

# **HEALTH AND COMMUNITY CARE COMMITTEE**

Wednesday 10 January 2001  
*(Morning)*

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## HEALTH AND COMMUNITY CARE COMMITTEE

### 1<sup>st</sup> Meeting 2001, Session 1

#### CONVENER

\*Mrs Margaret Smith (Edinburgh West) (LD)

#### DEPUTY CONVENER

\*Margaret Jamieson (Kilmarnock and Loudoun) (Lab)

#### COMMITTEE MEMBERS

\*Dorothy-Grace Elder (Glasgow) (SNP)

\*Janis Hughes (Glasgow Rutherglen) (Lab)

\*Mr John McAllion (Dundee East) (Lab)

Shona Robison (North-East Scotland) (SNP)

\*Mary Scanlon (Highlands and Islands) (Con)

\*Dr Richard Simpson (Ochil) (Lab)

\*Nicola Sturgeon (Glasgow) (SNP)

\*attended

#### THE FOLLOWING ALSO ATTENDED:

Malcolm Chisholm (Deputy Minister for Health and Community Care)

Mr Keith Raffan (Mid Scotland and Fife) (LD)

#### CLERK TO THE COMMITTEE

Jennifer Smart

#### SENIOR ASSISTANT CLERK

Irene Fleming

#### ASSISTANT CLERK

Joanna Hardy

#### LOCATION

The Chamber



## Scottish Parliament

### Health and Community Care Committee

*Wednesday 10 January 2001*

*(Morning)*

[THE CONVENER *opened the meeting at 09:31*]

**The Convener (Mrs Margaret Smith):** Good morning. I welcome everybody to the first Health and Community Care Committee meeting of 2001 and wish you all a good new year.

In particular, I welcome the new members of the committee. After a few weeks of fluctuating membership, the committee is now complete. It is good to know that this team will progress the committee's business. I hope that the new members will find that this is a fun, broad-ranging committee. We cover a lot of different issues and constantly look for comments from members on everything under the sun. John McAllion has some idea of the breadth of the committee's work because he is always forwarding us petitions on all sorts of issues. I hope that the new members will find the committee interesting. It is certainly important, not only because of the subject matter, but because we preside over the scrutiny of the health budget, which is one third of the total Scottish Executive budget.

### Interests

**The Convener:** The first agenda item is to invite the new members to declare any relevant interests.

**Janis Hughes (Glasgow Rutherglen) (Lab):** I am a member of Unison.

**Mr John McAllion (Dundee East) (Lab):** I am a member of the GMB and of the Socialist Health Association. I also have shares in Glasgow Celtic Football Club, but I do not know whether that counts. I have only five ordinary shares and five preference shares. That is not very much.

**The Convener:** It may call into question your intelligence, but I do not think that it debars you from the committee.

**Mr McAllion:** It certainly shows that I am in good mental health.

**The Convener:** That is a good public health attitude.

## Deputy Convener

**The Convener:** Having struggled on without a deputy for a couple of months, I am absolutely delighted that agenda item 2 is the appointment of a new deputy convener. The deputy convener's role is important.

Under the d'Hondt system, our deputy convener must be chosen from the Labour members. Under the watchful eye of our former deputy convener, Malcolm Chisholm, I invite nominations for the new deputy convener.

**Dr Richard Simpson (Ochil) (Lab):** I nominate Margaret Jamieson.

**Mary Scanlon (Highlands and Islands) (Con):** I second that nomination.

**The Convener:** Is everybody happy with that?

**Members indicated agreement.**

*Margaret Jamieson was chosen as deputy convener.*

**The Convener:** Do you want to say anything, Margaret?

**Margaret Jamieson (Kilmarnock and Loudoun) (Lab):** No. I will wait with interest.

**The Convener:** That is unusual.

### Items in Private

**The Convener:** Under agenda item 3, I ask the committee to consider three agenda items in private to allow full discussion of conclusions and recommendations. Those items are: item 9, the consultation on public sector ombudsmen in Scotland; item 10, the Scottish Executive joint future group report; and item 11, the committee's future work plan.

We can handle those items in a couple of ways. It would be competent for us to discuss the joint future group report and the public sector ombudsmen report in public, but it is normal practice for the committee to go into private session to discuss its conclusions before putting together a report of its own. I am quite relaxed about that on this occasion. Going into private session to discuss our work plan will allow us to be as robust as we want to be in our discussions about how the committee will approach its future work and what it wants to cover.

Are we agreed?

**Members indicated agreement.**

## Tobacco Advertising and Promotion Bill

**The Convener:** Agenda item 4 concerns the Tobacco Advertising and Promotion Bill, which is being considered by the UK Parliament. I welcome Malcolm Chisholm, who is here to give evidence. The bill contains provisions that affect Scotland and are within the legislative competence of the Scottish Parliament. The UK Government and the Scottish Executive have taken the view that it would be more practical and appropriate for the relevant provisions to be dealt with in one UK bill rather than to have a separate Scottish bill. That approach has been referred to in the past as a Sewel motion. The other devolved assemblies in the UK have taken a similar view.

Although a Sewel motion is being used, the committee has an opportunity today to consider the bill before the motion goes to a meeting of the Parliament. I hope that members have had a chance to consider the memorandum that has been circulated. Standing orders do not set out a formal procedure for dealing with bills that come before us in this fashion, nor are we required to publish a report as a result of our discussion today. However, members will obviously have questions and comments to put to the minister.

I now invite Malcolm Chisholm to tell us about the bill. We are interested in two substantive issues. First, we want to know the rationale for the bill being handled using a Sewel motion, rather than the Scottish Parliament having its own bill. We would also like to know about timetable implications. Secondly, we have questions about the thinking behind the bill and what it is hoped it can achieve. Members will be able to ask the minister detailed questions about the substantive nature of the bill.

**The Deputy Minister for Health and Community Care (Malcolm Chisholm):** I am delighted to be here at the first meeting of the new-look Health and Community Care Committee. I congratulate Margaret Jamieson on her election to the post of deputy convener. Given that that position seems to be a stepping stone to my job, I shall have to keep a close eye on Margaret.

I was going to begin with some general remarks about smoking but, given your preamble, I suspect that you probably do not want to hear them, so I shall truncate them. Members are all aware that smoking is the greatest single cause of preventable disease and ill health in Scotland and is responsible for 13,500 deaths a year—one in five of all deaths—and for some 33,500 hospital admissions. That is the background to today's discussion.

The Scottish health plan reaffirms our commitment to battling against the impact of tobacco and highlights our focus on prevention, which is one of the priorities of the health improvement fund, to which £100 million has been allocated over the next three years. Members will also be aware of many of the measures that are currently being taken, such as giving a week's free supply of nicotine replacement therapy to poorer smokers. There is currently consultation on making all NRT products available on prescription. A charter on smoking in public places is being considered along with various other smoking prevention activities.

The Tobacco Advertising and Promotion Bill is being introduced in line with a UK Labour general election manifesto commitment. That in itself highlights the determination of the Labour Government at Westminster to ensure that it is passed before the next UK general election, whenever that may be. We did not think that UK primary legislation would be necessary, but the bill is being introduced now, rather than last year or the year before, because of a challenge in the European courts to a European Union directive.

We want the bill to apply throughout the United Kingdom because advertising and promotional activities do not respect national boundaries. There is clearly a cross-border flow, which means that the ban must be implemented across the United Kingdom if it is to be effective. We need a consistent approach that is robust in the face of legal challenge and is capable of effective enforcement. Any inconsistencies could be exploited by the tobacco industry, through a legal challenge or in other ways.

As the memorandum explains, the bill is comprehensive and follows the policy set out in previous consultations on implementing the EU directive. The bill will ban all forms of tobacco advertising and promotion. In some instances, detailed measures will be set out in subordinate legislation, on which there will be consultation. The bill contains a number of regulation and order-making powers, some of which will be conferred on Scottish ministers. That is explained in the memorandum.

For other types of promotion—such as brand sharing, distributions at nominal cost and advertising by electronic means—it is intended to legislate on a UK-wide basis at secondary legislation level. It is difficult to legislate in those areas, both from a technical and from a legal standpoint, and it would be difficult to enforce such legislation in a Scotland-only context. Moreover, such legislation may require notification to the EU under the technical standards directive, which takes some time. We are keen that that does not delay the introduction of wider statutory controls in

the meantime. I hope that that explains why some of the provisions of the bill are in regulations. I know that is something that the committee has been concerned about on previous occasions and it will no doubt be mentioned in relation to this bill.

I ask the committee to support the Executive's motion. It makes good sense to work co-operatively with other parts of the UK. In proposing the motion, our overriding concern is to introduce a firm and effective ban on advertising and to do so quickly. This is a major step in our drive to reduce the devastating toll that smoking takes on our nation's health.

**The Convener:** Thank you for that introductory statement. We all share your concerns about smoking and would echo the points that you have made about the importance of tackling the number of smoking-related deaths in Scotland. It is clear from the paperwork relating to the bill that we could save somewhere in the region of 300 lives a year in Scotland.

You have outlined the reasons for the Sewel motion and I know that members will want to ask about that. I would like to begin by asking about the timetable for the bill's progress through this Parliament and through the Westminster Parliament, if we agree that that is how it should be handled.

**Malcolm Chisholm:** If the committee is agreeable, the Sewel motion will be considered by the Parliament next week. We do not have any direct control over when the bill will be introduced at Westminster, but I understand that it will be introduced this month. I am assured that the intention is to pass it by the spring. I cannot give a guarantee on that and I suspect that not even the business managers at Westminster could do so, because MPs are at liberty to move amendments to the bill.

Putting some of the provisions in regulations will get the bill through more quickly. A reason for putting the brand sharing details in regulations, as opposed to in the bill, is that putting them in the bill would mean that EU procedures would delay us by three months. Putting them in regulations will help to get the bill through in a relatively short time. We are talking about a manifesto commitment, and from what we have been told by Westminster, we expect the bill to go through fairly quickly—by the spring, I hope.

09:45

**Nicola Sturgeon (Glasgow) (SNP):** I would like to indicate my support for the objectives of this bill. I hope that all of us support what the bill is trying to do. I fully appreciate the arguments for having a UK-wide ban and UK legislation. In this case, those arguments have been well made.

However, we have to consider timing. As you said, Malcolm, we are talking about a Labour manifesto commitment. Yet, for whatever reasons—and I accept that some of those reasons are reasonable—the bill is only now being introduced, at the tail-end of a Westminster Parliament. You say that you are unable to guarantee that this bill will be on the statute book before the general election—it seems to be assumed that we will face a Westminster general election within three or four months. Without a guarantee that the bill will be enacted before that election, we in the Scottish Parliament are in a difficult position. If the bill were not enacted, we would be back to square one at Westminster. No progress would have been made at all. We would be left hoping that the issue would be in the next Queen's speech, in order to get it up and running again. That seems to be an argument in favour of having Scottish legislation. Can Malcolm give us any stronger a guarantee that the bill will be enacted before the Westminster general election?

**Malcolm Chisholm:** To be fair, it is entirely because of EU legislation and the challenges that it poses that the bill is being introduced relatively late in the Parliament—although it is only year 4. We should put that on the record.

Theoretically, it is possible that the bill will not go through before the general election. No one can doubt that, although no one knows when the election will be. If it did not go through, we would have to review the situation. I am not in a position to reveal, or even to speculate on, the contents of the next Queen's speech. It would be remiss of me even to suggest which party will be deciding the details of the next Queen's speech. Speaking for the Labour party, I would say that there is little doubt, given the commitment that has been made, that the issue will be in the Queen's speech after the general election if there is another Labour Government. Clearly, however, that is speculation.

I cannot really add anything else as an assurance of what will happen at Westminster. I know that I am still a Westminster MP, but that does not give me any particular insights into how matters will progress. I know only that the intention and resolve are there to pass the bill in the first part of this year.

**The Convener:** Assuming that all committee members share the views that have been expressed so far and support the bill, it seems reasonable that this committee could make a robust statement today saying that we want the bill to be enacted this side of a general election. If there were any question of slippage, we would want to review the situation, as the minister suggested.

**Malcolm Chisholm:** In certain other Sewel motions, the strongest argument has been the

convenience argument—that things would be done more quickly at Westminster. However, in this case, time and convenience are not the only considerations. The most important thing is to deal with this issue consistently across the UK. The whole argument should not turn on whether things will be done before the date on which Nicola Sturgeon presumes that the general election will be held.

**Dr Simpson:** Automatically, a clause in the bill will state that Scottish ministers will take over enforcement powers in Scotland.

**Malcolm Chisholm:** The bill actually says that enforcement will be by local trading standards officers but that there will be powers for Scottish ministers to take over enforcement. However, normally it will be for local trading standards officers to report any offences to the procurator fiscal. Enforcement will be under Scottish jurisdiction.

**Dr Simpson:** The EU has been thwarted in its attempts to introduce similar measures, because it acted under competition law and not under public health. As I understand it, that is why the measures failed. Will the EU take up the issue again? We have been talking about cross-border issues between Scotland and the rest of the UK, and we have been talking about written publications. However, because of the way that other media are developing, we have to consider other boundaries. Is the EU likely to come back with new directives under public health?

**Malcolm Chisholm:** I believe that it is working on another directive. As you suggested, the problem with the original directive was that it was introduced as a single-market provision, before it was ruled that it was a health provision. Another directive would clearly be helpful in many areas, not least in sponsorship. That may be a further reason for putting the precise time of the sponsorship ban in regulations. We can perhaps hope for some European developments in the immediate future.

**Dorothy-Grace Elder (Glasgow) (SNP):** Thank you, Malcolm, for outlining matters. I think that everyone welcomes the intentions behind this legislation.

Haste is commendable, but I wonder whether there is not danger in that haste. Who will be criminalised in, for instance, the newspaper industry if, accidentally, every so often, they run advertisements for tobacco products? Will the proprietor, the editor, the advertising manager, or even the news vendor, be at risk of being criminalised for having sold a newspaper containing a tobacco-related advertisement? This legislation is fairly draconian in a free society.

Has the Government, or anyone else, computed the loss to the newspaper industry? Although it is possible to focus on magazines that are targeted at young people, the newspaper industry is generally accepted as being targeted at an adult market. If newspapers are seriously harmed by a loss of advertising and have nothing to make up for that loss, there will be a threat to the printed word. That will affect literacy, which we all want to promote.

**Malcolm Chisholm:** There is no intention to catch people who do something accidentally. The bill gives a clear and explicit defence, in more than one of the subsections of clause 5, for people who do things unwittingly.

I do not know offhand how much revenue newspapers get from tobacco advertising. I would imagine that they could make up any loss from alternative sources. I do not know whether you saw the interesting story in one of the Sunday newspapers that formula 1 has already been able to attract sponsorship from non-tobacco sources. Obviously, I could not guarantee that that would happen with newspapers, but I do not think that any of us would want to justify tobacco advertising on the grounds that Dorothy-Grace Elder laid out.

**Dorothy-Grace Elder:** Malcolm, you indicated that you personally, and perhaps the Scottish Executive, did not have a figure for the possible loss to the newspaper industry. However, one would hope that the UK Government did have such a figure, because we are talking about a vital industry in Scotland. Although we all wish overall tobacco intake to be cut down, a number of people feel that these measures could harm the newspaper industry. The people—and, in particular, the very young people—whom we most wish to discourage from tobacco products are the people who are least likely to be reading an advertisement for tobacco in *The Herald* or *The Scotsman*. Has there been no computation of the possible harm to the newspaper industry in Scotland?

**The Convener:** I think that we have some figures in one of the papers, but I am not sure.

**Malcolm Chisholm:** The only figures that I have, which are for business in general, are for the impact that the ban could have on business throughout the United Kingdom, and they do not set out figures for the newspaper industry. There will be a reduction of more than £300 million in tobacco expenditure, a £50 million reduction in tobacco advertising and a £43 million reduction in tobacco sponsorship of sports, but that does not help to answer your question about newspapers, Dorothy-Grace. It sounds as if you are arguing for an exemption for newspapers. I have to say that I disagree strongly with you.



**Dorothy-Grace Elder:** I did not want to get too deeply into this, but I must declare an interest as a member of the National Union of Journalists. Will the Executive go further and consider this matter and come up with some figures?

**The Convener:** I have a supplementary on the matter. On the question of the proper identification of the correct offender—that is, the producer of the defective product—how will the responsible person in the newspaper chain, from the editor through to the vendor, be found? That might be costly and time-consuming. Has that been taken into account?

**Malcolm Chisholm:** That is deliberately left open in the legislation so that the courts can make a judgment on it.

**Margaret Jamieson:** Will there be a moratorium during which retailers and others will have the opportunity to remove tobacco-related livery without fear of prosecution?

**Malcolm Chisholm:** One of the clauses in the bill leaves it up to ministers to decide the commencement date, so I am sure that that point would be taken into account. It is not implied that the bill will take effect immediately on receipt of royal assent. It will be up to ministers to decide on the commencement date. That would allow for the transitional period that Margaret Jamieson suggests. However, for certain matters, such as brand sharing and sponsorship, there will be a longer transitional period because it will take far longer for people to adapt in terms of brands of clothing and finding alternative sponsorship. That is one reason why there will probably be a longer delay in those circumstances. It will be up to regulations to determine the commencement date.

**Margaret Jamieson:** Will any provision be made for retailers such as newsagents, which cannot be classified as specialist tobacconist shops under clause 6(2), for the loss of income that might be occasioned by being unable to advertise their wares?

**Malcolm Chisholm:** No, there is no such provision in the bill. It is an important part of the bill that general shops, rather than specialist shops, should have restrictions. Such shops are where young people are likely to go. One reason why there is an exception for specialist tobacco shops is that older people tend to go to them. Clearly, however, we will have control of the regulations for general shops, so there will be consultation on the details of the regulations. Members will therefore have an opportunity to raise specific points of concern about how the legislation should be enforced in general shops. However, the clear intention is that there should not be advertising outside shops or in shop windows and there is no provision for compensation. In any case,

compensation would be difficult to quantify.

**Margaret Jamieson:** You indicated that there would be consultation. How do you envisage that being carried out, given that the matter will be handled by the Westminster Parliament? Will the matter come before this committee again?

**Malcolm Chisholm:** The Executive memorandum explains that some of the regulations, such as those on brand sharing, will be dealt with on a UK basis. There are good reasons for that. It would be ridiculous, because of cross-border flow, to say that there could be products with a brand on them in Scotland, but not in England. The regulations that refer to what happens in shops at the point of sale, specialist tobacconists, and the date of the sponsorship ban will all come before this Parliament and this committee. Those regulations will also be consulted on, so that the details can be discussed. I cannot give the committee the details of the consultation at the moment, but we could think about it and write to the committee.

10:00

**Nicola Sturgeon:** Could you say more on Margaret's point about newsagents and small shops? Point-of-sale advertising is exempted from the ban—subject to regulations, as you say—but what is your thinking on the shape of those regulations? Clearly, point-of-sale advertising in newsagents and small shops is exactly the advertising that young people in particular might be most likely to come into contact with. They are more likely to see such advertising than they are to see an advert in a newspaper, for example. It is therefore important that the exemption is narrowed as far as possible for the ban to be effective. I know that you said that there will be consultation, but what is your thinking at this stage on the shape of the regulations?

**Malcolm Chisholm:** Nicola Sturgeon can rest assured that we can deal with the matter at a Scottish level. That is appropriate, because the same cross-border and enforcement issues do not apply in this case. It is our intention that the regulations should be as robust as possible. I have already alluded to my understanding that they will ban advertising outside shops or in shop windows.

There is an issue about how tobacco products will be displayed inside shops. I imagine that it will be legitimate, if a shop is selling tobacco products, to display them. I presume that the name of a product could be put beside the product inside the shop, but we want to refine such areas in the regulations. However, in general, we will want to make the regulations robust, and there will be an opportunity for members to push for whatever level of strict controls they want. We will have

latitude to do as we wish.

**Nicola Sturgeon:** I will make a technical point. If one reads clause 4(2) and clause 6, it seems that there is an argument that the primary legislation will ban advertisements in shop windows, so it is arguable whether that is an issue for regulations—the regulations are about point-of-sale advertising in shops. You say that shops will be able to display products and advertise the names of those products. I am not clear to what extent advertising within shops can be regulated, but it is the form of advertising that probably impacts most on the people whom we are trying to protect with the ban. I am not clear that we know enough about what is envisaged in the regulations to give a carte-blanche acceptance to the legislation.

**Malcolm Chisholm:** When I referred to shop windows, I was referring to displays in shop windows, which could be covered by regulations.

**Nicola Sturgeon:** That is in the legislation. Given the way in which clause 4(2) is framed, I would argue that such displays are banned. Clause 6 uses the words,

“outside of the premises of, a specialist tobacconist”,

which implies that such advertising will be allowed. That is not referred to in clause 4(2), so such advertising is already banned. It seems to me that clause 4 refers to advertising inside a shop. I know that you cannot give me a categorical answer, but is it in your mind to regulate advertising within premises?

**Malcolm Chisholm:** Clearly, it is. As I said, I would expect there to be a sign if a company's products were being sold, but the location and the size of the sign can be dealt with in regulations. It would not be appropriate to deal with that in primary legislation.

**Mary Scanlon:** My party also supports the bill, the fact that it is UK-wide legislation and the ban. I assure Nicola Sturgeon that, should the Tories win the next general election, we will pursue the legislation.

**The Convener:** We will rest easy in our beds.

**Mary Scanlon:** We all support the measure, but what evidence exists to show that banning tobacco advertising will contribute towards the achievement of a healthier Scotland? I believe that the television advertising ban has been in place for at least a decade. Will you tell us whether that ban has resulted in smoking cessation?

**Malcolm Chisholm:** Nobody is saying that a ban alone will change the situation—that is partly why I mentioned all the other measures that we are taking at the same time. Research leads us to believe that there might be a reduction in smoking of about 2.5 per cent—that represents a significant

number of people and a significant number of deaths. It is clear that the ban will have an impact, but nobody is pretending that that measure alone will deal with the problem.

It is difficult to disentangle the effect of the ban on television advertising from all the other things that are happening. I am not aware of any specific research on the effects of that ban—I am not sure how such research would be conducted. We can regard a ban only as part of a jigsaw. We need action on many other fronts as well.

**Mary Scanlon:** What impact do you feel that the bill will have on smoking cessation?

**Malcolm Chisholm:** We expect that it will have some effect, especially in preventing young people from starting to smoke. We are not putting all our eggs in this basket; we must do many other things, which is what we are beginning to do.

**Mary Scanlon:** You mentioned the secondary legislation regarding electronic sales—I presume that you were referring to the internet. Many people purchase cigarettes over the internet, where it is more difficult to regulate advertising. Given the increased use of the internet, how will you extend the ban—if you can—to electronic advertising?

**Malcolm Chisholm:** That is increasingly important. We want to ban advertising on the internet of UK-based businesses. Clause 7—a short clause in the bill—is important; it concerns an area on which everybody would agree that we need to have regulation-making powers. I am sure that members have all read it, but since it is so short, I will read it. It says:

“The Secretary of State may by order amend any provision of this Act if he considers it appropriate to do so in consequence of any developments in technology relating to publishing or distributing by electronic means.”

That is an important regulation-making power. For obvious reasons to do with the internet, it is appropriate that that should be a UK power.

**Mary Scanlon:** How will the bill support the Executive's health strategy on alcohol, tobacco and drugs?

**Malcolm Chisholm:** Nicotine is a drug, so in that sense drugs are included. We should consider the bill in terms of its effect on the number of people who smoke. I do not know whether Mary Scanlon has something else in mind; does the bill cross over in ways that I am not quite capturing?

**Mary Scanlon:** I am thinking about the links with the overall prevention of abuse, health strategies and the contribution of the bill to achieving reduced cancer and heart disease rates and so on in Scotland. How will it impact on those clinical objectives?

**Malcolm Chisholm:** The bill is an important part of that, but it would be wrong to become complacent and to feel that, once we have passed the bill, we have made the major step forward. We must be realistic; a ban in itself will not stop most smokers smoking, but we hope—and all the research suggests that this is the case—that it will stop a significant number of people smoking.

**Mary Scanlon:** We are looking not only at a ban, but at other measures, such as better enforcement of the legal age limit and so on. Will a ban be part of a bigger package?

**Malcolm Chisholm:** Absolutely. Out of respect for what the convener said, I truncated the first part of my speech. I thought that she might tell me off if I strayed too widely. There are many measures; we must act on under-age smoking, prevention, nicotine replacement therapy and the health improvement fund. The committee has been concerned with the issue of smoking in public places—I am sure that members will keep a close eye on the voluntary code and may express a view on that at some point.

**Mr McAllion:** I apologise for coughing. It is not due to smoking—I have never smoked.

It is clear that the intention behind banning the advertisement and promotion of tobacco is to reduce consumption. It is inevitable that, as a result, there will be financial losses to businesses of all kinds, whether to newspapers—through advertising losses—the tobacco companies or shops. Is it the intention of the Executive—or should I call it the Scottish Government—and the UK Government not to compensate anybody for any kind of financial loss that arises out of legislation such as this?

**Malcolm Chisholm:** That is the intention. John McAllion has opened up a complicated area—there could be knock-on effects on all sorts of things, including taxation revenue. Our view is that a ban is so important that we have to accept that.

A ban is complicated in that it can work in different ways. The substitution that I referred to, when I mentioned formula 1 racing, is one factor. There is the effect on the macroeconomy: if people are not spending money on cigarettes, they will spend it on something else. The macroeconomic and taxation effects might be more complicated than we first thought.

**Mr McAllion:** My second point is on timetabling. Like the minister, I have been at Westminster and know that no Government can take Oppositions—and indeed its own back benches—for granted. However, given the Government's majority of 177 and the cross-party support for a ban, there is no reason to presume that the legislation will not be in the statute book before the general election, even if that election is on 3 May. Is that correct?

**Malcolm Chisholm:** I am glad that my Westminster colleague puts it even more strongly than I did. I suppose that we both have the right—John McAllion certainly does—to go down and speak at the bill's second reading.

**Mr McAllion:** Or even to vote for it.

**Dorothy-Grace Elder:** It would be helpful if the minister indicated how long people have been working on the bill. Coming through the ether today is an indication that those who have drafted the bill do not seem to have thought out the difference between in-your-face advertising—such as billboard advertising, with cigarettes being pushed everywhere possible without people having to seek them out, which all of us deplore—and newspaper advertising. We can have a say about that in Scotland, so will the minister consider an exemption for the Scottish newspaper industry? Does Malcolm Chisholm honestly think that youngsters will take up smoking because they happen to see an advertisement for cigarettes in, for instance, *The Scotsman* or the *Daily Record*?

**Malcolm Chisholm:** On the member's first point, work has been done on that for a considerable time, but the context was different. I and others have referred to the EU directive. The first main piece of work that was done by the UK Government was to make up regulations that would carry the directive into effect. Those regulations were available about a year ago. That indicates that much work has been done. It must now be done differently, through primary legislation. As I said, the provisions of the primary legislation are similar to what was contained in the EU directive. The impression Dorothy-Grace Elder gives, that somehow the bill has been cobbled together in a hurry, is not correct. Not only has it been worked on at UK level for a considerable time, it has been worked on at European level for a considerable time. What is proposed here is very much consistent with the EU directive.

I am not sure whether the points that Dorothy-Grace Elder makes about the newspaper industry have been made by others elsewhere. All I can say is that I had not previously been aware of that. As I have indicated, I am not minded to agree with her on that, but I have no doubt that she and those of her colleagues in the newspaper industry who agree with her are more than capable of making those points in the next few weeks, if they wish to do so.

**Dorothy-Grace Elder:** I make the points myself, Malcolm. Nobody has got at me—they do not need to.

Do you accept that there is a big difference between a sought-out, bought product, such as a newspaper—not a teenage magazine—which is intended for the general public, and in-your-face

advertising?

**Malcolm Chisholm:** There might be a difference in the degree of promotion, but that difference is not such as to persuade me to make an exemption for newspapers.

**Nicola Sturgeon:** Let us move on to prohibition on sponsorship, which we all support. The explanatory notes to the bill highlight a potential loophole, on which I would like the minister to comment. They say that

"it is not intended to prevent a tobacco company supporting a theatrical production and being acknowledged for so doing, provided that the acknowledgement mentioned solely the name of the company".

That raises the possibility of football shirts or formula 1 cars having the name of tobacco companies emblazoned on them. According to the explanatory notes, that would not be outlawed by the bill. That suggests a big loophole. What is your view on that?

**Malcolm Chisholm:** I recognise that sentence from the explanatory notes, but Nicola Sturgeon is extending the scope of that explanatory note beyond what is intended.

**Nicola Sturgeon:** I am reading it as it stands; I have not paraphrased it.

10:15

**Malcolm Chisholm:** Explanatory notes are subordinate to the bill, therefore the wording of the bill always interests me more than the wording of the explanatory notes. Clause 9, subsection (1) of the bill states:

"A person who is party to a sponsorship agreement is guilty of an offence if the purpose or effect of anything done as a result of the agreement is to promote a tobacco product in the United Kingdom."

Such matters may ultimately have to be decided by the courts. However, it is clear to me that, if anyone went on to a football field with a cigarette brand name on their shirt, that would contravene that subsection of the bill. That would apply equally to billboards at sporting events. If even one word were recognised to be associated with a tobacco product, that would constitute a contravention of clause 9.

The point that Nicola Sturgeon makes about the explanatory notes' reference to a theatre production is valid—there might be some discussion of that at Westminster. The view is that a line should be drawn somewhere, and there might be implications relating to the European convention on human rights if tobacco companies were prevented from giving money for—as they would argue—philanthropic reasons. People might be cynical about that and I have no doubt that there will be grey areas. However, it would be

wrong to imply that there is a loophole regarding the use of a tobacco company's name if that is a single word—that would clearly contravene clause 9.

**Nicola Sturgeon:** I am happy to accept your reassurance that that is the case.

**Dr Simpson:** We should never forget that the tobacco industry is the most imaginative and inventive industry—those are euphemisms—when it comes to getting around the law. They are past masters of that. They have managed to extend and make flexible in their own interests every voluntary agreement that has been established. I predict that the company names that are related to tobacco will change rapidly if the companies are allowed to use them in a public setting.

Although I accept the restrictions of the European convention on human rights, I suggest that regulations that will apply in Scotland should be drafted as tightly as possible, concerning both the point-of-sale issues that Nicola Sturgeon has alluded to and the use of the names of the tobacco companies. I predict that tobacco companies will still succeed in getting round any prohibitions—they are the most clever and imaginative people.

**Malcolm Chisholm:** We will consider what Richard Simpson and Nicola Sturgeon have said on the matter. I had some concerns about the explanatory notes, which Nicola Sturgeon has raised, although I was reassured when I referred the issue back to clause 9. There is a dividing line, and some people will argue that it could go further. That point will be made at Westminster. It is clear that a company cannot get around the prohibition simply by using its name instead of its product, but there are still issues to be considered.

**The Convener:** Judging by the body language of all members of the committee, Nicola Sturgeon's point is well made and addresses an area of common concern. It would be helpful if the minister conveyed the fact that all the committee's members share that concern.

**Nicola Sturgeon:** The issue of brand sharing has been mentioned in passing, but has not really been addressed today. In that area, regulation is a matter for UK ministers, but it is important that we have a voice either through the committee or through Scottish ministers making their views known to Westminster. If the regulations are not very tightly drawn, the imagination of tobacco companies—to use Richard Simpson's phraseology—will be employed in using non-tobacco products to promote tobacco, by associating tobacco terminology with non-tobacco products or vice versa. A well-financed tobacco company could go to town on getting around the legislation and I am concerned that this is a big area of legislation that is subject to regulation in

which the Scottish Parliament will have no direct involvement.

**Malcolm Chisholm:** As I have said, there would be no chance of the bill being passed in the next three months if we were to put the regulations in primary legislation. I have explained our obligations under the technical standards directive. There is a three-month period during which member states cannot progress a measure when it comes under that directive.

We want to make the regulations as strict as possible, although it was suggested by no lesser person than the Advocate General of the European Court of Human Rights—when the matter was discussed there—that there could be ECHR issues. I was glad that the Court's judgment did not express that concern, but that indicates something of which we should be mindful in the drafting of the bill, as in the production of other legislation.

A time factor is also involved, and we accept that it might take some time for the industry to adapt to the changes. It is a complex area, both from technical and legal perspectives. The regulations might also overlap with trading law, which is a reserved area. That is another reason for legislating on a UK basis. I understand Nicola Sturgeon's concerns, but there are good reasons for putting the provisions in regulations, which I hope that she accepts. It is our intention and the intention of the Westminster Government to make the legislation as strict as possible, but we want to ensure that we get it right.

**Dorothy-Grace Elder:** Of course we want to cut out the in-your-face advertising, but by cutting off the tobacco barons from all legitimate forms of advertising, we will push them into being more subtle, which could be more dangerous. They could go into film production and finance films that have more stars smoking in them. I urge the minister to consider ways in which the clever people who are associated with advertising could advise the Government of the tactics that tobacco companies might adopt if they are not allowed the legitimate outlet that is least harmful to the general public.

**Malcolm Chisholm:** Dorothy-Grace Elder's general point is correct, which is why brand sharing is one of the key aspects of the bill. If that is not tackled, there is a possibility that tobacco companies will merely transfer advertising expenditure to that type of promotion. However, I do not draw from that the same conclusion that she draws. We must be mindful of the alternatives and ensure that we take action to stop the transfer of expenditure into those areas. I agree with the general point, but I do not accept the conclusion that we ought to give tobacco companies an area in which they can operate legitimately.

**The Convener:** I have a final point, which John McAllion touched on. According to the estimates that are contained in the Executive memorandum, the Government stands to lose in the region of £250 million a year in revenue, following the implementation of the measures. I presume that the Government's thinking is that that is a price worth paying.

**Malcolm Chisholm:** Absolutely. We must be up front about that. The less revenue that we receive from tobacco sales, the better. That matter is primarily for the Westminster Government. It might not be a simple calculation of lost revenue. As I said, the macroeconomic effects will be complex and if tobacco revenue releases spending power in other areas of the economy, we cannot necessarily say that the loss of that money would be offset in some way.

The point that you as a health committee and I as a health minister would make is that, even if that loss was not offset, we would be delighted to take in less revenue from tobacco sales.

**The Convener:** We would be delighted to take less revenue from cigarette sales, but one of the positive developments in the past 12 months has been that, as a result of taxation of smokers, £26 million has gone directly into public health work in Scotland. None of us wants that work to be jeopardised, so funding will have to be found from different sources as revenue diminishes if you reduce the number of people who smoke.

**Malcolm Chisholm:** I am sure that people would be very happy to look for alternative sources of funding if tobacco revenue decreases, as we hope it will.

**The Convener:** I will sum up the issues before we discuss our substantive decisions.

We have highlighted three or four concerns. Dorothy-Grace Elder has her own agenda on this issue; I do not get the impression that other members have a great deal of sympathy with that. I certainly do not.

Points have been made that have had sympathy across the committee; we ask the minister to take them on board. One is the timetabling of this bill. We would like it to be dealt with as a matter of urgency before a general election.

Concerns were raised about the point of sale. That matter will come back to the committee as the regulations are in the hands of Scottish ministers. We are concerned as advertising at the point of sale is important, especially for young people—as Nicola Sturgeon said—as it is in their face. The committee is also concerned about sponsorship and brand sharing.

Malcolm Chisholm said that if we agree to this item going through the committee this morning, it

will go through Parliament next week. Will time be allowed for debate or will it go through the chamber without debate?

**Malcolm Chisholm:** I am told that that is up to the business managers, as ever.

**The Convener:** Do members have any comments on that?

**Nicola Sturgeon:** It is a matter for the business managers, but we could make our views known.

We do not require a lengthy debate as the issues have been explored in detail today. Equally, it is not appropriate for it to go through on the nod; there should be a short debate so that these important issues can be aired in the chamber. We should communicate that wish to the business managers.

**Mr McAllion:** I support Nicola Sturgeon's comments. This is a devolved issue, so we should not let it slip through Parliament unnoticed. The Parliament should exercise its rights and say that we are interested in this matter. There should be a parliamentary debate about why it has been dealt with at Westminster.

**The Convener:** It is a good idea for Parliament to be made aware when Sewel motions are happening, why we are agreeing to them and how often they are being used. There is not great concern about it on this matter, but there might be in some cases. As a general rule, we should not let them slip by. We will intimate to the Parliamentary Bureau that the committee wants a short parliamentary debate.

We will now make a decision. There are no standing orders on this, so we are making it up as we go along—that provides echoes of a year and a half ago.

Are members agreed that this matter should be dealt with through the Sewel motion mechanism and that, following a debate next week, Westminster should deal with the legislation?

**Members indicated agreement.**

**The Convener:** I thank Malcolm Chisholm and his officials for attending the committee.

## Subordinate Legislation

10:30

**The Convener:** Item 5 is the Plastic Materials and Articles in Contact with Food (Amendment) (Scotland) Regulations (SSI 2000/431). The regulations were circulated to members on 5 November last year and no comments have been received from members. The Subordinate Legislation Committee has no comments to make on them and no motion to annul has been lodged. I therefore recommend to the committee that it does not wish to make any recommendation on the instrument.

Are we agreed?

**Members indicated agreement.**

## Influenza Vaccination

**The Convener:** The committee is asked to comment on the minister's response to the committee's 13<sup>th</sup> report, on influenza vaccination. Members will recall that Richard Simpson was our reporter. New members will have picked up on the issues that were raised in that report.

The report grew out of the concerns that were expressed by members of the committee and others in the wake of the situation that arose in the winter of 1999-2000. There were questions about when an outbreak becomes an epidemic or a pandemic. There was a cross-border difference on that and there were also differences between Scotland and England in the mechanisms for GP payment, advertising and how vaccination was given. That was in addition to questions about the effectiveness of the service.

As a result of the concerns, Richard Simpson was asked to report to the committee. He produced an extensive report some months ago. We have now received the minister's response to his report. Richard Simpson will give the committee his thoughts on the Executive's response.

**Dr Simpson:** The most interesting point is, perhaps, that the Executive was responding as we were undertaking the investigations. Discussions that we had with SCIEH and others—

**The Convener:** Can I ask you to explain what that is?

**Dr Simpson:** I was hoping that you would not do that, as I can never remember what it stands for. I think that it is the Scottish committee for infection and epidemiology, but I cannot remember what the H stands for.

The discussions that we had were matched by the Executive's desire to change radically the system of flu immunisation in Scotland. It introduced a new programme which, so far—touch wood—seems to have been beneficial, as I heard last week that the rates are 78 per 100,000 compared with 1,000 per 100,000 last year. That is having a massive beneficial effect on the health services as they are under considerably less strain. Whether by chance or design, the Executive has gone a long way to implementing the major recommendations of the report and started to do so even before the report was produced.

However, if the committee thinks it appropriate, we should pursue some residual questions with the Executive. It has accepted the overwhelming majority of the recommendations on which it had not already acted, but it has not referred to some others. We still do not have a pan-European definition of flu. I assume that it will continue to work towards one. That is important in the longer term.

The Executive has said that it will review the method of distribution. It introduced a central reserve supply this year, which was very helpful. I am concerned not only about under-supply in some areas being matched by a central reserve but about the fact that there is some waste: general practitioners, under the current ordering system, may be left with supplies of vaccine at the end of the season. The Executive has undertaken a review on that—we could perhaps ask it when it will be prepared to give us information on the conclusions.

I remain very concerned about the targeting of the under-65s. I think that the over-65 programme has been highly successful and I am told that uptake figures of 60 per cent and upwards have been reached. That is extremely welcome. However, we need to encourage the Executive to continue to monitor uptake among people under the age of 65 who are at risk, to ensure that that group is properly targeted and that measures are implemented so that that group receives the support, in the form of a call to vaccination, that the over-65s have received.

The Executive has indicated that it will continue discussions at a national level on whether immunisation among health service staff should be promoted. That is, in any case, being done on a voluntary basis, which is extremely welcome. I am not clear about the extent to which it is being done in nursing and residential homes, or among other care support workers, but the Executive has said that it will pursue the matter on a research basis.

It will be interesting to learn the outcome of the discussion with the Department of Health and about what further research is to be undertaken. I

say that because the existing research, as I noted in my report, was excellent. The Scottish research was very good, but did not have sufficient certainty to indicate that staff immunisation programmes should be compulsory, as they are for German measles and hepatitis B, for example.

The Executive says that some of the research that I recommended is really a matter for the industry. I question that and will give a specific example. The effective dose is currently thought to be 15 microgrammes, although there are indications that 10 microgrammes may be sufficient. I do not think that it is in the industry's interest to reduce the dose by a third unless it can charge the same price. I hope that, if members agree, we might consider whether that is an area where there should be some sponsored research, perhaps on a European basis, to find out whether a dose of 10 microgrammes is effective. That would be of particular importance in the event of a pandemic. If we can get away with a lower dose, it would reduce production difficulties.

The Executive has rejected my proposed solution of either a nationalised production company—similar to that which exists in Holland—or a joint company, operated with private industry. That is not crucial in normal years, but I remain deeply concerned that we have only one supplier, with a production line based near Liverpool, to produce the required supplies in the event of a pandemic.

Further, I would want to know more about the contracts that the Executive has in place with the industry should there be such an eventuality, to ensure that emergency supplies are made available. To be frank, if I was in Belgium, France or Germany, where there are major production lines, and a pandemic emerged, I would say that we should supply our nationals—or rather the people living in our country—first and that, if there is some left over, the United Kingdom could get it.

**The Convener:** For the benefit of newer members of the committee, can I stop you there, Richard? Will you tell them—and remind me—of the statistical details relating to pandemics and about why you are particularly concerned about them?

**Dr Simpson:** A pandemic is characterised by an incidence of at least 25,000 per 100,000, rather than 1,000 per 100,000. The stretch on the health service that led the committee to initiate this report last year was caused by a rate of something in the region of 1,000 per 100,000, which was a near-epidemic level. A pandemic would have a devastating effect. As is shown in the report, the last very, very serious outbreak was just after the first world war. The estimates of the number of deaths throughout the world vary: the minimum estimate is 20 million, which is regarded as a

gross underestimate, and the most acceptable estimate is 40 million. The true number is likely to be greater than that, and is certainly substantially in excess of the number of people who died during the first world war.

The last serious epidemic was in 1956, but at a lower level. That was the Asian flu epidemic, which is still talked about today. That was the last very major shift in the viral pattern. There was a small outbreak of the Hong Kong virus in 1968, at pandemic levels. There has not been a pandemic since 1968, so we are getting towards the longest recorded period without one.

**The Convener:** Are you saying that there is some sort of discernible pattern of pandemics?

**Dr Simpson:** Nobody knows, and nobody can predict when the next pandemic will occur. There was nearly one in 1997, again in Hong Kong—it was the Hong Kong chicken virus—but it was discovered, thank goodness, and did not transmit from human to human. All the deaths that occurred in Hong Kong in 1997 were from direct transmission of the avian virus, which is the normal route for new flu viruses.

The potential for a pandemic is present. If one occurs, the effects on the country in terms of deaths, illness and morbidity will be devastating. That is why emergency plans are in position. The Executive is updating them as I recommended—it was in the process of doing that anyway.

The health boards apparently hold two-yearly reviews of their procedures. I wonder how effective that is: I think that there should be trial runs. I do not know whether we can ask for further work to be done on that. In any case, the prospect of pandemics is the most frightening, although it is one for which we in Scotland could be quite well prepared if we take the matter seriously. The indications are that the Executive is doing that.

**The Convener:** Mary Scanlon has a question for you, Richard, but, staying on the same point, I want first to comment on the fact that the Executive has clearly said no to the idea of having our own national production facility, which would enable production to be guaranteed. Has it done that on the basis of cost? If so, what would the cost involved be? Was that decision based on its not agreeing that there is something to be concerned about? I invite Mary Scanlon also to ask her question at this point, but would then invite you to answer both mine and hers.

**Mary Scanlon:** Richard Simpson made a point about the vaccine's availability to all staff who work with patients. I understood that that was addressed on page 7 of the report, which says:

"Along with private and voluntary sector health care employers, social care employers have been similarly encouraged to offer vaccination to relevant staff."

I am therefore quite satisfied that the Executive has addressed the matter, but would like to hear Richard Simpson's comments.

I have a few brief questions. First, does Richard Simpson feel that the 60 per cent vaccination uptake target for over-65s is ambitious enough? Secondly, is he satisfied that the figures from the Scottish Centre for Infection and Environmental Health will be made available to all of us? That would allow us to consider where the outbreaks occur and whether there is any correlation with the uptake of the vaccine. Finally, I have not heard much about flu epidemics elsewhere in the country or in Europe. Are we in a good flu year; are we at the opposite end of the spectrum from a pandemic year? Is Scotland faring better than other areas, or is it too early to recognise whether that is the case?

**Dr Simpson:** I will answer Margaret Smith's question first. It is not clear from the Executive's response why it rejected the idea of having our own national production facility—except to say that it simply does not believe that it is necessary. It deems the current supply arrangements to be satisfactory. I included the issue in the report because—apart from the most important aspect, which is that of pandemics—two or three years ago, there were difficulties with supply at the Liverpool factory, which is the only national supplier. This year, there were supply difficulties with Solvay Duphar, a Dutch-Belgian company, which held up some supplies in England, from where more extensive orders from that company had been made.

There are limitations on supply, and I am not totally satisfied that the Executive has considered the Dutch set-up. It might be worth encouraging the Executive to come back with a fuller answer on whether it has sent people to Holland and examined the advantages and disadvantages that the Dutch find in that system of production.

10:45

**The Convener:** Has the Executive produced any costings?

**Dr Simpson:** I do not know. My guess is that it has simply said that supplies are satisfactory and is not interested in other matters.

The Executive encouraged other workers to have the vaccination, but I do not think that any significant system was established. My understanding is that the uptake among health professional workers and others was very low. Later, we should ask SCIEH whether it has information on that, and find out what is happening.

The SCIEH figures are published regularly in a



bulletin. Pan-European publications also exist, but their figures are more delayed than those in the national Scottish publication. Nevertheless, figures are available. However, disaggregating them to local levels involves problems with validity. My report asked about that and said that the numbers should not be published unless they are valid. The Executive's response slightly skirts round that issue. It said that there were always difficulties with local figures, but did not say whether they would be beefed up. A new procedure that uses the continuous morbidity recording system will be introduced, which is what I recommended. If that system is further strengthened, the possibilities for local figures may increase. However, they are not really available at the moment.

The last question was, is it a good year for flu. My suspicion is that the answer is yes. The flu vaccination programme has been much more successful in Scotland this year than heretofore, but we will know whether that is a coincidence only when we have had a year or two with a new and unpleasant virus strain. If the levels of immunisation are maintained and the programme is not stretched, the flu programme will have been effective.

That returns me to the final point about whether 60 per cent is enough. The level is limited because people perceive the flu jab as one that can cause side effects. All the indications are that the side effects are minimal. There have been very few serious side effects from the flu injection in the 40 years during which it has been used extensively and controlled by the Medicines Control Agency.

The number of reports of serious consequences has been minuscule—about 102 for 19 million vaccinations. However, nothing is risk-free. Some older people feel that they have had a bad reaction to the vaccination or, more important, that it did them no good because they had a virus during the winter. Such myths are false, because older people often get a respiratory syncytial virus, which is not a flu virus, but one that occurs every winter.

It will be a constant battle to maintain the level at 60 per cent or push it up to 70 per cent, which I guess we might reach. We will never reach the level at which we can eliminate the virus, which changes every year anyway. It is not like measles. If we had a 95 per cent response for that from the population, we could eliminate the virus.

**Nicola Sturgeon:** My two points have been partially covered, at least. The first concerned uptake. We should seek figures on vaccine uptake among health workers and at-risk under-65s too, because further efforts may be needed next year to increase those rates.

**The Convener:** That task could continue

throughout the year.

**Nicola Sturgeon:** The second point related to Mary Scanlon's question about whether this year was good for flu. Richard Simpson mentioned a figure of 78 per 1,000 this year, compared with 1,000 per 100,000 last year. Is that figure as of now, or is it a prediction for the danger period? I have spoken to doctors who say that they expect any flu outbreak this year to occur in the latter half of January. It might be too early to tell how this year's figure will turn out.

**Dr Simpson:** I agree with Nicola Sturgeon about the follow-up, which is important. There is another aspect to that. We should ask the retail pharmacists in Scotland whether they have been comfortable with the programme's support systems and with local variation. It would help to have that view.

The figure that I produced is the last that I have that was produced weekly. October to March is the flu period, so we could still have an epidemic, but the risk is decreasing. It must also be remembered that there are both influenza A and influenza B. As in previous years, there may be a minor outbreak of influenza B in the second half of January. I think that that is what Nicola Sturgeon referred to. That often happens.

The current two weeks are the period in which the respiratory syncytial virus hits, so there will be a mini peak of non-flu-virus winter respiratory conditions at the moment. There may be a further small peak at the end of January, but even if influenza B reaches the same level as it did last year, it will not stretch the services. The figure will be about 100, 120 or 130, which is quite small.

**The Convener:** I will recap the issues about which Richard Simpson still has some concerns, most of which I think the committee shares.

What work has the Executive done on a nationalised production facility and to plan for pandemics? Are the plans adequate? Has the cost of establishing our own production source been calculated? Why does the Executive believe that that is unnecessary? We will construct some further questions for the Executive and approach it again. As well as the pandemic question, supply issues can arise. I am worried that we have only one national UK supplier.

The Executive responded to Richard Simpson's questions about dosage levels by saying that the industry can take care of them. In the Accounts Commission for Scotland's report on prescribing of about a year ago, we saw evidence that there are several ways of slashing the NHS's prescribing budget by up to £50 million. We should constantly look for ways of making dosage and prescribing more effective. If they were more cost effective, resources would be freed up elsewhere in the

health service. If the committee takes the view that we can pursue that issue, we should.

We will try to get our hands on the figures. I have heard anecdotal evidence that the staff take-up was quite good, but we should try to obtain figures for all groups. We need up-to-date figures for the over-65 and under-65 targeted people. It is possible that what can be called a good flu year might lead to some complacency in the following year. We must keep the pressure on for the targeted over-65s.

I would like us to advance the point of view that targeting under-65s should be a continuing task for general practitioners, if not other health professionals too. They deal with people with respiratory problems, asthma and other illnesses throughout the year. They should say to those people in October, "Have you thought about a flu jab?" People who are at risk should continually be made aware that the flu jab is part of their health care package every year. We can keep up the pressure on that.

Richard Simpson also added some points about continuing to work towards a review of distribution and a pan-European definition.

As for community pharmacists, although they are generally happy, some concerns about blips have been raised anecdotally with me and it would be useful to find out how they compare the situation this year with what happened last year.

**Mary Scanlon:** Given that this time last year we were at the height of the flu epidemic—with 1,000 cases in every 100,000 compared with 78 cases in every 100,000 this year—at what point can we predict that we might have a bad flu year? I am thinking in particular of planning for flu jabs. Last year, the epidemic just seemed to happen, but we have not had one this year.

**Dr Simpson:** I cannot answer that question; all we can do is wait and see whether the figures rise. In England, the first warning comes through NHS Direct, which will start to receive more calls seeking advice. As its response makes clear, it will closely examine the research that is being undertaken to find out what sort of early warning can be given. However, up to that point, it is difficult to say whether there is an epidemic. Although a new virus has appeared this year, it does not seem to be having much of an effect; I do not know whether that is because it is not very infective.

**Mary Scanlon:** So there is no early warning; we know that it is going to be a bad year only when an increasing number of people start coming down with flu.

**Dr Simpson:** That is right.

**The Convener:** We will have a final point from

Dorothy-Grace Elder and then wrap up the issue.

**Dorothy-Grace Elder:** I want to return to Richard Simpson's initial report, which has sparked this response and done the public a great deal of good this winter. You said that, although it is easy to calculate the number of over-65s who are vulnerable, the numbers of vulnerable younger people are not known. We might be able to tackle that difficulty if the Executive provided a much more precise figure on the number of such people with chronic bronchitis and so on and involved the pharmaceutical industry in helping to publicise the problem. In some surgeries I have visited this winter, the publicity has been almost counterproductive; it is all "Are you over 65?" and then "Flu vaccination blah blah". That can make younger vulnerable people think that flu vaccination is not for them.

**The Convener:** I suggest that we collect all the points made by Richard Simpson and other committee members and prepare a response for the Executive. Richard, are you happy to have a look at that response before we send it off?

**Dr Simpson:** Yes. I would be delighted to.

**The Convener:** We will wait and see what response we receive from the Executive.

I suggest that we have a five-minute comfort break. Various members will do unspeakable things such as have a smoke; the rest of us can go to the loo.

10:58

*Meeting adjourned.*

11:07

*On resuming—*

## Complaints System (Public Sector Ombudsmen)

**The Convener:** The next item on the agenda is consideration of the Scottish Parliament information centre report about modernising the complaints system. We decided earlier to have the discussion in public and then to make decisions about the report in private session. As we have discussed this item before, I will try to speed through it a little.

We need to reach a view on certain key questions. I have read the evidence that Angus MacKay gave to the Local Government Committee in December. There is obviously a need for a post-devolution Scottish parliamentary ombudsman, and the Executive has taken advantage of that to consider the whole question of public sector ombudsmen.

The committee needs to discuss a number of questions. Should there be a one-stop shop and, if so, how should that be put together? Should there be an MSP filter or should people have a direct line to a Scottish parliamentary ombudsman? What is the role of new technology? Should we allow people to make oral submissions and use the internet?

At the moment, there is no enforcement. An interesting example was given at the Local Government Committee by the local government ombudsman. He said that no local council had gone against an ombudsman's decision in the past six years. I am not clear about the situation in the health sector, but I know that there is an element of naming and shaming when councils get taken to task.

Should ombudsmen be able to initiate investigations or should they only react to people's complaints? Is a year a reasonable time within which people must take a complaint to the ombudsman, given that the ombudsman is the last resort after people have been through the NHS complaints system or the local government complaints system? Should we have a definition of maladministration? Should we call the officials commissioners, ombudsmen or something else, such as that rather nice Spanish suggestion, the defenders of the people? Those are some of the issues that have cropped up in the papers that have been submitted to us and in the evidence that was given to the Local Government Committee.

**Margaret Jamieson:** I think that the MSP filter

would be useful. A number of individuals have become professional complainers and do not go through the internal processes of local government or the NHS. A lot of time has been allocated, particularly in the NHS, to ensure that the complaints procedures are robust. We must ensure that those procedures have been the first port of call for someone with a complaint. If the individual goes through what we are calling the MSP filter, most MSPs will indicate what the complaints procedures are and strongly recommend that the individual takes that route in the first instance. That role is of benefit to the complaints system and should be retained. It is not necessary for MSPs to sign off someone's complaint or decide whether that person's case should be advanced. We do not have the right to decide that, as the person has the right to have their complaint heard.

On the time scale, a constituent of mine has a complaint with the parliamentary ombudsman that has been on-going for more than 18 months. That is unacceptable and we need to ensure that there is a speedy resolution to complaints. I think that the matter should be dealt with by the ombudsman within one year. I stress that that length of time should be the maximum, not the norm.

**The Convener:** Another issue is that the complaint must be taken to the ombudsman no more than one year after the incident that instigated the complaint took place. If a person is unable to contact the ombudsman within a year because they are caught up in the internal complaints system of the local council or the NHS, they should not be penalised for that.

**Margaret Jamieson:** I am saying that once the matter has been sent to the ombudsman, it must be resolved or reported on within one year. I do not think that it should just be left on a shelf somewhere. We need to tie it down.

**Mary Scanlon:** I have a few points to make. The reason that I did not raise them at the previous meeting is that we received the paper from Customer Management Consultancy very late. I have now had an opportunity to read that paper, which raises some relevant points. I put on record my call for a full and frank debate of the whole Parliament, because the issue involves housing, local government and other matters. In the interests of openness and honesty, we should have a full debate to ensure that we understand the procedure.

**The Convener:** At the Local Government Committee, Angus MacKay said that the consultation responses would be taken on board and that detailed proposals would then be drawn up in the spring before being subjected to further consultation. At that point, further work will be done with a view to introducing legislation in the

autumn. There will therefore be other opportunities to debate the issues.

11:15

**Mary Scanlon:** I am pleased about that, as I had understood that the time scale was a bit tighter than that. There seems to be some confusion about the health commissioner and the Mental Welfare Commission for Scotland. The timetable that you have outlined would give us the opportunity to examine the Millan recommendations before proceeding.

The idea of a one-stop shop is misleading. Some sectors, such as the water commissioner, the Scottish Prison Service and schools, are not included. Many people will go along thinking that the office really is a one-stop shop, but it certainly is not.

I am also seriously concerned about the rather narrow definition of maladministration that is mentioned on page 8 of the SPICe note. There is a table showing how many cases go to the ombudsman and how many end up being investigated. If I am reading that table correctly, 257 cases went to the ombudsman in 1998-99 and 248 in 1999-2000, but only 11 investigations were carried out in 1998-99 and 12 in 1999-2000. We must examine whether maladministration is too narrowly defined. Many of the representations that we received said that we should be considering service. I realise that that extends enormously the scope of the ombudsman's role, but I think that it is something that we should debate.

I would like to know why the private health sector is not included. We need an answer to that question. We also need to know why the water commissioner is not included and why we cannot include service as well as maladministration. Paragraph 50 of the main committee paper suggests that there should be an amendment to the Scotland Act 1998. It states:

"We are not aware of any legislative provision which has substituted 'Scottish Ministers' for 'the Treasury', although that would be the normal approach under the Scotland Act 1998."

We need time to consider the matter in much more detail and to ask questions. I do not think that the water commissioner is as accountable as he should be. As water is still in the public sector, this is one of the sectors in which I would like much more accountability and the ability to refer complaints to the ombudsman.

The CMC paper contains too many criticisms for me to mention today. I hope that the many points of clarification that are needed will be unravelled over the next few weeks and months.

**The Convener:** I can give a partial answer to

the point that you raised about the difference between the number of complaints put to the ombudsman and the actual number of cases where a formal investigation was conducted. The local government ombudsman was questioned on that point by members of the Local Government Committee, who quoted the figures that you mentioned.

Quite a lot of mediation and conciliation goes on, and many cases were resolved to the satisfaction of the complainant, the ombudsman and the council. However, they did not go to formal full investigations although, behind those figures, work was being done by the ombudsman's office to deal with the issues. There was no clarification of the numbers, and the figures in the paper are rather misleading. It looks as though the vast majority of the complaints have been thrown out and that only 11 of them were investigated. Having heard the evidence, I do not believe that that is a fair reflection of how matters are being dealt with. That is not to say that there is no issue, but it is perhaps more complex than it seems.

**Mary Scanlon:** It is good that John McAllion is here, because he has relevant experience. Many people seem to think that the answer to all their problems is a public inquiry. I like the suggestion about the wider role of ombudsmen as public inquiry handlers or promoters of good practice. We have an opportunity to have a more open, wide-ranging discussion, so that people are not throwing everything at the Public Petitions Committee and feeling dissatisfied if they do not get a full public inquiry—which is very expensive.

**The Convener:** Several people have raised that point. If the ombudsman is contacted by someone with a problem and, in investigating that problem, the ombudsman finds other types of maladministration, the ombudsman cannot decide to go back and investigate those. There are different ways in which the scope of the ombudsman can be widened. That is a simple example. If, during an investigation, the ombudsmen find maladministration of other kinds, they should be able to investigate them, because their role is to promote good practice at all levels of government.

Mary Scanlon's point about the situation regarding the Millan commission is important. One of the key issues is the relationship between the health service commissioner, the NHS complaints system and people who suffer from mental health problems. Until the Millan commission reports on that, we cannot take it further. There is a wider issue. If we progress with the idea of a one-stop shop, in which one public sector ombudsman heads an office with several deputies who deal with particular fields, thus keeping the teams of experts, what do we do about mental health? It

could remain a distinct operation or it could be absorbed into the remit of one of the deputies as part of a health ombudsman team. One of the submissions suggested that the Mental Welfare Commission officials should be used by the health ombudsman to work on such investigations. However, until we see the Millan commission's recommendations, we will have to reserve judgment on that. When the issue returns as legislation, that is one of the key areas to which the committee will want to contribute.

**Mary Scanlon:** I believe that the Millan commission is reporting in March or April. Would that give us time to study the commission's findings and include them in our consideration of the matter?

**The Convener:** The commission might be reporting a little earlier than that. We will ask for clarification from the Executive.

Are there any views on enforcement? Individuals often tell us that the public expectation of the ombudsman's role is rather woolly. The public think that an ombudsman can overturn a bad decision, whereas an ombudsman can only point out that a decision has been reached badly, and sometimes they cannot do even that. When we examined international comparisons, we saw that there was a mixture of systems. In some countries ombudsmen have enforcement powers and in others ombudsmen have no such powers. The evidence seems to suggest that enforcement powers are a double-edged sword. While they may allay some of the public's fears, by giving the ombudsman a little more clout, in Scotland the ombudsmen's achievements happen in a more behind-the-scenes, conciliatory, naming-and-shaming way without enforcement powers.

**Dorothy-Grace Elder:** The ombudsmen should have enforcement powers. As a journalist, and at my surgeries, I have dealt with quite a number of cases over the years where people have been considerably disappointed about their experiences with ombudsmen.

The system, which was Scandinavian originally, was introduced to these islands with a great fanfare. People's disappointment hinges on the lack of enforcement powers and on the back-up arrangements—the number of staff employed by ombudsmen. The ombudsmen in each discipline address only a small number of cases. One wonders how many cases fall by the wayside because of a lack of back-up or because of difficulties with the time scale. We do not know whether people are properly satisfied with all the conciliatory moves that the ombudsmen make behind the scenes. In other words, the public do not have a happy perception of the system.

I missed a couple of minutes at the beginning of

our discussion, but I hope that we are to have a full debate in Parliament on this subject. There is a problem with the time scale, because we do not want to jump the gun in relation to the Millan commission, but I would push for such a debate.

**The Convener:** When Angus MacKay gave evidence to the Local Government Committee, he said that, as well as consulting the Health and Community Care Committee and other organisations, the Executive has been proactive by writing to 650 individuals who made complaints about services in the past year, in order to obtain their views on ombudsmen. That is a good approach; it is better than just waiting for people to come to the Executive because, as Margaret Jamieson suggested, that would have led to responses from serial complainers. We want to know how the ombudsman system deals with the average member of the public.

The nub of the issue is whether people are getting satisfaction from the existing complaints system. Anecdotal evidence suggests to me that they are not. We must establish a system that enables people to feel that their voices have been heard and that their complaints have been dealt with effectively. I assume that everyone is happy and relaxed with the term "ombudsmen".

Are members happy at the prospect of ombudsmen being able to initiate investigations? There are two schools of thought on that matter. Earlier, I raised the point that ombudsmen might pick up on examples of maladministration but would not be able to deal with them. On the other hand, the public sector ombudsmen's response was that they did not want to get sucked into what might be seen as the politically—with a small p—motivated role of instigating investigations. Do colleagues have comments on that point?

**Margaret Jamieson:** We should explore whether the ombudsmen could use other public organisations. For example, if the complaint is about financial management or the best value regime, it could be referred to Audit Scotland. We should make use of the appropriate specialist organisations.

The papers that we received on the NHS commissioner indicated that the ombudsmen cannot investigate services that are not purchased or paid for by the NHS, but we are about to commence discussion of the Regulation of Care (Scotland) Bill, which does not distinguish between those who pay the bill. It is only right and proper to refer to what we are going to discuss, as that discussion will be much wider. The bill clarifies—for me and for members of the public—what we mean when we talk about care services. It mentions independent schools and independent provision and talks about traditional NHS services and local government services—education and

social work. Our response to the consultation must take account of those services. I am concerned that the consultation might preclude changes that will come about through other legislation. We must draw the Executive's attention to that issue.

11:30

**Mary Scanlon:** The submission from the Scottish health board chief executives group, which has been mentioned several times, says at paragraph 4.7 that there is no clear boundary of responsibility. Where do the Scottish Health Advisory Service, the Mental Welfare Commission for Scotland and the Clinical Standards Board for Scotland fit into the system? We have been told by the organisations that they all talk to one another, but the situation is becoming bureaucratic, with organisations falling over one another and without any clear lines of responsibility. We are not such a wealthy nation that we can afford to pay for four different sets of bureaucrats to do the same work.

We should be looking for clear lines of responsibility. We want to make the system simpler, but it appears that more organisations are being proposed, which will make the system more confusing. As has been highlighted, in mental health alone the system will involve Audit Scotland, the Mental Welfare Commission, the Clinical Standards Board and SHAS reports, as well as an ombudsman. That will be too confusing.

**Mr McAllion:** I come to the discussion late on, but I am a little worried by the talk of giving new enforcement powers and powers to initiate investigations to an office that is not elected but appointed by the Executive, especially as it will enforce decisions on elected bodies, such as councils and the Parliament. The legitimacy of the ombudsmen must become part of the debate. They should not be appointed by the Executive—they should be appointed by a committee of the Parliament and accountable directly to the Parliament. That would give them legitimacy and then we could talk about enforcement powers. I am nervous about unelected people telling elected bodies what to do—that would be a bad precedent.

**The Convener:** Historically, ombudsmen have rarely been given enforcement powers. One suggestion was that the ombudsmen could make a recommendation to Parliament on an issue. Rather than having the power of enforcement, they could have an extra power to suggest that Parliament could examine a particular issue.

**Mr McAllion:** It would also be possible to use the Public Petitions Committee as an ombudsman service.

**The Convener:** Yes, but are you looking for more work?

**Mr McAllion:** That would beef up the work of the Public Petitions Committee considerably.

**The Convener:** I have some sympathy with your view about the fact that ombudsmen are not elected, while other bodies are.

Are there any other comments?

**Mary Scanlon:** What will happen next?

**The Convener:** At the beginning of the meeting, we agreed that we would hold this discussion in public and that we would move into private session to pull together our report.

## Joint Future Group Report

**The Convener:** Our next agenda item is on the joint future group report, although I do not know whether we can comment on it.

As colleagues know, the Executive set up the joint future group to consider certain issues. As the committee's reporter, I outlined those issues in section 1.2 of my draft response. The group went through the process contemporaneously with the work that we did on our report into community care. Its remit was slightly different from ours, as it touched slightly on housing as it relates to the voluntary sector, for example. Some of our recommendations were in those areas, and they do not necessarily overlap.

I have been fairly generous to the group—it was Christmas and the season of good will. There is a fairly large common agenda. A lot of work that was being done was taken on board by the Executive in the minister's statement on 5 October, which was then echoed in the committee's report on community care. I think that the outstanding issue is the manner in which the joint future group thinks joint working will take place locally.

There is some general overlap between what we said and what the joint future group said: national standards must be tightened up; there must be benchmarking; and good practice must be shared, in a structured and strategic way rather than loosely or on an ad hoc basis. However, we said that at local level there should be a single body delivering care, a single point of entry for services, a single budget and a single body responsible for commissioning.

The committee did not name that body. We did not say that it should be the trust or the local health care co-operative—this person or that person. We discounted some bodies but left the matter open to allow local flexibility. We know from our discussions and in other ways that it is unlikely that one size will fit all. For example, there are differences between rural and urban circumstances. In some areas there is a high degree of private sector involvement, but in others there is not; some areas have strong voluntary sectors, but others do not. There are many differences, so we left that question open, although we took the view that there should be a single body.

To some extent, the joint future group mirrors what we said. It proposes that there should be a national programme planning group to set targets for the implementation of priorities and that the people in local partnership agreements should pool new resources in community care. I was concerned by the constant reliance on new

resources, so my report highlights the fact that the committee said that it is also important to take stock. We have to ask where we are at the moment, what we are spending on community care services, whether we are doing so wisely and what is happening in relation to revenue and the crucial capital that is tied up in long-stay facilities.

The resources that exist across the board for community care, as well as new resources, must be pooled. The joint future group is saying that the new resources for community care services, including social work, the relevant NHS acute services, and social housing, should be pooled, and then a decision should be taken on the targeting of those resources and the required outcomes. The committee took the view that there should be a single commissioning body, with a single commissioning budget and a single point of entry. Those positions are not necessarily incompatible.

People may have a view on whether the joint future group's approach is right, but there is still much work that can be done on the effectiveness of pooling budgets. When committee members went round the country, we all saw effective programmes and projects. Local people—or perhaps a health board or council—had identified a need for a service and a representative from the social work sector, or the health sector, had become involved. Over time it became almost impossible to say where the care manager had come from—was he or she a social worker, a community nurse, or what?

When services are joined together, about 18 months of tension will probably follow. The services then develop. When Mary Scanlon and I were in Inverness looking into mental health facilities, we were told that, five or 10 years down the line, no one worried about where they had come from—they just provided the service.

There are different approaches, and the committee's recommendations allowed for a level of local autonomy. However, that should be put against the backdrop of national targets. My report on the joint future group is a draft report, and I have simply said that we have noted the joining together of services. If committee members feel that they want to endorse, or criticise, a particular approach, they can do so.

Where, in the report, I have said that the committee had a view on any issue, that has come from our committee report or from deliberations in committee meetings. I hope that our new members will bear with us when our approach, based on our committee report, diverges from that of the joint future group. We take a divergent approach on charges for home care services. My view, and the view that we put in the committee report, is that we endorse the full implementation

of the Sutherland recommendations on free personal care.

I have welcomed the joint future group's suggestion that older people should receive up to four weeks' free home care—when we consider things as they are now, that suggestion has to be welcomed—but the committee takes a different view on free personal care. I certainly take exception to the group's proposal that free personal care would

“do nothing to develop better community care services”.

If anything was clear to the committee, at the end of 10 months of taking evidence on community care, it was that—apart from evidence of the fairness and equity of free personal care—there was overwhelming evidence that free personal care could deliver better community care services. It was not only about the heart, but about the head, and it was what the professionals told us. I have taken exception to that point in the joint future group's report. I hope that members agree that that reflects the committee's report into community care.

This draft report is not of the quality that we have come to expect from Richard Simpson's reports. It was put together at the end of the Christmas holidays. I have to confess to muttering to myself quite a lot that, although I had gone off on holiday with the best of intentions of tackling the report early on, I had, as usual, left it late, which led to a severe reprimand from my children, whom I constantly reprimand for leaving their homework until the last minute. I hope that it is a fair reflection of the group's report. The Sutherland commission's report is at the top of the agenda, and we expect a statement in response to our report later this month. That will obviously include an Executive statement on Sutherland.

**Mary Scanlon:** I was quite disappointed in the joint future group's report. To be perfectly blunt, it has added very little to the debate. It has done little more than state the obvious. Many of its recommendations had already been accepted and implemented by the Executive—I have talked about the statement of 5 October.

It would be a retrograde step even to consider some of the measures that the group has proposed, as they are counter to Sutherland's recommendations on the single body and point of entry. I do not want the committee to return to the discussion about jointly resourced and jointly managed bodies. We have been at this issue for 10 months and, as I said, any discussion on the group's points would be a retrograde step.

11:45

The highlight of the report—that free personal

care would do nothing—illustrates that the thought of the joint future group is well out of kilter with thought in the rest of Scotland. Given the time the committee has put into discussing community care, and after the Sutherland report and all that has been done—I commend the Executive on much of its work over the past year—I question the need for a joint future group.

**The Convener:** To be fair, after conversations with ministers over the past year, I think the Executive's decisions on 5 October were based to some extent on background work by the joint future group. That work has certainly fed into the Executive's decision-making process. The package was announced on 5 October—which was before the group's report was finalised—but the Executive was not going to announce something that was totally at variance with the work of that Executive-inspired group.

We should not say that the joint future group did not have an impact; I think it probably did. That is a feeling that I have picked up from conversations with ministers—the minister herself alluded to that in comments on 5 October. Although some of the gloss might have been taken off the report, we should not forget the fact that the group contributed to the decision-making process.

**Nicola Sturgeon:** Although I am prepared to believe that, I think that Mary Scanlon's comments are well made. At this stage in the debate, the joint future group report adds nothing whatsoever to the Sutherland report or the committee's report. As the group's recommendations have been discussed endlessly, we should not spend too much time going over them. Instead, we should refer the Executive back to the Sutherland report and the report of the committee and respectfully suggest that it gets on with implementing the recommendations in them.

**Dr Simpson:** Convener, you made a valid point. This is simply a compression of the previous system in which we would receive a report and have a period for consideration after which the report would be implemented. The Executive is now implementing things as it goes along, which is not a major difficulty as it is often acting on best practice anyway.

Certain important issues link these various reports. Taking into account the points made by Mary Scanlon and Nicola Sturgeon, I think that we should highlight those issues, as you do in your report. Paragraphs 4.1 and 4.10 of your report refer to the closures programme. As far as I know, we have not yet had any details about bed closures, apart from the learning disability bed closures, as your report indicates. No one can make any reasonable comment about the costs of implementing Sutherland and its effect on the community care budget until we know the balance



between free NHS care and whatever system will be put in place when Sutherland is brought in. We should highlight that issue and press the Executive on it.

**The Convener:** We have received a letter from the Executive.

**Dr Simpson:** You have?

**The Convener:** Yes. It is in the papers for the meeting and is headed

“Plans for closure of long-stay hospital beds”.

**Dr Simpson:** Right. I have not seen that. That is excellent.

**The Convener:** The letter says:

“Figures show a substantial reduction in the number of long-stay beds in geriatric and psycho-geriatric specialties”

which

“reflect changing patterns of care”.

**Dr Simpson:** The figures in the letter are for previous years. This is what I mean. The letter does not contain new figures—well, they are relatively new; they have been brought up to date.

**The Convener:** Your point is that the letter does not contain any projections.

**Dr Simpson:** The question is what will be the Executive’s final position on NHS beds.

**The Convener:** Right. Have I covered that point in paragraph 4.1 of my report?

**Dr Simpson:** Yes, and you refer to it again somewhat in paragraph 4.10.

I have forgotten my other point. Perhaps I will come back to it later.

**The Convener:** If there are no other comments, I will bring the public session to a close.

11:50

*Meeting continued in private until 12:33.*



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