

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 19 May 2009

Session 3

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SUBORDINATE LEGISLATION COMMITTEE

17th Meeting 2009, Session 3

CONVENER

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

DEPUTY CONVENER

*Ian McKee (Lothians) (SNP)

COMMITTEE MEMBERS

*Jackson Carlaw (West of Scotland) (Con)

*Malcolm Chisholm (Edinburgh North and Leith) (Lab)

*Bob Doris (Glasgow) (SNP)

*Helen Eadie (Dunfermline East) (Lab)

*Tom McCabe (Hamilton South) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)

Ross Finnie (West of Scotland) (LD)

Christopher Harvie (Mid Scotland and Fife) (SNP)

Elaine Smith (Coatbridge and Chryston) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Mary Cuthbert (Scottish Government Public Health and Health Improvement Directorate)

Edythe Murie (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Shelagh McKinlay

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 19 May 2009

[THE CONVENER *opened the meeting at 14:16*]

Tobacco and Primary Medical Services (Scotland) Bill: Stage 1

The Convener (Jamie Stone): I welcome you all to the 17th meeting in 2009 of the Subordinate Legislation Committee. We have no apologies and a full house. I ask everyone to turn off their mobiles and BlackBerrys.

Agenda item 1 is consideration of the delegated powers memorandum for the Tobacco and Primary Medical Services (Scotland) Bill. We welcome from the Scottish Government Mary Cuthbert, the head of tobacco, sexual health and HIV policy, and Edythe Murie, principal legal officer. It is a pleasure to have you join us today.

We agreed to hold an evidence session to examine the delegated powers relating to the fixed penalty scheme for offences under chapters 1 and 2 of the bill, which deal with tobacco products. Just to clarify, what we are probing is the Scottish Government's justification for what powers should and should not be in the bill, and how far they might go. We want to put a bit of flesh on the bones of that on behalf of the Parliament. Helen Eadie will ask the first question.

Helen Eadie (Dunfermline East) (Lab): It is nice to see Mary Cuthbert again. Ian McKee and I spent a long time with her last week.

Mary Cuthbert (Scottish Government Public Health and Health Improvement Directorate): Don't I know it.

Helen Eadie: I welcome her to this committee.

My questions centre on the provision in paragraph 3 of schedule 1 for a time limit for the issue of a fixed penalty notice. Can you please explain why there is a need for a time limit beyond which a fixed penalty notice may not be given and how that power might be used?

Edythe Murie (Scottish Government Legal Directorate): That type of provision appears in a number of fixed penalty schemes; it just puts a final time limit on serving a notice. You can imagine that we would not want a notice to be served months or years after the offence. In this case, we have left it to the Scottish ministers to prescribe a time. We left the time element to

regulations just to allow for adjustment in the light of experience when the scheme is up and running. There is a similar provision in the Smoking, Health and Social Care (Scotland) Act 2005.

Helen Eadie: Do you want to say any more about how that power might be used?

Edythe Murie: Mary Cuthbert might want to say something on the policy front.

Mary Cuthbert: When we were pulling the bill's provisions together, we considered carefully what should rightly be in the bill and what should be confined to regulations. We could have followed a number of options and precedents, but we opted for the seven-day approach of the 2005 act. I suppose seven days seems a reasonable period for the time after which a fixed penalty notice should not be issued. The fixed penalty notice would probably be issued immediately. Nine times out of 10, it would involve someone who had been caught out by a test purchasing exercise. It would be clear that an offence had been committed and that the fixed penalty notice could be issued. However, we came up with the figure of seven days, which seems a reasonable period.

Helen Eadie: Would it not be possible to specify in the bill the time after which a fixed penalty notice may not be given? Why do you need a subordinate legislation power to set that time?

Mary Cuthbert: I suppose that allows a certain amount of flexibility to cope with the problems that we will find once the scheme comes into operation. For example, some problems have been experienced with the smoking ban—although we have not changed the time period—particularly with vehicles in which people have been seen to breach the ban. There have been problems in finding out who the owner is and so on in order to enable enforcement officers to issue a fixed penalty notice. It was therefore deemed appropriate to have flexibility in the bill so that, if seven days was not appropriate, we could extend it or, indeed, reduce it, if we felt that that was more appropriate.

Tom McCabe (Hamilton South) (Lab): What circumstances lead you to believe that you might need to amend the time after which a fixed penalty notice cannot be given?

Mary Cuthbert: Obviously, this is the first time that we have proposed the use of fixed penalty notices in relation to tobacco sales law. Once the scheme is up and running, we will seek to amend the time period only if we feel that there is sufficient evidence from enforcement agencies in the field that a different period needs to be specified. Obviously, we would have detailed discussions about developing the regulations. We have had such discussions all along about the bill's provisions, as Helen Eadie probably heard ad

infinitum when we gave evidence at last week's Health and Sport Committee meeting. We will have detailed discussions with everybody concerned so that we have a provision in the regulations that people are comfortable with and think is proportionate.

Ian McKee (Lothians) (SNP): I am concerned about the maximum amount of the fixed penalty. It is obviously important, but it seems that it could be a moveable feast. Why could not the maximum fixed penalty under section 20 be set out in the bill?

Edythe Murie: There are diverse approaches to fixed penalty schemes throughout the statute book. It is a question of flexibility. We expect the provisions to be in place for years to come and, over the years, there may be changes in social attitudes to the severity of the offence. Putting the maximum penalty in regulations gives us the flexibility to deal with that.

Ian McKee: The maximum penalty in other fixed penalty schemes is set out in the act in, for example, the Antisocial Behaviour etc (Scotland) Act 2004 and the Aquaculture and Fisheries (Scotland) Act 2007. Why differ for this bill's scheme? Surely the principles are the same.

Edythe Murie: Equally, other acts do not set out the maximum size of their fixed penalty schemes; for example, the Town and Country Planning (Scotland) Act 1997 and the Smoking, Health and Social Care (Scotland) Act 2005. Some acts relate the fixed penalty to the standard scale, so there is a variety of approaches out there. The approach in this bill was chosen simply for reasons of flexibility.

Ian McKee: So it is just a matter of chance which approach is chosen.

Edythe Murie: No, I do not think that it is a matter of chance. One consideration, for example, is whether there will be changing social attitudes over the years.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): What do you anticipate would be the maximum amount of a fixed penalty?

Mary Cuthbert: At this stage, we have not determined what the penalty would be. We would certainly have that in regulations before stage 2, but we have not set a figure. Because the bill takes the approach of three strikes and you are out—that is, three fixed penalty notices—some have said that the amount of the fixed penalty should increase, but the bill provides for one fixed penalty amount. Under the smoking ban, the fixed penalty for retailers is £200, but you get some money off if you pay on time. I think that the current penalty for a smoker is £50. We are probably talking about that kind of range. The offence would attract a level 4 maximum penalty of

£2,500, so we would be looking at something in proportion to that sum, but we have not as yet set a figure.

Malcolm Chisholm: It is interesting that you referred to level 4 on the scale and your colleague pointed out that, in some other schemes, there is a relationship between the civil and the criminal penalty. Even if you do not want to state a maximum penalty because, as you said, people's attitudes might change over time, would it not be appropriate to provide a link between the powers to set maximum penalties under the two regimes?

Mary Cuthbert: We could consider that, but we determined at the time that we would not put a figure in the bill. However, if there were a recommendation that we should look at that, we would do so.

Malcolm Chisholm: What is your working assumption about the power to set penalties in terms of percentages under the two regimes?

Mary Cuthbert: Ian McKee mentioned the Aquaculture and Fisheries (Scotland) Act 2007. Although it says that the maximum penalty can be no more than 80 per cent of a level 4 fine, the regulations that flowed from that act set the fixed penalty at £200. We would have to look at that and determine a reasonable figure to set. As Edythe Murie said, one could adopt a number of models—

Malcolm Chisholm: You are open-minded about the possibility of making the penalty a percentage of the maximum amount.

Mary Cuthbert: At the end of the day, ministers would have to decide on that, but we could consider it.

Malcolm Chisholm: My last question is: is there an alternative reference point that you anticipate could determine the maximum amount of a fixed penalty or do you have only a percentage in mind?

Mary Cuthbert: If you consider the current tobacco sales situation, in which proceedings have been initiated, although the maximum fine is £2,500, the average fine is something like £170. You want a fine to be a reasonable deterrent for people who breach the law, but it must be proportionate because, ultimately, the penalty could be taken further—for example, a banning order could be imposed or the person could be prosecuted in court, if that were deemed the most appropriate way to deal with the situation.

Malcolm Chisholm: So you think that the current fines that are issued under other tobacco legislation are a yardstick.

Mary Cuthbert: They seem to be a yardstick. The level of fine that can be applied under smoking legislation seems reasonable. However, as I said, we have not determined what the

penalty should be and we need to do more consultation before we reach a conclusion.

Jackson Carlaw (West of Scotland) (Con):

Given that a fixed penalty has been levied, we want people to be able to pay it. The power under paragraph 11(2) in schedule 1 permits the deadlines for the payment of fixed penalty notices to be reduced. Most people have got used to having 28 days in which to pay, or 14 days in which to pay a discounted sum, so why and in what circumstances would ministers wish to reduce the deadlines of 28 and 14 days, which are specified in paragraphs 5(1) and 5(4) in schedule 1 to the bill?

Edythe Murie: We are not necessarily arguing that ministers will do that; again, it is about having the flexibility to adjust the scheme if practical difficulties arise in the light of experience. The provisions are expected to be in place for many years and it is therefore sensible not to be stuck with something that you find is not working on the ground. There is nothing more to it than that.

Jackson Carlaw: Is that reasonable? If the 14-day period were reduced significantly, it would be difficult to be certain that an individual, having received the fixed penalty notice and made arrangements to pay, would have sufficient time to guarantee that they had complied with the notice. Why would it be considered inappropriate, for example, to specify in primary legislation a minimum time to pay the penalty? The concern is that in theory, the minimum time to pay could be 24 hours, which renders the provision rather difficult.

14:30

Edythe Murie: It could be 24 hours in theory, but I cannot imagine that we would ever propose that regulation. I expect that over the years ways of making payment will change; they have changed vastly over the past few years—I am old enough to remember when everything was paid for by cheque and now that is dying out. We are just looking to the future and anticipating practical changes on the ground.

Mary Cuthbert: I think that I am right in saying that the provision is not just to reduce the time limit; we could also increase it. The power is to vary the time limit. We might find that 28 days does not give people sufficient flexibility and we might increase the time limit.

Jackson Carlaw: It is just that people are now fairly used to the convention of having 28 and 14 days to pay; it seems to work well and is reasonable in most people's minds. Having that flexibility in schedule 1 might give rise to concern that the motivation for reducing the minimum period might be to try to collect a greater sum in

fines by making it difficult for people to pay within the shorter time, thereby making them liable to pay the higher fine.

Mary Cuthbert: If we were seeking to alter the 28-day limit, some procedure would have to be attached to it—we would need to demonstrate that it was appropriate to alter it. I know that this does not necessarily make the power right or wrong, but there is a similar provision in other legislation to allow flexibility if we feel that it is appropriate in practice. The power is not only to reduce the deadline; it could extend it. The power would give us the right to vary the period.

Jackson Carlaw: You are saying that with almost a straight face.

Bob Doris (Glasgow) (SNP): So far, we have subordinate legislation that can be used to determine the level of the fine, to specify the time after the alleged offence has happened in which the fixed penalty notice can be issued, and to vary the period in which to make payment. Those wide-ranging powers are not in the bill; they are bolted on by subordinate legislation.

Why is no provision made for the way in which fixed penalty notices will be served, given that that will impact on the time available to pay? Why would that not be defined in the bill? We now have several powers that are not defined in the bill but bolted on by subordinate legislation.

Edythe Murie: Are you talking about what happens on the ground?

Bob Doris: Yes. There is nothing in the bill to say what the procedure is for issuing a fixed penalty notice in a shop, for example.

Edythe Murie: I imagine that the notice would just be handed over. In many cases, it would happen in the case of a test purchase.

Mary Cuthbert: The approach is not without precedent. Enforcement officers are used to giving out fixed penalty notices so it is a matter of following enforcement procedure, which I presume would be covered in enforcement guidance and protocols that we agree in the implementation of the act. I am not sure whether it is appropriate to set out in detail those procedures on the face of the bill because the enforcement agencies have to have a certain level of flexibility. We are not proposing an entirely new procedure to give out fixed penalty notices. Obviously, there are provisions in the bill that allow us to say how the system will operate, but the practical issue of a fixed penalty notice is an enforcement procedure to which the enforcement agencies will be well used.

Bob Doris: Are there examples of other bills in which the procedure for issuing fixed penalty notices has been included in the bill, or would the

Tobacco and Primary Medical Services (Scotland) Bill be the first, if it were to happen?

Edythe Murie: I am not aware of any examples.

Mary Cuthbert: I honestly do not know. Such procedure is certainly not included in the smoke-free laws.

Bob Doris: Given the significance of the powers under paragraphs 3, 4 and 11(2) of schedule 1, what is the justification for using negative as opposed to affirmative procedure?

Edythe Murie: As you can see, we have opted for affirmative procedure in some cases. Our thinking was that the elements of the scheme that the Scottish ministers seek to prescribe in instruments that are subject to negative procedure are those that might be liable to require adjustment, either in the light of experience of the scheme in practice or just as a result of changing times, which could lead, for example, to changes in the value of money. Although those are important parts of the scheme, they are not structural elements. The scheme's structure is all dealt with in the primary legislation. The instruments in question will give rise to extremely uncomplicated provisions, such as, "the amount prescribed is £X," or, "for X days substitute Y days." Instruments that deal with other parts of the scheme, in relation to which we felt that more complex issues might arise, such as the circumstances in which notices might not be served, will be subject to affirmative procedure. In other words, we have picked out elements that are liable to need to be adjusted or to change over the course of time.

Bob Doris: I know that you are saying that the powers in question are administrative powers as much as anything else, but it could be decided through the use of a negative instrument that someone who faced a fixed-penalty fine would have only seven days to pay it. Mr Carlaw's point was that the relevant provision could be altered quite dramatically and that that would affect the bill's implementation on the ground. Rather than use a negative instrument for that, would it not be best if such an argument had to be made to the full Parliament as part of its consideration of an affirmative instrument?

Edythe Murie: We are not advocating that no procedure should apply—the Parliament will get to consider all those elements. It is a question of balance. We went through all the powers carefully and picked out those for which we thought that the use of negative instruments was more appropriate; for others, we chose affirmative procedure.

The Convener: Thank you very much indeed. It was good of you to join us. We will take one further look at the issue and will report back before

the cabinet secretary gives evidence to the lead committee.

Agenda item 2 is on the same subject: delegated powers in the Tobacco and Primary Medical Services (Scotland) Bill. We disposed of a number of the delegated powers that we were content with at our meeting on 28 April and put a number of questions to the Government, to which we have received its response in writing. We will go through the response section by section, just to tidy things up.

We have obtained further explanation from the Scottish Government on the power in section 2 to provide whether a display that amounts to an advertisement is to be subject to enforcement under the bill or under the Tobacco and Advertising and Promotion Act 2002, and the power in section 3(1) to impose requirements in relation to the display of prices of tobacco products or smoking-related products in a place where tobacco products are offered for sale. Do we agree that the proposed powers are acceptable in principle and that they are subject to negative resolution procedure?

Members indicated agreement.

The Convener: Section 8(2)(e) deals with the power to determine the form and manner of an application for registration in the register of tobacco retailers. Now that we have obtained further explanation from the Scottish Government, do we agree that the proposed powers are acceptable in principle and that no procedure is appropriate?

Members indicated agreement.

The Convener: Section 17 contains the power to provide that in its application to vessels, vehicles and other moveable structures, chapter 2 of the bill shall be subject to such modifications as the Scottish ministers consider necessary or expedient. [*Interruption.*] I thank the legal team for pouring me some water—I had a small green thing that hops about in water in my throat.

As presently drafted, the power under section 17 to modify chapter 2 of the bill in its application to vessels, vehicles and moveable structures appears to be too wide in scope, but in the light of the Scottish Government's response, do we agree to recommend that the Scottish Government should bring forward an amendment to make it clear that the power is to be applied only when it is necessary or expedient to make the existing law in chapter 2 apply effectively to moveable structures?

Members indicated agreement.

The Convener: Are we content to recommend to the lead committee that if the Scottish Government does not bring forward an

amendment to make it clear that the power is to be applied only when it is necessary or expedient to make the existing law in chapter 2 apply effectively to moveable structures, the use of affirmative rather than negative procedure would be appropriate?

Members *indicated agreement.*

The Convener: Section 30 deals with the arrangements in section 17C of the National Health Service (Scotland) Act 1978 that relate to persons with whom agreements can be made. In relation to proposed new section 17CA(1) of the 1978 act, are we agreed, now that we have obtained further explanation from the Government, that the powers in question are acceptable in principle, and that it is appropriate that they are subject to negative resolution procedure?

Members *indicated agreement.*

The Convener: Are we content to draw to the attention of the lead committee the answers that we got from the Government?

Members *indicated agreement.*

The Convener: In relation to new section 17L of the 1978 act, which is provided for by section 31, "Eligibility to be contractor under general medical services contract", are we agreed, now that we have seen the Government's response, that the power is acceptable in principle, and that it is appropriate for it to be subject to negative resolution procedure?

Members *indicated agreement.*

Climate Change (Scotland) Bill: After Stage 1

14:40

The Convener: Item 3 is consideration of the delegated powers provisions in a bill that we are familiar with—the Climate Change (Scotland) Bill. Do colleagues have any comments on the Government's response to our stage 1 report?

Malcolm Chisholm: In general, I am content with what the Government has said about public bodies and waste. I am not sure about what it has said about the powers relating to forestry, which still seem to be quite wide. To some extent, the Government has accepted our point on the independence of the advisory body.

The Convener: Are we content to note the response? We will consider the bill again once it has been amended at stage 2.

Members *indicated agreement.*

Schools (Consultation) (Scotland) Bill: Stage 1

14:41

The Convener: Item 4 is consideration of the delegated powers in the Schools (Consultation) (Scotland) Bill. You—not me—took oral evidence from Government officials at the committee's meeting last week. We have all had a chance to reflect on what was said and we have the legal brief.

As members have no comments, do we agree that the further clarification that the Scottish Government has provided on the proposed power in section 22 is satisfactory, such that we may be content with the power as set out in that section, and that, on the understanding that the power in section 22 to amend enactments is to be construed strictly, it is not subject to parliamentary procedure?

Members *indicated agreement.*

Draft Instruments subject to Approval

**Proceeds of Crime Act 2002 (Cash
Searches: Constables in Scotland:
Code of Practice) Order 2009 (Draft)**

**Proceeds of Crime Act 2002
(Investigations: Code of Practice)
(Scotland) Order 2009 (Draft)**

14:42

The committee agreed that no points arose on the instruments.

Instruments subject to Annulment

Purity Criteria for Colours, Sweeteners and Miscellaneous Food Additives (Scotland) Regulations 2009 (SSI 2009/167)

14:42

The Convener: Are we content to find the Scottish Government's explanation for not consolidating the 1995 regulations acceptable and to report to the lead committee and Parliament accordingly?

Members indicated agreement.

Period to Prepare an Adoption Allowances Scheme (Scotland) Order 2009 (SSI 2009/168)

The Convener: Do members agree to report to the lead committee and Parliament on the grounds that, in relation to article 2 of the order, there has been a drafting error in so far as that article contains a patently incorrect reference to "Regulations" rather than "Order", which does not affect the instrument's meaning or operation? In other words, the wording is wrong, but the order still works.

Members indicated agreement.

The Convener: Has an acceptable response been received on the point about the citation of powers in the preamble?

Members indicated agreement.

Swine Vesicular Disease (Scotland) Order 2009 (SSI 2009/173)

The Convener: Are we content to report the order to the lead committee and Parliament on the grounds that, in relation to articles 16 and 17 of the order, an explanation has been sought and provided by the Scottish Government about the meaning and effect of the provisions, with which the committee is satisfied; and that in relation to the powers of inspectors that are contained in articles 38 and 39, and the restrictions on persons that are contained in paragraph 7 of schedule 1, an explanation has been sought and provided by the Scottish Government, with which the committee is satisfied?

Members indicated agreement.

The Convener: Are we content to note and welcome the Government's undertaking to review the provisions the first time that the order is amended for other reasons, and to give careful consideration to providing for a judicial warrant

procedure along the lines that are set out in the question that was posed to the Government? Are we also content to report that, in relation to paragraph 4(4) of schedule 2, there is a drafting error that the Scottish Government has undertaken to correct, which might be considered unlikely to affect the operation of the order?

Members indicated agreement.

National Health Service (Pharmaceutical Services, Charges for Drugs and Appliances and Charges to Overseas Visitors) (Scotland) Amendment Regulations 2009 (SSI 2009/177)

The Convener: Are we content to report to the Parliament that we find satisfactory for our interests the Scottish Government's explanation in the letter to the Presiding Officer dated 8 May 2009 for the failure to comply with articles 10(1) and 10(2) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096)?

Members indicated agreement.

Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) Revocation Order 2009 (SSI 2009/180)

The Convener: Are we content with the order?

Members indicated agreement.

The Convener: Are we content with the Scottish Government's explanation for its failure to comply with the dreaded 21-day rule and, if so, are we content to report accordingly?

Members indicated agreement.

Individual Learning Account (Scotland) Amendment Regulations 2009 (SSI 2009/176)

Education (School Lunches) (Scotland) Regulations 2009 (SSI 2009/178)

The committee agreed that no points arose on the instruments.

Instruments not laid before the Parliament

Products of Animal Origin (Disease Control) (Scotland) Amendment Order 2009 (SSI 2009/174)

14:45

The Convener: Are we content to draw the order to the Parliament's attention on the grounds that are set out in the summary of recommendations?

Members *indicated agreement.*

Planning etc (Scotland) Act 2006 (Commencement No 8) Order 2009 (SSI 2009/179)

The committee agreed that no points arose on the instrument.

Instrument not subject to Parliamentary Procedure

Sea Fish (Specified Sea Areas) (Regulation of Nets and Other Fishing Gear) (Scotland) Amendment Order 2009 (SSI 2009/165)

14:46

The Convener: Are we content to draw the amendment order to the Parliament's attention on the ground that there is a doubt about the vires given that it is not competent to regulate relevant British or non-British fishing boats outside the Scottish zone as new articles 3(1A)(b) and 3(1A)(c) purport to do?

Members *indicated agreement.*

The Convener: Secondly, do we wish to comment in our report that a doubt remains about whether the relevant article can be read as competent under section 101 of the Scotland Act 1998 as the Scottish Government suggests?

Members *indicated agreement.*

The Convener: I thank members for their contributions and for questioning our guests. Our next meeting will be on 26 May at 2.15.

Meeting closed at 14:47.

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