

HEALTH AND SPORT COMMITTEE

Wednesday 27 May 2009

Session 3

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HEALTH AND SPORT COMMITTEE

17th 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:

Lesley Armitage (NHS Lanarkshire)

Fiona Beaton (Scottish Youth Parliament)

Sheila Duffy (ASH Scotland)

Trish Grierson (NHS Dumfries and Galloway)

Alan Lawrie (NHS Lanarkshire)

Elspeth Lee (Cancer Research UK)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Thornton

ASSISTANT CLERK

Seán Wixted

LOCATION

Committee Room 5

Scottish Parliament

Health and Sport Committee

Wednesday 27 May 2009

[THE CONVENER *opened the meeting at 10:02*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the 17th meeting in 2009 of the Health and Sport Committee. I remind members, witnesses and the public to switch off their mobile phones and other electronic equipment. We have received apologies from Michael Matheson.

Agenda item 1 is a decision on whether to take item 4 in private. Item 4 is consideration of the committee's approach to its stage 2 scrutiny of the Scottish Government's draft budget for 2010-11. Do members agree to take item 4 in private?

Members *indicated agreement.*

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

10:03

The Convener: Agenda item 2 is further evidence taking as part of our stage 1 consideration of the Tobacco and Primary Medical Services (Scotland) Bill. Our witnesses represent health boards and the voluntary organisations that support the proposals that are set out in part 1 of the bill. Alan Lawrie, the director of the South Lanarkshire community health partnership, will join us later in the meeting for our consideration of part 2 of the bill. As members know, the bill—like a football match—has two halves.

The committee has received submissions from the witnesses, for which I thank them. The panel is: Sheila Duffy, chief executive of ASH Scotland; Elspeth Lee, head of tobacco control for Cancer Research UK; Trish Grierson, tobacco control lead for NHS Dumfries and Galloway; Lesley Armitage, consultant in public health medicine for NHS Lanarkshire; and Fiona Beaton, member of the Scottish Youth Parliament and the acting convener of its health committee. All the witnesses are very welcome to committee.

It will assist us in the preparation of our report if witnesses and committee members stick to our question themes, which we will take in the following order: proposals for restrictions on the display of tobacco products; the banning of cigarette vending machines; proposals for a national register of tobacco retailers; and issues around enforcement and fixed penalties. We will then move to questions on part 2 of the bill.

Dr Richard Simpson will open our questioning on the first theme—proposals for restrictions on the display of tobacco products.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): One suggestion that has been made in the evidence that we have received so far is that the whole thing about display is a nonsense: a display does not really affect anyone, it is not causing any problems, it does not in any way normalise smoking for young people and it is not really advertising. In other words, a sledgehammer is being used to crack a nut. Would the witnesses care to comment on that? On the other hand, we are being told that if we restrict display, we will cripple small convenience stores, because a third of their cash flow results from cigarette sales. Can you give us a start by saying what the evidence is around normalisation and what the evidence is for a ban on displays?

Elspeth Lee (Cancer Research UK): I start by reminding the panel that a lot of information exists

that shows that advertising affects young people's smoking behaviour. Young people smoke for emotional reasons, and branding plays a key role in that. Various reviews of the evidence have taken place over the years, and those were the basis for the Tobacco Advertising and Promotion Act 2002. There is strong evidence that point-of-sale displays are a form of advertising, and for that reason we should take action.

I will paint a broad picture of various pieces of primary data. Cancer Research UK commissioned Professor Gerard Hastings and his team at the centre for tobacco control research at the University of Stirling to look at various pieces of data on the issue, and to analyse their own secondary data on youth perceptions of smoking and how marketing affects young people.

The team looked at data from other countries—we must recognise that different countries have in place advertising bans at different levels, so we must view some of the evidence with some caution when we talk about the effects of display bans themselves. However, the evidence that is already out there in studies from Australia, New Zealand, America and the United Kingdom clearly shows that point-of-sale displays affect brand choice, unaided recall of brands, perceptions of brands and imagery, the likelihood of smoking and intention to smoke.

Susceptibility is the key point; we need to be looking at non-smokers, such as young people who might be tempted through seeing the displays to start smoking. The evidence supports the view that point-of-sale displays affect young people's smoking. A systematic review that came out at the beginning of the year also substantiated that point. That review showed that, in seven out of eight studies, young people were found to be susceptible to point-of-sale displays, which affects their intention to smoke. Some new, unpublished data from New Zealand, looking at 25,000 14 to 15-year-olds, show that young people who see point-of-sale displays more than three times a week are three times more likely to try smoking than those who see such displays less than once a week. That is some of the background information.

In Professor Hastings's recent analysis of his study, his team looked at the changes in young people's perceptions of smoking and awareness of marketing since before the Tobacco Advertising and Promotion Act 2002 came in. The study goes back to 1999. There have been four waves of the study, which looks at behaviour in 11 to 16-year-olds—the behaviour of 4,500 young people has been taken into account over that time. We can see that TAPA has made a difference, as awareness of brand marketing and perceived peer prevalence have all decreased. That is

commendable, but the team now realises from looking at the evidence that point-of-sale displays are a form of marketing. The displays are designed deliberately to draw attention to brands, and brands drive adolescents to smoke.

We know that young people are still exposed to displays, because 46 per cent of young people recognised point-of-sale displays as a form of marketing. It was the form of marketing of which they were most clearly aware. Related to that, 18 to 27 per cent of young people were aware of on-pack promotions and other tools that are associated with point-of-sale displays. There is clear evidence that those displays have an impact on young people smoking. Young people are also aware of new pack sizes and designs, such as holograms on packs.

The Convener: That is a full answer, for which we are grateful. Many of those points are in your written submission, but I am pleased to have those comments in the *Official Report*. Do the other witnesses want to add anything, or perhaps to contradict what has been said?

Sheila Duffy (ASH Scotland): ASH Scotland is an evidence-based organisation. We have supported and recommended the bill given the evidence base, which has convinced us that, whatever the intentions of tobacco companies and retailers, promotional displays at the point of sale have a disproportionate influence on young people compared with adults and make young people more likely to experiment with the most visible brands. I have brought 15 pieces of published and peer-reviewed research from reputable journals that underline that. The committee has already heard about some of the evidence but, if I may, I will quote from the conclusions of some of those reports. A report in the *Archives of Pediatrics & Adolescent Medicine* in May 2007 states:

"Cigarette retail marketing practices increase the likelihood of smoking uptake. These findings suggest that specific restrictions on retail cigarette marketing may reduce youth smoking."

A report in *Pediatrics* in 2006 states:

"Promotions foster positive attitudes, beliefs and expectations regarding tobacco use ... Greater exposure to promotion leads to higher risk ... Causality is the only plausible scientific explanation for the observed data."

I could go on reading extracts from articles. I am happy to lodge that information with the committee if that would be helpful.

The Convener: That would be helpful.

Sheila Duffy: There was a secondary question about the impact on retailers. Most adult smokers—research suggests that the figure is 85 or 90 per cent—are firmly established in buying particular brands and know what they want to buy before they enter a shop. Therefore, having

branding out of sight in shops should make no difference to the majority of people who purchase cigarettes.

The Convener: I stopped smoking years ago—although I have had the odd little lapse—so I know that, when you are trying to stop, it is hard when you see cigarettes on display. That is just my anecdotal evidence, but I think that one of the submissions made a similar point. Was it yours, Ms Grierson?

Trish Grierson (NHS Dumfries and Galloway): Yes. We said that displays give a cue to smoke, which is particularly unhelpful for smokers who are trying to stop smoking.

The Convener: I agreed with that when I read it. I had to stop going into newsagents, because I knew that the temptation was there.

Lesley Armitage (NHS Lanarkshire): We made that point in our submission, too. I have nothing to add about the evidence on advertising, but I have a point about the concern that local retailers might go out of business. I appreciate that that is an economic impact, but smoking has an enormous economic impact, too. It kills a quarter of our population. One in two smokers dies prematurely. Most people who have smoking-related diseases—which are not just respiratory, but cardiovascular—have years of gradually worsening ill-health before they die. That has an economic impact as a result of issues such as their employability and premature disability payments. The impact on local retailers cannot be considered in isolation; it should be considered as part of the wider issue.

10:15

Fiona Beaton (Scottish Youth Parliament): On the influence of displays on young people, we found that the older band of young people—the 16 and 17-year-olds—were quite cynical about the positive effects of a ban, whereas those under 16 felt that it would have more of an impact. That suggests that a ban might have more of an impact on 13, 14 and 15-year-olds.

The Convener: How many respondents did you have to your consultation?

Fiona Beaton: I think that we had 83 respondents, many of whom, I should point out, were members of the Scottish Youth Parliament, who are elected to represent young people in their areas.

Dr Simpson: Am I right in thinking that, since the TAPA advertising ban, the amount of space that brands take up on displays and the number of variants of a single brand of cigarette has increased? I do not want to advertise the brand in question, but the other day a constituent told me

that five different brand variants of Silk Cut had been introduced that were really no different in content but had very slightly different packaging. As a result, they take up five times the space on the display. Is that a typical response from the tobacco industry? Have the displays increased, even though the industry says that that is nothing to do with advertising and everything to do with brand variation?

Sheila Duffy: I believe that when TAPA was introduced ASH Scotland did not oppose the exemption of retail displays, because they were not really an issue at the time. However, they have since become a major loophole in the 2002 act, and cigarette companies have invested a lot of money in glitzy, eye-catching promotional displays that are often placed next to confectionery. Brands have also proliferated—not, as your witnesses last week indicated, because of changes in the nature of the product, but because of changes to packaging. I have a folder of material that we collected from half a dozen retail publications in the first quarter of the year showing how brand variants are very often about making minor changes to the packaging to make the brand more attractive and have little to do with the product itself. I would be happy to make that material available to the committee.

Dr Simpson: Last week, the witness from Japan Tobacco International was very circumspect in her response to my question whether the tobacco industry would fund alternative displays if the bill were to be passed. Again, the small stores have told us that it would be extremely expensive to introduce gantries, an under-the-counter system or some other form of selling cigarettes, even though they already tend to change displays every three to five years. Do you have any evidence that, where such bans have been introduced, the tobacco industry has funded alternative displays? I have to say that JTI did not seem to know whether it had done so.

Sheila Duffy: The Canadian Government requires tobacco companies to be clear and transparent about their spend on tobacco marketing and their payments to retailers for storage and so on. As a result, we know that, in Canada, the tobacco industry has contributed to the costs that retailers have incurred in putting cigarettes out of sight; in fact, since the point-of-sale ban was introduced, payments to retailers have increased.

In a communication that we have seen, a colleague in the Office of Tobacco Control in Ireland has made it clear that the Gallaher Group, which is owned by JTI, has for some years now been fitting automatic vending machines in stores that supply the company's products and has indicated to retailers that it will now meet the costs

of converting those machines to comply with the Irish legislation. I point out that that legislation, which comes into force in July, is about four years late because of legal challenges from tobacco companies that were dropped at the very last minute before the cases came to court.

Ian McKee (Lothians) (SNP): The trouble with following Richard Simpson is that he often asks the same questions that I was going to ask.

The Convener: You can get in first the next time.

Ian McKee: Thank you.

First, I simply observe that, when my local supermarket stopped selling chocolate bars at the point of sale, my consumption of chocolate went down.

The Convener: In that case, I should probably ban Danish pastries.

Ian McKee: I turn to a slightly different aspect of tobacco displays. Section 1(2)(a) states that a person does not commit an offence under section 1(1) if the advertisement for tobacco products or smoking-related products

“is in or fixed to the outside of the premises of a specialist tobacconist”.

I understand why a display inside the premises of a specialist tobacconist might be exempt, because people go there for the purpose of buying tobacco products, but it seems to me that something fixed to the outside of such a premises would advertise tobacco to people who were not using the specialist tobacconist. Do you share my concern, or are you happy with that provision?

Sheila Duffy: ASH Scotland shares that concern, because we believe that the provision could create a loophole, which could be exploited. The products on display are often specialist products. However, we know that in Canada small single cigarillos with fruit flavourings are now being sold in highly coloured wrappings, which could subvert the intention of the legislation there. We believe that shop-front displays are public displays that are open to being viewed by children and families who are passing. We are really concerned that the provision could create a loophole.

Mary Scanlon (Highlands and Islands) (Con): The ASH Scotland evidence is highly critical of the funding of the lobby groups from which we heard last week. We asked all the lobby groups where their funding came from and I think that we are aware of how they are all funded. It is only fair that I ask you where ASH Scotland's funding comes from.

Sheila Duffy: ASH Scotland is a registered Scottish charity, so our accounts are publicly available and audited. In common with the national

charities that deal with drugs and alcohol, we receive substantial funding from the Government. Because of that, we are reviewed periodically by the Government, which commissions an independent review to look at our cost-effectiveness and funding. I can certainly give you a breakdown of our costs for the previous financial year if that would be helpful.

Mary Scanlon: I do not really want to know your costs; I just want to know where your funding comes from.

Sheila Duffy: Ninety per cent of our funding comes from the Scottish Government; 2 per cent comes from the national health service; 6 per cent comes from other charities such as the British Heart Foundation; and 2 per cent comes from self-generated income and donations from individual supporters. A condition of the public funding that we receive is that we may not use it for campaigning and lobbying. That activity is funded from our earned and voluntary income.

Mary Scanlon: You said that 90 per cent of your funding comes from the Scottish Government. How much is that in cash terms?

Sheila Duffy: In 2008-09 it was £938,000, which went to support a great deal of project work in areas such as inequalities in relation to tobacco, youth development work, partnerships and the development of training for smoking-cessation services.

Mary Scanlon: So, ASH Scotland is receiving nearly £1 million from the Government to fund it to lobby the Government.

Sheila Duffy: No. Under the terms of the funding, we may not use it for lobbying.

Mary Scanlon: You receive nearly £1 million from the Government.

Sheila Duffy: We receive that funding to deliver objectives that are in line with national policy. We are clear and open about the work that we do and the funding that we receive. That is not true of groups that are funded by the tobacco industry. There is no clarity about the tobacco industry—

Mary Scanlon: We heard from those groups last week; they got a good grilling from us all. You are being given nearly £1 million in order to support the Government's national policy on smoking.

Sheila Duffy: I must take issue with that statement, because the money that we are being given is to support objectives and outcomes that are in line with national health policies, including—

Mary Scanlon: Which are determined by the Government. The Government determines national health policies and it gives you nearly £1 million to lobby on those policies.

Sheila Duffy: I must be clear about the point that the public funding that we receive may not be used for lobbying purposes. It is for delivering services and projects that are in line with public health policy in Scotland.

Mary Scanlon: So, of the nearly £1 million, how much is used for lobbying? Can you give us a rough guesstimate in percentage terms?

Sheila Duffy: I have not looked at the exact percentage, but a really tiny percentage of direct spend goes on lobbying. That work tends to be shared with other health charities whose aims are similar to ours.

Mary Scanlon: In your submission you say that high-visibility displays at point of sale present

“smoking as a glamorous, aspirational and youthful lifestyle choice”.

One of our researchers showed me this cigarette packet this morning. Half of one side has “Smoking kills” on it. I had not seen this before, but the other half says:

“Smoking while pregnant harms your baby”.

That is accompanied by a photo of an ill baby. There is also “UK duty paid”. About three quarters of the packet is non-advertising, with a sick baby on one side and “Smoking kills” on the other. Do you really think that that shows

“a glamorous, aspirational and youthful lifestyle choice”?

Sheila Duffy: The health warnings and picture warnings were imposed on tobacco companies; they were not adopted voluntarily by them. That was done to be clear about the impacts of the product, which kills one in two of its regular consumers.

Mary Scanlon: I appreciate that, but I am asking you about a comment in your written evidence. I got the cigarette packet that I am holding from a researcher this morning. Is it right to say that what is shown on the packet is

“a glamorous, aspirational and youthful lifestyle choice”?

Sheila Duffy: Most adult smokers are established in smoking certain brands, and they are addicted to cigarettes. Two thirds of smokers start under the age of 18, and 40 per cent under the age of 16. It really is a childhood addiction. People start to experiment with cigarettes not because of the product, but because of the image of the product. The marketing from tobacco companies has had an impact, and it has been built up over a long period of time. The move to put cigarettes out of sight at the point of sale will have a long-term impact, not a quick one. We are talking about the impression and comfort that the branding and marketing give over a number of years. It will be a decade from the moment that the measure is brought in—if it is voted for by

Parliament—before we can see its full impacts. Branding exists to engage future consumers.

Elsbeth Lee: I wish to substantiate what Ms Duffy has been saying with two pieces of evidence. The first is from Professor Hastings’s team. As I mentioned earlier, we know that young people are aware of the new packs, in particular the hologram pack. Each new form of marketing that young people are aware of increases their susceptibility by 7 per cent. We would be happy to share with the committee evidence from the University of Nottingham, provided by ASH in London, which shows that, despite packs having health warnings on them, young people make decisions about the health and aspirational factors related to the packs depending on the other parts of the packaging.

Mary Scanlon: I have not had my answer from ASH Scotland, but I will leave it there for now.

ASH Scotland’s evidence says:

“85% of adult smokers always buy the same brand, with only 6.4% deciding what to buy based on the point of sale display.”

You mentioned 15 pieces of peer-reviewed evidence earlier, yet the only evidence that you have given us in your submission indicates that 34 per cent of people strongly support the removal of retail displays, with a further 23 per cent tending to support it. You have 15 pieces of peer-reviewed evidence; I am looking for an evidence base. Naturally, like any other politician, I want to reduce the incidence of smoking among young people, and I am looking for an evidence base. We did not hear about it last week. I have read every word of your evidence, and you even say: “the consistency of even—”

The Convener: Just one minute, Mary. What page is this on, so we can follow it?

Mary Scanlon: The final paragraph of the first page of the ASH submission refers to

“the limited evidence available that [point of sale] marketing influences children’s smoking”.

You say that you are an evidence-based organisation, but you admit in your submission that there is only “limited evidence available”. That makes it difficult for me to identify the evidence base that you keep talking about.

10:30

Sheila Duffy: As it says at the beginning, ASH Scotland’s submission is intended to be read together with the Scottish coalition on tobacco’s submission, which lays out some of the broad evidence base on which we support the policies as an independent organisation that makes policy decisions that are based on the evidence base.

Ending point-of-sale displays is a long-term measure, so international evidence about its impacts does not exist yet. In most countries, the initiative has been introduced with other measures. However, we believe that excellent evidence exists, and I would be happy to write to the committee to outline the references and specific evidence on point-of-sale displays as a marketing tool that influences young people and makes it more likely that they will experiment with cigarettes.

Mary Scanlon: The bill is crucial. To be fair, if you have 15 pieces of peer-reviewed evidence, I say with respect that I would expect to see them. Many of us are scrutinising the measures impartially.

Last week, the Scottish Grocers Federation told us that almost 50 per cent of 13 to 15-year-old girls who were regular smokers were given cigarettes by friends, siblings or parents and did not obtain them at a point of sale. In East Renfrewshire, 80 per cent of the shops that were tested sold cigarettes to a 15-year-old girl. Those are enforcement issues that have little to do with visual displays.

We also received evidence, which was quite prolific, that although display bans were introduced in Saskatchewan and Manitoba, the reduction in smoking among 15 to 19-year-olds over eight years was greater in the rest of Canada—where no ban was implemented—than it was in those two provinces.

The Convener: I ask Sheila Duffy not to respond to the enforcement point yet, because we will deal with that later, but please respond to the other points.

Sheila Duffy: Enforcement is certainly important. The issue with point-of-sale displays is that they are visible promotional displays of tobacco.

In considering the evidence from Canada, the committee must take into account several factors, including the previous smoking rates in the areas where point-of-sale bans were introduced. In Iceland, the figures have declined overall, as is shown by the statistics from the European school survey project on alcohol and other drugs, which are robust. The Scottish Grocers Federation and others have previously been challenged on the quality of statistics. I have with me a copy of a letter that the Public Health Institute of Iceland sent to Katherine Graham of the Tobacco Retailers Alliance in December that takes issue with the alliance's selective use of statistics, which the institute says does not represent the evidence base. I am happy to submit that letter to the committee.

The Convener: We will require to see that letter.

Sheila Duffy: We will write to give the committee the evidence that we have on smoking rates where such measures have been introduced internationally and we will describe some of the issues that put the information in context.

Ross Finnie (West of Scotland) (LD): I am slightly in the same camp as my colleague Mary Scanlon—I would probably prefer to ban the product, but we are not doing that; we are trying to control its sale in a way that is legal and evidence based.

I will follow up Mary Scanlon's questions about advertising. To put the issue in context, and as a preliminary to the vexed question of advertising, what effect will the increased age limit of 18 and the new regulations under the bill that will—we hope—make the principal defence against selling to a young person the fact that the retailer had sought proof of age have on the sale of cigarettes to young people?

Sheila Duffy: Such measures are important, but the difference will be made by the quality of enforcement, which we will discuss later.

Ross Finnie: Are you saying that the age limit and the possible threat to the retailer's business will have no effect?

Sheila Duffy: No. I believe that the opportunity to ban retailers from selling tobacco if it is shown that they are selling it to children is a powerful tool and that the fixed-penalty notices that could be issued for breaches of the law will be a real deterrent and a great advance.

Ross Finnie: Do you therefore think that the majority—or any number that you care to choose—of current retailers who face such a situation are wilfully breaking the law and are partly responsible for or complicit in the direct sale of cigarettes to young people?

Sheila Duffy: The Scottish schools adolescent lifestyle and substance use survey figures tell us that 82 per cent of 15-year-olds who regularly smoke say that they buy their cigarettes directly from shops and retail outlets and that 47 per cent of 13-year-old smokers do so. Between a third and a quarter of retailers regularly fail test purchasing exercises. We must act on that.

Ross Finnie: Okay. That is historic. The Government has changed the law on the age of sale for tobacco and is introducing new measures in the bill to enforce that. Do you think that that will have an effect? We know about the historical situation, but what will the impact of the new measures be?

Sheila Duffy: We welcome the measures that have been proposed, which we think will provide effective deterrents for enforcement officers to

use. We believe that the quality of enforcement will be crucial to the success of those measures.

Ross Finnie: That takes me to my next question. You are somewhat suspicious or sceptical about the retailer's motivation or ability to control the trade and you appear to have little confidence in those who sell such products. What effect does the display of cigarettes in a shop have on the total sale of cigarettes? After all, a person can go into a shop and be as excited as they like by a notice that says that smoking kills, but if the vendor does not sell them the product, they will not get it.

Sheila Duffy: We have supported the measure because of the visibility, rather than the availability, of tobacco to children. Ending point-of-sale displays is crucial to closing down one of the ways in which the tobacco companies can build their relationships with future consumers and get their marketing and branding lodged in people's minds. That is a real issue, on which we will submit further evidence to the committee.

We are also concerned that a display should not simply be covered up and remain a focal point that has pride of place in a shop. We believe that tobacco needs to be put out of sight and out of mind if we are to tackle the effect of branding on future smoking initiation.

Ross Finnie: Let me be clear about the evidence that you are about to produce. The 2004 regulations on the advertising and promotion of tobacco effectively ban advertising in this country—the situation here is markedly different from that in the majority of the other countries that we have talked about. From your response to Mary Scanlon, I understand that there is clear evidence that the kind of packet that she exhibited has a clear marketing brand and that that packet with its health warnings represents clear branding of a particular type of cigarette. I wish that I had more people to help with my work, because since the committee's investigation started, I have made a bit of a nuisance of myself to several tobacco retailers in queues. I have spent some time casually observing; retailers are disappointed when I make no subsequent purchase. Perhaps I need to go back to my optician, but I cannot see much brand marketing on Mary Scanlon's packet. Thanks to the European regulation that increased the size of the lettering on cigarette packets, I can at least now read with total clarity the words "Smoking kills". What evidence exists on branding in tobacco displays?

Sheila Duffy: We would be happy to submit further evidence on that. I think that Professor Gerard Hastings covered the matter in a report that was commissioned by Cancer Research UK.

Elsbeth Lee: That was the research to which I referred before. It showed that young people's awareness of the new packs has increased. Therefore, we know that those packs are affecting young people. They are designed to attract them.

Ross Finnie: Are they affected by those packs when they enter shops?

Elsbeth Lee: A young child is exposed to those packs many times while growing up. It is not simply about children aged 15, 16, 17 or 18 and above trying to make a purchase, but about the degree to which they are exposed to marketing over a significant period of their life.

Ross Finnie: We all understand where you are coming from. I am interested in the straight, bare facts, without embellishment. In this country, cigarette packs are not accompanied by sideboard advertising; since 2004, there have been restrictions on the advertising and branding of cigarette products. Your submission to the committee is that cigarette packs, as displayed in shops at present, are a powerful marketing tool that induces the purchase of cigarettes.

Elsbeth Lee: The World Health Organization's framework convention on tobacco control—the world's first public health treaty, to which the UK is a party and which 160-plus Governments have signed and ratified—has looked at all the available evidence and strongly recognises point-of-sale display as a form of advertising that should be banned, along with vending machines. Based on the evidence that is available, the convention also strongly supports countries taking steps towards plain packaging. Cancer Research UK would be happy to provide the committee with evidence of the impact that packs have.

Ross Finnie: Remind me what proportion of a cigarette pack can be devoted to branding.

Elsbeth Lee: I do not know the percentage.

Ross Finnie: It is set by law.

Sheila Duffy: I think that warnings cover 40 per cent of the back and 30 per cent of the front of the pack.

The Convener: I feel that we are on some kind of shopping channel and that Ms Scanlon is about to hold up the product, so that we can all see it. Ms Beaton, we are trying to get at whether putting "Smoking kills" and pictures of sick children on packs has no effect on young people, who continue to be attracted by cigarette packs.

Mary Scanlon: I accept that smoking is bad and that it kills—we all know that. However, I feel slightly insulted by the suggestion that the pack that I am holding up is perceived as

"presenting smoking as a glamorous, aspirational and youthful lifestyle choice"

when on one side there is a picture of a dying baby, a bar code and an indication that duty has been paid, and when half of the other side is taken up by the message "Smoking kills". That is my concern. I do not think that ASH has chosen the right words.

The Convener: That is a fair line of questioning—I am glad that it was opened up. My supplementary is to ask whether the witnesses think that the messages on packs are irrelevant, as young people do not pay any attention to them. Is that what happens? Perhaps Fiona Beaton, as a young person, can tell us.

Fiona Beaton: Just over 40 per cent of the young people to whom we spoke thought that putting warnings on cigarette packets had had an influence, but 39 per cent said that it had not. Whether the warnings have an impact is down to the individual young person. Our evidence suggests that point-of-sale displays have more impact on younger young people than on 16 or 17-year-olds.

Mr Finnie mentioned the fact that the purchase age for tobacco products has been raised. The Scottish Youth Parliament campaigned strongly against that. Although we do not want to encourage young people to smoke, we think that they have the right to choose to do so and that 16 and 17-year-olds should not be criminalised overnight for a habit to which they are already addicted. Just under half of the young people whom we questioned thought that raising the purchase age had not made a difference. Many of the young people to whom we speak on a daily basis think that changing the law in that respect will not make a difference and that subsequent measures directed against shopkeepers, rather than young people, are more important.

Ross Finnie: That raises the interesting question whether we should now regard retailers as a bunch of crooks, which is a totally preposterous proposition. It has been suggested that they will continue wilfully to sell cigarettes to young people and that raising the purchase age will have no impact.

Dr Simpson *indicated disagreement.*

Ross Finnie: Richard Simpson is entitled to his view, but that is what people are saying in evidence. If the measure is having no impact, why is that? Is it not being implemented at the point of sale?

10:45

Fiona Beaton: One young person who spoke to us said:

"nothing will ever stop underage smoking! No matter how hard you try shopkeepers will always sell to us."

My peers who are underage know which shops in my local area will sell cigarettes to them and where they can get their hands on cigarettes. I feel—and the Scottish Youth Parliament feels—that it is important to tackle the root cause of the problem, which is the shopkeepers who make such sales. We know that not all shopkeepers do that, so we are not trying to criminalise the shopkeepers or anything. We believe that the shopkeepers, rather than the young people, should be targeted.

The Convener: Another issue that has been raised is proxy purchases—people buying cigarettes on behalf of underage smokers—but that does not seem to have been mentioned in the survey. Was that question asked?

Fiona Beaton: I do not think that we considered that in our consultation.

Mary Scanlon: The issue is mentioned on the third page of the ASH Scotland submission.

The Convener: Yes, but I wanted to ask whether the issue was included in the list of questions that the Youth Parliament asked. Forgive my saying so, but I think that that is a bit of a gap.

Fiona Beaton: I am afraid that we did not look at that issue in our consultation. Personally, I have experience of 13 and 14-year-olds approaching me in the street—I seem like an older person to them—to ask me to jump into the shop for them. That happens all the time. That is another reason why we need to target measures at the root cause, where young people get access to cigarettes.

The Convener: You should perhaps put on record that you refused to buy cigarettes for them.

Fiona Beaton: Yes.

The Convener: Good. That issue probably comes under the provisions on enforcement. However, I want to move on to the provision on the banning of cigarette vending machines—

Lesley Armitage: Convener, further to Mr Finnie's remarks on retail outlets, I just want to comment that both local authorities in Lanarkshire carry out underage test purchasing. It was rather saddening to see that, although test purchasing was not carried out in a vast number of outlets, some of those that were visited a second time again sold cigarettes—for a second time—to underage children. At one hearing that I attended, a member of the retail industry said that retail staff, especially in smaller retail outlets, can find it difficult to argue with people about their age. If retailers had some means of swiping an ID card, they would then have objective evidence that would make it easier to say no.

The Convener: Thank you very much.

We will move on to the issue of banning cigarette vending machines.

Rhoda Grant (Highlands and Islands) (Lab): I am quite interested in the provision in the bill that will ban cigarette vending machines, which are normally placed in establishments to which only those aged 18 or over have access. What are the panel's thoughts about that? Why would such a ban be helpful, given that such vending machines are not available to young people under the age of 18?

Elspeth Lee: Figures from National Association of Cigarette Machine Operators show that the majority of cigarette vending machines are in premises that are predominantly frequented by over-18s, but that is not the case for all such machines: 78 per cent are located in pubs, which younger people can enter; 10 per cent are in clubs; 7 per cent are in hotels; 3 per cent are in shops; 1 per cent are in bingo halls; and the rest are elsewhere. We need to recognise that certainly not all cigarette vending machines are sited in premises that are accessible only to those aged 18 or over.

Rhoda Grant: If cigarette vending machines were placed only in establishments that were accessible to those aged 18 or over, would there be no issue with such machines?

Elspeth Lee: As far as we are aware, no form of technology currently exists that would make such machines available only to those aged 18 or over. Placing the emphasis on busy bar workers, who are supposed to check people's ID, will not achieve our objective. We know that the current system is not working, because vending machines are disproportionately a source of sales to underage smokers.

Rhoda Grant: That does not really answer my question, which was: if a machine were placed in an establishment that was available only to the over-18s, would you have a problem with that?

Elspeth Lee: Young people can go into those places at times. We are most concerned about the protection of under-18s who should not be able to access those machines. It would be a different issue if machines were located in private members clubs, for example, and we had assurances that under-18s could not get in. I think that we are talking about the majority of places, however. In such places, there is the potential for young people to get in and access cigarettes.

Mary Scanlon: Last week, we heard that buying cigarettes from vending machines is the most expensive way to purchase cigarettes. It seems unlikely, therefore, that those machines are the

first port of call for young people in purchasing cigarettes.

The effect on businesses is not in the bill, but it is an issue. My Highland colleague agrees on that. As we know from recent stories, petrol stations in the Highlands are under threat. If they lose other sales, the profit margin is further reduced.

We trust bar staff in hotels, pubs and clubs to sell alcohol to over 18s. We are told that bar staff are highly trained—I agree that that is the case. Bar staff are willing to challenge someone on the under-25 or under-18 rule. If we trust them to sell alcohol to over 18s, can we not also trust them to sell vending machine tokens—we heard about token sales last week—or cigarettes to people over 18?

Sheila Duffy: On the expense of buying cigarettes from vending machines, we have anecdotal reports from members of the Scottish tobacco control alliance that suggest that single cigarettes are being sold for £1 apiece in Fife and 50 pence apiece in Glasgow. The expense of purchase may not be the deterrent that one expects—

Mary Scanlon: In a vending machine?

Sheila Duffy: No. [*Interruption.*]

The Convener: We will have no Greek chorus here. Will you clarify that please, Ms Duffy? We are asking about vending machines.

Sheila Duffy: Although it may seem expensive for a child to spend extra money on purchasing cigarettes from a vending machine, it may be an easier source of supply for them than other sources are. They can recoup the money by selling single cigarettes to other children.

I turn to the sale of cigarettes in licensed trade premises. Banning vending machines will not stop those premises from being able to sell tobacco. The point was made in evidence last week that pubs and licensed trade premises are places where young people can learn to drink responsibly. Given that there is no safe level of smoking, there is no way of encouraging young people to use tobacco responsibly.

Mary Scanlon: We are talking about section 6 of the bill, which is on the prohibition of vending machines. We are looking at that specific point. In evidence last week, we heard that bar staff can operate these machines by way of electronic control from behind the bar. Bar staff appear to be much better trained than they were in the past. They know the penalties for selling alcohol to under-18s. Do you not accept that they would act as responsibly in selling cigarette vending machine tokens to those over 18 as they do in selling drinks to them? Is their judgment not the same in selling cigarettes as it is for alcohol?

Sheila Duffy: Our support for the call to remove vending machines was made on the ground that they are a self-service way of purchasing cigarettes. If the method of purchase were to change, we would have to look at the evidence on the effectiveness of that method.

Elsbeth Lee: At the moment, we are not aware of such a system. Until that time arises, we will have to play with what we have.

Mary Scanlon: We heard last week that a system is being piloted in Manchester.

Elsbeth Lee: We will look at what happens in experimental conditions, but it will be interesting to see how it plays out in live settings.

Dr Simpson: I have a couple of quick questions. Does anyone know what is happening in Spain, because I gather that it has a token system for vending machines? Is there test purchasing there and, if so, does it demonstrate that the token system is effective? As Mary Scanlon said, if a token system is an effective control that would meet the test purchasing requirements, the committee must consider that seriously. A decision on vending machines will have an effect on employment, albeit not on large numbers of people. Nevertheless, there are companies in Scotland that manufacture in this area. I have another point on vending machines and enforcement, but I will come back to it later.

Sheila Duffy: I have no evidence on what happens in Spain, but we will look into that and come back to the committee if we access any information on it.

We would like to see test purchasing evidence on whether remote control or token systems for vending machines are effective. We have not questioned the majority of retailers, but we have said that enforcement officers report that a quarter of retailers, when test purchased, will make underage sales. We would have similar concerns about any vending machine system.

Ross Finnie: I appreciate that there is test purchasing evidence that, historically, there has been a failure to enforce the law—a number of us around the table have been pressing for some time for trading standards officers or, in the case of alcohol, the police to be more engaged in test purchasing—but I am concerned about the answer to Mary Scanlon's question. Looking forward under the bill, are we fundamentally suggesting that retailers will issue a vending machine token to an under-18? The implication is that retailers will take a positive decision not to sell alcohol to a person under that age, but will wilfully issue a token to an underage person who seeks to purchase cigarettes. I am concerned about what evidence there is that that is how retailers will act.

Sheila Duffy: I am not aware of the evidence on the underage sale of alcohol. However, on test purchasing, we certainly have evidence about—

Ross Finnie: This is at 18 and in pubs.

Sheila Duffy: Yes.

Ross Finnie: We really must confine our evidence to the question being asked. So you have test purchasing evidence of under-18 persons being sold cigarettes in public houses.

Sheila Duffy: No, I am not saying that. I am saying that we would have—

Ross Finnie: So you do not have evidence of that.

Sheila Duffy: What I am saying is that we would wish to see the evidence that those measures were effective in preventing underage sales.

Ross Finnie: No, with respect, you are telling me that you have the evidence.

Sheila Duffy: No.

Ross Finnie: Now you are telling me that you do not have the evidence.

The Convener: Just put your position, Miss Duffy.

Sheila Duffy: What I said was that we have evidence about retail outlets that have been test purchased that shows that there is a significant failure—

Ross Finnie: Miss Duffy, with all due respect, you consistently seek to extend your evidence into the field of a question that you have not been asked. You are being asked whether there is evidence that retailers will decide not to sell alcohol to an under-18 but will wilfully permit the sale of cigarettes to under-18s. If there is no evidence, there is no evidence; but you seem to be telling me that there is evidence, although it does not seem to relate to the current question—I would be grateful if you would clarify that.

The Convener: Can you just help me here, Ross? We are talking about public houses, are we?

Ross Finnie: Yes.

The Convener: Public houses and hotels.

Ross Finnie: That is exactly the question that Mary Scanlon asked.

The Convener: So the issue is the evidence in that particular context.

Sheila Duffy: I am not aware of there being evidence for that particular context. We would be concerned to see any evidence that there was effective prevention of underage sales.

The Convener: So we do not have evidence about the misuse of vending machines in that particular context

Elspeth Lee: I would want to look up the updated figures for you, but I have some Home Office figures from 2004 that could allow us to draw some comparisons.

The Convener: Are you reading something from your written evidence or from something separate?

Elspeth Lee: No, this is not from our written evidence.

The Convener: Right. So we would need this new evidence as well, if you are going to use it.

Elspeth Lee: We can supply it. Obviously, I would want to look at more up-to-date figures for you, but the Home Office's 2004 evidence states that 22 per cent of 10 to 17-year-olds who drank alcohol obtained it from bars and pubs.

Ross Finnie: Those figures are for where—Scotland?

Elspeth Lee: No, they are Home Office figures.

Ross Finnie: For Scotland?

Elspeth Lee: I think they are for England.

The Convener: Right. So we need Scottish evidence.

Elspeth Lee: We can look up those figures for you and provide them.

11:00

The Convener: We will now move on to deal with proposals for a national register of tobacco retailers.

Mary Scanlon: Last week, during our evidence-taking session with tobacco retailers, I compared a national register to the national registration scheme for private landlords, which is different but of which I have some knowledge.

The national registration scheme for private landlords determines whether someone is a fit and proper person to be a landlord. It is my understanding that no such test is proposed with regard to tobacco retailers and that the applicant will simply give their name and address, the address of the premises and so on. Do you have any concerns about the proposal for the national registration scheme, and do you agree with the policy memorandum that there is little evidence about what impact the tobacco retailers licensing scheme might have on the reduction of underage sales?

Sheila Duffy: We can supply good evidence on the efficacy of enforcement activities in reducing

underage sales. We welcome the register but share your concerns. We believe that a positive licensing scheme would allow a certain degree of vetting of applicants, and we ask the committee to consider whether a provision to enable the move to such a scheme, if there is a specific evidence base in the future, might be included in the legislation.

Mary Scanlon: I am sorry to be a bit tiresome, but in most of your answers today you have said that you could bring forward evidence. Given that we have all read the submissions that we have been presented with prior to your one day in court, as it were, I respectfully ask why you did not present that evidence to us rather than offer to hand it in at a later date. Given your close working relationship with the Scottish Government, you should know that it admits that there is little evidence on reducing underage sales. If you have evidence in that regard, it would have been helpful for us to get it prior to the meeting rather than as part of the tome of evidence that we are likely to receive from you after it.

Sheila Duffy: I refer you to the submission from the Scottish coalition on tobacco, which ours was intended to complement and which contains more of the evidence that we are talking about. *[Interruption.]* Sorry, convener.

The Convener: That is okay—I will come back to you if you want to have a thought. Does anyone else want to comment?

Lesley Armitage: Somewhere in the financial memorandum, the point is made that positive registration would be more effective but would also be more costly and difficult to implement. I suggest that those issues need to be weighed up against the resources that are used in the health world to deal with the problem of smoking. Again, as mentioned earlier, the item cannot be taken in isolation. We need the type of registration that most effectively brings about the desired outcome, not one that has too many compromises and therefore does not have the impact that the Scottish Government is seeking.

The Convener: Sheila Duffy, do you want to come back in?

Sheila Duffy: I was trying to find the name of the tobacco company that I wanted to talk about.

We were asked to keep our evidence to four pages. Unlike, I think, Japan Tobacco International, which made a submission of around 70 pages in length, we tried to meet that restriction. That meant that, unfortunately, we were unable to present all of the evidence that we have.

The Convener: It certainly is our standard practice to request evidence of about four pages in

length. If there has been an imbalance in this circumstance, we will follow that up.

Mary Scanlon: I point out that the ASH evidence is 12 pages, plus four pages of sources and a bibliography. Further, we have last week's evidence, which includes ASH. Let us be honest: it did not restrict itself to four pages.

The Convener: I am saying that I want to look into whether there should be restrictions on the length of submissions. Members might want to receive a large document with a short summary, for example. We will have to investigate the protocol and practice that has been adopted by not only this committee but others.

As you know, I was in favour of positive licensing but rejected it because of the cost. You suggest that we might leave a gateway open in the legislation through which we could move down the road towards positive licensing. Have you raised that with the Government? I have not.

Sheila Duffy: We would like to put it on the record that we ask for that possibility to be left open. Although we have not written formally to the Government to raise the issue, it is certainly aware of our call for positive licensing.

The Convener: Just to be clear, that positive licensing process would be a screening or vetting procedure that would not involve self-certification or self-screening. Is that correct?

Sheila Duffy: My understanding is that the current register requires people to provide information but involves no screening. We are concerned that that could create loopholes.

The Convener: I am trying to say that positive licensing would require some kind of screening process.

Sheila Duffy: I believe so.

The Convener: We will move on to a more substantial area—if you will forgive me for saying so—which involves enforcement and fixed penalties.

Ian McKee: Before we do, convener, I would like to ask one question.

According to my understanding of chapter 2 of the bill, which deals with registration, a person can apply to be registered and, legally, a supermarket with shops all over Scotland can be defined as a person. The Scottish ministers must grant the application unless one of the premises that are mentioned in the application has been banned from selling tobacco because of activities such as selling tobacco to people who are underage. I am a bit concerned about the principle of the situation, as a supermarket could fall foul of the law in different branches on a few occasions but would have to be granted licences for other branches if it

applied for them. Do you think that a person who is responsible for several outlets, some of which have broken the law on several occasions, should be automatically allowed to open up other branches in other areas ad infinitum?

Sheila Duffy: We have concerns about that and believe that a banning order could be circumvented merely by switching the registration between family members or close business associates. I also point out that test purchasing is tremendously resource intensive for enforcement officers as it requires two enforcement officers and a trained volunteer test purchaser. That means that it is difficult to build up the evidence to get a banning order in the first place. We would like that issue to be taken seriously.

Ian McKee: The bill refers to the premises. Would it be technically possible for a shop to move to the next-door premises and carry on operating with the same people and practices?

Sheila Duffy: If they re-registered, I believe that it would.

Lesley Armitage: Like Sheila Duffy, we would prefer the registration process to be as strong as it can be, and we think that any infringements should not be wiped off the register after a period of time but should remain there so that the record is always known.

Just as—I am sorry, but I cannot read your name plate from here. Mr McKee? Just as Mr McKee has said—

I am sorry, convener; I have completely lost my thread.

The Convener: That is all right; it happens to me all the time. We can come back to you.

Fiona Beaton: Before we move on from this point, it is important to recognise that many young people are unsure of the benefits of the proposal. Given that much of the bill concentrates on preventing young people from smoking, it is important to ensure that, whatever happens with the bill, its benefits are communicated to young people so that they understand why the measures have been put in place and that they are for their benefit. When we spoke to them, a lot of young people did not seem to understand what the register would involve and what effects it would have on them.

The Convener: Has Lesley Armitage gathered her thoughts yet?

Lesley Armitage: Yes, I have. The point was that I agree with Ian McKee completely on the issue of organisations that have multiple retail outlets. It would be easy to have problems going on in one area and not in another, so the register should be the responsibility of the overarching part

of the company rather than the individual retail outlets that belong to it.

The Convener: I have just thought of a brief question. I think that I am flogging a dead horse, but I am happy to flog a dead horse. Should the certificate of registration be displayed?

Sheila Duffy: We would have some concerns about a certificate being displayed, because it may give the impression that the Government endorses and supports the sale of tobacco. We wondered whether it might be appropriate to require that the registration number be displayed, either on the sign that relates to the age of purchase or on the list of brands and prices. We would support the display of a banning order, which states the period of time for which tobacco may not be sold.

The Convener: How would someone going into a shop that was a rogue retailer know that the retailer was banned from selling cigarettes?

Sheila Duffy: There would be a display of a certificate that detailed the banning order and the period for which it was in place.

The Convener: So you would want that to be displayed.

Helen Eadie (Dunfermline East) (Lab): I apologise for arriving late—I had a puncture on my way to the Parliament.

On the fixed-penalty notices, what is—

The Convener: We are now moving on to enforcement. Hands are going up, Helen, but you were swift in getting in with a pre-emptive strike.

Helen Eadie: Can I carry on with my question?

The Convener: Yes, I have you, then I have Rhoda Grant and Richard Simpson.

Helen Eadie: Should fixed-penalty notices be recorded on registers? If there are problems with multiple outlets and it is not recorded across different parts of the country that problems are beginning to develop, that might be a problem for us in monitoring and evaluating the difficulties of problem areas and assessing whether there needs to be any follow-on legislation. What is the opinion of the witnesses on whether fixed-penalty notices should be recorded on the register?

Lesley Armitage: We certainly agree that they should be and that the register should be a single central record, so that wherever the problems occur they are all put on one register and whoever has access to it has a full picture of what is happening with particular retail outlets.

Sheila Duffy: We believe that it would be really helpful to have the information about enforcement activities and the penalties that have been issued made public and available, because we have

concerns that, although resources have been allocated by Government to enforcement, they may not reach the front line as we would wish them to. It would also be helpful if guidance were issued that serious infringements and breaches of the law, such as selling tobacco to under-18s or displaying tobacco products, should attract an immediate fixed-penalty notice.

Helen Eadie: That has pre-empted my second question, but my third question is that—

The Convener: You will never defeat Helen—she would have had a fourth question if you had answered her third.

Helen Eadie: My question is about the levels of penalties. Obviously, representations have been made to us about level 4, which is £2,000, or level 5, which is £2,500 on the standard scale. What are your thoughts, particularly if there are persistent offenders, on how that should be tackled? It has been suggested that a particular infringement could result in a fine of £20,000.

I am interested, first, in whether the penalty for selling to an underage person should be increased to £2,500 instead of £2,000.

Sheila Duffy: We would certainly support the level of penalties reflecting the seriousness of the offence. We welcome the potential for illicit sales of tobacco to be very heavily penalised—it provides a quick way of dealing with smuggled and illicit sales of tobacco.

Helen Eadie: My final question, convener, if nobody else wants to comment—

The Convener: They are all beside you. I named and shamed them—we will have Rhoda Grant, Richard Simpson and then Mary Scanlon.

Ian McKee: She means the panel, convener.

The Convener: Oh, I see—sorry.

Helen Eadie: Thank you for looking after me, Ian.

11:15

Lesley Armitage: The current experience is that tobacco or alcohol retailers do not think that they are likely to be caught and that, if they are caught, they are not likely to be penalised highly. It is therefore important that the bill has real teeth. That said, one issue is that small retail outlets or corner shops have a low turnover, whereas Sainsbury's or Tesco stores have huge turnovers. To an extent, the financial penalty should reflect the organisation's profits. A huge sum for a corner shop would be tiny to a bigger organisation.

Helen Eadie: That is an interesting thought.

My final question is whether the fixed penalties should be recorded only for a certain time. Points on a driving licence are removed after three years. What are the panel's thoughts on whether we could have a similar time-related system under the bill?

Sheila Duffy: We have not taken a view on that.

The Convener: No one appears to have taken a view on whether the information should lapse after a period of time.

Rhoda Grant: I have questions on the legality of possession of tobacco by under-18s and proxy purchasing. One issue that was raised at last week's meeting was that, although it is illegal for someone who is under 18 to be in possession of alcohol and for over-18s to buy alcohol for under-18s, the situation is not the same with tobacco. Would you welcome a strengthening of the law on that?

Sheila Duffy: It was interesting that the Tobacco Retailers Alliance proposed measures on proxy purchase as though they were an alternative to ending promotions at the point of sale. The evidence base on such measures is tiny and, as far as I am aware, there is no evidence to support their effectiveness. ASH Scotland certainly supports the idea of giving the police powers to seize tobacco from underage people. Beyond that, we have a concern that proxy purchase measures might deflect from some of the more evidence-based measures that are being considered.

Rhoda Grant: I do not think that the Tobacco Retailers Alliance suggested that as an alternative—it pointed out what it considers to be an anomaly, in that police cannot seize tobacco from under-18s because it is not illegal for them to possess it.

Sheila Duffy: We support powers for the police to confiscate tobacco from under-18s, although we do not wish young people to be criminalised for possessing tobacco.

The Convener: Do you wish proxy purchasers to be criminalised?

Sheila Duffy: We do not have an objection to that.

The Convener: We have been considering that. There might be room to include proxy purchasing measures in the bill at stage 2.

Fiona Beaton: The Scottish Youth Parliament has great concerns about criminalising young people for possessing tobacco products, particularly 16 and 17-year-olds who have been affected by the raising of the age limit. Literally overnight, their habit of purchasing tobacco products became illegal. We should target retailers

and proxy purchasers who obtain tobacco products for young people rather than the young people who access products when they are underage.

Rhoda Grant: It is now more than two years since the age limit was changed, so nobody who was affected by that at the age of 16 is still under 18. That issue does not really fit.

I turn to the enforcing agency. What are the panel's thoughts about environmental health officers, rather than police officers, enforcing the policy?

Sheila Duffy: As they do with many other age-related goods, trading standards officers enforce the age-related sale of tobacco legislation. We recognise that a useful body of experience, education and engagement with retailers already exists, and the register should make that work even more possible and even more positive. We do not have a view on who should enforce the legislation, but our concern is that it should be regularly and effectively enforced.

Dr Simpson: Section 19 stipulates that councils

"must ... consider, at least once in every period of 12 months, the extent to which it is appropriate for it to carry out ... a programme of enforcement action".

I realise that I am leading us into a debate over single words, but is "consider" the right word in that context? For example, a council might feel that it has fulfilled its obligations under the bill if, at a council meeting, it simply acknowledges a report of, say, three test purchasing schemes. Should that provision be much tougher?

Sheila Duffy: We think that that wording is weak and ask the committee to recommend that it be strengthened. After all, complying with the provision might make it impossible for authorities ever to issue a banning order. We feel that councils should be required to undertake effective enforcement activities.

Lesley Armitage: We agree. The system is already weak; some of the legal penalties that people taken to court receive are derisory.

The bill stipulates that a banning order should be issued to any outlet found to infringe the law on three occasions in two years. It will be very difficult to enforce that because, as we have heard this morning, test purchasing schemes are very labour-intensive. It is fine if we are talking about a small area with only a few retail outlets, but, in areas where there are many outlets, councils will have little chance of covering them all to see whether any have infringed the law three times in a two-year period—and that is not taking into account their considering the matter and deciding whether to take it any further.

On behalf of the NHS, I recommend that the wording be changed to ensure that councils do not simply say, "Oh, we can consider the matter at a meeting and not do anything about it." The question is whether enough resources will be put into the provisions to ensure that we have the necessary coverage or whether there will be inequity, with certain retail outlets that have infringed the legislation appearing to be targeted while other outlets are not even inspected. Quite a few aspects of the provision are weak, if we want to ensure that those who repeatedly infringe the legislation are taken to court and pay the penalty.

Dr Simpson: That fits quite well into my second question. Section 12(3)(a), to which we have already alluded, stipulates that a banning order should be issued if

"within the period of 2 years ending on the date the application was made, the person has been the subject of 3 or more relevant enforcement actions".

The fact is that, on that basis and given the number of enforcement actions that have already been taken in Scotland, not a single ban would be issued. Do we need to ensure that the Government puts the same funding into enforcement actions under this bill as, for example, the previous Executive did with the ban on smoking in public places with, say, a massive surge in test purchasing when the act is passed, at least in the first instance?

Moreover, the reference to two years in that section means that an outlet could have an offence every year from now until kingdom come and never be banned. Is the provision reasonable, or should it be toughened?

Lesley Armitage: There should be enough resources to implement and monitor the policy effectively. Local authorities certainly do not have that kind of money at the moment.

We recommend that, instead of limiting the provision to three enforcement actions in a two-year period, the bill should stipulate that two infringements, regardless of when they occur, will trigger a ban. In other words, outlets get one chance and then receive a penalty if they break the law again. As you say, the current wording simply allows people to break the law repeatedly if it suits them.

The Convener: The test set out in section 12(3) is good because it is based on the balance of probabilities, which is used in civil cases and makes things easier when it comes to evidence. However, there are two legs to this provision. Section 12(3) states:

"The sheriff may make an order"

if he is satisfied that the outlet has received three or more enforcement actions in two years—that was the issue that Richard Simpson raised—and "the making of the order is necessary to prevent the commission of further offences".

Does the second leg of the provision build in too much discretion?

Lesley Armitage: The section weakens the bill and might mean that the legislation will have only a marginal impact on the retail of cigarettes. Local experience shows that the courts are not taking the issue that seriously anyway, so such discretion is very much a weakening agent.

The Convener: My concern is that, instead of having uniformity throughout Scotland, the provision will, by building in such discretion, lead to different approaches in various areas. Considering mobility and so on, that could be an issue. Are you recommending that section 12(3) should say, "The sheriff must make an order banning the person carrying on a tobacco business if he or she is satisfied that, on the balance of probabilities, there have been consistent breaches" or something like that?

Lesley Armitage: Yes.

Sheila Duffy: We want guidance that says that follow-up test purchasing exercises should be carried out within 12 months in any case where the legislation has been breached and there has been a sale to under-18s. Although we support the call for resources to carry out proper enforcement, the money must reach the front line and not be diverted into other services.

Mary Scanlon: In its submission, ASH Scotland says:

"during a test purchasing exercise in West Renfrewshire in ... 2008, 80% of shops tested were willing to sell cigarettes to a 15 year old".

However, although the financial memorandum says that the Government will

"fund a national campaign to help Trading Standards Officers inform tobacco retailers of the implementation of this new legislation",

paragraph 82 of the memorandum states that the Government does

"not consider that"

this bill

"will give rise to any administrative, compliance or other costs for local authorities".

Despite your feeling that the legislation must have real teeth and that existing measures are not being enforced properly, the financial memorandum confirms that not one more trading standards officer will be employed in Scotland. Does that give you concern?

Sheila Duffy: As I said, the test purchasing exercises are very resource-intensive. For example, they require two officers to accompany a trained test purchase volunteer. Test purchase activity should be resourced, but there should also be more of a requirement on councils to ensure that effective enforcement activity is carried out in their areas.

Mary Scanlon: But you are all complaining that the existing law is not being properly enforced. This new bill will bring in significant additional enforcement measures without a penny more for anything but a national advertising campaign. Are you confident that the existing trading standards officers, who do not appear to have the resources to enforce the existing law, will be able to take the new measures on board?

Lesley Armitage: I am not confident that they will be able to do so. They want to—and, indeed, try to—enforce the law, but they have many other responsibilities. Even though our local authorities are very committed to this work, there is a distinct limit to the number of premises that can be visited each year. What we need to make the bill work is an increase in staffing. It would be very sad if the bill turned out to be unenforceable and we simply ended up with the same problems that we have at the moment.

11:30

Ross Finnie: I am very supportive of measures in the bill to tighten enforcement. Indeed, I am one of those who believe that we ought to make much greater use not only of trading standards officers but of the police. The committee intends to take evidence on that matter.

However, if we up the ante on those who retail tobacco products, we still need to maintain the balance of justice. Therefore, I am interested in the comments that were made by Fiona Beaton and—I hope that I am not attributing these wrongly—Sheila Duffy, who expressed a reluctance to see under-18s face any penalty for possession of tobacco. Can they elaborate on their comments? Let me explain my slight problem. As I said, I have no real difficulty with upping the ante on retailers. However, if we were inadvertently to drift to a position whereby young persons faced no penalty for deliberately and fraudulently presenting themselves as being 18, thus inducing the committal of an offence by the retailer, I think that we would have materially interfered with the balance of justice. I am interested to explore that argument with the witnesses. I think that I heard both Fiona Beaton and Sheila Duffy—I hope that I have not misattributed these comments—say that they would be reluctant to see under-18s being

criminalised for possession of tobacco. I think that that is an issue.

Sheila Duffy: We certainly support the idea that tobacco could be seized and removed from young people under the age of 18. However, we would not support young people being criminalised for possessing tobacco. We believe that the many influences on young people that encourage the uptake of, and experimentation with, tobacco would be more appropriately tackled first. Those influences include the promotions that the tobacco industry engages in to encourage young people to experiment with tobacco.

Ross Finnie: Let me just press you on that. You have put it to me that you would support the ability to remove tobacco from under-18s. Do you believe that young persons who fraudulently present themselves to retailers as being over 18 and are successful in that fraudulent operation should bear no responsibility for doing so? Would you and your organisation be happy to see a substantial increase in the criminal penalty that could be imposed on retailers whose activity fails to comply with their responsibility, even if the commission of that act was due to the fraudulent actings of the young person?

Sheila Duffy: We certainly wish to stop the underage purchase of tobacco, but we feel that education and support, rather than criminalisation, should be the first-line response. The creation of a register of tobacco retailers will ensure that retailers are aware of their responsibilities under the law, so I believe that it is more appropriate to penalise retailers for breaching the law.

Fiona Beaton: I am afraid that I cannot speak on behalf of the whole Youth Parliament on the issue, as we did not consult on that to a great extent.

Speaking personally, I would strongly condemn the criminalisation of young people. However, just as the police are able to remove alcohol from a young person who is underage, I agree with Ms Duffy that they should be able to remove tobacco. I think that we need to target shopkeepers. It will be very hard to crack down on those young people who obtain tobacco by means of fake identification without criminalising every young person who obtains tobacco, whether by fraudulent means or from shopkeepers simply selling to them. I am not entirely sure how we could differentiate between the two.

Ross Finnie: The issue is quite simple. I am either 18 or I am not. If I seek to purchase tobacco in a shop—and I am under 18—I am breaking the law. The measure is not complicated. I have a responsibility as a citizen to know the law. The law states that I must be 18 or over to purchase tobacco.

Let us say that you are the retailer and I am the young person so I am under 18—that might be difficult to get your head round and make the question seem rather confusing, but I was keen to say “I am under 18” twice—

The Convener: We are all being so tactful.

Ross Finnie: In presenting myself to you, I am wilfully and knowingly attempting to break the law. I am trying to explore the issue. We know that everyone is keen to place much greater penalties on you, as a retailer. Is it entirely in balance that I, as a young person, should not be subject to a penalty? With respect, I do not see the complication.

Fiona Beaton: You say that young people have responsibility as citizens, but we must recognise that retailers have been given the responsibility of selling products and that they should sell them in a responsible manner—to people who are over the age of 18. The most effective way of tackling young people's access to tobacco is to target the root cause, which is with retailers.

Ross Finnie: So my wanting it is not a root cause. With all due respect, good law tends philosophically to be determined by a balance of rights and responsibilities, on both sides. The retailer has been granted, if they are registered, a right to sell tobacco, for which they have responsibilities. Equally, any citizen has a responsibility to uphold the law. Ignorance of the law is not a defence. There is a balance to be struck between young people wanting to experiment and their having to understand their responsibilities under the law.

Fiona Beaton: I agree that young people must be aware of their responsibilities. However, rather than criminalising them, we should focus on education and preventing them from wanting to take up smoking in the first place. No one has the ideal answer, but education in schools and youth projects will make a difference. As you said, if young people want cigarettes, they will find a way of getting their hands on them. It is not just about targeting retailers—that is important, but we must also educate young people more about the issue. They know the dangers, but we must try to change perceptions of smoking; the same applies to alcohol. We must try to ensure that tobacco does not appear glamorous, especially to young age groups—those under 16. The best way of doing that is through education.

The Convener: I respectfully suggest that it is not an either/or issue; the committee understands that. I asked a simple question: is it an offence for someone under 18 to purchase cigarettes? I am not sure of the answer. Ross Finnie makes the important point that people may be engaged in a criminal activity.

You alluded to the fact that someone may purchase tobacco from a cigarette vending machine to sell on to others. I am sorry for addressing you as “you”, Ms Duffy—that was very rude of me. I respectfully suggest to Ms Beaton and others that people who do that are committing a criminal offence, whatever their age. Frankly, what is the distinction between someone who is 17 and someone who is 19 doing it? The issue needs to be clarified.

Rhoda Grant: We received evidence on the matter last week. It was made clear that it is not criminal for someone under the age of 18 to try to buy and to be in possession of cigarettes. Neither is it a criminal offence for someone over the age of 18 to buy tobacco and to sell or hand it on.

The Convener: Thank you.

Ross Finnie: There is an anomaly between the licensing law for alcohol and that for tobacco.

Dr Simpson: We should look at the alcohol side as well. Proxy purchasing of alcohol is now illegal, but I am not clear about whether it is illegal for someone who is underage to attempt to purchase alcohol. We should have a uniform approach.

Rhoda Grant: I raised the issue earlier. I understand Ms Beaton's stance, because she represents young people. She would not come here and suggest that we should criminalise them.

The Convener: I sometimes feel like that. It is because I am getting old.

Rhoda Grant: I am really concerned about Sheila Duffy's point of view, because I cannot understand where she is coming from. If it were not illegal for a young person to buy and to be in possession of tobacco, they would be acting perfectly legally and the police would have no power to remove the tobacco from them.

Sheila Duffy: My concern is that the tobacco industry tends to place the blame on individual smokers rather than to take responsibility for its part in the picture. The statistics that we have indicate that two thirds of smokers start before the age of 18, and 40 per cent start below the age of 16. We need to move to protect children from tobacco, so that they do not become hooked on a highly addictive, lethal substance. The first line is for us to educate and support them to resist that.

The Convener: I want to move on. We are now looking at parity with the penalties relating to alcohol; we can develop that issue in discussion and further evidence, perhaps from the Association of Chief Police Officers in Scotland.

Miss Grierson, you submitted evidence on part 2 of the bill. You could have been sitting on the soft seats, not that there are soft seats in the gallery—I think that our seats are the soft ones. Other

members of the panel need not stay for the next evidence session. Mr Lawrie, from NHS Lanarkshire, will give evidence on part 2 of the bill. I would like us to continue and to have a break later, as this session should not be too long, but I have lost some of my people—the two doctors. I will suspend the meeting for two minutes, as I need them to ask questions.

11:41

Meeting suspended.

11:46

On resuming—

The Convener: I welcome Alan Lawrie, the director of South Lanarkshire community health partnership, and Ms Grierson, the tobacco control lead for NHS Dumfries and Galloway, who will give evidence on part 2 of the bill.

Dr Simpson: I believe that the possibility of a private company providing GP services has arisen only in Lanarkshire. For the record, will you tell us briefly about the circumstances and how Lanarkshire NHS Board dealt with the issue?

Alan Lawrie (NHS Lanarkshire): I was not sure on which issues you wanted me to submit evidence, but I can give you some background on the situation in Harthill. In November 2006, the health board was informed that the partnership in Harthill was to be dissolved, because the two GPs concerned had irreconcilable differences. It was a partnership at will—there was no written partnership agreement. In such circumstances, the contract with the health board comes to an end, because we have contracts not with individual GPs but with practices as a whole. Because the contract had come to an end, we issued temporary contracts to allow the GPs to continue to provide services, to give us time to think about our next course of action.

We had to consider carefully what we wanted to do in the circumstances. Our overriding concern was to ensure that patients in Harthill continued to receive high-quality medical services. We wanted to ensure that whatever we did put in place services that were high quality, sustainable and clinically safe. We looked at the four routes that were available to us. The first was the traditional general medical services contract. The second was a section 17C agreement—a personal medical services contract, of the sort that 6 per cent of practices already have. The third was the direct provision of general medical services in the Harthill area. The last was the health board PMS route.

After considerable thought, we took the view that we would seek expressions of interest in providing

general medical services to the Harthill area, which would cover both the traditional GMS route and the HBPMS route. We had a couple of reasons for taking that approach. It was thought that the HBPMS route, which is quite new, might provide improved access and capacity, help in relation to underdoctored areas, allow us to target issues that the current GMS contract does not target and lead to the development of innovative approaches. However, probably the overriding concern was that, at that time, we were not sure whether one, both or none of the incumbent GPs would be able to submit a bid and we wanted a wide range of people to do so.

As committee members will know, Harthill is a fairly remote area. Unlike the centre of East Kilbride, Hamilton or Glasgow, for example, where there is a range of GP practices, Harthill is a wee bit out on a limb, and that was a factor in our considerations.

After substantial discussions with the NHS Scotland Central Legal Office on the proposed approach, we were assured that what we were doing was legal and robust. We had to advertise widely, so we put an advert in the *British Medical Journal*. We did not state in the advert whether we wanted an HBPMS, GMS or PMS contract; we simply asked for expressions of interest.

We received expressions of interest from a raft of bodies, but only three of those resulted in formal bids. Those were from an incoming GP; another GP practice in South Lanarkshire; and a private company, Serco. It is fair to say that there was considerable local reaction and interest from patients during the process, not least because of the disagreements between the GPs, which were all over the local media. MSPs and councillors also expressed considerable interest, and that all led to what can only be described as a fraught public engagement process, which I was leading—I cannot go past Harthill services without a slight shudder.

The fraught engagement process in Harthill led us to make a fundamental change to the composition of the panel awarding contracts. Previously, both before 2004 and in a dissolution that took place after that, the panel was made up of non-executive directors, the medical director of the board, members of the area medical committee and a token patient representative. Following extensive, loud and difficult discussions with patients and local elected representatives, we reached the view that the composition of the panel should be very different. The chair should be a lay non-executive director and the board medical director and the general manager should be on the panel, but there should also be a member of the area medical committee and four patient

representatives, so that there would be an equal balance involved in the awarding of the contract.

As committee members will know, the outcome of the process was that we awarded the contract to one of the incumbent GPs, who had gone into partnership with another GP. We believe that the process that we went through was difficult but legally watertight, and that it led to a change in how we constructed the panel.

The media and political involvement throughout the process was distracting. We took feedback after the process from the key players who were involved, once the trauma and the excitement were out of the equation. Once things settled down, people believed that NHS Lanarkshire's work in relation to the panel and the public engagement had been good.

The problem, however, was the lack of public understanding about how general practice operates. There is a big gap between how people think GPs operate and how GPs actually operate, and a lack of knowledge about the role of the health board in any such arrangement. Some people took the view that we had perhaps enforced a contracting arrangement or that our actions had, in some shape or form, led to the dissolution of the practice. Such issues were more of a concern than the fact that we had chosen a slightly advanced contracting route.

The story does not quite end there, if you will let me continue for a few moments. After putting that episode to bed and working through the issues in Harthill, we were informed in January 2008 that a practice in East Kilbride was to go through exactly the same process. The practice that was dissolving there was a two-partner practice and there was no practice agreement, so the same arrangements applied.

Our thinking was put into gear yet again. We had no desire to go through the sort of trauma that the board, the patients and the GPs had experienced in Harthill. We took two factors into consideration. First, it was clear to us that both the GPs in the East Kilbride case would submit bids—that was guaranteed. Secondly, we wanted to find out exactly what the legal position was in relation to what the health board could and could not do. We thought that we had tested that out as much as we could in Harthill, but we wanted to go just that wee bit further with Central Legal Office and Scottish Government primary care division colleagues. We wanted to establish exactly what the regulations said, because there appeared to be a tension or a schism between what they said and what was prescribed under European tendering processes.

The bottom line was that we were clear that we had to go out to tender and that we had to do so

on a national basis, so we advertised in the BMJ. It was also clear that we could restrict the advert to a GMS-only contract. We knew from advice from colleagues in the CLO and the primary care division that that would not prevent a private company from putting in a bid but that it would be much more restrictive. We proceeded on that basis and awarded the contract to one of the incumbent GPs. The practice is now operating effectively.

It is clear from what I have said that the health board's biggest concern is to have absolute clarity about what it can and cannot do. That is the most important thing as far as NHS Lanarkshire's response to the bill is concerned, which is why we are supportive of the processes and ideas that have been put forward.

I have one reservation about flexibility, but I might come back to that during questioning.

The Convener: That was extremely helpful and, at times, quite colourful. I liked your understatement as you described the trauma that you suffered.

Ms Grierson, do you want to add to your submission?

Trish Grierson: NHS Dumfries and Galloway has had no experience of dealing with a commercial organisation and would feel considerable discomfort about doing so. The board is supportive of the move to ensure that GMS must be provided by active clinicians.

Dr Simpson: The general feeling in Scotland is that, essentially, we should have either GMS or PMS contracts. I do not think that there is any dispute about that. My one concern is to do with the fact that commercial companies have come in in England not just to allow competition but because, in a significant number of areas in England, it has not been possible to provide a sustainable primary care service on the traditional GMS or PMS model. We have not faced that situation in Scotland—although you considered the possibility in East Kilbride, Harthill is, as far as I know, the only place where it has been a realistic option.

Why are we introducing legislation to deal with a situation that has not occurred, which could result in a group of patients, at some future point, being deprived of general or primary medical services because of a legal restriction in primary legislation?

One of the savings measures that Crerar recommended was a substantial reduction in the number of medical students in Scotland. If we in Scotland were to become totally dependent on our own financial resources, we might not be able to have the same number of medical students. If we

were to substantially cut the number of medical students and to reduce it to the per capita level that exists in England, we might well face the situation that I have described.

Alan Lawrie: I will respond to a few of those points. From the description that I gave of the situations that arose in Harthill and East Kilbride, it is clear that I feel that the health board had to rely a great deal on the advice of the CLO to ensure that it did the right thing legally and would not at some point be subject to challenge by a commercial organisation or a general medical practice. Even if we were to follow the process that we followed in East Kilbride, I still feel that there appears to be a gap in the procurement regulations, whereby someone could make the case that we had not acted in an appropriately competitive way. I doubt that that would happen at the moment in Scotland because I do not think that the commercial companies see Scotland as a lucrative market that they should move into, but the possibility exists. The bill might remove any possibility of such a challenge.

12:00

My concern about the situation in England that you describe is that, although it may not arise in Scotland at present, health boards may become responsible in the near future or medium term for services that are less attractive to general practices. One area is the prison service—looking after prisoners in custody in the former police surgeon role—and another is looked-after and accommodated children. There is a range of services that general practice may view as less desirable or for which they feel insufficiently skilled. They are just not keen to do that work. In those cases, one option would be to go to direct provision, but that is not always the best answer. The scenario could arise that the provision of general medical services in some situations will become very difficult to do without access to other ways of doing things. The bill prevents us from doing those other things.

Dr Simpson: I would add drug and alcohol services to the list of problems.

Alan Lawrie: Yes.

Dr Simpson: My point is made exactly.

The Convener: I take it that you are not in favour of what could be called a straitjacket of legislation. What you want is to get clarity on the position but to retain flexibility.

Alan Lawrie: Clarity without flexibility is preferable to a straitjacket. My reading of the bill is that it prescribes a number of things that have to be done first—a number of hurdles that have to be jumped. Only once you have exhausted all means

of jumping those hurdles, and only then, are you allowed to look at alternatives. In 99 per cent of cases we fulfil our requirements by jumping through those hoops or over those bars—whatever you want to call them. For example, in Lanarkshire we have reorganised how we provide general medical services to nursing homes. One practice now looks after one nursing home instead of many practices looking after patients individually across nursing homes in the area. In the vast majority of cases, we have managed to organise that across Lanarkshire; practices have organised themselves to do that. However, in a couple of localities, no GP wants to provide the service. We are now looking to GPs outside the area to do that. If that fails, we will have difficulty in providing general medical services to that care home. We would then have to consider direct provision or another option. There will always be the odd instance where problems like that arise.

The Convener: My question is for Miss Grierson. Notwithstanding your considerable discomfort about the prospect of dealing with commercial organisations, in the scenarios that are being developed, would you rather see flexibility or what I am calling the straitjacket approach of “You cannot do that”? Although it may be preferable in philosophical terms to do something in a certain way, in practical terms you may have to leave legal room to do something else.

Trish Grierson: I cannot comment on that. I need to go back to our board, discuss the issue and come back to the committee with an answer.

Helen Eadie: I am not sure that the bill is a straitjacket. In her submission, Professor Allyson Pollock of the centre for international public health policy says that section 30

“does not conform to the minister’s 2008 assurance that NHS Scotland will remain a ‘mutual’ organization ‘firmly in the public sector ...’ On the contrary, the Bill adopts the English model and retains the 2004 market reforms which create a primary care market open to competition with commercial companies.”

My question is—

The Convener: Where is that?

Helen Eadie: It is on page 3—

The Convener: No, which part of section 30?

Helen Eadie: She does not delineate that; she refers only to section 30, saying that

“The Bill will retain the Health Board freedom to negotiate primary care services locally with commercial undertakings on the basis of commercial contracts”,

and that such contracts will be

“enforceable in private law courts”.

She goes on to cite the example of a company in Chelmsford that has become

“the largest alternative provider of NHS primary care services in the UK, managing 40 GP practices in England and Wales”.

Do Alan Lawrie and Trish Grierson agree with Professor Pollock’s analysis that the bill does not provide the constraints that ministers want? The cabinet secretary wants the NHS to have an ethos of mutuality and public delivery. She wants to eliminate competition from NHS provision, which I can understand. However, according to Professor Pollock, the bill will not do that. That is a concern, and it creates doubt for people such as the witnesses.

Alan Lawrie: I do not profess to be an expert on the drafting of the bill. My reading of the bill is that it would exclude the health board PMS contracting arrangements that are currently available to us. It is my understanding—my East Kilbride example demonstrates this—that it is currently possible to opt only for a GMS contract and that companies and organisations that are not just general medical practices can apply for GMS contracts. I honestly could not say whether that situation is covered in the bill.

Helen Eadie: That is interesting, because Professor Pollock states:

“The Bill will retain the Health Board freedom to negotiate primary care services locally with commercial undertakings on the basis of commercial contracts. Such contracts, enforceable in private law courts, are designed to introduce a commercial, competitive environment that will influence models of care.”

It is a bit worrying that the bill will therefore do the opposite of what people were hoping for.

The Convener: I will let Ian McKee give some supplementary information, because he is nodding vigorously in agreement.

Ian McKee: My understanding is that while the bill will rule out commercial companies as we understand them, it will allow in companies whose directors work in primary care themselves. Such work was defined at a previous committee meeting as being, for example, one day a week in primary care. A GP, a nurse or practice administrators could therefore set up a company, but as long as they keep up the contact with primary care, they can take over other practices and run them. The example was given of a doctor and a nurse running 40 practices in England. I think that Professor Pollock’s point is that, by any standards, that is a commercial organisation, although it is restricted to people who have a small foot in the door of primary care. The general drift of the argument is that, if such organisations bid for a practice and European competition law is not

taken into account when deciding who would run the practice, there could be problems.

The Convener: I am grateful to Ian McKee for that information. I think that he was referring to section 30, which will insert new section 17CA in the National Health Service (Scotland) Act 1978. I thank Helen Eadie for what she said, too. I was getting muddled about the position. Apparently, though, the provision in the bill is still a muddle: there will not be a straitjacket; there will be a sort of flexibility. Ian, are you saying that the current position will remain?

Ian McKee: There is doubt about whether a totally commercial company, with a board of directors who have nothing whatsoever to do with primary care in the United Kingdom, could come into primary care services. However, the bill will restrict a large number of people from entering the field, although it will still be possible to build up a new activity that would be commercial by any other standards, except for the primary care eligibility criterion for directors.

The Convener: Which is pretty de minimis.

Trish Grierson: Can NHS Dumfries and Galloway submit its view later on Professor Pollock’s feedback to the committee?

The Convener: It can refer specifically to section 30, although I think that we have clarified that for ourselves. Does anybody else want to comment?

Ian McKee: I have two small points to make. I will develop the topic that Helen Eadie so helpfully expanded on. Mr Lawrie, would the GP problem that you described earlier have occurred before the new contract came along? Then, contracts were with individual GPs who had individual patients on their list, rather than with practices. Before the new contract, if there was a disagreement between GPs, did you have the same problem that you have under the new contract?

Alan Lawrie: No. You are right that pre-2004, the contract would have been with the individual doctor and things would have continued as normal, but there is a downside to that. There are health centres and practices throughout Scotland that have up to three entrances, because GPs have fallen out with each other and small, often single-handed practices operate. I think that all health boards feel that single-handed practices have their own challenges and difficulties, not the least of which are their financial difficulties in providing care to patients.

From a contractual perspective, I entirely agree with you that before the new contract the process would have been different. The list would have been split and two single-handed GPs would have

been working in Harthill, but there is a significant downside to such an approach in providing modern health care.

Ian McKee: Those problems can be solved. I have seen it in action.

I declare an interest of sorts. Before I became an MSP, I was a directly employed GP.

The situation is perhaps not as negative as I think you implied. There is an advantage in directly employing GPs. In addition, simply by examining individual situations, taking away elements and having individual fee structures, individual terms and conditions and so on, issues with the standard of practice under the ordinary GP contract can be overcome. Do you agree that that can be a way of solving problems?

Alan Lawrie: Do you mean the direct employment of salaried general practitioners?

Ian McKee: Yes.

Alan Lawrie: Absolutely. We employ salaried GPs in our out-of-hours service, and we are looking to expand our salaried GP workforce, because we foresee situations in which a salaried GP workforce would have the capacity to do some of the things that I talked about previously, whether in prisons or in police surgeon roles. For nursing home contracts we are now talking about having a good cohort of salaried GPs who can operate flexibly. We want to employ salaried GPs. In NHS Lanarkshire there is a large number of high-quality salaried GPs, and the number of salaried GPs in our practices is going up fairly significantly. Through talking to colleagues fairly recently, I know that the calibre of people who are coming through the salaried GP route and are looking for salaried positions is very high. That is good, because it provides a different model of operation. I am not at all against the direct employment of GPs, because that can result in significant benefits, but there are times when the direct employment of GPs will not be the optimum solution.

Ian McKee: I am just making the point that if you employed people, the board would have a bit more flexibility in dealing with problems.

Alan Lawrie: Health boards are not good at running general practices. I have yet to see an example of a health board or a primary care trust running a general practice as effectively as a general practice can run itself.

The Convener: I think that you have pleased two members of the committee.

Mary Scanlon: Mr Lawrie, in your opening statement you mentioned the European contractual tendering process, which I do not know much about. You said that a private company

could submit a bid. Would anything in the bill contradict or sit uneasily with that process, given that you have said that private or commercial companies could apply for GMS contracts?

Alan Lawrie: As things stand, a private company could apply for a contract. An HBPMS contract could be offered. In the East Kilbride example, we did not offer an HBPMS contract; we offered only a GMS contract. A GMS contract can still be applied for if various criteria are met, although that is more onerous.

On conflict with the tendering regulations, I think that it is the Public Contracts (Scotland) Regulations 2006 that require a competitive process to be gone through. Involvement in the process cannot be restricted to only two GPs; it must be opened up. I am not aware—because I am not an expert in the area—whether the bill will conflict with the tendering regulations in any way.

12:15

Mary Scanlon: I appreciate what is in the bill, and I am obviously not an expert on European contractual tendering processes, but it appears that NHS Lanarkshire was told that, under the European processes, a private commercial company could apply to provide GMS. If the bill restricts commercial companies from applying for GMS, are we contradicting what is in the European contractual tendering processes? Does that make sense?

Alan Lawrie: It makes absolute sense, but my answer is that I do not know.

The Convener: That is a fair comment. We could ask the Scottish Parliament information centre to provide us with information, and we could also put the question to the cabinet secretary. We will ask for a note from SPICe—she said, while looking round at people from SPICe.

Mary Scanlon: Thank you, convener. That is very helpful.

My colleague Rhoda Grant and I represent the Highlands and Islands, which is a wee bit more remote than Harthill. If Harthill is remote, goodness knows about the Highlands and Islands. As you will know, single-handed practices are common in the Highlands. The new consultation document from the British Medical Association and the Royal College of General Practitioners, "General Practice in Scotland: The Way Ahead", suggests that major changes are taking place in recruitment and working practices. Expectations are also changing. As I understand it, not many young GPs wish to mortgage themselves up to the hilt to buy a practice. In the Highlands, some retired GPs cannot even sell their practices; the

current economic climate is hardly conducive to new GPs.

It is a wee bit difficult to understand what you are banning, because it does not exist in Scotland. Against that background, the background of single-handed GPs, and the background that Medacs often has to get out-of-hours cover for the Highlands from Poland, Germany and Latvia, would it not be sensible to retain a degree of flexibility for future provision?

Alan Lawrie: My answer to that is yes. I have used the prisons as an example, but difficulties can also arise with single-handed practices, especially in rural areas. We do not have all that many in Lanarkshire, but Clydesdale is a reasonably rural area. If a single-handed practitioner were to retire and not sell on their practice in some way, issues might well arise in service provision. We might well have to go down the route of direct provision or find some other means of providing the service. There are hurdles to get over, but when you can do no more, you perhaps have to look for something else.

Mary Scanlon: My very final point—

The Convener: Before you go on, Richard Simpson has a point.

Dr Simpson: Since 1948, it has been illegal to buy or sell practices.

Ian McKee: The Government bought out the good will.

Dr Simpson: Yes, in 1948. There has never been a legal entity of a practice that you could sell. Premises are a different matter, but buying or selling a practice is illegal.

Mary Scanlon: I stand corrected.

The Convener: Yes, I defer to my team of two experts on my right.

Alan Lawrie: I apologise for using that phrase.

Mary Scanlon: I meant the premises. I apologise.

The Convener: Our experts are useful at times, Mary.

Mary Scanlon: Yes, they are.

The Convener: Men are sometimes useful, and we have two very useful men here. That was a sexist remark, for which I shall pay.

Mary Scanlon: Having been corrected, I will leave my final point.

Rhoda Grant: I have two quick questions. The first is on the eligibility criteria for people entering into contracts. If someone was on maternity leave or on long-term sick leave, and so were not fulfilling the practising criterion, would that create a

problem? Would it be legal to prevent someone from being a contractor if they became disabled or unwell?

The Convener: If the witnesses do not have the answer, they can write to us with it later. Do you wish to do that, Mr Lawrie?

Alan Lawrie: Yes. I will drop you a line.

The Convener: Rhoda, will you repeat the question, so the witnesses can take a note of it?

Rhoda Grant: One of the criteria for contracting with people is that they directly practise in some form. If someone is on maternity leave or long-term sick leave, or has become disabled, they would no longer be able to practise. Would that cause a problem? What is the legal position, given the equality and disability discrimination legislation?

The Convener: That might be more a question for the Government. However, with that caveat, the witnesses are welcome to address it. The question has been noted down. If, having consulted on it, they do not think that it is appropriate for them to answer it, they can just tell us.

Rhoda Grant: The financial memorandum talks about directly employing doctors and suggests that that could be more expensive for health boards. I find it difficult to understand how that could be more expensive.

Alan Lawrie: We did some calculations on the total amount of money that was provided in Harthill and we worked out what that would mean in relation to direct provision and so on. The results were relatively neutral. There are issues about how the contractual framework works in relation to the quality and outcomes framework and enhanced services. It is difficult to make an absolute like-for-like comparison.

Rhoda Grant: I just found that part of the financial memorandum puzzling.

The Convener: There are no further questions. I thank both the witnesses for coming. Harthill is now engraved on our memories as a place of momentous events. They were mostly momentous in Mr Lawrie's life. Happily, I knew nothing about the events in Harthill—but I do now.

Subordinate Legislation

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

12:22

The Convener: The next item on the agenda is subordinate legislation. We have two negative Scottish statutory instruments to consider.

The purpose of SSI 2009/167 is to provide for the implementation of three new European Commission directives that consolidate existing European Union rules governing the purity criteria for colours, sweeteners and other miscellaneous additives in food—that is obvious, because that is what it says on the label. The cover note from the clerk sets out the regulations in more detail.

No comments from members have been received and no motion to annul has been lodged. The Subordinate Legislation Committee, which considered the regulations at its meeting on 19 May, wished to draw to our attention the fact that it sought, and was content with, an explanation from the Scottish Government as to why the regulations have not been consolidated with existing regulations that are already in force in Scotland. That being the case, do we agree that we do not wish to make any recommendations in relation to the regulations?

Members indicated agreement.

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

The Convener: The purpose of the regulations is to amend existing regulations so as to allow for arrangements to be put in place for pharmacists to deal with emergency situations that require the flexible provision of pharmaceutical services, such as in response to cases of pandemic influenza. The cover note from the clerk sets out the regulations in more detail.

No comments from members have been received and no motion to annul has been lodged. The Subordinate Legislation Committee raised concerns with the Scottish Government about why the regulations failed to comply with certain provisions of the Scotland Act 1998. However, that committee reports that it was satisfied with the Scottish Government's explanation on the issue. Do we therefore agree that we do not wish to make any recommendations in relation to the regulations?

Members indicated agreement.

The Convener: As previously agreed, we will consider item 4 in private.

12:24

Meeting continued in private until 12:52.

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