

# **HEALTH AND SPORT COMMITTEE**

Wednesday 13 May 2009

Session 3

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## HEALTH AND SPORT COMMITTEE

### 15<sup>th</sup> Meeting 2009, Session 3

#### CONVENER

\*Christine Grahame (South of Scotland) (SNP)

#### DEPUTY CONVENER

\*Ross Finnie (West of Scotland) (LD)

#### COMMITTEE MEMBERS

\*Helen Eadie (Dunfermline East) (Lab)

\*Rhoda Grant (Highlands and Islands) (Lab)

\*Michael Matheson (Falkirk West) (SNP)

\*Ian McKee (Lothians) (SNP)

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

\*Dr Richard Simpson (Mid Scotland and Fife) (Lab)

#### COMMITTEE SUBSTITUTES

Joe FitzPatrick (Dundee West) (SNP)

Mr Frank McAveety (Glasgow Shettleston) (Lab)

Jamie McGrigor (Highlands and Islands) (Con)

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

\*attended

#### THE FOLLOWING GAVE EVIDENCE:

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

Rosemary Lindsay (Scottish Government Legal Directorate)

Kathleen Preston (Scottish Government Legal Directorate)

Dr Jonathan Pryce (Scottish Government Primary and Community Care Directorate)

#### CLERK TO THE COMMITTEE

Callum Thomson

#### SENIOR ASSISTANT CLERK

Douglas Thornton

#### ASSISTANT CLERK

Seán Wixted

#### LOCATION

Committee Room 4



# Scottish Parliament

## Health and Sport Committee

*Wednesday 13 May 2009*

[THE CONVENER *opened the meeting at 10:01*]

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

**The Convener (Christine Grahame):** Good morning and welcome to the 15<sup>th</sup> meeting in 2009 of the Health and Sport Committee. I remind committee members, witnesses and members of the public to switch off their mobile phones and other electronic equipment. No apologies have been received.

Agenda item 1 is our first evidence session at stage 1 of the Tobacco and Primary Medical Services (Scotland) Bill. Today, we will take evidence from the Scottish Government's bill team. I welcome Mary Cuthbert, who is head of the tobacco, sexual health and HIV branch of the Scottish Government's public health and health improvement directorate; Rosemary Lindsay, who is principal legal officer in the health and community care division of the legal directorate; Jonathan Pryce, who is head of the primary care division of the primary and community care directorate; and Kathleen Preston, who is a solicitor in the health and community care division of the legal directorate.

I ask Mary Cuthbert and, if they wish to do so, her colleagues to give us a brief tour of parts 1 and 2 of the bill. The bill is like a football game—it seems to be a bill of two halves.

**Mary Cuthbert (Scottish Government Public Health and Health Improvement Directorate):** Obviously, part 1 covers issues relating to tobacco products. Chapter 1, which covers issues relating to the display and sale of tobacco products, proposes a complete ban on the display of tobacco products at the point of sale. For the provisions that cover the sale of tobacco products, we looked fundamentally at tobacco sales law in Scotland, which has been around since 1937.

Chapter 2 proposes a register of tobacco retailers. At the moment, we do not have a central record of where tobacco retailers are, although, obviously, local authorities work with people who retail tobacco at the local level. We have responded to the expert group's report, which suggested that we should have a negative licensing system. Offences are set out in the chapter.

Chapter 3 covers enforcement and fixed penalties. Much of what it contains simply repeats what is in the existing law, but some new offences will be created. In particular, the fixed-penalty notices provisions are new. The proposals follow a United Kingdom-wide approach to improving regulatory justice. They will free up court time, for example, so they are quite important. Powers of entry already exist, but the existing provisions will be strengthened in some ways.

The miscellaneous and supplementary provisions are relatively straightforward. On the presumption as to the contents of a container, for example, a packet of cigarettes will be presumed to be a packet of cigarettes rather than something else.

**Dr Jonathan Pryce (Scottish Government Primary and Community Care Directorate):** Part 2 of the bill covers primary medical services. It simplifies the list of eligibility criteria for persons who wish to enter into a contract for the provision of primary medical services. The most significant new element is the introduction of a commitment criterion. Essentially, in order to be a contract holder, someone has to spend a minimum amount of time working in a practice with direct patient contact in the delivery of primary medical services.

**The Convener:** This is our first foray into the bill, so it would be useful to go through it section by section. Some members have questions on part 2, but it would be helpful to us all, including the clerks, if we were to start with part 1 and go through the bill chronologically. I am thinking of when we look over the evidence in writing our committee report.

Does anyone have a question on chapter 1?

**Mary Scanlon (Highlands and Islands) (Con):** I seek clarification on the phrase "specialist tobacconist". One shop in Inverness sells pipes, lighters, loose pipe tobacco and cigars but it does not sell cigarettes. Is that shop a specialist tobacconist? Will it have to blank out its windows or can it carry on business as normal?

**Mary Cuthbert:** The definition of a specialist tobacconist is that 50 per cent of its profits come from the sale of specialist tobacco products. That is embedded in the Tobacco Advertising and Promotion Act 2002. Special provision has already been made for specialist tobacconists.

**Mary Scanlon:** I am sorry, but I am not familiar with all the previous legislation.

**Mary Cuthbert:** The provision in the bill is really a repeat of that. There are about 10 specialist tobacconists in Scotland.

The provision allows us to make requirements on top of the fact that specialist tobacconists cannot display what might be called non-specialist

tobacco products. From the discussions that we have had with specialist tobacconists, I understand that most of them stock such products. Indeed, we have been to some shops to see how products are set out at present.

As part of our work to develop the regulations that will underpin this and other sections of the bill, we will have more detailed discussions with the sector to look at other possible provisions. For example, the provision that we make may be for nothing to be seen from outside the shop. There are various options that we will discuss with the sector, after which we will make provision as appropriate.

**Rosemary Lindsay (Scottish Government Legal Directorate):** As Mary Cuthbert said, the definition of a specialist tobacconist comes from the Tobacco Advertising and Promotion Act 2002. The requirements have not changed: a shop that previously qualified as a specialist tobacconist qualifies now. If you would like me to, convener, I can read out the definition.

**The Convener:** Please do.

**Rosemary Lindsay:** It comes from section 6(2) of the 2002 act:

"A specialist tobacconist is a shop selling tobacco products by retail (whether or not it also sells other things) more than half of whose sales on the premises in question derive from the sale of cigars, snuff, pipe tobacco and smoking accessories."

I think that the question was on the sale of cigarettes. If the tobacconist does not sell cigarettes, it would still be possible for them to come within the definition.

**Mary Scanlon:** So, to be clear, if someone makes more profit from selling pipes and lighters than they do from selling tobacco, they can carry on as normal. If, however, more than 50 per cent of their profits come from the sale of loose pipe tobacco, they will be banned from making visual displays. Is that correct?

**Rosemary Lindsay:** If 50 per cent of their profits come from

"the sale of cigars, snuff, pipe tobacco and smoking accessories"

they qualify as a specialist tobacconist. Those in other circumstances do not qualify.

**The Convener:** I understand the definition, but how will all that be monitored? What if people try to find a way round things? The definition refers not to 50 per cent of profits, but to 50 per cent of sales. How is that checked?

**Mary Cuthbert:** It is checked locally by trading standards officers, who are responsible for enforcing the 2002 act.

**The Convener:** Do they look at the accounts?

**Mary Cuthbert:** I am not sure how they do it; I just know that it is their responsibility to enforce it.

**Mary Scanlon:** Does the definition refer to revenue from sales or to the number of sales?

**The Convener:** We will return to that. It would be a useful point of clarification for the committee.

**Mary Cuthbert:** There are about 10 such specialist tobacconists in Scotland. If you go to see them, it is clear that their product basis is specialist.

**Mary Scanlon:** Very much so. Given how responsibly the business that I am aware of operates, it would be disappointing if the bill forced it to close down or to black out its windows.

**Mary Cuthbert:** We have engaged very effectively with them. We are aware of their issues, and we are trying to be as sympathetic as possible to those issues.

**The Convener:** If you do not have the information now, you can write—

**Mary Cuthbert:** I can clarify that it is the sales on their premises that are put through—

**Mary Scanlon:** Do you mean the monetary value of those sales?

**Mary Cuthbert:** More than half of their sales—

**The Convener:** We will get that clarified later. It is perhaps not quantitative.

**Dr Richard Simpson (Mid Scotland and Fife) (Lab):** Will you clarify the situation with sub-specialist independents? Under the 2002 act, the situation for specialist tobacconists looks fairly clear. However, the sub-specialists, of whom there are 30 to 40, presumably sell cigarettes as well as tobacco, and they would not be exempt under the legislation.

**Mary Cuthbert:** They would not meet the definition, but we have been in discussion with them. The minister and I visited Marco Sinforiani, who is leading the discussions on the issue of sub-specialists. When we saw his shop, it was clear that although tobacco is a fair chunk of what he does, he stocks many other things, too. However, we continue to discuss how the sub-specialists might be accommodated. We must consider the options and decide one way or the other. At this stage, we are considering the advice and evidence from that group of shops.

**The Convener:** We should put it on the record that we are talking about sub-specialists.

**Mary Cuthbert:** Yes.

**Dr Simpson:** Independent sub-specialists.

**The Convener:** Which is what?

**Mary Cuthbert:** They are people who stock specialist tobacconist products but who also sell what we might call mainstream tobacco products.

**The Convener:** And they do not qualify under the 50 per cent test.

**Mary Cuthbert:** That is right. They do not qualify, but they feel that they should be given special recognition under the provisions.

**Dr Simpson:** When will you be able to give the Government's preferred option? What stage will we be at?

**Mary Cuthbert:** We are in the process of developing regulations to underpin the provisions. If and when the bill gets to stage 2, we need to have the regulations ready for the committee to consider. I am due to meet Marco Sinfiorani again next week or the week after. We are in active discussions with the sub-specialists, but ministers will need to take a view.

**The Convener:** Thank you—that is very useful.

**Helen Eadie (Dunfermline East) (Lab):** I have been reading the Scottish Parliament information centre briefing, and my question concerns the sale of tobacco products to persons under 18. Comments have been made to the committee about what types of identification should be prescribed in the bill, and I understand that driving licences and passports are proposed.

The bill proposes to ban vending machines that sell tobacco products, which is another area of concern. Clearly, there were those who were totally opposed—

**The Convener:** Sorry, but I was trying to keep the questions to the issue of displays. I will take you next on the age limit issue, Helen. Are there any other questions on displays?

There are none.

**Helen Eadie:** I will stick with the age issue. The argument that has been made in the context of vending machines and the types of ID is that better methods of age verification are available. What have the discussions been in that connection?

10:15

**Mary Cuthbert:** The provision on the forms of identification that people might use is a straight lift from the Licensing (Scotland) Act 2005. In section 4(4)(c), the reference to

“such other document, or a document of such description, as may be prescribed”

will probably be used to include documents such as the Young Scot pass or national entitlement card. However, in drafting the bill—as Rosemary

Lindsay will confirm—it was felt that, although that document is actively supported by the Government and is very much supported by retailers, it would be inappropriate to specify on the face of the bill a document that has no statutory basis. Therefore, as happened under the liquor licensing legislation, the document will be specified in subordinate legislation. However, we are working to boost the Young Scot card and to make it acceptable by retailers.

**Ross Finnie (West of Scotland) (LD):** I appreciate that the provision on forms of identification has been lifted from liquor licensing legislation, but an opportunity to think afresh is provided in framing new legislation. If the intent is to push retailers towards positive identification, what is the legal purpose of providing them with a defence that

“no reasonable person could have suspected from the customer's appearance that the customer was under the age of 18”?

If retailers are no longer to be interested in people's looks and appearance but are being driven towards seeking positive identification, what is the legal purpose of providing that wider defence?

**Rosemary Lindsay:** The SPICe briefing refers to comments suggesting that the wording

“offers a particularly easy defence for a tobacco retailer”,

but I do not think that that is the case. A fairly stringent standard is provided, in that

“no reasonable person could have suspected from the customer's appearance that the customer was under the age of 18.”

I do not think that that will allow a retailer to say, “Well, I believed that they were 18 and I think that that was a fairly reasonable assumption to have made.” The requirement is strong—

**Ross Finnie:** With all due respect, what would retailers need to do? It is quite clear that retailers will comply with the provision in section 4(2)(b)(i) if they have made some endeavour to determine the age by reference to some form of identification. However, the provision in section 4(2)(b)(ii) could be offered as an alternative to that defence.

**Rosemary Lindsay:** It is an alternative—

**Ross Finnie:** Therefore, as a retailer, I would be entitled to adduce that, although I did not seek a proof-of-age card, I formed a view about the person's age.

**Rosemary Lindsay:** The provision covers the situation in which all that the retailer has done is look at the person. If I were to go into a shop to buy cigarettes, the retailer would not need to take any steps as such to establish my age but could simply look at me and judge, from my appearance,

that I am over the age of 18. My appearance would need to be such that no reasonable person would suspect that I was under the age of 18. That is the situation that is covered.

**Ross Finnie:** I understand what situation is covered, but that is not my question. My question is what the legal purpose and effect are of providing such an alternative defence, when the Government's apparent intention is to move tobacco retailers towards seeking positive identification.

**Rosemary Lindsay:** I do not suspect that the defence would be available very often. It would be available in the situation in which no positive steps—

**Ross Finnie:** I am sorry, but the defence would be available because it is in the bill. If the bill is passed, the defence will be available.

**Rosemary Lindsay:** Yes, the defence will be available, but I think that we would say that there might be situations in which it is required for justice that such a defence is available, such as in cases where the young person looked much older to the extent that no reasonable person—not just a reasonable person—would have thought that the person was under 18. The case would need to be such that, if we asked everyone in this room, no one would say that the person was not over 18. It would not be a case of there being a fine balance as to whether the person was 17 and a half or 18. The person would need to be someone whom no reasonable person would have concluded was not over 18. In such a case, it seems fair enough that, even if a positive identification had not been sought, it should be a defence—against the charge of having sold cigarettes to a person who was under 18—that any of us in the same situation would have judged the person to be over 18.

**The Convener:** I think that you have convinced me, if not my colleague, of the need to have a defence—albeit a slim and slight one that would apply only in very special circumstances, as you have explained. We could perhaps develop the point further. Do you want to go on, Ross?

**Ross Finnie:** No, no.

**The Convener:** Does Richard Simpson want to come in?

**Dr Simpson:** I am totally unconvinced, but I will leave it.

**The Convener:** So it is just me who is persuaded. Mary, do you want to come in on the point about the age limit?

**Mary Scanlon:** I apologise, but I want to ask for clarification on the displays.

**The Convener:** Does your point precede the next discussion?

**Mary Scanlon:** Yes, it is important before we move on.

**The Convener:** Go for it.

**Mary Scanlon:** The policy memorandum mentions the recommendation

“that the Scottish Government prohibits the display of cigarettes at the point of sale, and that this display be replaced by a simple list of the brands available and their prices.”

Is there anything to prevent someone from making their “simple list” the same size as the previous gantry display of cigarettes? I would have thought that such a list would be the size of the sheet of paper that I have in my hand, but is there anything to prevent people from making the list the same size as the area that was used to advertise cigarettes?

**Mary Cuthbert:** Under section 3, there is provision for us to prescribe what might be in the lists.

**Mary Scanlon:** So you will prescribe a size for the “simple list”.

**Mary Cuthbert:** Yes.

**Dr Simpson:** I presume that it would not be in primary colours.

**Mary Cuthbert:** No. Obviously, that will have to be discussed with retailers.

**Dr Simpson:** I am sorry for not asking that question through you, convener.

**The Convener:** That is all right—sometimes I forget I am here myself.

**Mary Cuthbert:** We imagine that it would be an unbranded price list.

**The Convener:** Ross Finnie wants to ask a question on section 3, so for clarification—

**Helen Eadie:** My question is on section 3 as well.

**The Convener:** Yes, but Ross Finnie is ahead of you.

**Helen Eadie:** Okay.

**The Convener:** I want to ensure that we go by sections, because that will make it easier.

**Ian McKee (Lothians) (SNP):** I have a question on section 2.

**The Convener:** Are you still on section 2? It is entitled:

“Displays which are also advertisements”.

**Ian McKee:** Oh. No, I am on part 2.

**The Convener:** We are not on part 2; we are on section 2.



**Ian McKee:** Oh, right. Sorry.

**The Convener:** We return to section 3.

**Ross Finnie:** I appreciate that this issue will be covered in regulations, but it is quite important. What does the bill team have in mind for the display? What will be permitted, and what will be the size? Will it be some furtive little notice that could be confused with a note from someone down the road who wants to sell a pet? What exactly do we have in mind? We want to remove the temptation caused by looking at things and making inquiries, but the success of that will depend on exactly what the bill team has in mind for the display. What will regulations permit?

**Mary Cuthbert:** All those matters are still under discussion with retailers. Ministers have made it clear that we have to engage as effectively as we can with retailers to ensure that all the provisions are sensible and practical.

What we, as officials, have in mind for the list is something that is non-branded. It has to be borne in mind that, under the Tobacco Advertising and Promotion Act 2002, tobacco products cannot be advertised at point of sale. Branding on lists could well fall foul of the 2002 act.

Obviously, the list would have to be of a reasonable size, so that people could read it. I had not imagined a list of a size to take the place of a gantry, but we have not yet worked out the dimensions. It would have to be of a reasonable size to let customers know the products that were stocked, but it should not take up a disproportionate space within the shop.

**Ross Finnie:** That is helpful. I might want to go further and abolish the whole thing, but I must be careful not to allow my emotions to run ahead of the evidence.

It is not for you to comment on the evidence for whether the measure works; that is a political question that we will put to the minister. Indeed, you have made the interesting point that it is difficult to read the evidence because none of the comparable countries has regulations that are equivalent to our 2004 regulations on the advertising and promotion of tobacco. That makes the comparison very difficult indeed. We have to compare what exists at the moment with the kind of notice that you have in mind, which is difficult to do. I do not wish to spend the rest of the evidence-taking session contemplating what is in your mind.

**Mary Cuthbert:** Fear and confusion, at the moment.

**Ross Finnie:** Heaven forbid.

**The Convener:** You are making the lady blush, Ross.

**Ross Finnie:** I think she follows my point that it is not easy for us to make the comparison.

**Mary Cuthbert:** I appreciate that, at this stage, it is frustrating because we have not gone far in our consideration of some of the detailed points.

**Ross Finnie:** It is not a detailed point. If you get rid of displays because they are advertisements, we are entitled to be satisfied that what will replace them is not advertising.

**Mary Cuthbert:** Absolutely. I am not a politician, as you say, but we would not want to undermine the policy aims that we are trying to achieve in the bill. Therefore, what we come up with will clearly satisfy the needs of someone who sells a legal product and, in the course of their business, needs to be able to let people know what products they have and what their prices are. It will balance that against the need not to undermine what we are trying to achieve through banning displays and advertisements at the point of sale.

**The Convener:** Do we have a timescale for draft regulations? There is a precedent for committees seeing draft regulations prior to stage 2.

**Mary Cuthbert:** We are working towards having a fairly worked-up set of proposals for informal consultation over the summer. We envisage that we would have the proposals completely worked up in consultation with stakeholders by stage 2 but, if the committee wishes us to accelerate that process, we can consider it. Bear in mind that we have a lot of people to speak to and many things to take into account in developing the regulations.

**The Convener:** I am told that stage 2 will probably be in October, so we should have the regulations—perhaps even in final form—by then.

**Mary Cuthbert:** They will certainly be as near final form as we can make them at that time.

**The Convener:** That is helpful.

Helen Eadie wants to come in. Is it still on section 3?

**Helen Eadie:** It is.

**The Convener:** I can see my timetable slipping, as we are only on section 3, but go for it.

**Helen Eadie:** I will pick up on the reply to the question that Mary Scanlon asked on gantries and advertisements. Section 3 deals only with the regulation of display of prices, not with the point that she was talking about. Page 4 of the policy memorandum proposes that the

“display be replaced by a simple list of the brands available and their prices.”

The answer that Mary Cuthbert gave to Mary Scanlon does not answer that point.

**Mary Cuthbert:** Perhaps I misunderstood—I apologise if I did—but I thought that Mary Scanlon was talking about the price list.

**Helen Eadie:** She was talking about advertising products on the outside of a shop. Your answer said that section 3 covered that point but, in fact, it covers only the regulation of the display of prices, not the regulation of advertisements.

**Mary Cuthbert:** I apologise.

10:30

**Mary Scanlon:** I was reading out from the policy memorandum, which states that the display will

“be replaced by a simple list of the brands available and their prices.”

However, as my colleague Helen Eadie—the other part of the double act—has pointed out, section 3 refers only to prices. My question is about the “simple list of ... brands”. What size will that be, and is there, as Ross Finnie has alluded to, anything to stop people advertising this “simple list” across the whole gantry, in technicolour and whatever?

**Mary Cuthbert:** There is something to stop that. For example, as a result of the 2004 regulations on the advertising and promotion of tobacco, there is limited advertising at point of sale. We can prescribe the size and content of the price list, but obviously a list of prices will have to show what the brands are. Otherwise, it will not be a price list. Does that answer your question?

**Mary Scanlon:** In that case, do you accept that the reference in the policy memorandum to the display being replaced by a list is a bit misleading?

**Mary Cuthbert:** The wording is perhaps unfortunate, but what we are trying to convey is the fact that a list of tobacco products, rather than the products themselves, will be displayed. Whether the list will go in a display’s current location is another issue—and one, I suppose, for shopkeepers.

**The Convener:** And we will consider the regulations. My head is birling with all the references to displays and so on. If you do not mind, I think that we should agree simply to think about the issue and move on.

**Dr Simpson:** I am slightly concerned that, with the exclusion of websites from the bill, tobacco producers might use retailers’ sites as another conduit for advertising. As we know, websites contain various clever forms of advertising such as promotions and games. Indeed, mobile phone texts are also becoming a very important source of advertising.

Has the Government considered that area? The tobacco industry is among the best in the world at getting round legislation and will find some new technique or other. This is a constant battle that can be won only by abolishing tobacco, which is

never going to happen. We simply have to keep fighting the war.

**Mary Cuthbert:** Rosemary Lindsay will probably pick up on this point. Although we wanted our policy to embrace the wide range of outlets that might be a source for tobacco products, there is a limit to how far we can go. Anything to do with electronic communication strays into reserved territory and, indeed, is a matter for United Kingdom ministers under the Tobacco Advertising and Promotion Act 2002.

That said, the sites that you refer to have the same responsibility to comply with the law. In selling cigarettes—or indeed any age-restricted product—over the internet, Tesco, for example, must ensure that there is some way of verifying age through a card or whatever. I hope that Tesco will forgive me if it does not sell cigarettes on its website, but the point is that, irrespective of how the product is sold, the retailer still has a duty to comply with the law.

**Dr Simpson:** My question is not really related to the 18 age limit—

**Mary Cuthbert:** I know that you are talking about advertising.

**Dr Simpson:** —although I have to say that that is a very difficult area for us. As you say, I was asking about advertising. If, for example, a retailer had internet access in his shop and the home page showed the tobacco products on sale, he might be able to get round the requirements in the legislation. I simply wonder whether the area has been examined fully in this legislation.

**Mary Cuthbert:** Electronic communication is clearly covered by regulations made under the 2002 act. We would have to decide whether the use of a home page to show tobacco products constituted advertising. I suspect that it might well breach the point of sale regulations, but this is quite a technical legal question and I cannot really answer it in the abstract.

**Rosemary Lindsay:** I can confirm only that the bill is not intended to make any changes to the legal position regarding websites, which will remain regulated as before.

**The Convener:** There are no questions on section 4, “Sale of tobacco products to persons under 18”, or section 5, “Display of warning statements”. We come to section 6, “Prohibition of vending machines for the sale of tobacco products”.

**Rhoda Grant (Highlands and Islands) (Lab):** I have a question on section 6. What work has been carried out? Given that a lot of vending machines are situated in bars and pubs, which people have to be over 18 to access, why will vending machines be banned? Most people going into the

bar or pub will undergo an age check anyway. I understand why vending machines would be banned from somewhere to which young people had access, but not from pubs, clubs and the like.

**Mary Cuthbert:** The issue of vending machines is difficult. As you will know from the information that we provided to the committee, we had problems in engaging effectively with the representative body of vending machines companies.

Recently, a big programme of test purchasing from vending machines was conducted down south. The vending machines in the programme were in places with age restrictions. In one test, there were something like 12 sales from the 15 or so machines that were tested, despite the fact that they were in age-restricted places. The machines are self-service, and current legislation provides that they should be placed within the eyesight of the person controlling them, but often they are not. Sometimes the machines start off there, but then there is a refurbishment of the premises and the machines are moved into a corridor, so they are not necessarily controlled as effectively as they should be. That is clear from the work that has been done.

In revamping tobacco sales law, we have to consider whether, if we were writing the law from scratch, we would allow the sale of tobacco products from a self-service machine. Perhaps it was deemed to be appropriate in 1937, but I suspect that we would say that that was not an appropriate way to sell an age-restricted product. We have to consider carefully where vending machines fit in with the revision of tobacco sales law. I take Rhoda Grant's point. The regulatory impact assessment that we conducted looked at issues such as whether vending machines should be token operated or operated in other ways, but eventually the decision was taken that the most effective way of stopping underage sales from vending machines was to ban them completely.

**Rhoda Grant:** I am not sure that that argument holds up because, if we were starting from scratch, we would not legalise tobacco sales at all. However, we are where we are.

The concern was raised with the committee that the number of jobs related to vending machines has been greatly underestimated and is far greater than in the information that we received.

**Mary Cuthbert:** We totally appreciate that, and I think that the minister has now written to you to clarify the issue. It was our job to provide her with the information; it was not her fault that she did not have the information. We tried on several occasions to engage with the National Association of Cigarette Machine Operators—the representative body for cigarette vending machine

companies—but without success. We have engaged effectively with a range of representative organisations since we announced last May that legislation was going to be introduced. We managed to engage with Sinclair Collis, which is the company that has most of the machines. We had a meeting with it to talk through the issues and options, and it told us quite clearly that about 14 jobs would be affected.

As a result of our answer to a parliamentary question, in which we said that we had not managed to engage with NACMO, the association contacted us and we had a meeting with it. We keep getting different figures from it, which makes it difficult for us, but we are willing to engage with the association, and ministers are keen that we do so to get a clearer indication of the job losses that might occur as a result of the bill. There has been no lack of will on our side to engage with the organisations concerned, but different figures are still being bandied about.

It is my job as an official to ensure that the impact is clear. I ask the committee to bear in mind that when we did the regulatory impact assessment it was based on a far greater number of vending machines than there are in reality. We had to make assumptions, as has been detailed in the minister's letter to the committee, and we were very careful about how we did that. We did our level best to get as much information as we could to back up that provision.

**The Convener:** You said that you had difficulty engaging. What was the process? I want to get it on the record as representatives of the association are coming before us.

**Mary Cuthbert:** We sent e-mails and made several phone calls, but nobody came back to us. We had no other option. I should say that the organisation was engaging with colleagues in the Department of Health, which is where we got the pro rata figure, but there is a limit to how far we can go. As I said, we engaged with Sinclair Collis about job losses. It has the greatest number of machines—2,000—and it gave us quite a lot of information, for example on the drop in the number of machines over the past two years. The difficulty has not been through any lack of will on our side to engage with the sector.

**The Convener:** I will get the clerks to find out for us how many members the National Association of Cigarette Machine Operators has. We do not know whether that association represents everybody. We will find out about the distribution of its membership, which will be helpful for clarifying the background.

**Rhoda Grant:** You have spoken about an impact assessment. Did it take into account the impact on small pubs, which might depend on the

sales from vending machines for some of their profits? Was any work undertaken to find out how the bill could impact on them?

**Mary Cuthbert:** I personally did not do the regulatory impact assessment; it was done by one of our economists and another colleague who worked to develop the proposals. I do not have a straightforward answer to the question, but I spoke with people in the licensed trade while developing the proposals, and my impression was that they do not make a great deal of money from cigarette vending machines, particularly given the smoke-free policy in licensed premises now. I would need to come back to the committee on that, as I am honestly not sure what was taken into account.

**The Convener:** Ian McKee wishes to speak. We are still on section 6.

**Ian McKee:** I will withdraw.

**The Convener:** Is this point on section 6, Helen?

**Helen Eadie:** Yes.

**The Convener:** After that, we will have Mary Scanlon on section 6. Members are coming in as a team.

**Helen Eadie:** I will stick with the issues that Rhoda Grant has raised. Our letter from the National Association of Cigarette Machine Operators states:

"There has not been a subsequent meeting with NACMO since we disclosed the number of machines, 1,566,"

a turnover of more than £7 million per annum and 45 employees. If NACMO states that there has not been a "subsequent meeting", that implies that there was an original meeting. You say that you were not able to engage with the association, yet the letter clearly implies that there was a meeting.

**Mary Cuthbert:** We were not able to engage with NACMO in the process of developing a regulatory impact assessment—basically, we did not manage to make contact. However, an MSP—I cannot remember which one—then asked a parliamentary question about what engagement there had been with vending machine interests. In response, we said that we had tried to engage with NACMO but had been unsuccessful. Following that, we received a phone call to say that its representatives would like to meet us.

Two representatives of NACMO then came up to meet us—they are based down south. They were concerned that they had not had the opportunity to feed into the process at an earlier stage, although we explained that we had tried very hard to engage with the association. The representatives gave us some figures at that meeting, which were followed up in writing, but we have received different sets of figures. When we realised that an

issue would arise, the minister felt that she should write to tell the committee that we were having problems in finding out the information, that we realised that 14 jobs—the only hard-and-fast figure that we could give at the time—was an underestimate, and that we were trying to establish what is involved.

The minister's letter says that we have not had a subsequent meeting, but bill team members have spoken on the phone to Ron Bullough. His letter is perhaps a wee bit disingenuous, as we have had discussions and tried to engage with him to ensure that the financial memorandum reflects the true position, if we can establish what that is.

10:45

**Helen Eadie:** So the memorandum has not been updated.

**Mary Cuthbert:** It has not been updated. We were going to update the memorandum, but when we saw different figures being bandied about we thought that it would be inappropriate to update the memorandum this week if we could find next week that the figure was different again.

**The Convener:** We have exhausted the subject. All that I want to ask is what NACMO's response was when you said that you had tried to contact it many times. Did NACMO address that?

**Mary Cuthbert:** NACMO told us that there were issues with some office-holders—I think that changes had occurred internally. Perhaps NACMO had not appreciated the work that we were doing in Scotland, although it was well—

**The Convener:** We will ask NACMO about that.

**Helen Eadie:** Another issue in NACMO's letter, which is separate from the line of questioning that I have just pursued, is its proposal for a

"system of radio frequency controlled cigarette vending machines that would ensure that children under the age of 18 years old could not use the cigarette vending machines and give greater levels of control than in retail shops."

NACMO asks whether that has been considered and what the Government's response is. Given that 14 independent Scottish companies with 45 employees are involved, NACMO regards the bill as important.

**Mary Cuthbert:** The RIA clearly sets out various costed options. One is the use of such machines, but the conclusion was that a complete ban would bring greater benefits. The proposal is not something of which we were not aware—it is covered in the RIA.

**The Convener:** We will move on to chapter 2 of part 1, which is on the register of tobacco retailers.

**Michael Matheson (Falkirk West) (SNP):** I am interested that you have gone for a national register. What is the rationale for having a national register rather than a licensing scheme that is operated more locally, as with alcohol licensing?

**Mary Cuthbert:** In developing the proposals, we—at official and ministerial level—engaged closely with trade interests. We heard from retailers that the last thing that they wanted was a bureaucratic licensing system—another burden on business, if you like. I know that the committee will speak to trade representatives, so they will be able to speak for themselves—I hope that they will say the same things as I have said. I think that the trade also recognised that it would be useful to have a register of tobacco retailers.

We examined various options, such as a negative licensing system, which the expert group recommended. Under such a system, retailers would lose the right to sell tobacco if they were caught selling it to underage customers. We also considered the full-blown licensing scheme that was mooted and the option of a register. We feel that the registration scheme will have many of the benefits of a licensing scheme but without the bureaucracy.

Having a national register means that companies that operate on a national basis, such as Tesco, will be able to register simply. The register will be available to local authorities—the bodies that enforce the relevant laws—which means that, for the first time, they will know who the retailers are and will be able to support them to comply in full with the law.

**Michael Matheson:** Am I correct in saying that each premises that seeks to sell tobacco will have to be on the register?

**Mary Cuthbert:** Yes. If you want to sell tobacco, you will have to be registered to do so.

**Michael Matheson:** That therefore means that each of the Tescos or Asdas in Scotland that seeks to sell tobacco will have to register.

**Mary Cuthbert:** Yes.

**Michael Matheson:** So how does that remove bureaucracy?

**Mary Cuthbert:** It means that Tesco does not have to go to 32 local authorities in order to register, as it can simply register on a national database.

**Rosemary Lindsay:** Tesco could send in an application that lists all of its premises. There would be only one applicant—it would not be the case that every individual Tesco would have to send in a separate application. I do not know how Tesco would administer it, but it could send in an application that listed all of the premises in which it wanted to sell tobacco.

**Michael Matheson:** So one application could be made en masse. I got the impression from Mary Cuthbert that, as each store had to be registered, each store would have to make an individual application.

**Mary Cuthbert:** I did not mean to mislead you. Each premises would have to be registered, but a company could register all of its premises en masse. The companies seem to welcome that, as it will cut down on the bureaucracy.

**Michael Matheson:** I can see that.

**The Convener:** Section 8 of the bill says:

“A person may apply to the Scottish Ministers ... to be registered”.

**Rosemary Lindsay:** Yes, but that person can be a company, which is a legal person.

**Dr Simpson:** A person or a company can be a legal entity. If a multiple applied and then breached the law in one area, would that result in a person—the legal entity or individual—being banned from selling tobacco only in premises in the council area in which the enforcement had been breached?

**Rosemary Lindsay:** In order for there to be a banning order, there would have to be three relevant enforcement actions in respect of the premises, which would then be banned.

**Dr Simpson:** That is a different matter. I was wondering about the practicality—

**Rosemary Lindsay:** If Tesco—

**The Convener:** Let us change the example. We should use Sainsbury's instead, as it is its 140<sup>th</sup> anniversary.

**Dr Simpson:** We could just say “a multiple” or even “a supermarket”. We must not advertise only one store.

**Rosemary Lindsay:** If a supermarket in Kirkcaldy were found on three occasions to have sold cigarettes to under-18s, that retail premises could be banned from selling tobacco products, but the other premises in the chain would not be affected. The penalty would be limited to the store in which the problem existed.

**Dr Simpson:** What made you decide on three breaches? I can understand that being banned after one instance would be a bit tough, but three sounds as if you are allowing a lot of breaches, especially as all three breaches must occur within two years. That means that someone could have a breach every year from now until kingdom come and not be banned.

**Rosemary Lindsay:** I think that that was a policy decision.

**Dr Simpson:** Okay. We will come back to that.

**Mary Cuthbert:** It is probably worth saying that the provision is in line with the regulatory justice approach, which has been introduced in an attempt to prevent cases from being dealt with only through the courts. The notion of “three strikes and you’re out” is part of that.

**Dr Simpson:** The approach is not, “three strikes in a two-year period and you’re out”?

**Mary Cuthbert:** I think that I am right in saying that there is the option of overriding that approach.

**Rosemary Lindsay:** Yes, there is. It is not the case that a person can commit three offences and nothing will happen. The “three strikes and you’re out” approach gets someone to the stage of being liable to have an application for a banning order made in respect of them. Such a person will already have been subject to a fixed-penalty notice or criminal proceedings. A decision must be made about when the person’s behaviour is deemed to be so bad that they become liable to be banned from selling tobacco products. A judgment must be made that the person is that far down the line. There must be three enforcement actions before a person can be banned from selling tobacco; they will not go unpunished in the interim period.

**Dr Simpson:** Section 17 will allow the Scottish ministers to make regulations to provide for chapter 2 to apply to

“vehicles, vessels and moveable structures”.

An application for registration must give the address from which tobacco will be sold. That could be a mobile van or a car boot sale. Why did you not go for an outright ban on sales from such places? It would have been reasonable to have excluded mobile vans that are the only retailers of groceries and so on in very rural areas. In other words, you could have gone for a ban on sales from vans and moveable structures with exceptions, rather than say that ministers may regulate in future on such sales, which implies that you will allow them.

**Rosemary Lindsay:** You are correct to say that the purpose of section 17 is to allow the registration provisions to be modified, for example in relation to the address—that is a good example of a modification that might be made. Mary Cuthbert might comment on whether a ban is intended.

**Mary Cuthbert:** We included the provision because we were aware that people run mobile shops, particularly in rural areas, and we wanted to be able to cover such people if necessary. However, I accept what Dr Simpson said.

**Dr Simpson:** The wording of the provision will allow every ice cream van to sell tobacco, provided that they register.

**Rosemary Lindsay:** Yes, if they register, but they will need to comply with the law.

**Dr Simpson:** Have you discussed the matter with HM Revenue and Customs? I understand that car boot sales and mobile vehicles are the places from which contraband is potentially more likely to be sold and are much more difficult to police than other premises.

**Mary Cuthbert:** We have been working closely with HMRC as part of the enhanced tobacco sales enforcement programme, as you know, and we are well aware of the types of vehicles from which illicit products might be sold. We considered whether the bill will allow someone who sells tobacco illicitly to apply to go on the register, but the wisdom is that such a person would not apply because doing so would mean that enforcement officers would know where they were and could contact them. Someone who is registered is visible to the relevant agencies, and the work with HMRC would indicate whether they were likely to sell illicit products.

**Dr Simpson:** Convener, I do not know whether we will take evidence from HMRC, but I propose that we ask it for information on enforcement and sale of contraband in the context of chapter 2. It would be useful to get some estimates from HMRC.

11:00

**The Convener:** It is my turn to ask a question. I carried out a large consultation, and I eventually came to share the view that the cost of licensing would be pretty onerous, not only in terms of the cost to retailers—some of which are very small and precarious businesses, particularly at the moment—but because it would involve going through the licensing procedure, which is quite a cumbersome process and would raise issues for local authorities. I also examined the issue of mobile vehicles—ice cream vans and so on.

I see that there are to be certificates of registration and a public register. Is consideration being given to placing a requirement on retailers to display their certificate of registration? I look forward to that, in order that things cannot masquerade as other things. If there is a banning order—which we will discuss later—the certificate should be removed. There needs to be an education process for the public as well as the retailers—a name and shame process, if you like.

**Mary Cuthbert:** We considered the matter when we were drafting the provisions. One issue was that we could create an offence of not displaying the certificate, but there would be nothing to make retailers stop displaying them. We took the decision, rightly or wrongly, that we should not create an offence of not displaying the certificate,

because of the situation in which the certificate of a retailer who was acting correctly in every other way had simply fallen off the wall.

**The Convener:** I know that my road tax disc has to be displayed, and it is no defence to say that it has fallen flat on the dashboard the wrong way up. I have tried that—I had to photocopy the disc and send it in because it had fallen off.

**Mary Cuthbert:** Yes, but although the certificate will not have to be on public display, it will have to be shown to an enforcement officer or to anyone who enters the shop and asks for it.

**The Convener:** I will pursue that with the minister.

**Rosemary Lindsay:** I do not know whether you want me to say something further on that. We discussed the matter and concluded that it was sufficient that the offence was one of not being registered, and that it was not necessary for us to create a separate offence, for someone who was registered, of failing to display a certificate of registration, in line with the lack of bureaucracy and not wanting to be too heavy.

**The Convener:** As registration will apparently be done online most of the time, people could print off the certificate to let the public see it. If there was a banning order, the public would know, and it would help trading standards and the police to identify those retailers.

I give notice—not to you, but to the minister, if she is listening—that I will pursue that route through an amendment, if necessary, to put in the bill a requirement to display the certificate and a provision that it will be an offence not to display it.

**Mary Scanlon:** According to the financial memorandum, the set-up costs for the registration scheme will be £400,000, which will come from the public health budget. That, it appears, is required for the “simple registration form” and for the Scottish ministers to issue a certificate of registration. That must be accepted, but how did you determine that it will take one person 18 hours a week on 0.5 of a full-time salary—being paid £10,000—to monitor the scheme for the whole of Scotland? After the initial set-up costs, including the form et cetera, what will that person do in their 18 hours a week for £10,000?

Also, will the registration scheme look at, for example, the national registration scheme for private landlords, which—allegedly—determines who is fit and proper to be a landlord? Will the registration scheme look into the backgrounds of the characters who are going to sell cigarettes? Finally, will there be a cost to retailers? I understood that there would not be, but I have not seen anything on that. Can you clarify that?

**Mary Cuthbert:** There were several questions there. I will start with the first one, on how we came to our assumptions. You must understand that they are just assumptions, and are not necessarily what the reality will be. We considered a range of similar schemes—how much they cost to establish and so on—and we hope that we will come in under budget. We also took evidence. I did not do it personally, but the economists who did the RIA spoke to people who had set up such schemes and spoke to people in Ireland who are setting up a registration scheme, and they made some broad assumptions about what might be needed to maintain the scheme. In the interest of public funds, if we can provide the scheme more cheaply as we develop, we will try to do so. However, we wanted to give as clear a picture as possible of the potential costs.

Your second question was whether we considered other systems. We considered the landlord registration scheme, which is a web-based system. We might want to use that scheme, whereby retailers can register free online—they are not charged for registration.

Your other question was whether the registration process will ensure that an applicant is a fit and proper person. The process in itself will not do that, as there is nothing in the bill to cover that. The bill says that if someone applies to be put on the register, it is assumed that they will go on the register. It is not like a licensing scheme in which people are vetted; it is a different type of system.

**Mary Scanlon:** A strange man with a white van selling things at car boot sales or people with ice cream vans could just fill in the registration form and that would be okay.

**Mary Cuthbert:** In theory, yes, but it is another matter whether, in practice, they would be able to comply with the questions that we would ask. The bill states what sort of information they would have to provide. Whether such people would want to provide that information is a different story.

**Mary Scanlon:** The registration form is simple. On it, will you ask for details of, for example, criminal convictions?

**Mary Cuthbert:** No.

**Mary Scanlon:** So the person might not be what is considered a fit and proper person under the landlord registration scheme. Basically, anyone will be able to register, regardless of their criminal background.

**The Convener:** I think that Mary Scanlon’s point goes back to section 8.

**Rosemary Lindsay:** Would you like me to address that point?

**The Convener:** Yes, please.

**Rosemary Lindsay:** The application form is straightforward. Section 8(2)(d) states what information must be provided and allows scope for requiring the form to

“contain such other information as is prescribed”.

It would be possible for the form to ask for information on someone's criminal convictions. However, section 8(3) states:

“The Scottish Ministers must grant the application unless ... it does not comply with the requirements in subsection (2)”.

Therefore as long as someone provides the requested information, they will have to go on the register. There will be banning orders, but that is a separate matter.

The process is not intended to be a vetting system. It is unlikely that someone with lots of criminal convictions relating to tobacco would comply with the register but, in theory, provided that they filled in the application form, the Scottish ministers would have to grant the registration.

**The Convener:** You have highlighted an important point that we should ask the minister about. I want to move on.

**Mary Scanlon:** I have not received an answer to one of my questions. What will the person who monitors the scheme do for his £10,000 a year and what will happen beyond the setting up?

**Mary Cuthbert:** As I said, when we looked to set up the system—I did not do the work myself—maintenance of the database was considered. It may not cost as much as that; we just took figures that were given to us and made assumptions on the basis of information that was provided on similar schemes. We might not need someone to maintain the database, but we tried to be as fair as possible in costing the scheme.

**The Convener:** We may have to tighten up the application process. Issues have been raised, which perhaps the minister can address, about red alerts when certain people apply and about the need for more vetting.

Helen Eadie has a question. Is it on the registration process?

**Helen Eadie:** Yes, and it relates to a late response that we received from the Association of Chief Police Officers in Scotland, which is among our papers for this meeting. What discussions have you had with ACPOS, because although it supports the majority of the proposals in the bill it is concerned that there are potential difficulties in the approach?

One particular issue is licensing. ACPOS feels that, given the large number of retailers who will require licences under the regime, it may be appropriate to consider the route of local

authorities and the Civic Government (Scotland) Act 1982 rather than a national register, because, according to ACPOS, that

“would not only allow for greater local accountability, but may well offer added flexibility in respect of enforcement.”

We can return to that aspect later. What discussions did you have with ACPOS and how did you respond to it on that point?

**Mary Cuthbert:** We have not had direct discussions with ACPOS on the bill, mainly because trading standards officers in local authorities traditionally enforce tobacco sales law. They are the current enforcers. I am not saying that the police do not have general powers to enforce legislation, but they are not the primary agents in enforcing tobacco sales law. That said, I chair a cross-Government, cross-agency group that considers enforcement and ACPOS is represented on it.

**Helen Eadie:** I will deal with enforcement issues later, but I want to focus on local accountability and the way that local licensing works better with local authorities than it will with the national register that you propose. Our papers tell us that more than 11,000 retailers could be involved. I want to compare and contrast the local licensing scheme and national registration.

**The Convener:** We have been over that ground. I do not want to crush questions, but we are trying to pinpoint some of the issues, not get the full and final answers.

**Helen Eadie:** My point is that I am concerned that ACPOS has not been consulted. Only the committee has consulted ACPOS; the Government has not done so.

**The Convener:** Mary Cuthbert said that she consulted trading standards officers, not ACPOS. The letter of 7 May represents our committee consulting ACPOS. I just want to clear that up.

**Helen Eadie:** I am surprised that the Government has not consulted ACPOS.

**Mary Cuthbert:** The main reason for that is that we are engaged with the authorities that currently enforce tobacco sales law, and the police are not the primary enforcement authority. Having said that, I chair a cross-Government group that contains representatives of ACPOS.

ACPOS was well aware that legislation was on the cards, but I admit that we did not have detailed discussions with it about the legislation, mainly because the police tend not to—

**Helen Eadie:** The police are involved in other licensing activities—

**The Convener:** We have established that. I want to move on.



**Helen Eadie:** They are involved with alcohol and other things.

**The Convener:** I understand that, but I want to move on, because it is 11.13 and we are only at page 5 of the bill.

Do Michael Matheson and Ian McKee want to ask questions on registration?

**Michael Matheson:** No.

**Ian McKee:** I do.

I have a question on supermarkets with lots of outlets. Section 8(3)(b) says that if a person applies to be registered but any premises that are specified in the application are subject to a banning order, the application from the person, which could relate to a supermarket with lots of outlets, will not be entertained. Surely in fairness, if two weeks after being registered one of the premises receives a banning order because it has broken the law, all the other premises should fall as well—adopting the logic of that statement—because they have fallen foul of the same thing. By introducing simplicity, you might also be introducing a grey area around the status of applicants. If an application applies to 50 stores and 25 of them receive banning orders, will the applicant be able to carry on selling tobacco in the other 25 stores? How will that work?

11:15

**Rosemary Lindsay:** The applicant could apply to register the 25 stores that had not received banning orders, on the basis that there had been no wrongdoing in those premises. A larger retailer, such as a supermarket, that had been banned from selling tobacco products in Kirkcaldy but wanted to open another store in Dunfermline would be able to do that, because—

**Ian McKee:** Not according to the bill. It says—

**The Convener:** Will you read out the relevant section, please?

**Ian McKee:** Section 8(1) says:

“A person may apply to the Scottish Ministers ... to be registered.”

Section 8(3) says:

“The Scottish Ministers must grant the application unless” premises specified in the application are the subject of a banning order. If any premises specified in the application are the subject of a banning order, the registration application cannot be entertained. That would affect all of a supermarket’s branches.

**Rosemary Lindsay:** It would apply in respect of the premises specified in the application.

**Ian McKee:** That is not what the provision says.

**Rosemary Lindsay:** The applicant would be banned from retailing tobacco in specific premises.

**The Convener:** Yes. Section 8 says that the applicant would be banned from selling tobacco

“at any premises specified in the application.”

I take it that you are saying that when a large store submits a universal application, it will specify a list of premises. If a banning order is in place, it will apply only to the specified premises.

**Rosemary Lindsay:** Yes.

**Ian McKee:** That is a sensible arrangement, which I can understand, but it is not how I read the bill. Section 8 says:

“A person may apply to the Scottish Ministers ... to be registered.”

In other words, a supermarket can apply to be registered.

**The Convener:** Section 8(2)(b) says that the application must

“state the addresses of all premises at which the applicant proposes to carry on a tobacco business”.

**Ian McKee:** Yes, but section 8 says that if one of the premises has been the subject of a banning order, the person cannot be registered.

**The Convener:** My reading of the provision is that a person cannot be registered only if the premises in respect of which they are making an application are the subject of a banning order.

**Ian McKee:** It does not say that.

**Dr Simpson:** The situation is made even more complicated when one takes into account section 12, which says:

“A council may apply to the sheriff for an order banning a person from carrying on a tobacco business from premises within the council’s area.”

If a supermarket that has a number of stores in Fife—to stick with that example—is banned from carrying on a tobacco business, that company is banned from carrying on a tobacco business in

“premises within the council’s area.”

**The Convener:** But it does not say “every” or “all” premises.

**Dr Simpson:** Should it say “individual” or “specific” premises?

**Rosemary Lindsay:** Section 12 is really just about jurisdiction and who can make an application. According to section 12(2), an application that is made by a council under section 12(1)

“must specify the premises from which the person is to be banned from carrying on a tobacco business.”

It simply clarifies that a council has jurisdiction to apply for a banning order in respect of any premises within its area.

**The Convener:** Section 12(1) is about jurisdiction. An application that is made under section 12(1) does not apply to all premises in the council's area.

**Rosemary Lindsay:** A council could specify all the premises in its area, if it had grounds to do so. The point is that it must specify the premises concerned in the application.

**The Convener:** We move on to enforcement, which is dealt with in chapter 3.

**Michael Matheson:** I am sorry, but I want to ask about banning orders, which are dealt with in chapter 2. You might already have covered the issue that I want to ask about; maybe I did not pick up what you said or I picked it up incorrectly. My point relates to people whose premises have been the subject of three enforcement actions in a two-year period. I am not clear about what would happen if, for example, someone committed a serious offence by selling to an underage person a considerable amount of tobacco—say, 200 fags, rather than 10 fags. In my view, selling 10 cigarettes would be a lesser offence than selling 200 cigarettes. How would that affect enforcement action? Under the bill, would such offences be treated equally in the eyes of the court?

**Rosemary Lindsay:** A more serious offence would be likely to result in a criminal prosecution rather than a fixed-penalty notice. Sentencing would provide an opportunity to reflect the offence's seriousness.

You ask what account a sheriff will take of the seriousness of an offence when a banning order is to be made. In weighing whether banning a person is appropriate, a sheriff will consider the offences and whether they were serious. Councils will apply for banning orders, but sheriffs will decide whether to grant them.

**Michael Matheson:** I will take a step back to fixed-penalty notices. If a fixed-penalty notice is to be issued, that is likely to be done by a trading standards officer.

**Rosemary Lindsay** *indicated agreement.*

**Michael Matheson:** How will an officer determine that a fixed-penalty notice is not appropriate and the matter should be referred directly to a court for criminal prosecution?

**Rosemary Lindsay:** That decision will be for the trading standards officer—that is not a legal issue.

**Michael Matheson:** My problem is that, for similar offences, one local authority might decide just to issue a fixed-penalty notice, whereas

another local authority might refer the matter to the courts. We are in danger of creating a system in which local authorities pursue issues differently.

**Rosemary Lindsay:** The bill says:

“An enforcement officer may give a person a fixed penalty notice if the officer has reason to believe that the person has committed an offence under Chapter 1 or 2.”

Whether to issue a fixed-penalty notice or refer a matter to the procurator fiscal will be an individual decision for the officer.

**Michael Matheson:** Do you see the difficulty? In one local authority, one enforcement officer might issue a banning order, whereas his colleague who is elsewhere on the same night might decide to refer a similar offence for criminal prosecution. The potential exists for an inconsistent approach.

**The Convener:** Perhaps I misunderstand the situation, but I do not think that trading standards officers will be able to make a banning order.

**Rosemary Lindsay:** That is correct.

**The Convener:** That is for a sheriff.

**Michael Matheson:** I understand that. Before three fixed-penalty notices have been issued in two years, an offence could be referred directly to a sheriff for criminal prosecution. However, different trading standards officers—even in the same local authority, never mind in different authorities—will decide the level at which to pursue cases. I am concerned about the potential for different approaches to be taken in different local authority areas.

**Rosemary Lindsay:** Under section 19, councils will be able to undertake programmes of enforcement, which would cover such matters. I am not really qualified to speak about the issue.

**Michael Matheson:** I acknowledge that provision, but you can see exactly what could happen: a retailer in one local authority area could be criminally prosecuted for something for which a retailer in another local authority area receives just a fixed-penalty notice.

**The Convener:** I will leave the subject there.

Before the sheriff court is reached, what does the bill say will happen if someone rejects a fixed-penalty notice and says, “Trading standards are wrong in what they say about me”?

**Rosemary Lindsay:** A person can make representations to the council. That is their first line of—

**The Convener:** Where is that in the bill?

**Rosemary Lindsay:** I am looking for the provision.

**The Convener:** There is an appeal process under the sheriff—

**Rosemary Lindsay:** There is. It is possible—

**The Convener:** But where is it to be found earlier in the process?

**Rosemary Lindsay:** I think that it might be in the schedule. Yes, it is in schedule 1, paragraph 8(1), which says:

“A recipient of a notice”—

**The Convener:** Okay. That is fine.

**Ross Finnie:** You prefaced earlier remarks by saying that this is an opportunity to redraft the law—the very old law—on the sale and enforcement of tobacco products. However, in response to Helen Eadie’s question on consulting ACPOS, you said something like, “Ah, wait a minute. We don’t have to consult ACPOS, because the law on licensing is dealt with by trading standards officers.” Surely, in redrafting the law, we should keep an open mind on where we are going.

Given that tobacco has been elevated to one of the most dangerous products that is on sale—it is not even to be visible in any public place where people wish to sell it; displaying it is to become a very serious offence—why did you retain the framework of trading standards officers and not accord tobacco enforcement to the police? After all, tobacco is now a far more serious product than alcohol. Why have we not accorded the enforcement of tobacco products to the police?

**Mary Cuthbert:** We have a set of laws and we considered what we might do to update them. As we have made clear in the explanatory memorandum, much of the bill is restated provision. It is clear that the regime that we have developed is the same as before: trading standards officers will continue to be the principal enforcers.

Perhaps it was remiss of us not to have detailed discussions with ACPOS. I hold my hands up on that, but—

**Ross Finnie:** Let us leave that to one side. I am interested in the balance of the argument. If tobacco is so serious a product that it cannot and must not be displayed by anyone who is selling it, it is a far more serious product than alcohol. Alcohol offences are enforced by the police, yet this more serious product comes under the remit of trading standards officers. In saying that, I do not in any way intend to demean those officers; I simply want to know the balance of the argument. Why are trading standards officers to enforce the law on one of the most serious products ever on sale anywhere?

**Mary Cuthbert:** I do not think—

**The Convener:** Perhaps that is a matter for the minister.

**Ross Finnie:** I am interested in hearing about the balance of the argument from the bill team. The minister made the decision, but what is the balance of the argument? You have described how part of your job was to reframe the law. Why did you reframe the law in this way, given the tremendous importance that is now being assigned to the sale of tobacco products?

**Mary Cuthbert:** I can only repeat what I said earlier: local authorities have responsibility for enforcing this law—as they have for a lot of other laws of this nature. Alcohol is unique in a way. I take your point and—

**Ross Finnie:** But alcohol can be displayed; anyone can go and look at it. I can pick up a bottle, hold it in my hand and examine it. I can talk to it. I can find out its product content. It can tell me how many units it contains. The offence under the bill is far more serious than that relating to alcohol. In drafting the bill, the Government has elevated tobacco to a product that must not be seen. Its product information must not be read. It must not even be looked at. However, enforcement is to be carried out by trading standards officers. I am puzzled by that.

**Mary Cuthbert:** I can—

**The Convener:** We will come back to this. The point has been made. I, too, have raised the issue in terms of efficiency.

Given that the police have always had responsibilities in relation to the licensing of alcohol and underage alcohol sales, there could be a more efficient use of manpower. The retailers who commit the offence of selling alcohol to underage customers might be the same people who do not give two hoots about selling tobacco to underage customers. There will be onerous legal requirements on tobacco retailers, and there might be efficiencies to be gained. We will take up the matter with the Government.

11:30

**Ross Finnie:** It is regrettable that the approach that the bill team has described—I appreciate that it is not their province—bears heavily on the drafting of all the sections on—

**The Convener:** Registration.

**Ross Finnie:** No, enforcement, from section 18 onwards.

**Mary Cuthbert:** An important point that came through from the ACPOS response was the need for local agencies to work effectively together, which we encourage—

**Ross Finnie:** Sorry, that is not the point. If the intention of the bill is to spell out the importance and dangers of the sale of tobacco, it is odd that the provisions will be enforced by trading standards officers, whereas laws on alcohol sales are enforced by the police. I am not criticising trading standards officers; the issue is public perception of who enforces the law.

**The Convener:** We will come back to the issue. I said “registration” because I thought that a licensing scheme could have offered an approach that encompassed the police. Helen Eadie and Mary Scanlon want to ask questions.

**Helen Eadie:** My question is on powers of entry.

**Mary Scanlon:** Mine might be on powers of entry, too.

**The Convener:** It “might be”, might it? I am in suspense—or suspenders, as my mother used to say.

**Helen Eadie:** It is rare that professionals volunteer their services, as ACPOS has done. ACPOS made an important point when it said that

“it may be appropriate to widen the powers to enter and inspect premises ... to include the Police. Such an approach would again give far greater flexibility when dealing with enforcement action.”

The approach seems eminently sensible and would add value to the bill. I hope that the bill team will discuss the matter with the minister. The police are offering to support an important bill.

**The Convener:** Members have underlined ACPOS’s point in red ink.

**Mary Scanlon:** Will the provisions on powers of entry, warrants for entry and fixed-penalty notices and the related supplementary provisions apply to ferries, cruise ships that are based in Scotland and duty-free shops? Will it be difficult to enforce the provisions in such places?

**Rosemary Lindsay:** Yes. Duty-free shops in Scotland are shops—

**Mary Scanlon:** Will the bill apply to duty-free shops in all Scotland’s airports? That will put Scotland at a disadvantage, compared with all other countries. Will it also apply to cruise ships that are based in Scotland, wherever they are, and to ferries?

**Rosemary Lindsay:** It will be a question of jurisdiction. When a ship is in the jurisdiction of Scotland it must comply with Scots law.

**Mary Scanlon:** Does that mean that the ferry to Zeebrugge can bring out its big tobacco displays when it is past 12 nautical miles out into the North Sea?

**The Convener:** Members are all saying yes. We are all giving evidence for the bill team now. It has been a long morning.

**Dr Simpson:** The display can be opened up when the ship is 12 nautical miles out—

**Rosemary Lindsay:** Scots law applies only in the Scottish jurisdiction.

**The Convener:** Scots law can extend only as far as the boundaries of Scotland—unless an international co-operation agreement is in existence, I imagine. [*Interruption.*] I am being whispered at by the clerks. Will the bill apply air-side in airports?

**Rosemary Lindsay:** By “air-side”, do you mean in duty-free shops?

**The Convener:** I mean when people have passed through security.

**Rosemary Lindsay:** Duty-free shops are beyond security checks, so yes, the bill will apply.

**The Convener:** Are you happy now, clerks? Even you are asking questions through the chair—and why not? Perhaps the official reporters who have sat through all this are desperate to ask a question. Feel free.

**Michael Matheson:** I presume that test purchasing could be used to help with the enforcement of the eventual legislation.

**Mary Cuthbert:** Yes. Test purchasing would not be like it is for alcohol, in which the young person is also committing an offence, so there is a specific provision in the alcohol licensing laws to allow the chief constable to permit test purchasing. There is no specific provision for that in the bill, but test purchasing is permitted. The Lord Advocate’s prosecution policy allows for it. Under the enhanced enforcement programme, test purchasing would be one of the tools at the disposal of trading standards officers for enforcing the law.

**The Convener:** We move on to chapter 4, “Miscellaneous and supplementary”. I love the section heading “Presumption as to contents of container”. Sometimes I have to do that in my fridge. I can get it wrong—we have bacteria.

**Ross Finnie:** Too much information.

**The Convener:** Indeed.

**Michael Matheson:** I will not be going to yours for dinner, then.

**The Convener:** You have not been invited. I feel we are reaching the end of a long session. Hysteria is setting in.

**Ross Finnie:** “Listeria”, did you say?

**The Convener:** No, wisteria belongs down south—and some people have paid to get it removed.

We are on to part 2 now. I expect my former medical practitioners to leap in with clarity in their questions. I have just challenged you, gentlemen. Part 2 is on primary medical services. Your time has come, Dr Pryce and Ms Preston—you have been waiting for ages for this. I invite questions.

**Dr Simpson:** First, how many practices are currently not compliant with the proposed law? Secondly, how many applications have there been for private, non-eligible companies over the past few years? In other words, how many things are we actually banning under the legislation?

**Dr Pryce:** I do not have the detailed information to answer either of those questions, but I do not believe that there are any general practitioner practices in Scotland that are not delivered under the traditional model and based around GP partners or GP shareholders of a limited company. There may well be some partnerships, or partners, who might not qualify under the eligibility criteria that we are inserting in respect of the time that is spent in practice delivering direct patient care.

**Dr Simpson:** That relates to my other question: Where is the definition of what constitutes “regularly” or “day to day provision”, which are the terms that are used in the bill? Some practising GPs who are limited or part-time partners, who work for only short periods of time, will not provide day-to-day patient care. Some of them will just work for a day. As the bill is drafted, as I understand it, they would be excluded, unless “day to day” is definable as “less than X hours”.

**Dr Pryce:** We consulted on the idea that a minimum level of commitment might be at least one day a week, on average. The precise definitions will go into the regulations. We were not envisaging that “day to day” would mean consecutive days, if that is of any help.

**Dr Simpson:** It seems strange to have “day to day”, even if a GP might only have to work on one day. That is week to week, rather than day to day. We will need to see the regulations before we consider the matter. Hopefully, we will get them.

**The Convener:** I took that to mean regulations that—

**Dr Simpson:** Could we get a response—

**The Convener:** Sorry, just a minute—I need to clarify this, Richard. I take that to mean both sets of regulations pertaining to part 2 of the bill, before stage 2.

**Dr Pryce:** Yes, that is the intention.

**The Convener:** That is fine.

**Dr Simpson:** Could you come back to us on any estimates that you have, or can get, on the number of practices that might not be compliant? In other words, how many practices will, as a result of the eventual act, have to be dissolved or have their contracts with the health board changed?

Secondly, could you come back to me with information on how many boards would be involved? The only one that I know of is Lanarkshire NHS Board; there is a practice on the border between West Lothian and Lanarkshire, which is the only one that I know of that could not get GPs.

**The Convener:** Just to be clear, will you come back to the committee convener with that information? I will distribute it to the committee.

**Dr Pryce:** Yes. I am able to respond to the first of the questions. However, it has now slipped my mind.

**Dr Simpson:** There were two questions. First, how many practices will not be compliant with the proposed law? In other words, how many practices will get into difficulties because of their current contracts?

**Dr Pryce:** The legislation will not be retrospective. No partnerships or contracts will have to be terminated as a result of the legislation, because the legislation is prospective and applies only to new contracts.

**Dr Simpson:** That still leaves the question unanswered as to what those practices would be able to do going forward.

The second point related to the policy in the bill. If GPs are not interested in a general medical services contract, and if a section 17C or 17L approach is not being taken, how will you protect patients and ensure that a primary care service is delivered to them?

In some areas of England, primary care services have had to be delivered by nurses. Private contractors have also been used, because doctors have not come forward under proposals similar to the ones in the Scottish legislation. How will the bill ensure that health boards can fulfil their obligation of providing primary care services, without repeatedly using locum services—which is what happened in England and was totally disastrous? There is good evidence, especially from London, that such use of locum services provides very inferior services to patients. How will you protect patients by forming this legislation as you have done?

**Dr Pryce:** I am not aware of any instances in Scotland where it has become impossible—

**Dr Simpson:** I accept that. I was talking about the future.

**Dr Pryce:** Even in the Lanarkshire case, where a bid came in from the commercial sector, the contract was awarded to a traditional provider. That, to a large extent, deals with that particular part of the issue.

**Dr Simpson:** I do not think that it does. Nowhere in the bill do you say how you will protect patients if no provider comes forward under the legislation. You just assume that things will not change in the future; we make law not just for today or tomorrow, but for a long period, we hope.

The other thing is, the—I have lost my train of thought.

There are practices in Scotland where, for a considerable time, locums have had to be used on a temporary basis, and the quality of the service has inevitably been inferior because the locums are not committed to developing the services. I do not think that you have answered my previous point.

**Dr Pryce:** There remains a power for the health board to put in place a salaried practitioner. The health board always has the ability to employ its own general practitioners and to provide the service through that mechanism. That is the main fall-back position in the event that an independent practice did not come forward.

**Dr Simpson:** A report—I cannot remember which report it was, I think it was Crerar—recommended that we could substantially reduce the number of medical students in Scotland because we are overproviding doctors in Scotland. This region of the UK has always produced more doctors, because of Scotland's strong tradition of medical faculties.

However, if a future Government was to accept that recommendation and cut the number of medical students, I see no reason why we would not end up in a similar position to the current one in England, where it is not possible to get GMS contracts, PMS contracts, section 17C contracts or salaried doctors. I entirely accept that we do not have that situation in Scotland, but if a future Government were to cut our intake of students, the bill would not protect our patients from a failure to provide a medical service. It would block a mechanism for providing the service.

11:45

**Dr Pryce:** Health boards would have whatever mechanisms they needed to put in place the service at their own hands. They do not normally do so but I am not convinced that, if the problem was that no general practitioner could be found, widening the eligibility criteria would enable that. If

no GP could be found, it would be for health boards to put in place alternative provision, which might have to focus more on other members of the health care team.

**Ian McKee:** I will ask a simple technical question that the centre for international public health policy raised. It suggested that entry controls such as are proposed in the bill could be illegal under European Union competition rules because they would handicap certain companies that were bidding for a contract on a level playing field. Could that be the case?

**Kathleen Preston (Scottish Government Legal Directorate):** I will come in on that because it is a legal issue. We have investigated thoroughly any arguments that those proposals might contravene European law, in particular competition law. As you will appreciate, the matter is extremely complex but, after quite a rigorous analysis, we have satisfied ourselves that there is no merit in the argument that—*[Interruption.]*

**The Convener:** We are getting funny sounds because somebody has some electronic gadget on. I am sorry, Ms Preston; I interfered with your flow.

**Kathleen Preston:** I was just confirming that we have investigated the matter thoroughly and have concluded that there is no justification in the argument that the measures are contrary to EU competition law.

**Ian McKee:** I just wanted to clear up that point. I will now ask about the qualifying partnership. We have already heard your definition of “day to day”. Once it has been established that a partnership qualifies, is there anything in the bill that would restrict its activities to one area? For example, if a doctor and nurse set up a partnership and worked in the Lothians in such a manner as fulfilled the bill's criteria, could their partnership seek to offer primary care services in Strathclyde?

**Dr Pryce:** Under the provisions on qualifying, it could. If the doctor and nurse were providing medical services themselves, they would need to be on the performers list of every board in whose area they performed those services. However, a partnership that has more than one practice can fulfil the involvement criteria through any one of its practices or any combination of them; the bill does not require the partners to provide services personally in each practice.

**The Convener:** What is a performers list? I do not see it mentioned in the bill.

**Dr Pryce:** It is not in this legislation. The performers list is the minimum that a medical practitioner requires to be registered with the health board and to satisfy the conditions of the National Health Service (Primary Medical Services

Performers Lists) (Scotland) Regulations 2004 that they are indeed a medical practitioner, registered with the General Medical Council and so on.

**The Convener:** Is that universal in Scotland?

**Dr Pryce:** Yes. The performers list is a clinical and professional rather than contractual issue.

**Ian McKee:** The point that I am trying to elucidate is that these performers could be employees of the qualified practice. Is not that the case?

**Dr Pryce:** Yes.

**Ian McKee:** So, what has happened in a part of England, where a doctor and a nurse have set up an organisation that now runs 40 practices and sometimes contracts to work in chemists, pharmacies and supermarkets, could happen in Scotland under this legislation.

**Dr Pryce:** That would be permitted under the legislation. However, the key point is that every member of such a partnership or limited company must meet the involvement criteria, which at the moment would mean that they would have to work in their practices at least one day a week.

**Ian McKee:** I take it for granted that the person in question will work in one practice; however, in the example that I highlighted, there are 39 other practices in which they are not working. Instead, they employ performers who have been accepted by health boards. I imagine that the way in which things are structured and what those performers are paid are matters for their commercial judgment. Am I right in thinking that such an entity could make a profit?

**Dr Pryce:** I am not aware of any partnerships that have quite as many practices as the one that you have described. However, some certainly operate on more than one site. In that sense, the provision is compatible with the status quo.

**Ian McKee:** But is it compatible with the Cabinet Secretary for Health and Wellbeing's desire to ensure that NHS Scotland remains firmly in the public sector?

**Dr Pryce:** Yes. I am quite confident that, in the situation that you have described, the partners would describe themselves as independent contractors and not commercial companies.

**Ian McKee:** Would that be the case if the conditions that they had negotiated with outside organisations such as pharmacists and supermarkets had benefits from what you might describe as a mutual crossover of customers?

**Dr Pryce:** You suggested that these people could make a profit from the business, but that is what independent contractors do. In most general

practices, the partners take a profit from the business. There is nothing new in that.

**Ian McKee:** I certainly accept that.

**Ross Finnie:** I am glad.

**The Convener:** As Mary Scanlon has just said, GPs have to eat.

**Ian McKee:** But a doctor and nurse in England have set up a unit running 40 general practices, and it is possible for such a unit to engage in commercial activities that would bring those involved more benefits than if they were running an ordinary general practice. For example, they could set up in supermarkets at peppercorn rents, as their very presence would attract customers to the supermarket pharmacy and so on. Is it not the case that an element of commercialisation is possible under the bill?

**Dr Pryce:** I understand your concern, but the fact is that a partnership that operates on only one site can still reach a business arrangement with a commercial company such as a pharmacy multiple or a supermarket. I am not clear whether any traditional general practices operate out of supermarkets in Scotland, but I would not be at all surprised to learn that certain arrangements existed between some general practices and other health care providers.

**Ross Finnie:** I understand that the thrust of the proposal is to retain service provision within the public sector. However, I am concerned that we might be placing if not restrictions on competition, then inhibitions on the provision of services. Under section 30, for example, a contractor has to regularly perform or be

"engaged in the day to day provision"

of services in order to meet the involvement criteria. I might put together a new contract in which I am prepared to commit myself to more general practice involvement in day-to-day out-of-hours care; however, I will not qualify under the criteria. Because of the out-of-hours nature of that work, I neither regularly perform nor am

"engaged in the day to day provision"

of services.

**Dr Pryce:** Perhaps I can clarify that. I will find the precise wording in a moment, but one does not have to be involved in the day-to-day provision of primary medical services to be eligible to take out a contract under these provisions. It is also permitted to have a contract that ensures that, in the future, you will be involved in the provision of services.

**Ross Finnie:** I would have liked to have seen that wording in the bill. I had trouble with section

30, which seeks to insert new section 17CA into the National Health Service (Scotland) Act 1978—

**Kathleen Preston:** I refer Mr Finnie to new section 17CA(4) to the 1978 act as set out in section 30, which makes it clear that a contractor has “sufficient involvement” if they are

“engaged in the day to day provision of ... primary medical services in accordance with section 17C arrangements, a general medical services contract or any other arrangement made in pursuance of section 2C(2) (or will so perform or be so engaged by virtue of the agreement in question).”

**Ross Finnie:** Right. So one would qualify even if such involvement was contemplated.

**Kathleen Preston:** Yes.

**Ross Finnie:** And the provision is replicated over the page.

**Dr Pryce:** Yes.

**Ross Finnie:** It refers to the arrangement in question.

**The Convener:** Is that okay?

**Ross Finnie:** Yes. I will read the bill again in that context.

**Rhoda Grant:** Before I ask my substantive question, I have a supplementary to Ross Finnie’s question. What is the difference between “independent” and “commercial”? That seems to me to be the nub of the argument.

**Dr Pryce:** I am not sure whether we have a legal or technical—[*Interruption.*]

**The Convener:** I am sorry, Dr Pryce. Someone has left their phone on; I have just heard a ringtone, text alert or something. I feel the old schoolteacher in me returning. I might have to name the girl in the yellow jumper two rows from the back.

**Rosemary Lindsay:** I must apologise—I thought that I had switched it off.

**The Convener:** There we are. It was the lady in the pearls.

Carry on, Dr Pryce.

**Dr Pryce:** I am sorry—I have lost the thread.

**The Convener:** I have lost it, too.

**Rhoda Grant:** The question was about the difference between “independent” and “commercial”.

**Dr Pryce:** I do not think that we have any legal, technical definition of the distinction between commercial and anything else. However, I feel in spirit that a commercial company has shareholders who are not involved in service provision and might well have a purely financial

interest rather than be driven by any desire to deliver services to the patient and public.

**Rhoda Grant:** I will park that matter, because I am probably opening another can of worms.

**The Convener:** I am glad you have done so. We do not need any more cans of worms at this time of the day.

**Rhoda Grant:** How will the reference to “day to day provision ... of services”

fit in with maternity leave, long-term sick leave and, indeed, disability discrimination considerations? For example, someone who has a contract might become disabled and not be able to practise. How does that provision fit in with various legal requirements?

12:00

**Dr Pryce:** The regulations that will define what involvement entails will also cover the period for which someone may not meet the involvement criteria and still be permitted to remain a partner. The consultation discussed, for example, the issue of maternity leave and the possibility of career breaks. We also envisaged that those who had been practising and who then retired should be given a period of time before being required no longer to be partners in a contract holder, as it would be unhelpful to force partners to withdraw their equity from the business immediately on their retirement. We have yet to set the time periods for things such as career breaks and post-retirement involvement, but the consultation suggested that the period might be set at five to seven years. Many respondents to the consultation did not respond on that issue, but several of those who did said that five years seemed about right, whereas others suggested a shorter period, such as two years. Practitioners who become unable to perform services would be covered by that period—which might be five years—during which they could remain a contract holder, but something else would need to be done at the end of that period.

**Rhoda Grant:** Some consideration needs to be given to the issue of disability discrimination. Allowing people to remain a partner only for five years because they have a disability would bring the provisions into conflict with other laws.

**Dr Pryce:** I will look at the point that you have raised. I think that people need to perform the services to meet the provisions in the bill, but I take the point. We will investigate that.

**The Convener:** The next questions will be from Mary Scanlon and then Helen Eadie, who will have the last question. Sorry, it will not be the last question—we have not gone through the whole



bill—but I hope that it will be the last today. I will need to bring my camp bed in here soon.

**Mary Scanlon:** Paragraph 48 of the policy memorandum talks about two separate sorts of contract: contracts for the provision of primary medical services, and GMS contracts that include, as Richard Simpson said, a medical practitioner who is engaged in day-to-day provision. I have read through the bill, but I am unsure whether the procedures that will apply to medical practitioners who are engaged in the day-to-day provision of primary medical services are the same as the procedures that will apply to those who operate under a GMS contract. Is that the case?

**Dr Pryce:** I am not entirely sure of the distinction that you are making between primary medical services and GMS. I accept that primary medical services encompass—

**Mary Scanlon:** I refer to the final two sentences of paragraph 48. I would be happy for the officials to get back to me on this. The fact that the paragraph seems to be talking about two separate things confused me a bit.

**Dr Pryce:** The bill explicitly covers two different sorts of contract, one being a GMS contract—

**The Convener:** By the way, we are talking about paragraph 48 of the policy memorandum. If anyone is busy looking for a hidden paragraph 48 in the bill, they will not find it there.

**Mary Scanlon:** The bill covers two contracts. One of those is a GMS contract that includes, as Richard Simpson mentioned, a practitioner who is engaged in day-to-day provision. I am asking about the other contract, for primary medical services. Do the same restrictions apply to that? Must there be a practitioner who is engaged in the provision of day-to-day services?

**Dr Pryce:** The bill covers both. The other form of contract that is covered explicitly in the bill is contracts under section 17C of the National Health Service (Scotland) Act 1978.

The bill also states that eligibility criteria will apply to any primary medical services contract. Section 29(b) inserts new subsection (2B) in section 2 of the 1978 act, which states:

“The requirement is that, were the contract an agreement under section 17C, the parties to the contract ... would be persons with whom the Board could enter into such an agreement by virtue of section 17CA.”

**Mary Scanlon:** Until I read the policy memorandum, I did not realise that we were dealing with two separate contracts. The policy memorandum states that health boards may enter into a contract

“for the provision of primary medical services with medical practitioners ... qualifying partnerships, limited liability partnerships or companies.”

Does the provision apply only to the primary medical services contract and not to the GMS contract?

**Dr Pryce:** No, it applies to all forms of primary medical services.

**Mary Scanlon:** So under the GMS contract health boards may enter into contracts with qualifying partnerships, limited liability partnerships, companies and commercial companies, whatever they are?

**Dr Pryce:** Any of those forms of contractor may be involved, provided that all the partners or shareholders in any of the bodies meet the involvement criteria.

**Mary Scanlon:** So a health board may enter into a contract with a commercial company, provided that it meets the involvement criteria.

**Dr Pryce:** That is correct. A commercial company could hold a GMS, private or section 17C contract under the new provisions, but every shareholder in that company would have to meet the involvement criteria and to work in one of the practices that were covered by the contract.

**The Convener:** That is an important point.

**Mary Scanlon:** It raises the issue of discrimination. If I wish to set up an enterprise with 40 GPs all over Scotland, I will not be allowed to do so, but Richard Simpson and Ian McKee will be able to do so. Why should I be discriminated against because I am an economist, rather than a doctor? The provision prevents me from pursuing entrepreneurial initiatives.

**Ian McKee:** Your patients might be worried.

**Mary Scanlon:** They would be very worried.

**Rhoda Grant:** That has nothing to do with Mary Scanlon being an economist.

**Mary Scanlon:** The point is that Richard Simpson and Ian McKee could set up an enterprise and work an hour a week, whereas I could not.

**Dr Pryce:** I will clarify two points. First, work of an hour a week would not qualify under the provisions that we envisage, although I accept that that is not set out in the bill at the moment. Secondly, being a partner or shareholder is not restricted to medical or clinical staff. Administrative staff in a practice and practice managers can be members of the partnership or shareholders in the company, as long as they meet the involvement criteria.

**Mary Scanlon:** So someone doing administrative work could meet the criterion of engagement

“in the day to day provision of ... primary medical services”.

**Dr Pryce:** Yes.

**Mary Scanlon:** So if I cut the grass around the practice and trim the rose bushes a few times a week, I could qualify, because I am

“engaged in the day to day provision of ... primary medical services”.

**Dr Pryce:** I am looking for the precise words.

**Mary Scanlon:** The bill states that contractors must be

“engaged in the day to day provision of ... primary medical services”.

**The Convener:** I do not think that cutting the grass is sufficient.

**Mary Scanlon:** What about telephonists and admin assistants? You are saying that contractors do not have to be medical practitioners.

**Dr Pryce:** They do not. A receptionist in a practice has day-to-day contact with patients and would qualify.

**Mary Scanlon:** My next question relates to the position of retired doctors; Rhoda Grant may be familiar with the issue in the Highlands. Is it the case that retired doctors who are unable to work, because of ill health or simply old age, but who still have a commitment to their patients will no longer be allowed to continue to provide services on a day-to-day basis by employing doctors to do so, despite the fact that they own the property?

**Dr Pryce:** That would be the case, after a period of time that is yet to be set out in regulation but which we envisage might be up to five years.

It might be helpful if I were to expand a little on the rationale. The intention behind the involvement criteria is to ensure that the people who hold the contract and, therefore, share in the profits from the enterprise have a genuine commitment to the delivery of the service and are familiar with the way in which the general practice works and the requirements of the contract. When someone has not been involved for a significant period of time—as I said, we are thinking about a period of around five years—there is a significant risk that they will no longer be up to date with the current requirements, both contractual and otherwise. That is why someone who has retired should not be given carte blanche to continue as a shareholder or a partner for an indefinite period.

**Mary Scanlon:** Am I right in thinking that the provisions, as we understand them today, apply equally to dental practices?

**Dr Pryce:** No, they do not.

**Mary Scanlon:** In part 2 of schedule 2, dental services are mentioned quite a lot. Can you explain what changes there will be for dentists?

**Dr Pryce:** Those provisions basically say that a dentist can be a partner to, or a shareholder in, a contract if they provide primary medical services. It is not about the provision of dental services; it is about the provision of medical services.

**Mary Scanlon:** I know that time is short, convener, but I have a final question.

Atos Healthcare is the biggest private sector employer of doctors in Scotland—I understand that it employs around 1,700 full-time doctors who examine people claiming benefits and so on. I understand that Medax provides out-of-hours services to the police and the Scottish Prison Service—the situation might have changed, but it used to be the case, at any rate. Will companies such as Atos and Medax no longer be allowed to operate in Scotland?

**Dr Pryce:** There is nothing in the bill that says that certain companies will not be allowed to operate. Any company that meets the eligibility criteria will be able to operate.

I cannot comment on the role of Atos. I believe that Medax still provides services to the Scottish Prison Service, but not through a contract under the 1978 act, which means that it is not affected by the bill. There is no interference in the contractual relationship between the SPS and any doctors it employs.

**The Convener:** We must move on. Helen Eadie has a question.

**Helen Eadie:** I heard the response to Ian McKee's question about the centre for international public health policy and EU competition law. I also understand the aims of the bill, with regard to arrangements between health boards and contractors for the provision of services.

However, a development at EU level—

**The Convener:** Ah, Helen, I knew that you would get Europe in here.

**Helen Eadie:** It is a serious question.

**The Convener:** You are our European monitor.

**Helen Eadie:** I am this committee's representative on the European elected members information liaison and exchange network.

Two weeks ago, the issue that I am discussing was voted on. At that time, the Conservatives and the Liberal Democrats voted to allow the proposals that were being put forward by Mr Bowis to go ahead without there being any prior authorisation by the member states. In effect, they signed a blank cheque for any member of the public to go to Europe to access whatever service they want. There is no restriction that would enable the NHS

to control whom that patient goes to for services, and the NHS will have to pick up the bill for that.

Labour proposed an amendment—

**The Convener:** Helen—

**Helen Eadie:** There would have to be prior authorisation—

**The Convener:** Helen, please just tell me what the question is, in a way that relates to the bill.

12:15

**Helen Eadie:** How are officials going to be able to ensure that the bill that we are discussing will prevent a patient from Scotland from going abroad to access, without prior authorisation, any primary care treatment that they want, from dentistry to acute care? The developments in Europe prevent the bill from being effective.

**Kathleen Preston:** I think that Helen Eadie is talking about the on-going discussions on the proposed EU directive on cross-border health services. The draft directive is presently under consultation.

**Helen Eadie:** I am sorry—

**The Convener:** Please let the witness answer first.

**Helen Eadie:** But the answer is not accurate. The proposal has gone beyond the consultation stage. The consultation has finished, and we are now at the stage at which votes have taken place in the European Parliament. The committee stage has finished, and the matter is now with ministers.

**Kathleen Preston:** I have not been involved in the detail of what has gone on in the European Parliament, but, as far as I am aware, the directive has not been finalised.

**Helen Eadie:** It has not been finalised.

**Kathleen Preston:** I think, perhaps, we can agree on that.

**Helen Eadie:** It has been voted on, though.

**Kathleen Preston:** The cross-border directive will deal generally with primary care medical services, such as GP services and dentistry, and secondary medical services. As far as I am aware, because we have not seen the final directive, we do not have a final position on the issue of prior authorisation. However, the decisions around prior authorisation and the entitlement of people who live in Scotland to go to other EU countries for medical treatment will depend very much on the individual circumstances of those people.

The issue of the cross-border directive is a separate issue from the one that we are currently looking at. The bill concerns the eligibility of

contractors to provide what we call GP services. The issue of the eligibility of patients to access health care in the EU is to do with the cross-border directive, which is a separate matter from the bill.

**The Convener:** Yes, it is a separate issue. It has nothing to do with the bill.

**Helen Eadie:** I am leaving the patients bit to the side.

**The Convener:** Helen, I am sorry. I do not put my foot down often, but the matter that you are trying to raise is not within the ambit of the bill, which is what we are concerned with today.

Do members have any other questions?

**Mary Scanlon:** Plenty, but I will leave them for now.

**The Convener:** Thank you all very much. I do not know about you, but I am exhausted. This has been a two-hour session, and I have not even had a cheese scone. There had better be one left for me.

12:19

*Meeting continued in private until 12:51.*



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