.

The Convener: Can we agree to note the order?

Members *indicated agreement*.

Knife Dealers (Exceptions) Order 2009 (SSI 2009/218)

The Convener: Members' attention is drawn to the cover note on the second order, which is paper 2. The Subordinate Legislation Committee drew the order to the attention of the lead committee and the Parliament on the ground that its meaning could be clearer in relation to the extent to which persons are treated as "qualified to teach" fencing. The Subordinate Legislation Committee considered that clarity is particularly important, as only qualified persons will be exempt from the requirement to hold a licence and not having an appropriate licence will be a criminal offence from 1 September 2009.

Are members content to note the order?

Members *indicated agreement.*

The Convener: We will have a brief suspension while the witnesses for the next item come to the table.

16:05

Meeting suspended.

16:06

On resuming—

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener: Item 2 is our final oral evidence-taking session on the Criminal Justice and Licensing (Scotland) Bill. The majority of the questions will be on the licensing provisions, with which we will start. After dealing with that issue, we will return to the criminal procedure questions that we did not have time to cover when we last considered the bill.

I welcome to the committee the Cabinet Secretary for Justice, Kenny MacAskill. On this occasion, he is supported by George Burgess and Tony Rednall, of the Scottish Government criminal law and licensing division, and Craig McGuffie, principal legal officer in the Scottish Government legal directorate.

Stewart Maxwell (West of Scotland) (SNP): My first question concerns the task group that was established by the previous Executive to review the provisions in the Civic Government (Scotland) Act 1982. I believe that the report of the task group was published in 2004. According to evidence that the committee has received, only some of the task group's recommendations have been taken forward. Why did the Government take that approach?

Secondly, why is the 1982 act merely being updated rather than being replaced?

The Cabinet Secretary for Justice (Kenny MacAskill): The 1982 act has served Scotland well and, rather than replace it, we have sought to build on it and enhance it. It seems to us that we should seek to improve something that has worked reasonably well rather than making a change for the sake of it.

On your first question, all but two of the recommendations of the task group that require legislation have been taken up. One recommendation that we have not taken up is that a section be renamed "Late Hours Food and Drink Provision". The issue of nomenclature is dealt with elsewhere.

The other recommendation that we have not taken forward is

"that a statutory obligation should be placed upon licensing authorities to ensure that any licensing requirements they have in place are adequately enforced."

We do not think that such a statutory obligation is required, as section 9(2) of the 1982 act includes a provision requiring activities to be licensed where a resolution is made. Therefore, the duty that is asked for already appears in that act.

One other recommendation requiring legislation does not appear explicitly in the bill. However, we intend to deal with that through the enabling power in section 121, which will allow Scottish ministers to prescribe by order a variety of matters.

Stewart Maxwell: Thank you for clarifying that.

Section 121 enables ministers to set mandatory conditions and licensing authorities to set standard conditions for licences granted under the 1982 act. We have heard evidence that such mandatory conditions are a radical departure from the 1982 act and will not allow licensing authorities to take local circumstances into account. A number of licensing authorities have also suggested that there should be a transitional period to allow them to draft, consider and publish standard conditions. What were the reasons for creating such mandatory conditions? Will you accept the proposal that a transitional period be introduced?

Kenny MacAskill: Several issues are involved. Obviously, the power to set mandatory conditions allows for the implementation of some of the task group's recommendations, for example on the carrying of licences, in a more flexible way. We accept that the setting of mandatory conditions has the potential to limit local flexibility. Whenever they exercise the power, ministers will need to be aware of that. We are seeking an appropriate balance between matters that require to be dealt with uniformly and those that require to be dealt with on a much more localised basis. We recognise the need for a transitional period in which local authorities can set standard conditions. We will consider that carefully as part of implementation.

Stewart Maxwell: Do the mandatory standard conditions not remove local flexibility to such an extent that local differences in circumstances will be ignored?

Kenny MacAskill: No. It is a matter of getting a balance. Clearly, there are instances when it is appropriate for matters to be dealt with uniformly across the country. Equally, there are instances when an element of more localised treatment is required.

As I said, we need to recognise that there will be instances when ministers of whatever political hue will seek to do things a bit more rigidly. Equally, there will be instances when it will be appropriate for them not to do things in that way. My take on the issue is that mandatory conditions will have to be used sparingly.

Stewart Maxwell: I will push you on that. Will you give specific examples of conditions that will be national and mandatory and conditions that will be localised and flexible?

Kenny MacAskill: I will leave the specifics to George Burgess.

George Burgess (Scottish Government Criminal Justice Directorate): It might be helpful if I explain the genesis of the mandatory conditions power. In response to your previous question, the cabinet secretary said that one recommendation was to make it mandatory that the licence holder should carry the licence, or a copy or plate of the licence. We felt that the easiest way in which to achieve that would be to create a power to set mandatory conditions. Given that the 1982 act covers a variety of licences, we felt that it would be better to create a power than to write directly into the 1982 act a different type of condition for each type of licence. That was our starting point for creating the mandatory conditions power. We do not have a long list up our sleeve of other mandatory conditions that we are looking to insert by way of the power.

The origin of the standard conditions recommendation in the task group's report was a concern that licences can be granted by default. At present, if the licensing authority does not consider the application within a sufficient timeframe, the licence is granted unconditionally. Standard conditions are created as a set of conditions that apply automatically to any licence that is granted by default. For most types of licence, most local authorities have a set of standard conditions. As the cabinet secretary said, before the provision is brought into force, plenty of time will be allowed for local authorities to determine and fix their standard conditions.

Stewart Maxwell: That is helpful.

The Convener: As there are no further questions on the task group report or mandatory and standard conditions, we move to questions on the licensing of taxis and private hires.

Nigel Don (North East Scotland) (SNP): Good afternoon. My question is on section 124, which lays down that licensing authorities will have to set taxi fares every 18 months and review charges following consultation with the appropriate people. I have no problem with the drafting, but how will that work in practice? Will we see a rolling review with fares set every 18 months or will there be consultation periods of a few weeks or months every 18 months?

16:15

Kenny MacAskill: My understanding is that 18 months will be the maximum period for carrying out such a consultation. The approach takes forward a task group recommendation and it is important to remember that it clarifies an interpretation of the current conditions as contained in the 1982 act.

Our understanding is that most authorities have been working on the basis that the review process should be completed within 18 months. We are not aware that compliance has caused undue difficulty. The 18-month period is not meant to be viewed as a rolling review period—unless an authority wants to do that. If an authority decides to review fares, the consultation period should be no more than 18 months, and the authority should seek to complete the consultation in less time than that.

Nigel Don: Are there sanctions on a licensing authority that fails to set its charges in the right period?

Kenny MacAskill: None is specified. I am not aware of sanctions being required or of any breaches. I know from my experience with the City of Edinburgh Council that the taxi trade is not shy in coming forward if it thinks that there are matters that are prejudicial to its financial wellbeing. To some extent, there is an in-built mechanism for local authority accountability, given that councillors are lobbied by the trade.

If people think that a fail-safe mechanism is necessary, I am more than happy to consider the issue. However, neither the trade nor councils think that it is necessary, and it appears that everything is dealt with within 18 months.

Nigel Don: It appears to be a classic case of, "It ain't broke, so don't fix it."

The Convener: If there are no more questions on the issue, we move on to consider the provisions on miscellaneous licences.

Bill Butler (Glasgow Anniesland) (Lab): Section 125 will remove the exemption for non-commercial organisations from the requirement for a market operator's licence, and section 126 will remove the exemption from the requirement for a public entertainment licence for free events. Witnesses have suggested that the approach will increase costs for charity, community and other such groups and might discourage such groups from holding events. How do you respond to such concerns?

Kenny MacAskill: The removal of the exemptions will not prevent local authorities from creating their own exemptions for some or indeed all of the organisations that currently benefit from exemptions. Paragraph 563 of the explanatory notes says that although the change

"will bring charitable organisations etc within the scope of the licensing provisions, licensing authorities have discretion as to whether to charge reduced or no fees to such organisations."

Many local authorities set different charges for different bodies or types of events. The changes will give greater local flexibility and will help to

prevent some of the abuses that the task group noted in its report.

Bill Butler: Is it realistic to presume that local authorities will use their discretion and not charge such organisations, given the current economic climate? If local authorities are allowed to charge, they will surely do so.

Kenny MacAskill: It is for local authorities to decide on such matters and to be held accountable to their electorate for their decisions. We must allow local authorities to make a decision. Some licensing authorities might decide that a charge is appropriate; they will have to answer for that to the council and to the electorate. Some might decide on a reduced charge, depending on the event for which the licence is sought—a car boot sale or whatever. The approach recognises that Scotland is a varied country. In a recession, we want to ensure that the voluntary sector is catered for, but the best people to make that judgment are the members of the local authority, who will take account of the needs of charities and the wants of the community.

Bill Butler: Will the approach not lead to an absurd situation, whereby a branch of an organisation in one local authority area will be charged and a branch of the same organisation in another area will be exempt? Is that not unfair?

Kenny MacAskill: That is democracy.

Bill Butler: Equating democracy with absurdity and unfairness—if that is what you are doing—is not the way to go. Surely the approach will be a hostage to fortune. We should not be withdrawing the exemptions; there is no need to do so.

Kenny MacAskill: Local authorities already decide the charges that they levy. It is about allowing local authorities to use the common sense that they are born with and to represent the area to which they are accountable.

Bill Butler: I could say common sense, that most uncommon sense, but I will refrain from quoting the poet. Does the cabinet secretary not understand that the committee's information is that the revenue of most village halls is about £3,000 a year or less and that the average fee for such licences is about £200 a year? Will such a fee not be a bit of a burden on those whose local authorities are, according to your definition, less democratic than others?

Kenny MacAskill: I trust these matters to the judgment of the elected local councillors; it is not appropriate that they should be specified from St Andrew's house or Victoria Quay. There are good reasons why, in Scotland, we allow these matters to be decided by the locally elected representatives, who are closest to the people and are able to meet those concerned and take the nature of the village hall into account; they know the organisations involved and in many cases they know the people involved personally. In some instances, different fees may be charged by different local authorities, but that already happens in relation to a variety of matters.

Bill Butler: Should we encourage it in relation to this matter?

Kenny MacAskill: It is for local councillors to use the common sense that they are born with to recognise that many parts of the voluntary sector do an excellent job with a limited budget. They know the organisations and their communities, and I want to give them the flexibility to do what they think is appropriate. They will ultimately be held to account—as you and I are—by the electorate.

Bill Butler: Once every four years, which means that, for four years, events may not be held that have been held for 50 years.

Kenny MacAskill: As we heard, the same issues arise in relation to taxi fares. There is a constituency of interest that will not be shy in coming forward. We should trust the ability of councillors, of whatever political colour, to make an appropriate decision to represent what is needed in their communities.

Bill Butler: I do not agree with you, cabinet secretary, but I hear what you are saying.

Robert Brown: I will pursue that issue with the cabinet secretary, if I may. The bill is designed to remove a current exemption; in other words, there will no longer be a general exemption. Would it not be preferable to do this the other way round and give councils the power to charge without automatically removing the exemption? I can understand that large events of one sort or another might need to be covered by the provisions, but in relation to the typical women's guild event, summer gala or a similar event at a modest level, it strikes one that a sledgehammer is being used to crack a nut. What are your thoughts on fiddling about with the formulation of the provision?

Kenny MacAskill: Would George Burgess like to comment?

George Burgess: Yes. The answer to that question lies in the transitional provisions. Perhaps it will be helpful if I set out our intention in that regard. When these provisions and the ones on scrap metal dealer licensing and so on come into force, the default position will be whatever the local authority has already decided is the scope of the licensing scheme in its area. Of course, most of those are optional licensing schemes that the local authority elects to apply or not and whose precise scope it determines. On day one, the

licensing scheme will apply to precisely what it applied to before the provisions came into force. It would take an active decision by the local authority to decide to apply the provisions to those organisations or events that are currently covered by the exemption. There will not be an automatic application of the provisions to those organisations or events. That is not in the bill; it will be covered in the transitional and commencement provisions, but that is the effect that we are looking to achieve. There will not, on day one, be any requirement to license voluntary organisations or the like. It will be down to the local authority to take that step, which they currently cannot take, if they see a need to apply the provisions to that class of body.

Robert Brown: That may help, but I will pursue another issue, which is discretion—Bill Butler may have touched on the issue. We have been asked whether local authorities have discretion not only to bring the scheme in or not to bring it in, but to bring it in for certain types of organisations and to exempt certain others—to charge some people and not others. Will the local authority have full discretion on all these matters and not just on whether to have a scheme?

George Burgess: Yes.

Robert Brown: Can you point us to a provision in the bill that identifies that?

George Burgess: I think that it is in section 9 of the 1982 act rather than in the bill. I think that it is section 9 and that another section is linked to that. However, we are satisfied that local authorities have discretion in licensing and in relation to fees. If you look at the fees that are currently set by local authorities for different licensing systems, you will see that that discretion already exists and is used.

Even going back to some of the earlier questions, I think that there is provision in paragraph 15 of schedule 1 to the 1982 act on how local authorities are to set the fees. Essentially, it is looking for a cost-recovery regime, so licensing is not intended as a cash cow for local authorities. As the cabinet secretary has said, there would be quite a bit of fuss if local authorities attempted to use the licensing scheme in that way.

Robert Brown: It is fair to say that there is some concern among the committee about the direction of travel of these provisions. I appreciate that you have identified the linkage between the 1982 act and the current bill, but it might be helpful if the Scottish Government could give us an explanatory note that goes into the matter in a bit more detail. I know that you have dealt with some of it in the evidence today, but I would personally like to look at it a bit more closely and ensure that it does exactly what you say on the tin that it does and that we have chapter and verse on it. That would be helpful to the committee.

The Convener: It would indeed. As I recollect from local government days, the section 9 resolution under the 1982 act worked reasonably satisfactorily. However, you will already have got the impression from the committee that there is some anxiety over this section of the bill, cabinet secretary, so we would appreciate clarification on it.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Cabinet secretary, you will not be surprised that committee members used the explanatory notes and the policy memorandum to guide us in getting into the policy intention of particular parts of the bill. Part 8 covers sections 121 to 128. The policy memorandum covers all those sections except for section 125, so it is silent on the Government's policy intention on that issue. Do you believe that charitable organisations should be brought within the bill's scope?

Kenny MacAskill: I believe that local authorities should be given the discretion to act according to how they see matters in their area. As I said to Bill Butler, it is clearly appropriate to look after the interests of the voluntary sector, especially in a time of recession. Equally, we all know that there are areas in each constituency where voluntary organisations can sometimes be viewed as impeding legitimate trade. It may be felt that that is inappropriate and that there should perhaps be the same level of licensing. I therefore think that it is best left to those who are accountable and responsible to deal appropriately with the needs and wants in their areas. The Government and I remain fully committed to the excellent work that the voluntary sector does. However, as I said, each specific matter is best dealt with by the local authority that knows the area.

Cathie Craigie: A very important point about accountability and responsibility follows on from that. If the bill were to go through, all 128 members of the Scottish Parliament with voting powers would be accountable and responsible for the decision that they took to pass it. I repeat the question: do you believe that charitable organisations should be brought within the bill's scope?

Kenny MacAskill: As I said, I believe that local authorities should be given the powers to use their discretion and act accordingly. Indeed, local authority members should be able to use the common sense that they were born with in order to look after the interests of their communities and of charities that act appropriately. If there are instances when charities go head to head with legitimate businesses that have been in place for some time, local authorities should be able to use the flexibility to act as they see appropriate.

16:30

Cathie Craigie: What consultation has been done on the matter? What evidence led the Government to include such organisations in the remit of licensing boards? Where are the examples that suggest that the new provisions would be advantageous?

Kenny MacAskill: Our approach comes from the task group's recommendations. Anybody who represents an urban area will be aware of some relevant examples. I am a great supporter of charity shops, which do an excellent job for the organisations that they represent. However, in some areas, traders point out that although they have to pay full rates and do various other things, charitable organisations are going head to head with them. We recognise that we have to look after the interests of charities. They do an excellent job, using volunteers in the main, on a shoestring.

There are also instances when we must provide some balance. The best people to decide on such matters are those in local authorities. They know the area, and they are charged with the responsibility of listening to all parties—business and the voluntary sector.

Cathie Craigie: I remind the minister that—as far as I understand it—we are dealing with market operators here, not traders on main streets.

Kenny MacAskill: A considerable number of markets operate on a commercial basis. The point is to allow people in local authorities to use the common sense that they were born with to judge what is clearly a commercial operation and what is a charitable operation.

Cathie Craigie: I am sure that the committee will pursue the matter.

The Convener: We will revert to the issue, yes.

Stewart Maxwell: I seek further clarification on the points that Cathie Craigie has raised. Is it reasonable to suggest that the decision that a local authority might take would be based not necessarily on the type of organisation, but on the type of event or activity that the organisation is involved in? It is the activity or event that is important, rather than the nature of the organisation.

Kenny MacAskill: Absolutely. The situation must be considered in the round. A variety of factors are involved. You are right to say that it is the event that is relevant. Is it wanted, is it suitable and is the activity already being provided? There is also the question of who is doing it and why.

The Convener: There are no further questions on section 125.

I refer you to the renewal of licences and to section 128, which allows licensing authorities to consider licence renewal applications that are received up to 28 days after the expiry date of the previous licence as renewal applications, rather than as applications for a new licence. We have heard concern that that approach could cause difficulty if an offence was committed during the 28-day period. Would it be possible to give us your justification for that provision? Has any consideration been given to that issue?

Kenny MacAskill: If the licensing authority allows a late renewal application, trading will be legal, in the same way that it will be when the renewal application is made on time. If there has been no renewal application, or if the licensing authority does not recognise good cause for a late application, offences concerning trading without a licence will apply as normal.

The Convener: Therefore, there should be no particular difficulty in that regard. We need to consider the miscellaneous licences for market traders and the problems of reset, with which you will be familiar.

Kenny MacAskill: Yes.

The Convener: It is a common difficulty that arises under that occupation. If somebody is convicted of reset during the 28-day period, there should not be a difficulty regarding the forfeiture of a licence.

Kenny MacAskill: Not that I am aware of. Section 128 allows the licensing authority to recognise honest mistakes and to allow a licence holder to continue to trade, even if the renewal application is made late. It is not meant to deal with people who commit criminal offences.

The Convener: Let us turn now to alcohol licensing, starting with the modification of layout plans.

Cathie Craigie: Section 131 enables licensing boards to modify layout plans that have been submitted to them in relation to a premises licence application. We have heard from respondents who are concerned that a licensing board could require a costly or time-consuming layout or design change—perhaps a change that required planning permission. What are your views on those concerns?

Kenny MacAskill: The provision was included following a request from licensing boards, which saw it as being helpful, rather than something that would stifle businesses—it should enable applications to be progressed, rather than rejected. It came from people who sought to smooth matters, or perhaps just to iron out glitches. All such decisions rely on licensing boards using a degree of common sense in relation to the changes that they ask for. If a change is large or radical, the question is whether

the premises were suitable in the first place. It is important to remember that the applicant must agree to the changes—they cannot be agreed without the applicant commenting.

In a nutshell, the provision came from licensing boards, which were trying to be helpful by suggesting that—I paraphrase—if the applicant changed this or did that, they would be happy to grant the application. If the applicant said no, the application would have to go away for consideration, but if they said yes, it could proceed.

If there is nervousness about that in the trade, I am more than happy to discuss the issue with it—I will be having meetings with the Scottish Licensed Trade Association again shortly. I take from the provision that licensing boards are seeking to act in a helpful manner in situations in which board members have some concerns. If boards can agree the modification with the applicant, rather than remit the application or bring it to a hearing, the issue can be sorted there and then. However, if there are concerns about the provision, I am happy to discuss them.

Cathie Craigie: I am grateful for that answer. There were also concerns about the short timeframe for agreeing modifications and consulting the relevant authorities so that they could look at the application more fully. Given that you are to meet the SLTA shortly, I assume that you will discuss these issues with it and that you will share information about that discussion with the committee.

Kenny MacAskill: Absolutely. I will meet the SLTA shortly. I was at a reception last night at which I met hoteliers and restaurateurs associations from Edinburgh and Glasgow. I am conscious that a variety of bodies out there represent the trade. It is not simply the SLTA; there are others. We are happy to listen, meet and engage. We recognise that there are unintended consequences—they might be covered in further questions about the Licensing (Scotland) Act 2005. We are here to try to make things work better, so that licensing boards can act accordingly and we can make our communities better.

The Convener: We now turn to antisocial behaviour reports.

Paul Martin (Glasgow Springburn) (Lab): Cabinet secretary, what difficulties do you have with the current arrangements, which were introduced by the previous Executive and agreed by the former Local Government and Transport Committee and which require an antisocial behaviour report for all applications for a premises licence?

Kenny MacAskill: We took the view that was put forward by the police, who saw a great deal of trouble and inconvenience with information of little relevance being provided. We have sought to strike the appropriate balance between the needs and wants of our communities, the requirements of our police and the amount of information that can be dealt with by the board that is charged with the ultimate responsibility of deciding whether to grant the application.

Paul Martin: Where does the community come in? I lodged the relevant amendment to the Licensing (Scotland) Bill when it was before the former Local Government and Transport Committee, because communities were concerned that when an application was being renewed, information about antisocial behaviour relating to the premises was not being properly reported to the licensing committee. Do you accept that the amendment that was agreed to required a more consistent approach to reporting on antisocial behaviour, rather than leaving it at the behest of the chief constable?

Kenny MacAskill: No. I think that we have struck the appropriate balance. We have to take into account the fact that licensing standards officers are up and running. A variety of checks and balances exist. We have to consider the scheme and the operation of the 2005 act in the round. The police have a particular role and duty. There are also the rights of individuals and the rights of the trade. Balance is provided by the licensing board, which is assisted by licensing standards officers.

Paul Martin: Given the licensing sergeant's workload, would you be confident that if there were, say, 200 calls about antisocial behaviour at an off-licence, the police would always have such information at their disposal? Would it not be better to allow the police to interrogate matters more consistently through, for example, computerised systems, which are easier to use than the systems that were used in the previous regime, and ensure that applications involving premises that are associated with antisocial behaviour are not accepted?

Kenny MacAskill: I do not seek to interfere in police operational matters with regard to licensing or, indeed, the investigation of minor or serious crimes. Whether the police use information technology systems in that respect is a matter for them.

As the representative of a constituency that is close to the Parliament, my experience is that the police very much have their ears to the ground and their eyes on where incidents are taking place. They are not shy in coming forward, and I believe that in looking after people's interests and dealing with antisocial behaviour the police and, in particular, licensing officers do an excellent job. I am more than happy to put my trust and faith in

their ability to carry out the appropriate tasks with which they have been charged.

Paul Martin: Can you give a guarantee today that, if the Government's proposals are agreed to—

Kenny MacAskill: I cannot give a guarantee on any matter that is—

Paul Martin: Please let me finish the question.

The Convener: Let Mr Martin finish his question, cabinet secretary.

Paul Martin: Will the cabinet secretary guarantee today that applications that are granted will contain no element of antisocial behaviour that has been reported to the licensing committee?

Kenny MacAskill: My answer to that question is the same as that to any question that seeks a guarantee from me on matters that are not under my direction or within my control: I cannot give a guarantee on any matter that is the operational responsibility of the police. However, as the Cabinet Secretary for Justice on the very day that we have announced the rolling-out of an additional 1,044 police officers, I can say that I have the utmost faith in our police. From experience in my constituency and having met licensing police officers in Perth and, indeed, in Mr Martin's city of Glasgow, I think that they do an excellent job. Sometimes something might fall by the wayside, but they are the first to recognise that they might have erred. As I have said, they do an excellent job and we are very well served by them in licensing matters and in everything else that they do to protect, guard and serve us.

Paul Martin: I wonder whether the additional police officers that have been introduced to deal with the supposed workload will be made available to prevent antisocial behaviour. After all, we must ensure that any application that comes with reports of antisocial behaviour must not be granted. I am also grateful for the confirmation that you cannot give a guarantee that any reports of antisocial behaviour surrounding an application will not go by the wayside.

Kenny MacAskill: I am delighted to assure you that the 1,000 additional officers that this Government has provided for our communities will indeed be out there in those communities. When we agreed to fund that proposal, the Association of Chief Police Officers in Scotland assured us that those officers would not be behind desks but would be visible in our communities. It was a pleasure to accompany two police officers from Baird Street—which I believe is in your constituency, Mr Martin, although I might be wrong—as they went out and about doing an excellent job. I give you an absolute assurance that those officers will be out in our communities. I do not direct them operationally; as you well know, any such move would be constitutionally inappropriate. Indeed, it would be as inappropriate for me to do that as it would have been for my predecessors, whatever their political hue.

The Convener: Now that the cabinet secretary has satisfied the committee about his knowledge of the geography of Glasgow, we will move on to the issue of occasional licences.

Bill Butler: Perhaps we can turn back to the bill.

As you know, cabinet secretary, section 134 enables applications for occasional licences to be fast-tracked where appropriate, with the time allowed for comments from chief constables and licensing standards officers reduced from 21 days to

"not less than 24 hours".

To be fair, I point out that some respondents have welcomed that provision; however, others are concerned that the new procedure could be open to abuse by applicants. What is the Government's view on such concerns?

16:45

Kenny MacAskill: We are happy to look at concerns if they are raised, and it is clear that some people have raised concerns with you. However, I believe that we have the appropriate balance. There are good reasons why licences should be fast-tracked for a variety of local events that provide benefit. Again, it comes back to licensing boards knowing their communities and the individuals concerned. The 2005 act does not delegate to officers the granting of occasional licences, responsibility for which remains with the board members or the clerk. Occasional licences can be granted for events of significant size and also for those of a less significant size.

If there are significant concerns, either from the committee or indeed from the trade, we are happy to look at them, but my experience leads me to think that matters can be dealt with by checking with the convener of the board. We need some flexibility to let local events take place if they serve and benefit the community.

Bill Butler: I agree that we must exercise common sense, but concern has been expressed that the proposed amendment to the 2005 act to which I referred—for the consultation period to be reduced to

"not less than 24 hours"—

appears not to take into account the requirement for every application to be advertised for a period of seven days. Surely the proposal raises false expectations.

Kenny MacAskill: I ask Tony Rednall to comment on that.

Tony Rednall (Scottish Government Criminal Justice Directorate): The seven-day period is held in regulations, which we will look to change if the provisions are passed.

Bill Butler: I see. Well, that makes that clear.

I have one more question. The committee heard evidence that questioned why the power cannot be delegated to members of staff who are employed to assist the licensing board and the clerk, and it was also suggested that the provisions should be replicated for applications for extended hours under the 2005 act. What is the Government's view on those suggestions?

Kenny MacAskill: We are happy to look at them. Our initial view is that the board is ultimately accountable and there has to be some signing off by those who are ultimately to be held responsible, just as we sign things off as a Parliament. If there is a need for more flexibility, we are more than happy to look at that. If the board conveners and those who seek the power to act on authority are happy, we have no fixed views. It is a matter of ensuring that we get the right balance of ultimate accountability and responsibility. If a licence is granted at 24 hours' notice and there is trouble, for example, the local community will want to know why.

We are genuinely open to discussing the matter. If that is what boards want, we will be prepared to consider it, but I would want to take the temperature of the boards.

Bill Butler: If I may say so, that guarantee is most welcome. I am glad that that is on the record. Thank you.

The Convener: We move on to questions on the appeal procedure from Robert Brown.

Robert Brown: The cabinet secretary will be aware of the evidence that we received about the appeal procedure. I think it is fair to say, if I have not misread it all, that there is a fairly uniform view from those who have to operate the system that the stated case appeal procedure under the 2005 act does not work well. There seems to be strong support for going back to a reapplication system, which would be rather more informal and perhaps more effective in achieving what is wanted. Have you had cause to think about that? Can you give us any guarantee or undertaking on that aspect?

Kenny MacAskill: Yes. You are quite right. We now recognise the concerns that have been raised that the stated case procedure that is detailed in the 2005 act seems not to work as well as the previous summary application procedures. I did not use those in relation to liquor licensing because I was not involved in that area, but they were used in a variety of other areas. We will seek to lodge amendments at stage 2.

Robert Brown: I am grateful for that.

I take the opportunity of our discussion to return to personal licences, which do not strictly come under the bill, but about which we had an exchange before the recess. The matter has been the subject of quite a lot of publicity in the press recently. I do not want to look at the matter too widely, but given the furore about the new date, the lack of granting of applications—Cathie Craigie might know more about this, but apparently no personal licences have been granted in North Lanarkshire—and some of the issues of interpretation, can we have an update on the matter?

Tony Rednall: In relation to personal licences, regulations were put to the Parliament to enable people to nominate, during the past month, a deemed premises manager who had completed their personal licence qualification but had not yet been granted their personal licence. As far as we are aware, in the past couple of weeks, licensing boards have been telephoning licensed premises that do not have a deemed premises manager to ensure that one is put in place. We believe that only a minority of premises do not have one in place.

In the majority of licensing board areas, enforcement officers and the police have agreed that they will take a pragmatic approach in going round premises. Officers will contact the licensing board to ensure that an application has been made and then allow the premises to continue trading. Recently, a lot of attention has been given to the issue of whether premises have a premises licence when trading is carried out. We believe that quite a few licensing boards got most of their premises licences out. However, a few are behind, one of which is North Lanarkshire licensing board. It is an offence for premises to trade in those circumstances, but they have a good defence in that the licensing board has not issued the licence. We would not expect licensing standards officers to go looking for a licence if their council is behind.

Robert Brown: The committee has previously alerted the Government to the point that it is not satisfactory for legislation to have all sorts of good intentions while, in effect, the discretion of the enforcement authorities allows an illegal situation to continue. Have you had further discussions with councils or the trade—or perhaps both—with a view to regularising the situation? Is there a time limit within which the process will be finished and the issue sorted out? Will you need to lay further subordinate legislation before the Parliament? The situation is a bit of a mess, although I hasten to say that that is not necessarily the Government's

fault. However, there is a practical problem to be dealt with.

Tony Rednall: Licensing boards are working extremely hard to rectify the situation in which they find themselves by getting out licences and ensuring that people have the correct paperwork. The problems have frequently been a result of a mess being made of applications. Licensing boards are working hard to ensure that provisions are in place so that premises can open. The boards are trying to ensure that those provisions are legal, by using occasional licences, for example. Many boards will hold hearings on 15 September to try to catch up and deal with premises in relation to which a mess was made in the application process, to ensure that those premises are not closed for a significant amount of time. The boards are taking action to rectify the situation as quickly as possible.

The Convener: I refer members to the correspondence that we had with the cabinet secretary when the matter was raised with the committee previously. The Government has done everything that could reasonably be expected of it. There is definitely evidence that local authorities—or licensing authorities, if I am to be strictly accurate—are now dealing with the matter. The situation is unsatisfactory but I hope that it will be remedied fairly quickly.

We will now leave the licensing provisions of the bill and return to the criminal justice aspects, to sweep up some of the questions that we did not have the opportunity to ask the cabinet secretary on 23 June. I will suspend the meeting briefly to allow the officials to change over.

16:54

Meeting suspended.

16:54

On resuming—

The Convener: I thank the officials who are leaving. The cabinet secretary has been joined by Rachael Weir from the Scottish Government's criminal procedures division and Denise McKay from its legal directorate. As ever, Mr Burgess is with us.

We will deal first with disclosure, on which I ask Robert Brown to lead the questioning.

Robert Brown: Mr Burgess obviously is omniscient on such matters.

As the cabinet secretary knows, there has been a lot of evidence from knowledgeable sources about the complexity and length of the arrangements that the bill proposes on disclosure. It has been suggested that there is a need for a simple statement of the Crown duty of disclosure at the beginning of part 6 and that a good bit of the detail could be removed to, for example, the proposed code of practice. That seems a reasonable suggestion. Is the cabinet secretary sympathetic to it?

Kenny MacAskill: It is a question of theory and practice. In theory, disclosure is relatively simple, but in practice it can involve a great deal of complexity. It is clear that we do not want to make matters as opaque as possible. As the Solicitor General said in his evidence to the committee on 9 June, a significant amount of advice requires to be given to prosecutors. We have tried to strike the appropriate balance and to ensure that the bill contains what is necessary. Unfortunately, it is not possible to reduce the relevant provisions to a one-liner. We must have some flexibility in regard to how the law develops. We have done our best to restrict the bill's provisions on disclosure, but although it would appear to be a straightforward concept, in practice, as the Solicitor General said, a great deal of guidance has to be issued. That is why we have had to be broad.

Robert Brown: Surely that is the point. Flexibility does not readily come from the inclusion of provisions in statute; it more readily comes from codes of practice and guidance. The information that we have received has come not from amateurs but from people with a close knowledge of the system. They have expressed significant concerns about how the bill deals with disclosure. Given the evidence that the committee has received, is it not worth having another look at the disclosure provisions?

Kenny MacAskill: Absolutely. We are happy to reconsider whether elements of the provisions could appropriately be dealt with in rules of court or a code of practice, but I must sound a note of caution. The duty of disclosure is a critical duty, and if too many provisions were removed, Parliament would be deprived of its important scrutiny role. We are more than happy to consider whether rules of court or a code of practice could be used, but we think that the bill should provide sufficient specification on what is an important issue.

Robert Brown: I will move on to defence statements, which have been the subject of quite a degree of controversy and comparison with the English system.

It has been suggested that the provisions on defence statements will not work and that the use of defence statements does not readily fit with the Scottish system, which already provides for the use of alibis and special defences. In the light of the evidence that the committee has received, has a sufficient case been made for requiring defence statements in solemn cases? Could we have a

halfway house, whereby defence statements were voluntary? Will the issue be looked at again? It has been indicated that there would be problems with the proposal working in practice and that it would not necessarily achieve what the Government wants it to achieve because of the attitude of judges and the legal profession to the rights of the defence in Scots law.

Kenny MacAskill: As you said, defence statements will be mandatory only in solemn cases. When they gave evidence, the Lord Advocate and the Solicitor General gave examples that demonstrated the scale of the task that prosecutors face. We are conscious that it has been suggested that the existing special defences are enough. We disagree and are persuaded by the Crown that a restricted range of potential defences are covered and that being limited to intimating those defences in the context of disclosure would risk essential information not being disclosed that might very well have been disclosed if the prosecutor had appreciated its significance. I do not know whether Denise McKay wants to add anything to that.

As I said, the Lord Advocate and the Solicitor General gave the committee clear examples of instances that would not be covered simply by the defence of alibi, impeachment or whatever else. There are instances in which the Crown's obligation cannot really be triggered unless it is given some idea of what the likely defence will be.

17:00

The Convener: Does Denise McKay have anything further to add?

Denise McKay (Scottish Government Legal Directorate): No, I have nothing further to add to what the cabinet secretary has said.

Robert Brown: I suggest to the cabinet secretary that a chicken-and-egg question is involved. In the Government's mind, what is the purpose of defence statements? Are defence statements intended to enable the Crown more adequately to fulfil its disclosure duty, or are they intended to enable the Crown to have more detailed knowledge of the nature of defences going forward? As the cabinet secretary will be aware, the latter would raise other sorts of issues.

Kenny MacAskill: Clearly, they are about the Crown fulfilling its duty. To do that, the Crown needs to know what the defence is looking for in the myriad of evidence that might be available. As the member well knows, in significant solemn matters the evidence can go from the almost sublime to the ridiculous, including who was where and who put up the ticker tape. In some instances, such details can be of significant importance if it suddenly comes to light that the evidence includes people who say that the person did not come in this or that direction.

Defence statements are about ensuring that the Crown can fulfil its duty. In order that the Crown can do that, it must know what the defence is looking for. Defence statements are not about asking people to incriminate themselves—that would be precluded under the European convention on human rights. They will simply allow the Crown, when reviewing what needs to be disclosed to the defence, to have some idea of what is totally extraneous and will not be part of the defence argument. That will mean that the Crown can dispense with details about ticker tape and who drove the vehicle that carried such-and-such. However, there may be instances in which such information is relevant, so the Crown needs to know what is relevant. Defence statements are about the Crown being able to fulfil its statutory duty.

Robert Brown: Does that not make the point that voluntary defence statements, which would in principle be triggered by the defence, would be a more satisfactory and less bureaucratic way of dealing with the matter, given the fears that have been expressed both about what is said to have happened in England and about how the proposed requirement would fit into the Scottish system?

Kenny MacAskill: I recognise that problems have arisen in England and Wales, where a different system operates. The Crown Office has provided further written evidence on the changes that took place in England and Wales. Given the significance and importance of such matters, it appears to us that there should be a statutory disclosure duty on the Crown. If the Crown is to fulfil that statutory duty, the statements that it receives from the defence must provide the appropriate information that will allow the Crown to do so, therefore it is appropriate that defence statements should be mandatory. That view is also taken by the Crown.

Nigel Don: My question is on non-disclosure and special counsel, which are provided for under sections 102 to about 116. Some submissions have raised concerns about the compatibility of those provisions with the European convention on human rights. In our collective absence, on 10 June a report was published by a specially convened nine-member Appellate Committee of the United Kingdom House of Lords on the case of the Secretary of State for the Home Department v AF and others—the complete citation includes the information "[2009] UKHL 28"—that considered the issue of secret evidence in terrorism cases. It is not difficult to draw the conclusion that that judgment might be relevant to the issues that we are considering under the bill. Does the cabinet secretary think that non-disclosure will be

acceptable in Scottish law? Are those provisions in the bill being looked at?

Kenny MacAskill: We think that sufficient safeguards are already built into the bill, which is why the Presiding Officer has allowed it to be introduced. We are aware of the case south of the border to which the member referred, but it does not apply to the procedures that we operate in Scotland. It is certainly correct to say that the matter could at some stage apply in Scotland, but the procedures here would be different. With the non-disclosure provisions, we have checks and balances through the ability to appoint special counsel. In our view, we would not be in the same position in which the courts in England have found themselves, because we have those checks and balances and the bill comes within the ECHR. Denise McKay can elaborate on the matter in greater detail.

Nigel Don: I would be grateful for that.

Denise McKay: You described the evidence that was dealt with in the case of the secretary of state v AF as secret evidence. In immigration cases, the judge considers the evidence and makes a decision based on it. However, it has never been the intention that under the disclosure scheme that we have brought before the Parliament evidence that the accused has not seen will be put to the judge when reaching his verdict. Any information covered by a non-disclosure order will be put to the side and will not go towards the verdict.

We can distinguish the Scottish scheme from the case of the secretary of state v AF because the Scottish scheme will never rely on evidence that the accused has been unable to see. The Scottish Government's view is that that would not be compatible with ECHR and would not represent justice for the accused. Such evidence will not be relied on and it will be put to the side. That is a critical element of the disclosure scheme that we have brought to the Parliament, and it is a critical element in ensuring compatibility with ECHR.

Nigel Don: Thank you. That is revelatory to me. That was not my understanding. I want to bounce that back and ensure that I have got it right. Non-disclosed evidence will be brought to court—and, if necessary, discussed with special counsel in order to elucidate the facts—so that it can be put to one side by the judge and not put to the jury. In that way, such evidence will be dealt with in court—albeit in camera—but will be no part of the evidence on which guilt can be found.

Denise McKay: Absolutely—perfectly put. That is exactly how the scheme will work. Special counsel will be the independent voice and the independent advocate. The judge will be the person who makes the decision, so the information will be put to the judge. Special counsel will have an opportunity to make representations, alongside the Crown. Ultimately, the judge will make the decision. There will be judicial independence in all of these matters.

Nigel Don: Thank you—I take compliments where I find them. That is helpful.

The Convener: After that exemplar of clarity, we go to unfitness for trial.

Angela Constance (Livingston) (SNP): Part 7 of the bill, on mental disorder and fitness for trial, has been broadly welcomed, not least because the new statutory defence will replace the common-law defence of insanity and because it will get rid of all the old-fashioned, outdated language. However, the committee has received evidence from organisations, including the Mental Welfare Commission for Scotland, raising concerns that the provisions are inadequate for people who, when they commit an offence, know that their actions are wrong but are nonetheless compelled to commit the offence due to their illness or mental disorder. We have been given two examples. The first is severe cases of depression in which, although the people concerned know that their actions are wrong, they are, because of their view of themselves and the world, unable to resist the impact of their illness. The second example is someone with a psychotic illness who has command hallucinations. For example, they know that it is wrong to harm another person, but because of their delusional beliefs they cannot resist the impact of their illness. What is the Government's view of that? Will the Government seek to amend the bill to include those individuals who have a diagnosed mental disorder and who know that their actions are wrong but who, due to their illness, cannot resist their urges?

Kenny MacAskill: For many a year there have been deep-running debates about personality disorders, as well as about the issue to which you refer. Unless the committee persuades us otherwise, we will not seek to amend the bill, because we are basically implementing provisions that the Scottish Law Commission considered long and hard. Things have not been done on a whim and a fancy; the Law Commission went away and discussed matters.

The issue is deeply complex. It is about where we strike the balance in respect of those who clearly have a treatable mental health issue and those, such as those to whom you refer, who have a personality disorder and complex issues to deal with. The Law Commission considered the matter in detail, and the new special defence, in proposed section 51A(1) of the Criminal Procedure (Scotland) Act 1995, provides that

"A person is not criminally responsible for conduct constituting an offence … if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct."

I understand the issues to which you refer. The test relies on the accused not being able to understand the wrongfulness of their actions. Therefore, any accused person who suffers from a mental disorder that means that they understand that what they are doing is wrong but is unable to stop their conduct is excluded from the special defence.

As I have said, we are implementing the Scottish Law Commission's recommendations, because it is difficult to know where the line must be drawn. I am open to listening to representations, as the committee has done, but the Law Commission has already listened to recommendations and representations from the Crown and others and put forward the special defences. We based the provisions on the views of the Law Commission, which carried out intensive research, but I am open to other views.

Angela Constance: In the interests of clarity, I was certainly not making any arguments for people with a sole diagnosis of psychopathy. I know all too well the risks and dangers of getting the wrong men in the wrong system and I understand the caution.

My brain is a little bit rusty because of the recess, but I am sure that the committee heard evidence on the issue not just from organisations with a role in advocating on behalf of people with mental health problems or learning disabilities; I think that people with a legal background also reflected on the issue. I do not want to name those people, because I may be being inaccurate. I will have to go back and read the Lord Advocate's comments. I think that the Law Commission also gave subsequent oral evidence to the committee, but that will have to be checked for the sake of accuracy. As I say, I have a rusty brain.

There are real issues to do with people who have a bona fide mental disorder or psychotic illness who understand that what they are doing is wrong but who cannot resist their command hallucinations because of the severity of their diagnosed illness. I continue to be concerned about that. However, I am happy to check the evidence and write to the cabinet secretary if need be.

Kenny MacAskill: We are more than happy to consider any representations from the committee or individual members. We are standing on the views of the Law Commission, but we appreciate the complexities that are involved and we are more than happy to consider information that people provide to assist with the Law Commission's proposed changes. Criminalising the sick is the last thing that we are seeking to do. If we can avoid any manifest injustices, we will be more than delighted to do so. However, the difficulty lies in ensuring that we draw the line so that certain people to whom you have referred do not escape justice.

The Convener: To be fair to Ms Constance, her memory is not flawed. I recollect such evidence being given. Obviously, the matter could be pursued to advantage.

A letter has been received from the Scottish centre for crime and justice research that relates to section 41, on breach of undertaking. I am not totally satisfied that the objection in it is particularly well founded. Can you assure us that there was adequate consultation on that section? Does it widen the net, as has been claimed, bearing in mind the terms of the 1995 act? I do not think that it will make things particularly different, but I am interested in receiving an explanation from the cabinet secretary or one of his officials.

Kenny MacAskill: I cannot give you a categorical assurance on the matter, but I am more than happy to undertake research and to write to you about it.

George Burgess: Last September, we published a document entitled "Revitalising Justice—Proposals to Modernise And Improve The Criminal Justice System" in which we outlined our intentions. No comments on that matter were received at that stage.

The Convener: That is fine. We may pursue the matter in writing.

Members have no more questions. We will pursue in writing a number of issues that are not as important as those that we have pursued in the meeting.

I thank the cabinet secretary and his officials for their attendance. The committee will now move into private session.

17:16

Meeting continued in private until 17:42.

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