



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 20 December 2011

Session 4

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SUBORDINATE LEGISLATION COMMITTEE

16th Meeting 2011, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)

*Kezia Dugdale (Lothian) (Lab)

*Mike MacKenzie (Highlands and Islands) (SNP)

*John Scott (Ayr) (Con)

*Drew Smith (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Judith Morrison (Legal Adviser)

Edythe Murie (Scottish Government)

Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Health, Wellbeing and Cities Strategy)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament
Subordinate Legislation
Committee

Tuesday 20 December 2011

[The Convener *opened the meeting at 14:31*]

Decision on Taking Business in
Private

The Convener (Nigel Don): I welcome members to the 16th meeting in session 4 of the Subordinate Legislation Committee. I ask all those who are present to ensure that their mobile phones are turned off and not merely in silent mode.

The first item of business is for the committee to consider whether we should take item 7, which is consideration of the evidence that we are about to hear, in private. Are members content to do that?

Members *indicated agreement.*

Alcohol (Minimum Pricing)
(Scotland) Bill: Stage 1

14:31

The Convener: Agenda item 2 is an opportunity for members to ask questions of the Cabinet Secretary for Health, Wellbeing and Cities Strategy on the delegated powers in the Alcohol (Minimum Pricing) (Scotland) Bill. It is my great pleasure to welcome Nicola Sturgeon and her advisers, Donald Henderson and Edythe Murie. Would you like to make an opening statement, cabinet secretary?

The Deputy First Minister and Cabinet Secretary for Health, Wellbeing and Cities Strategy (Nicola Sturgeon): Not a long one. With any piece of legislation, there are judgments to be made about the extent of the delegated powers that we seek to take, and it is important that we consider that carefully. The delegated legislation that we are seeking to pass in the Alcohol (Minimum Pricing) (Scotland) Bill is appropriate and has been subjected to the right tests, but I am happy to answer any questions that members have. For me, the important aspect of the bill is that it gives us what I consider to be the missing piece in the jigsaw in our battle against alcohol misuse. In a relatively short bill, we set out what we are doing, what it is appropriate to have in the bill and what we consider delegated powers are appropriate for. I am happy to answer questions about any of that.

The Convener: That is fine—thank you. Can you please expand on the reasoning for wanting the initial price to be in delegated legislation? It is entirely obvious why any change that might happen over the years will be made by delegated powers, but why do you feel that the initial price should be set by delegated powers?

Nicola Sturgeon: My answer is in two parts. First, the primary legislation deals with the principle of minimum pricing. In considering that legislation, it is important that all the committees that are involved in its scrutiny—the lead committee, which is the Health and Sport Committee, and the other committees—have the opportunity to address that principle. In a previous session, Parliament did that and came to one conclusion; I hope that Parliament will come to a different conclusion this time. That principle is important.

Secondly, whatever price is set initially, that price will not stay forever but is likely to change over time. I take it from your question that it would not be reasonable to have to introduce primary legislation every time that the price changed. So, why not have the initial price in the bill? The

arguments that I have heard for that have concerned assessment of the competence and legality of the bill. However, I think that the bill complies with law and any price that is set by subordinate legislation would be required to comply with law as well. I am not convinced that setting the initial price in primary legislation would be the right approach. If we are going to take a subordinate legislation route in setting the price, that should apply to the initial price too.

This does not necessarily address the principle of your question, but in terms of practicalities, as the committee will be aware, we want—indeed, we are obliged—in setting the price to ensure that our decision is based on the most up-to-date evidence. We are currently updating the Sheffield model, and we should have that update in January. That will enable us to reach a decision about the price as the bill progresses through Parliament, as we did on the previous occasion.

The Convener: Thank you. I think that John Scott may want to pursue the point about evidence.

John Scott (Ayr) (Con): The minimum price is to be calculated by multiplying together the minimum price per unit, the strength of the alcohol and the volume of the alcohol in litres, and multiplying it all by 100. How was that formula arrived at? What evidence is the Government considering in order to reach a view on the level at which the MPU should initially be set?

Nicola Sturgeon: The equation that is set out in the bill is designed to translate a minimum price per unit of alcohol into the minimum price at which any alcoholic product on the market would be sold. The equation flows from the decision to pursue a minimum price per unit of alcohol.

On where we would set the minimum price per unit, the price of any alcoholic product flows from that and from its strength and volume, and we need to ensure that the measure meets the public health objectives that we have set for it and that it complies with European law. It is important that we have the most up-to-date evidence to determine where we can set that price to deliver the benefits that we want to flow from it.

In short, we need to ensure that we are not setting the price too low, so that it would be ineffective, or too high, so that it would be an unwarranted interference in the freedom of movement of goods. As the committee is aware, the Sheffield model presented a series of different prices and the estimated benefits in terms of health, reduced mortality, reduced crime, days off from work and that type of thing. We are in the process of updating that exercise just now.

Did you want to add to that, Edythe?

Edythe Murie (Scottish Government): No.

John Scott: Forgive me if I am straying into forbidden territory, but have you had any discussions with the United Kingdom Treasury about where the revenue should go? You said that you have modelled everything else.

Nicola Sturgeon: Parliament discussed that very point when it considered the previous bill. Some members put forward the view that if we were to deal with the price and consumption relationship of alcohol through tax, for example, the additional revenue would go to the Exchequer.

Obviously this Parliament does not have the tax powers to enable that to happen. As you would expect, we have closely examined the issue over a long period of time, and there are other reasons why addressing it through the taxation system would not meet our objectives. The main example is that we cannot ensure that increases in tax and duty for alcohol will be passed on to the consumer, so increasing alcohol duty would not necessarily mean that the price that someone pays for a bottle of cheap cider in the supermarket would go up. That is the main difference between doing it by minimum unit pricing and doing it by taxation.

I was fairly open—and I will be open again—on the issue of additional revenue. The previous Sheffield model included potential additional revenues. In public discourse, that became a debate about added profits for supermarkets. In reality, any additional revenue from minimum unit pricing would be spread across the alcohol industry among producers and big and small retailers. It was never correct—and never will be—to say that all that additional revenue would accrue to supermarkets. As a policy, minimum pricing is designed to reduce alcohol consumption. Over time, we would hope that the reduction in consumption would balance out any additional revenue from a higher price.

I have made the following point before. If there is additional revenue, even in the short to medium term, I am open-minded about coming up with innovative ways of applying a portion of that to measures such as programmes to deal with alcohol misuse. The idea that I previously put forward—but which went no further, because the minimum pricing provisions were not passed—involved the social responsibility levy, the provisions for which were passed. Such options remain on the table and I am happy to continue to discuss them with any interested party.

Drew Smith (Glasgow) (Lab): I welcome the cabinet secretary. When the Parliament considered the issue with you in the latter stages of the previous parliamentary session, you had a price in mind—you talked about 45p. What has changed to mean that you can no longer say that

45p is the indicative figure? Has something substantial changed such that we need to revisit the initial price?

Nicola Sturgeon: The policy is intended to deliver health benefits, reduced crime levels, a reduction in lost productivity and benefits to all issues that are caused by alcohol misuse. The sale and consumption of alcohol do not stay steady over time—they change. Since the Parliament considered the bill in the previous session, more updated data has been published on consumption, hospital admissions and mortality rates. It is vital to feed the most up-to-date information into the model to get the most up-to-date advice, if I can call it that, on the best level at which to set the price to get the desired benefits.

This is not about being unwilling to say whether we still think that 45p is right. We cannot make that judgment until we have the most up-to-date modelling. Given the importance of that judgment to compliance with European law and to getting the benefits that we want from the policy, my strong judgment was that we should update the model and decide on the price on the back of that.

As I said, we expect to have the updated model in January—probably towards the end of January. That will allow us to analyse the position, to make the decision and, as the Alcohol (Minimum Pricing) (Scotland) Bill goes through Parliament, to say what initial price we intend to set. By the time that Parliament takes the stage 3 vote on the bill, people will know our intention for the initial price.

Drew Smith: Does that mean that Parliament will have that indication at the time of that vote?

Nicola Sturgeon: We made such information available at stage 2 of the Alcohol etc (Scotland) Bill. We will take the decision when we have the information.

The short answer to your question about why we are not sticking with 45p is that the information and the reality that we are dealing with have changed in some respects. We need to base the decision on the up-to-date information. We will do that as quickly as we can and we will make the information available to Parliament.

Drew Smith: I understand your argument about wanting to rerun the model and to understand what the price should be. Do you envisage rerunning the model every time the price is to be changed in the future under the delegated power?

Nicola Sturgeon: There are a number of ways to approach the price. We have not come to a conclusion, so please do not take what I am about to say as a statement of intent on our policy. An inflation-based approach to changing the price could be taken—the price could rise in line with the retail prices index or the RPI plus 2 per cent.

Alternatively, the price could be reviewed every two years or five years—if that approach was taken, I strongly suspect that any future Government would look to update the evidence before it changed the price. There are various options for ensuring that the price stays up to date with current prices; we have not taken a final decision on what the best approach would be.

14:45

Chic Brodie (South Scotland) (SNP): The principle of the bill is not under question. We are here to consider whether the proposed use of delegated powers is appropriate in principle.

Out of curiosity, I carried out some research in a local supermarket over three weeks and I found wide variability, to say the least—whatever price mechanism you set. I will tell you my numbers if you like. You said that no figure was set until stage 2 of the Alcohol etc (Scotland) Bill. Where have you got to with the research? Given the time that has elapsed since 2007, will the current research enable you to be confident about setting a price, when you start to use the delegated powers? Alcohol pricing is a moveable feast, as I found, so how often do you anticipate revisiting the minimum price?

Nicola Sturgeon: When you talked about variability, I suspect that you were talking about the wide range of prices of alcohol. The point about minimum unit pricing is that it applies in a completely non-discriminatory way, so the approach to whisky is no different from the approach to wine, beer or cider. There is a price per unit of alcohol, which determines—through the complicated-looking equation in the bill—the minimum price below which a bottle of wine or whisky cannot be sold. In that sense, the approach is not variable but very consistent, because the minimum price will be applied consistently, regardless of the alcohol product. The policy will lead to different prices for different alcohol products, but the difference will be dictated by the strength and volume of the alcohol that is being sold.

Before we considered the Alcohol etc (Scotland) Bill in the previous session of the Parliament, we had the Sheffield model. No country has introduced minimum pricing in the way that we envisage doing so; we will be the first to do that if the Alcohol (Minimum Pricing) (Scotland) Bill is passed. Therefore, the Sheffield model was important in giving us the best-available evidence on what effect setting the price at a particular level would have. I should say that, although no other country has taken exactly the approach that we are taking, there is recent evidence from Canada of a strong relationship between price and consumption, which is very helpful to us.

Since the Sheffield model was produced, updated data on consumption and mortality have come out regularly, as a matter of course, so we are feeding the up-to-date information into the model, to get a revised model. We expect to have that by later in January, as I said.

I do not really need to make this point to the Subordinate Legislation Committee. In seeking to set the price through delegated powers, the Government is not seeking the ability to set a price without reference to anyone; the order will have to go through the very robust affirmative procedure. This committee, other relevant committees and the Parliament as a whole will have to satisfy themselves about the various tests that will be required. I know from previous experience that the delegated powers provision is no walkover—there is still a fairly robust procedure that we must go through.

Chic Brodie: I accept your point about the approach being consistent.

When I wandered round the supermarket, I was appalled to find that, applying the notional MPU of 45p—although I also did it with 50p, 55p and 60p—the minimum price of vodka was 37 per cent above the amount that it is currently sold at. Vodka was £7.96 a bottle, compared with the £12.60 that it would have been under the proposals. Malt whisky was £23.99. There is a wide disparity, which is why the principle of the bill is right. My second question is based on that. How often do you think you might have to revisit the MPU?

Nicola Sturgeon: That goes back to my earlier answer that various approaches can be taken. Obviously, whatever price is set initially, we will want the policy to continue to be effective. If a minimum price is set and inflation goes through the roof, that price will become less effective and will therefore no longer do the job. As I said, we have not yet reached a final conclusion on the issue, but we could link the price to inflation or to inflation plus an escalator, or we could have periodic reviews. I am open to people's views on those options. Those are the main options for updating the price.

The Convener: Kezia Dugdale wanted to ask a follow-up question, although it might have been superseded.

Kezia Dugdale (Lothian) (Lab): It has a bit, but I will have a go anyway.

Is the cabinet secretary concerned about a legal challenge to the bill?

Nicola Sturgeon: It is almost certain that the bill will be legally challenged. Any piece of legislation that the Parliament passes is potentially subject to legal challenge. The legislation that we passed to ban smoking in public places was legally

challenged. I work on the basis that, based on things that I have heard, there will be a legal challenge. My job is to ensure that we have legislation that can meet that legal challenge. I am confident that we will.

Kezia Dugdale: What would you say to pessimists who think that the only reason for waiting to set the price through subordinate legislation is that you know that a legal challenge is coming and you want the law to be on the statute book before that happens?

Nicola Sturgeon: That argument would be not only pessimistic, but illogical. A legal challenge would come at the point at which minimum pricing became effective. The European Commission has stated:

“Community secondary legislation ... does not prohibit Member States from setting minimum retail prices for alcoholic beverages.”

That is what the bill seeks to do. Therefore, there is nothing in principle in European law that prevents that. However, in setting the price, we must ensure that it is compatible with other provisions of Community law, including those on the free movement of goods. That is why the setting of the price is crucial. By the time that we implement minimum pricing, we will have to have said what the price is. Therefore, that is an illogical argument rather than a pessimistic one.

Kezia Dugdale: I was interested in your remarks on the variables that are involved in setting the price. You said that you want to leave setting the price as late as possible to ensure that you have the most up-to-date information. Is it possible that changes to the variables could eventually make the legislation illegal? For example, if the price in one particular part of your formula rises rapidly, could the legality of the bill be challenged on that basis?

Nicola Sturgeon: No, because in setting the price we need to ensure that we are acting proportionately. In other words, we need to set the price at a point at which we will deliver the health and other benefits that justify the policy, but not so high that we interfere with the market unjustifiably. If the variables in relation to the health benefit change in a way that would justify a higher price over time, we would have the data on the health variables that would justify putting up the price. There is not a fixed test. Therefore, what you say would not be the case.

Mike MacKenzie (Highlands and Islands) (SNP): My question is on a slightly different tack. You will know that the lead committee for an affirmative instrument has 40 days for scrutiny and that the Subordinate Legislation Committee has 22 days for scrutiny. How challenging would it be for those committees to complete their separate

processes—and in so doing to complete an evaluation of the supporting evidence for setting the MPU—in those timescales?

Nicola Sturgeon: To be perfectly frank, I do not think that it will be challenging. The Government has to specify the unit price by order. That order will be very short—it is likely to be one line long—but it will come with all the necessary, normal and required supporting evidence and policy justification. Moreover, in order to ensure that we do not breach competition law, we have to set the price without discussing it with the alcohol industry.

The law's technical operation is set out in the bill. Going back to John Scott's original question, I point out that the equation is the technical way in which we use the minimum price per unit to come up with the price below which alcoholic products cannot be sold. I do not think that the procedure is particularly complicated. The timelines for affirmative procedure have been set out to give the Parliament and committees adequate time to do their work; I do not think that anything in this order will make that process any more challenging than it is for most other pieces of secondary legislation that we face.

Mike MacKenzie: That is very reassuring.

John Scott: Given the complexity that you have just described and the fact that when the order is laid Parliament will need to assess not only whether the policy objective is likely to be achieved but whether the order is compatible with European Union law and therefore within the Parliament's powers, have you considered using the super-affirmative procedure for such orders to include an extended period for consultation and comment on a draft order before a final order is laid for approval?

Nicola Sturgeon: My first point relates back to Kezia Dugdale's point. We have to pass all those tests when we lay the order. We have to demonstrate that we can achieve the policy objective and Parliament will have to assess whether the order complies with EU law and is within its competence; we will have to convince it that that is the case. Doing it this way is in no way—and it cannot be seen as—an attempt to get round the legal issue or the possibility of a legal challenge. We will have to go through all that when we come to set the price.

The direct answer to John Scott's question is that we considered the super-affirmative procedure. I have no great automatic hostility towards it—in fact, I have agreed to its use in relation to other bills—but on balance we feel that it should be used only in exceptional circumstances. I think that the affirmative procedure, for many of the reasons that I outlined

in response to Mike MacKenzie, strikes the right balance between allowing proper parliamentary scrutiny and allowing us to use a normal procedure for bringing provisions into effect.

That said, on this as on all these issues, we are at an early stage of the process. I will continue to listen to the arguments that are made about points of procedure. For me, the principle in the debate is that there should be a minimum price for alcohol. As you have probably gathered, I am passionate about the move because of its benefits to our health and, more widely, to society. Everything else about the process—vital though it is—is not a great issue of principle for me. The issue is to find the best practical way of introducing a policy in which I passionately believe.

John Scott: I share your passion and concern about achieving the objectives. However—I am not trying to catch you out, cabinet secretary—I sense reluctance on your part to suggest the frequency with which revised orders might be laid. Do you see that happening annually, biennially or even every five years, all of which you mentioned? We are not specialists in the bill or the work surrounding it, so I suppose that my question is this: how often are the orders likely to be laid before the committee?

Nicola Sturgeon: I am more than happy to come back to the committee as our thinking develops on the matter. I am in no way reluctant to talk about it—it is a reasonable question for the committee to ask. However, we have not reached a final view because we need, as a Parliament, to strike a balance. For example, at certain times, the inflation rate might be changing because of economic circumstances, so more frequent price changes might be needed than in periods when inflation and other associated forms of behaviour are much more stable. We have to give that serious thought.

We are still thinking through the issues, and I will listen to the views that are expressed here, but my instinctive view is that we would not want to change the price more often than we have to. I am not instinctively in favour of an annual uprating or anything like that, because people want a certain degree of stability—although, on the other hand, we have to ensure that the minimum price continues to do the job that it exists to do. It is important that we take some time to consider all of the arguments properly.

John Scott: That is fair enough. Thank you.

15:00

The Convener: There is one other issue, but I will first go back to the evidence. The Sheffield modelling is clearly a substantial piece of work: you have alluded to it and to work from Canada,

which is hugely supportive. Do you anticipate having any other evidence available?

Nicola Sturgeon: The Sheffield model will be the principal work that we will rely on in setting the price. The Canadian evidence is extremely instructive—I am happy to make it available to the committee if you have not already seen it—and data on issues such as consumption and mortality are updated fairly regularly. That is all important contextual information for us to take account of. The Sheffield model takes all the evidence and models it so that it can anticipate the effect that a particular price could have, which is why it is the key evidence that we will take account of.

The Convener: Thank you. The final question is from James Dornan.

James Dornan (Glasgow Cathcart) (SNP): Welcome, cabinet secretary.

Commencement orders under the bill may make any transitional, transitory or saving provisions that are considered appropriate in connection with commencement. As the bill is drafted, the additional provisions will not be subject to parliamentary procedure. What additional provisions do you envisage may be required? Is it considered that those provisions will be complex or likely to cause practical problems in implementation?

Nicola Sturgeon: I do not expect much by way of transitional measures. If Parliament agrees to the policy, a minimum price per unit of alcohol will come into effect at midnight on a certain night and from that point on it will be the price below which alcohol cannot be sold.

There may be the odd issue; for example, contracts might have been started but not completed. If somebody had started the process of buying something by mail order when the minimum price came in, we would have to allow the contract to be completed at the price at which it started. However, such cases are pretty incidental. Not much is expected by way of transitional provisions, so my view is that it is right to cater for them by way of a commencement order.

The Convener: There being no additional questions, it remains for me to thank the cabinet secretary for coming. I did not give their titles on the record earlier, so I thank Donald Henderson, head of public health division, and Edythe Murie, principal legal officer of the Scottish Government legal directorate. I thank you all for your attendance.

Instruments subject to Affirmative Procedure

Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2012 [Draft]

15:03

The Convener: We move to item 3. Although no points have been raised on the order, I ask the committee to note the communication between our legal advisers and the Scottish Government on obtaining the consent of a minister of the Crown before making the order, and to accept that the consent requirement has been discharged. Are we content?

Chic Brodie: Why is that consent necessary? I understand that it is probably a legality, but it defeats me why we have to get the authority of the minister of the Crown.

Judith Morrison (Legal Adviser): It is a statutory legal requirement to obtain such consent before exercising the power in this way.

Chic Brodie: I think that we might change that.

The Convener: All sorts of things might change, but we can only work with the law as we find it. Despite that, is the committee content with the instrument?

Members *indicated agreement.*

Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Amendment Regulations 2012 [Draft]

Public Services Reform (Social Services Inspections) (Scotland) Amendment Regulations 2012 [Draft]

Social Care and Social Work Improvement Scotland (Excepted Services) Regulations 2012 [Draft]

Local Electoral Administration (Scotland) Act 2011 (Consequential Amendments) Order 2012 [Draft]

The committee agreed that no points arose on the instruments.

Instruments subject to Negative Procedure

Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc) (Scotland) Revocation Regulations 2011 (SSI 2011/428)

15:05

The Convener: We move to item 4. The regulations have not been laid at least 28 days before coming into force, as is required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. On that basis, does the committee agree to draw the instrument to Parliament's attention on reporting ground (j)?

Members *indicated agreement.*

Mike MacKenzie: We should caveat that with words to the effect that we accept the reasons that have been given.

The Convener: Indeed. I was just about to ask the committee whether we are inclined to accept the explanation from the Government—I think that members will have read it—which is simply that as the regulations will revoke previous regulations time was always agin the Government, which is really why it has failed.

John Scott: It appears that we are going back to the beginning of the process to address it properly, so I think that the explanation for breaking the 28-day rule is reasonable.

The Convener: Are members inclined to accept the Government's explanation, although we are required to report the instrument on the basis that it breaches the 28-day rule?

Members *indicated agreement.*

Confirmation to Small Estates (Scotland) Order 2011 (SSI 2011/435)

Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436)

The committee agreed that no points arose on the instruments.

Instrument not subject to Parliamentary Procedure

Act of Adjournal (Amendment of the Criminal Procedure (Scotland) Act 1995) (Refixing diets) 2011 (SSI 2011/430)

15:06

The committee agreed that no points arose on the instrument.

Draft Instrument not subject to Parliamentary Procedure

Public Services Reform (Recovery of Expenses in respect of Inspection of Independent Further Education Colleges and English Language Schools) (Scotland) Order 2012 and Draft Explanatory Document (SG 2011/237)

15:07

The Convener: We move to item 6. Does the committee agree to report to Parliament that the draft explanatory document could explain more clearly why article 2 will remove an administrative inconvenience and obstacle to the efficiency, productivity or profitability of the further education establishments that are affected by the order—rather than the effects of the order on Education Scotland—and that paragraph 27 of the draft explanatory document could explain in a clearer way the grounds on which the Scottish ministers consider that the policy objective that it is intended will be secured by the provision could not be satisfactorily secured by non-legislative means, rather than only stating those means?

Members *indicated agreement.*

15:08

Meeting continued in private until 15:31.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Members who wish to suggest corrections for the revised e-format edition should e-mail them to official.report@scottish.parliament.uk or send a marked-up printout to the Official Report, Room T2.20.

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