

# **HEALTH AND SPORT COMMITTEE**

Wednesday 11 November 2009

Session 3

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## HEALTH AND SPORT COMMITTEE

29<sup>th</sup> Meeting 2009, Session 3

### CONVENER

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

### DEPUTY CONVENER

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

### COMMITTEE MEMBERS

\*Helen Eadie (Dunfermline East) (Lab)

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

\*Michael Matheson (Falkirk West) (SNP)

\*Ian McKee (Lothians) (SNP)

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

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

### COMMITTEE SUBSTITUTES

Joe FitzPatrick (Dundee West) (SNP)

Mr Frank McAveety (Glasgow Shettleston) (Lab)

Jamie McGrigor (Highlands and Islands) (Con)

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

\*attended

### THE FOLLOWING ALSO ATTENDED:

Kenneth Gibson (Cunninghame North) (SNP)

Shona Robison (Minister for Public Health and Sport)

### CLERK TO THE COMMITTEE

Callum Thomson

### SENIOR ASSISTANT CLERK

Douglas Thornton

### ASSISTANT CLERK

Seán Wixted

### LOCATION

Committee Room 3



## Scottish Parliament

### Health and Sport Committee

*Wednesday 11 November 2009*

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

10:08

*Meeting suspended until 10:17 and continued in public thereafter.*

### Decision on Taking Business in Private

**The Convener (Christine Grahame):** Welcome to the 29<sup>th</sup> meeting of the Health and Sport Committee in 2009.

Does the committee agree to consider in private at this and future meetings its approach to forthcoming legislation on alcohol?

**Members** *indicated agreement.*

## Tobacco and Primary Medical Services (Scotland) Bill: Stage 2

10:17

**The Convener:** This is day 1 of stage 2 consideration of amendments to the Tobacco and Primary Medical Services (Scotland) Bill. I remind members and people in the public gallery to switch off mobile phones and other electronic equipment. No apologies have been received. I welcome the Minister for Public Health and Sport and her team.

### Section 1—Prohibition of tobacco displays etc

**The Convener:** Amendment 11, in the name of Ian McKee, is grouped with amendments 18 and 19. I draw members' attention to the pre-emption note on the groupings. If amendment 40, in the next group, is agreed to, amendment 19 cannot be called. Those amendments will be disposed of at next week's meeting.

**Ian McKee (Lothians) (SNP):** Amendment 11 is to leave out from section 1

"or fixed to the outside of the premises of"

in line 15 on page 1 of the bill. The reason for the amendment is that advertising fixed to the outside of premises of a specialist tobacconist can be seen by young people who do not go inside the building and can, therefore, constitute a form of advertising that is visible by them. In the spirit of the bill, the provision should be removed.

I move amendment 11.

**The Convener:** Do you want to speak to any of the other amendments in the group?

**Ian McKee:** Amendment 18 follows the same philosophy, so I do not want to add to what I have said. Amendment 19 is a technical amendment.

**The Minister for Public Health and Sport (Shona Robison):** The display ban exemption for specialist tobacconists is lifted directly from the Tobacco Advertising and Promotion Act 2002. The bill as drafted exempts specialist tobacconists from the display ban if a display

"(a) is in or fixed to the outside of the premises of a specialist tobacconist,

(b) does not include cigarettes or hand-rolling tobacco,"

and complies with any other requirements.

Although I do not think that anyone believes that specialist tobacconists are places frequented by children, concerns were expressed that allowing such shops to display and advertise tobacco in their shop window would undermine what we are trying to do through the display ban. I understand that specialists have concerns about the impact of

amendment 11, but we will work with them while drafting regulations to ensure that the impact on their business is minimised. On that basis, I do not oppose amendments 11, 18 and 19.

*Amendment 11 agreed to.*

**The Convener:** Amendment 12, in the name of Mary Scanlon, is grouped with amendments 13, 14, 34 to 36, 40 and 41. I remind members that, if amendment 40 is agreed to, amendment 19 in the previous group cannot be called.

**Mary Scanlon (Highlands and Islands) (Con):** Amendment 12 is a critical amendment, because it relates to the main point of the bill. We can all agree on the link between smoking and poor health and on the fact that the younger people start smoking, the more acute their health problems in later life are likely to be.

Today we are faced with a decision about whether to ban the visual display of cigarettes to address the problem. The truth appears in paragraph 47 of the committee's stage 1 report, which states:

"The Committee notes that strong views were advanced on both sides of the debate. The Committee also recognises that the evidence base for this proposal is at an early stage and that the international evidence to date is inconclusive. The Committee notes the Minister's comments that action such as the proposed ban would itself lead to ... more conclusive evidence over time."

The Government is banning visual displays in the hope that that will produce an evidence base in support of the argument that the measure will reduce smoking. There is not yet conclusive evidence that the measure will achieve what it sets out to achieve. The claim in the policy memorandum that banning visual displays of cigarettes will

"protect children and young people from the impact of tobacco smoking"

is, therefore, not true.

The policy memorandum also states that the bill will

"reduce the attractiveness and availability of tobacco products to children and young people".

I cannot think of anything less attractive than what is stated on the packet that I am holding up. Although a ban on visual displays will put cigarette packets out of sight, there is no doubt that the Government needs to consider many other measures to make the policy successful. I can think of nothing less attractive than a product that states "Smoking kills". I see no benefit in repeating the arguments on both sides that we have heard and read about.

I move amendment 12.

**Michael Matheson (Falkirk West) (SNP):**

Given that Mary Scanlon quoted directly from the committee's stage 1 report in relation to this issue, it is important to state for the record that, in the end, the report came down in favour of what is intended in the bill. We are at an early stage of gathering international evidence on the link between the types of displays in shops and young people taking up smoking, but it is clear that the committee is taking a precautionary approach on the issue and has supported what the Government intends to do. It is important that we recognise that the committee has supported the proposals to ban advertising smoking in places where tobacco is sold.

**Helen Eadie (Dunfermline East) (Lab):** The general principles of the bill, which include a ban on tobacco displays, have been supported not just by the committee but by the Parliament.

The arguments in the written and oral evidence that was submitted to the committee were especially compelling, particularly the convincing evidence from international sources and the World Health Organization on the display bans that have been introduced elsewhere in the world. Some of the issues that Mary Scanlon has raised can be tackled in other ways, and I strongly reject her amendments.

**Dr Richard Simpson (Mid Scotland and Fife) (Lab):** I, too, want to speak against these amendments for a number of reasons. First, the evidence from Professor Hastings in particular on the effects on young people clearly demonstrates that the removal of such displays from shops is, over time, likely to lead to a reduction in the number of children who take up smoking.

Secondly, the Scottish Youth Parliament and the various youth groups that have been consulted also support the ban.

Thirdly, the fact is that, since the 2002 act came in, the number of these displays has increased hugely. If the displays are not advertising, why do we have a proliferation of brands that are only tiny variations of existing brands? There is no variation in the cigarette itself, only in its packaging and form. The displays have become a powerful form of advertising and apart from a couple of dissenters the committee and the Parliament are unanimous in the view that they need to be significantly curtailed, if not eliminated.

**Shona Robison:** Amendments 12 to 14, 34 to 36, 40 and 41 seek to delete the provisions banning the display of tobacco products that are at the heart of the bill.

Although I understand the concern about the ban on displays, I feel that a great deal of it is being driven by those who naturally seek to protect their own business interests, namely the

tobacco industry. However, as the Minister for Public Health and Sport, it is my business to protect future generations from the harmful effects of tobacco. I thank the committee for its boldness in supporting this measure, particularly in the face of such opposition.

Although the advertising ban has been a success in reducing overall awareness of tobacco promotion and branding among young people, the marketing of tobacco products persists, as members have said, through prominent displays at the point of sale in thousands of supermarkets, newsagents and petrol stations. I accept that evidence can be produced on both sides of the argument. Those who do not want a display ban will produce certain evidence to prove their case, while those who want a ban will produce a different set of evidence. The question, then, is whose evidence is more compelling.

For me, a more fundamental issue is the message that we send our children when we tell them that cigarettes are dangerous and then they find that the most prominent thing on display is lit-up packets of the product. The messages are mixed. If we tell children that cigarettes are dangerous, they will simply ask why, if that is the case, the packets are displayed in lights. We need to put an end to that.

Although she has not really articulated it this morning, I understand the concern that Mary Scanlon has previously expressed about the cost of the measure to business. However, through our work with retailers and, of course, by giving them an additional two years to comply with the provisions, I believe that we have gone a long way towards addressing concerns about costs and indeed would argue that they are now unfounded.

On that basis, I ask Mary Scanlon to withdraw amendment 12 and not to move amendments 13, 14, 34 to 36, 40 and 41.

**Mary Scanlon:** In response to Michael Matheson, I point out that the committee's stage 1 report said that the evidence was "inconclusive". Indeed, the minister has just said that there is evidence on both sides of the argument. Because the evidence base itself is not conclusive, we cannot say for certain that banning visual displays will in itself reduce the incidence of smoking in young people. We are not yet at that point. That said, I hope that if the bill goes through—and I have no doubt that it will—it will reduce smoking among young people. I know that we all agree with that.

Helen Eadie made a good point, because there are many other ways in which to tackle the issue, including others that are in the bill—for example, the measures on proxy purchasing and the establishment of the register. I certainly fully

support other ways of trying to reduce the incidence of smoking not just in young people but in people of all ages. The bill's emphasis is on young people smoking, which is a huge problem, but I would like to see a reduction in the incidence of smoking in people of all ages.

10:30

As far as the minister's comments are concerned, it is easy to say that the objections come from the tobacco industry, but I certainly have no connections with the tobacco industry. I looked at the evidence base and have put it forward.

I reiterate my main point, which is that the claim in the policy memorandum that the banning of visual displays will

"protect children and young people from the impact of tobacco smoking"

is simply not true. It may do that, but we do not have the evidence base to claim that it will. We have all, including the minister, said that the banning of visual displays will lead to an evidence base. I am just looking for a bit of transparency and honesty. I hope that the ban will achieve what it sets out to achieve, but I think that it is wrong to claim that a reduction in smoking will happen, because we simply do not have the evidence to support that. I will therefore press amendment 12.

**The Convener:** The question is, that amendment 12 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Scanlon, Mary (Highlands and Islands) (Con)

**AGAINST**

Eadie, Helen (Dunfermline East) (Lab)

Finnie, Ross (West of Scotland) (LD)

Grahame, Christine (South of Scotland) (SNP)

Grant, Rhoda (Highlands and Islands) (Lab)

Matheson, Michael (Falkirk West) (SNP)

McKee, Ian (Lothians) (SNP)

Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

**The Convener:** The result of the division is: For 1, Against 7, Abstentions 0.

*Amendment 12 disagreed to.*

*Section 1, as amended, agreed to.*

### After Section 1

**The Convener:** Amendment 43, in the name of Mary Scanlon, is in a group on its own.

**Mary Scanlon:** I say to the minister that I did not mention costs in my first three amendments because they are covered in amendment 43—I am sure she will understand that.

Amendment 43 sets out a scheme for making payments to the small businesses that are most likely to be affected by the display ban. I appreciate that the timetable for complying with the ban has been extended for such businesses.

The financial memorandum estimates that the cost of the display ban for the smallest retailer will be in the region of £1,200. Others have estimated that refitting costs for small retailers will be between £2,000 and £5,000. In its report, the committee accepted

“that there would be a cost to business arising from the proposed ban, namely in relation to the reconfiguration of retail space, and welcomes the discussions that the Scottish Government is undertaking to facilitate the adjustment for smaller retailers.”

The intention behind amendment 43 is to gain a clearer record of discussions about what can be done to assist small retailers in Scotland to comply with the legislation.

We received a briefing from the Scottish Retail Consortium this morning—it is a wee bit late, but never mind—which refers to

“The very misleading reference to a compliance cost for materials of £20: in any busy retail outlets larger than the very smallest, compliant gantry modifications will need to be significantly more durable, professional, costly and disruptive than implied by this assertion”.

I lodged amendment 43 to get more clarity, because there is no doubt that businesses are not entirely clear about what the costs will be and what exactly they will have to do to comply with the legislation.

I move amendment 43.

**Helen Eadie:** I do not agree with what amendment 43 proposes; in fact, I am strongly against it. There is no doubt that the proposed ban can help to reduce smoking. There may be a cost from the ban for some sectors of society, but there will also be savings for our public health generally, which will benefit everyone, including small businesses.

We took photographic evidence from other parts of the world that showed the Rolls-Royce solution to provide what will be required and the inexpensive solutions. Although a cost will be incurred, I was convinced that, on balance, the bigger cost is the public health cost to society from the potential loss of life.

We must make a judgment. My judgment is that valuing people's lives is more important. I understand and sympathise with businesses' concerns about costs, but we must make a judgment.

**Michael Matheson:** I strongly support Helen Eadie's comments about the social cost of smoking and the financial cost to our health

service and other services, which must pick up the pieces of the problems that are associated with tobacco. However, I recognise the difficulties for businesses in the present economic climate, so it is important for the Government to take the opportunity to work with businesses where it can to introduce a manageable scheme. I know from ministerial evidence that much work has been done to try to achieve that.

We are reaching the end of our budget consideration. It would be interesting to know from which budget heading Mary Scanlon would like funding to be taken to introduce a compensation scheme for businesses in the form that she would like.

**Rhoda Grant (Highlands and Islands) (Lab):** I was concerned about the cost for small businesses in particular of complying with the bill, but I was reassured by the prototypes and solutions for businesses that I saw, which are affordable. If the amendment were agreed to, it could cost the public purse a huge amount, because people could use such a scheme to fund the unnecessary refitting of their shops and the like.

I have been reassured about the costs of implementing the bill. I know that some people who support the bill are unhappy with the simple adaptations that can be made, but the right balance has been struck. Given that, I will not support the amendment.

**Shona Robison:** The Scottish ministers have been mindful from the outset that a ban on displays will affect businesses—particularly small businesses. We have worked closely with retailers to draft legislation that will allow them to comply at a very low cost, which I believe is the best way to address the impact on business.

I have shared with members the solution that the National Federation of Retail Newsagents suggested to hide tobacco from display, which could cost as little as £20 per gantry. The federation—not the Scottish Government—made that proposal. The Scottish ministers will also give small businesses until 2013 to comply with the bill. Taken in the round, all that means that we can have a solution that does not have an unfair impact on small businesses and which achieves the bill's aims. On that basis, I ask Mary Scanlon to withdraw amendment 43.

**Mary Scanlon:** I welcome the enterprising £20 invention, which looks competent to me. However, as I said, I lodged the amendment with the intention of gaining a clear record of discussions about what can be done to assist small retailers.

Michael Matheson made a good point about working with businesses to find a manageable solution. Members will agree that, when I spoke to



the amendment, I emphasised clarity. That was because I was a bit surprised to receive briefing papers from organisations such as the Scottish Retail Consortium today, when the committee is to discuss amendments.

I will not repeat what I said previously, but the Scottish Retail Consortium's paper talks about

"The unresolved need to understand exactly what solutions will comply and become the most common in a typical store, and what they will mean in practice for staff having to reach behind facings/panels/flaps/drawers to retrieve packets which they, like the customer, can no longer see."

I am looking for positive and constructive solutions and a good partnership with all retailers in the current economic climate. We all want to achieve the same end, which is a reduction in smoking.

I would like an assurance from the minister that she will work with the Scottish Retail Consortium and the Scottish Grocers Federation on the issue. I know that the small newsagents are in favour of the £20 solution, but if I could get an assurance from the minister I would be minded not to press amendment 43.

**Shona Robison:** I hope that I can give that assurance. We have had a lot of discussions, and officials have met the Scottish Retail Consortium and the Scottish Grocers Federation on a number of occasions to discuss ways forward. The model that I shared with members is one example. Clearly, there will be other models, and we are working closely with those groups to find cost-effective solutions. We will continue to have that dialogue. I hope that that reassures the member.

**The Convener:** Does Mary Scanlon wish to withdraw amendment 43?

**Mary Scanlon:** I sought clarity, and I feel that we have been given some clarity today.

*Amendment 43, by agreement, withdrawn.*

## **Section 2—Displays which are also advertisements**

*Amendment 13 not moved.*

*Section 2 agreed to.*

### **After section 2**

**The Convener:** Amendment 6 is in the name of Kenny Gibson.

Welcome to the committee, Kenny. I cannot quite remember the full title of the cross-party group that you chair.

**Kenneth Gibson (Cunninghame North) (SNP):** It is the cross-party group on tobacco control. I am speaking as the chair of the cross-party group rather than in any party political sense.

Amendment 6 has the support of ASH Scotland, the British Medical Association and Cancer Research UK. As the bill is currently drafted, tobacco products may not be displayed in the place where they are offered for sale, and regulations will specify the requirements that retailers must meet to comply with that. However, the bill does not set out in detail the manner in which products must be stored to fit best with the spirit of the law.

Amendment 6 would require tobacco to be stored in a closed container, whose contents must remain out of sight of or facing away from the customer. It closely mirrors the Irish legislation, which has been successfully implemented since July 2009. However, it also learns lessons from loopholes that have been exploited in Ireland. I am circulating some graphic displays of that and the solutions in other countries.

**The Convener:** It is your inaugural visit and here you are inaugurating something. Mary Scanlon has displayed a cigarette packet so I do not see why you cannot do something similar.

**Kenneth Gibson:** Endorsement of the general principles in chapter 1 of part 1 of the bill acknowledges that point-of-sale displays of tobacco products constitute a form of advertising designed to generate interest in and encourage the use of tobacco products. The spirit and intention of the law is to remove that influence entirely for the principal reasons of preventing children and young people from taking up smoking and reducing the future harm that smoking uptake inevitably causes. By not specifying conditions of tobacco storage, the bill as currently drafted is open to future exploitation that will seek to adhere to the letter of the law while violating its spirit, as has happened in Ireland.

Inevitable moves by the tobacco industry to seek and exploit loopholes in the law should be pre-empted now to ensure that the passage of the bill creates meaningful tobacco control legislation that will not need to be returned to in the near future, and to plug gaps that allow the industry room to manoeuvre. Many other countries are considering similar legislation and will look to Scotland to get it right.

The tobacco gantry remains a focal point in the everyday retail environment and, while the covering of existing gantries will mean in most cases that tobacco branding is concealed, the gantry itself will generate attention and interest in its contents and serve to attract attention to the tobacco as a whole. That effect has been capitalised on in Ireland, which implemented its display ban in July. Multiple, oversized, "No ID—No Sale!" signs provided by the industry are used to emphasise the contents of the now-covered

tobacco gantries while still complying with the letter of the law.

10:45

Historically, the tobacco industry has been at the forefront of adapting to and circumventing regulation that has been designed to curtail its marketing practices. If we allow a system in which retailers must open doors or shutters facing the consumer in order to access products for sale, that is certain to generate a window of opportunity in which tobacco products will be visible during the transaction. In Ireland, tobacco companies supply retailers with sealed cartons of cigarettes with prominent branding primarily intended not for sale but for grabbing attention during the transaction window while the product is temporarily on view in the gantry. Display solutions that have been proposed and supported by the industry will be designed to comply with the bare minimum of the law while maximising the remaining promotional opportunities through design.

Numerous other problems could arise in allowing existing gantries to be covered. Those include: the covers of doors accidentally being left open after sales, restocking, cleaning or maintenance; the dimensions of the existing gantry meaning that large amounts of branding are visible when covers need to be opened in order to process a sale; and the addition of brand names or brand-suggestive imagery, such as the use of well-established brand colours without any reference to the brand name.

The commentary on the draft regulations under part 1 of the bill suggests that the cheapest solution to comply with the legislation would be to

“install a white plastic fronting to each row on the gantry.”

However, as Helen Eadie said in comments that I found heartening, the important issue is the health message that the bill will deliver and the protection that it will afford to our young people. Promoting such a solution for compliance demonstrates a weakness in the bill as currently drafted. Such solutions are likely to compromise the spirit of the bill. The emphasis of the legislation should be not on finding the lowest-cost solution but on balancing the cost to retailers with the need to protect public health by limiting tobacco marketing to the fullest extent possible.

Storing tobacco products in closed containers out of sight of, or facing away from, customers will be simpler for both retailers and consumers. The equivalent English tobacco control legislation has been made so complex that there is now confusion about the practical methods of implementation and it has been suggested that, in any case, existing gantries might be unable to be modified to make them compliant. The equivalent

draft Scottish regulations that will be made under the bill appear to share many of those weaknesses. That strengthens the case for robust, clear primary legislation.

In order to prevent large areas of tobacco branding being exposed during a sale, the Department of Health's draft regulations stipulate that an area of only 1,500cm<sup>2</sup>—about the size of an A3 sheet of paper—should be visible at any one time. The draft regulations under the bill show that the Scottish ministers plan to limit the area exposed in a similar manner to that of the English regulations but with as yet unspecified dimensions. That is troubling, as early estimates indicate that a typical small shop might need to fit at least 20 doors or coverings to its existing point-of-sale unit in order to comply. A representative from the Association of Convenience Stores concludes that, to comply with the regulations, the

“technical challenge in fitting a solution to existing units could be insurmountable.”

We must be clear that the storage of tobacco products must always be in closed containers out of sight of, or facing away from, customers. That would eliminate confusion among retailers and provide clarity for the consumer. Amendment 6 would make it clear that, aside from infrequent necessary procedures such as restocking, cleaning or maintenance, tobacco products should always be kept out of sight. The amendment will also make it clear to the adult customer that it is not permissible for the coverings to be lifted temporarily for the purposes of brand perusal.

There is also a business case for storing tobacco products out of sight. Covering existing point-of-sale displays will mean in effect that prime retail space—most commonly, the large expanse behind the counter that provides high brand exposure to any customer making a purchase—is wasted.

Tobacco has been called a sunset industry, as sales have been in decline for an extended period. With the sufficient lead-in time that is being provided, the bill could present retailers with a significant opportunity to use the space provided by the departure of traditional tobacco displays to market other high-margin items, as has been done by many forward-looking retailers in Iceland and Canada. That can be seen from the photographs that I have provided.

Finally, experience in countries that have already enacted similar legislation shows that there are many solutions, which can be adapted to fit a wide variety of shop designs. Amendment 6 offers retailers continued flexibility in the way that they comply with the legislation to fit individual store layouts. In Iceland, Tasmania and Canada, cigarettes are now stored in drawers next to the

retail check-out or in overhead storage units that are accessible only to the retailer.

Amendment 6 would tighten the provisions in the bill and, I hope, mean that they will not need to be revisited in future.

I move amendment 6.

**The Convener:** I thank Kenny Gibson for that very full submission.

**Ross Finnie (West of Scotland) (LD):** I very much support Kenneth Gibson's amendment 6. He is right: if we are going to be consistent, we have to ensure that no opportunities for advertising are overlooked. What Kenneth Gibson is proposing, on behalf of the cross-party group, is correct and consistent. I will therefore support the amendment.

Can the clerk clarify the extent to which parliamentary draftsmen are able to tidy up the bill after a committee has agreed an amendment? Proposed subsection (6), which amendment 6 would insert, refers to the definition of "specialist tobacconist". If the amendment is agreed to, the definition will appear in the new subsection (6), but it will already appear in section 1(3). Can that definition subsequently be put in the definition section, which is section 27, to tidy up the bill?

**The Convener:** We will perhaps see if the minister can answer that. The clerk will come back to it at the end.

**Ross Finnie:** It is only a minor matter.

**Rhoda Grant:** I seek clarification on two points. First, would amendment 6 prevent someone from storing tobacco products in a different room that is not on view to the general public? It would prevent people from having to buy specialised containers if the tobacco products were stored out of view in a different room. A lot of small retailers will have a stock room where they keep tobacco supplies before they put them up on the gantry.

Secondly, would the amendment interfere with the solution proposed by ministers? It refers to "a container", but my understanding is that the solution proposed by ministers is a cover rather than a container. I would be concerned if the amendment had an unintended consequence. If it does, perhaps it should be withdrawn and redrafted to ensure that that does not happen.

**Mary Scanlon:** The previous amendment 43 was seeking clarity, which is understandable.

Kenny Gibson referred to robust, clear primary legislation. We are not privy to the discussions between the ministerial team and retailers. Is amendment 6 necessary?

We have heard from the minister that people will be able to do stocktakes and so on of tobacco products in the shop. One of the briefing papers

from retailers states that Kenny Gibson's amendment 6 is

"impractical for retailers given that they need to restock products, usually several times a day, as well as be able to serve customers with what is, after all, a legal product."

That is a reasonable thing to say.

Before Kenny Gibson sums up, I would be pleased to hear what the minister has to say. Has she discussed the issue with retailers? Has she discussed how they are able to restock? Do they have to close the shop if they want to restock products? That would be impractical, so I would like a bit more clarity.

**Dr Simpson:** I understand the purpose of amendment 6. If we were starting from scratch and tobacco products were new products, it is exactly the sort of provision that we would bring in. My concern is that it is not proportionate at present. I presume that, if the amendment were agreed, the draft regulations, which have already been discussed, and the compromise that has already been reached would no longer be effective. In fact, we would have to go back to square one in discussing all that. I would like that to be confirmed.

There are concerns that the tobacco industry, which is undoubtedly one of the most powerful industries in terms of its capacity to avoid or evade legislation—I do not know which is the correct legal term to use without being libellous. The industry is adept at getting around legislation. Therefore, we must be sure that we will be able rapidly to amend regulations to address those attempts at getting round legislation and developing loopholes. Provided that we can do that, I am minded not to support this amendment, as it imposes a burden on retailers that might be excessively damaging to some small retailers.

As I said, if we had been starting from scratch with a new product, I would certainly have supported the amendment. At the moment, however, I think that we need time, although I will support the proposal if it can be shown that we are not in a position to make rapid changes to the regulations and close loopholes that develop in the compromise that is proposed in the current draft regulations.

**Helen Eadie:** Kenny Gibson has opened our eyes to some aspects that might not have been evident previously. However, it is important for us to hear what the minister is going to say in her response. As Richard Simpson said, we do not want to do anything that will undermine the legislation. Although I am sympathetic to the points and the arguments that have been made—*[Interruption.]*

**The Convener:** As you have just heard, we will shortly observe the two minutes' silence. I propose

that we do so in public session. Members of the committee will stand to observe the silence, and I ask all those in the public area to do so as well—I am sure that I did not need to say that.

**Helen Eadie:** As I was saying, I am sympathetic to the arguments that have been made, but it is important to hear what the minister has to say, as her arguments might deal with the points that Kenny Gibson has made.

**The Convener:** Just to tidy things up, with regard to the point that Ross Finnie made, if Kenny Gibson's amendment is accepted by the committee, the bill could still be amended at stage 3—with an amendment proposed by a member or by the Government—if some technical change needs to be made. It is not really a problem.

In order to avoid the minister being interrupted when she responds, I will suspend the meeting for a few minutes and come back into public session in order to observe the two minutes' silence.

10:57

*Meeting suspended.*

11:00

*On resuming—*

**The Convener:** The committee is back in public session. We will now hold the two minutes' silence.

11:02

**The Convener:** I thank the committee members and those in the public gallery.

We now move on, so that the minister can answer the issues that Kenny Gibson and other members have raised.

**Shona Robison:** Amendment 6 proposes to prescribe how retailers should store tobacco products. Kenny Gibson and I agree that there is no place in modern Scotland for the promotion of tobacco in our shops, and I pay tribute to him for his long-standing drive to expose the tobacco industry for what it really is.

However, a key point, which relates to our previous discussion, is that we are living in difficult economic times. We have therefore been mindful of the impact of the policy on small business. I believe that a number of members, including Ross Finnie, share our concerns about the cost to small business. My job as a minister in the Scottish Government is to weigh up all the issues and interests and take account of all interested parties' views in order to reach a final decision.

Although I firmly believe that there can be no compromise in protecting our children and young

people from the harm of tobacco, I also believe that our solution is proportionate. The solutions that are emerging will protect children and young people from the promotion of tobacco in our shops, while minimising the impact on businesses. We set out from the start to work with retailers to find solutions that comply with the legislation rather than prescribe exactly how tobacco is to be stored, which we want to avoid.

I will answer directly some of the points that members have raised. Rhoda Grant asked about containers. Containers are an alternative to modification of the gantry: shops can either keep the gantry and modify it or store tobacco in containers. We believe, and I have said to retailers, that the gantry should be allowed to remain and that modifications to it can be made, so there are two very different solutions. The cost of requiring retailers to store tobacco in such containers is going to be fairly prohibitive, particularly to small retailers.

Convener, you have dealt with Ross Finnie's question about the technical amendments that would be required at stage 3.

To Richard Simpson I say that the legislation contains the facility for rapid changes to regulations to close any loopholes that might emerge. I hope that I have given reassurance on that.

I have a few things to say about the handout that Kenneth Gibson gave out. Retailers will have to comply with the advertising ban and limits on the size and content of warning notices. For example, if they use a door solution in their gantry, they will not be allowed to leave the door open. Also, I suspect that the display of lighters would not be allowed under the advertising ban because of their association with tobacco products. As the bill stands, we should not be concerned about loopholes in that area, but if some emerge the legislation will give us the ability to revisit them.

On the allowed dimensions of the opening, we will not allow anything like the 1,500cm<sup>2</sup>. We are talking about the maximum size of a packet of 20 cigarettes, which would be no more than 150cm<sup>2</sup>. Any solutions will have to meet that requirement.

On maintenance and cleaning, exemptions are allowed for the normal course of business, but that is exactly what is meant, and any flouting or misuse of that exemption will be quickly identified and clamped down on by trading standards through enforcement of the legislation. To answer Mary Scanlon's point, we will allow maintenance and cleaning to be done during opening hours, but any abuse will be clamped down on quickly. It would not be in retailers' interests to abuse that exemption given that they will know that we could

require them to do the work outwith opening hours.

In short, we are making a judgment call about what is a proportionate response. In the current climate, we must listen to the views of retailers, particularly small retailers. I have no doubt that the big retailers will come up with a solution—we know that they are working on something like a dispensing machine that will meet the legislation's requirements, but they can afford that. Medium-sized retailers will be looking at various options such as openings, drawers and so on. We need to give our attention to what happens in the small retailers such as corner shops. If we give them the flexibility to come up with solutions to comply with the legislation, they will be able to remove tobacco products from display and meet the costs of doing so.

On the basis of all that I have said, I ask Kenneth Gibson to withdraw his amendment.

**Kenneth Gibson:** In Canada, when legislation was introduced, the tobacco industry's support for retailers increased from \$74 million to \$108 million per year, so it is likely that the tobacco industry will meet some of the costs.

I am slightly disappointed by the minister's response, although I am heartened by what Ross Finnie said. I hope that other committee members will reflect on today's discussions before stage 3.

I note Richard Simpson's concern that we should be able to change legislation quickly so that we can eliminate any potential loopholes, although I hope that the legislation will eliminate the number of potential loopholes from the off. That is really the point of my amendment.

I hope that the minister and her colleagues will check whether there are other loopholes that could be closed as we approach stage 3. I do not think that we want to find ourselves in a situation in which we have to continue to revisit the legislation. That would not be in the interests of retailers, the public at large or the health of the people of Scotland.

I emphasised the importance of adhering to the spirit of the law, which I do not think that the minister mentioned in her summing up. We must ensure that the spirit of the law is covered. That is why we must minimise potential loopholes in the bill.

Rhoda Grant had a couple of points of clarification, one of which was dealt with by the minister. The other was about whether amendment 6 would apply to people's storage areas as well as to the front part of the shop. It would apply only to the front part of the shop. If amendment 6 was agreed to, activities such as restocking and stocktaking could be carried out in

the same manner as they could be under the bill as it stands. Regulations will state what is allowed and what is not allowed during stocktaking. Having a requirement to keep tobacco products out of sight through the use of containers or dispensers is likely to make it easier for proprietors to adhere to the law and not inadvertently breach it during restocking.

In the light of members' comments, I will not press amendment 6, but I might want to revisit it at stage 3.

*Amendment 6, by agreement, withdrawn.*

### **Section 3—Regulation of display of prices**

**The Convener:** Amendment 20, in the name of the minister, is grouped with amendment 37.

**Shona Robison:** Amendment 20 seeks to delete from section 3(3) the words "prohibition or". Section 3(1) allows the Scottish ministers to make regulations to "impose requirements" in relation to price lists. However, section 3(3) states that a person commits an offence if the display of prices is in breach of "a prohibition or requirement". The amendment will correct that inconsistency.

Amendment 37 seeks to correct a reference in section 28, subsection (4) of which should relate to subsection (2) rather than subsection (3).

I move amendment 20.

*Amendment 20 agreed to.*

*Amendment 14 not moved.*

*Section 3, as amended, agreed to.*

### **Section 4—Sale of tobacco products to persons under 18**

**The Convener:** Amendment 44, in the name of Richard Simpson, is grouped with amendment 45.

**Dr Simpson:** Section 4 deals with the sale of tobacco products to persons who are under the age of 18. There is a big debate about how to identify people who are under 18. Section 4(3) deals clearly with the documentation involved, but I do not think that section 4(2), which deals with the age that someone appears to be, is sufficiently clear.

Best practice in the industry is moving towards a challenge 21, if not a challenge 25, approach. The provision that says that

"the accused believed the person under the age of 18 ('the customer') to be aged 18 or over"

should be amended to say that the accused believed them to be aged 21 or over. An alternative would be to say, "such age as may be prescribed in regulations", which would allow us to move from 21 to 25, if that becomes the industry

standard. At present, the minimum level of best practice should be that the person should appear to be over the age of 21.

Section 4(2)(b)(ii) says that

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

Amendment 45 seeks to delete that provision because I am deeply concerned that because test purchasing involving children of approximately 16 and a half is now under way, some of those children would be called before the court in order to establish whether they appeared to be over the age of 18. That is not something that we can entertain, so section 4(2)(b)(ii) should be deleted.

I move amendment 44.

11:15

**Ross Finnie:** I oppose Richard Simpson’s amendment 44, but I support his amendment 45. There is a difficulty in setting an offence in relation to an age that is not established as a criminal age. Although a person in a shop might wish to challenge somebody as to their age and say that they are not 21, 25 or whatever, they do so for the purposes of establishing whether they are breaking the law as it stands. The law as it stands is that the customer must be 18. The whole purpose of establishing that age and entering a defence must be related to the law. It would not be proper and correct to specify that a person working in a shop should believe that the customer was 21 or over. They can believe that if they like, but what they are trying to establish is that they are not breaking the law. Although I understand the intention of amendment 44 and I support wholly schemes such as challenge 21, that is not the purpose of the person working in the shop—their purpose is to establish whether they are breaking the law. Therefore, it would not be correct and proper to introduce in statute a challenge 21 proposition, although I understand perfectly where Richard Simpson is coming from.

On amendment 45, I am bound to say to the minister that the three or four paragraphs of great length that she devoted to the defence in section 4(2)(b)(ii) in a response to the committee had a slight touch of, “Methinks the minister doth protest too much.” I was obliged to the minister for telling the committee that our belief that the measure is regressive was not correct and that in fact it might be progress. I accept that small chastisement, but I do not accept the proposition that is contained within it. It does not seem to me that the provision advances how we deal with people. In a trial, clever counsel might want to point to someone and to argue that no person could have suspected that they were under 18.

That takes me back to the first point. We now use opportunities to challenge people who are under 21. If the customer produces evidence that they are over 18, that is the defence for the person working in the shop and that remains the case if they are subsequently charged. Amendment 45 would retain the words:

“the accused had taken reasonable steps to establish the customer’s age”.

That is sensible and it is what we should require. Richard Simpson’s amendment would do just that.

**Shona Robison:** The purpose of amendment 44 is to require retailers to seek ID from any person who is under 21. However, unless we raise the age of purchase to 21, the amendment would mean that if a retailer believed a person who purchased tobacco to be 18 or over and had been shown valid ID confirming that, a defence would not be available. That could have the unintended consequence that retailers would not sell tobacco to under-21s for fear of prosecution, despite their being presenting with valid ID. We believe that the best way of achieving the purpose of the amendment is by working with retailers and advising them on how to avoid selling tobacco to under-18s by, for example, asking for ID from all customers who appear to be under 25. It is a matter for retail policy, rather than legislation. Ross Finnie laid that out very well. On that basis, I ask Richard Simpson to seek to withdraw amendment 44.

On amendment 45, we believe that the no reasonable person defence is a stringent test. It does not cover borderline cases in which there might be opinions either way on a person’s appearance and it is in line with the licensing legislation. In our view, it is just and fair that, in those very limited circumstances, the retailer should not be held to commit an offence. We also take the view that it is preferable to provide for the defence in legislation. If it was removed from the bill, unlike licensing law, we would return to the 1937 position under which, in strict legal terms, retailers would be required to ask for ID from every customer.

I appreciate that there are concerns that young people who are involved in test purchase operations might have to appear in court. We believe that the strict guidance that is in place on test purchase operations gives young people enough protection and should prevent them from being called to give evidence in court. However, we have rehearsed the arguments with the committee before—Ross Finnie eloquently alluded to that—and I believe that members are still not convinced. On that basis, my judgment is not to oppose amendment 45.

**Dr Simpson:** The arguments have been adequately rehearsed. I take Ross Finnie's point and I will not press amendment 44, but I remain unconvinced in relation to amendment 45, so I intend to move that.

*Amendment 44, by agreement, withdrawn.*

*Amendment 45 moved—[Dr Simpson]—and agreed to.*

**The Convener:** Amendment 46, in the name of Richard Simpson, is grouped with amendments 7, 7A, 8, 8A, 47, 47A, 9, 9A, 10 and 59.

**Dr Simpson:** I will speak to my amendments 46, 7A, 8A, 47A and 9A. The other amendments, I think, are in the name of the minister, so I will allow her to lead on those—sorry, if the convener permits that.

**The Convener:** A bit of deference at last.

**Dr Simpson:** In essence, amendments 46, 7A, 8A and 47A propose an escalator within the fee system to increase the fine from level 4 to level 5 in the event of a second offence. I believe that the fines at levels 4 and 5 are currently £2,500 and £5,000 respectively, although the minister might correct me on that. The amendments allow for a progression in the event of a second offence.

I lodged amendment 9A more as a testing amendment, to find out from the minister what will happen when the police try to confiscate tobacco products from an individual who is under 18 and they refuse to comply with the constable's request to surrender the product. The amendment proposes that

"A constable may arrest without warrant any person who fails to comply with a requirement made under subsection (1)".

I lodged it to find out what will happen if the person does not comply.

I move amendment 46.

**The Convener:** I call the minister to speak to amendment 7 and the other amendments in the group, after which I will call Michael Matheson to speak to amendment 8.

**Shona Robison:** I will speak to my amendments 7, 9 and 10 and the non-Government amendments in the group: 7A, 8, 8A, 9A, 46, 47, 47A and 59. This is a big group of amendments, so I hope that the convener will forgive me if I take a little time to go through them.

Amendments 7 to 10 respond to recommendations in the committee's stage 1 report. The committee took evidence on them last week. As members know, the bill rationalises and updates the statutory framework for the sale of tobacco in Scotland, which dates back to 1937. In framing the bill's proposals, and specifically the

new retailer registration scheme, we mirrored much of the legislative framework that exists for alcohol. However, there is a clear desire both within and outwith the Parliament for the law on tobacco sales to be brought even further into line with alcohol regulation, and specifically for more of a balance of statutory responsibility to be created between tobacco retailers and underage purchasers or those who facilitate the purchase of tobacco for underage people. Amendments 7 to 10 do just that.

Amendment 7 makes it an offence for someone who is under 18 to buy or attempt to buy a tobacco product or cigarette papers unless they are specifically authorised to do so by a council officer or constable as part of a test purchasing programme. Of course, we do not take lightly the idea of criminalising young people, but it is unfair for the onus for complying with the law to rest entirely on the shoulders of retailers.

Amendment 7A and the consequential amendment 59 amend the penalty provisions in amendment 7 to provide that a penalty charge or fine need not be paid if the person agrees to go on a smoking cessation course. The amendments also give the Scottish ministers regulation-making powers in that respect.

Although I appreciate the sentiments of Richard Simpson's amendments, I am afraid that they are fundamentally flawed. First, they do not work technically. There is a fixed period for payment of a penalty charge and the amendment is at odds with that. Introducing that option by the time that a penalty or fine had been imposed would be too late. Secondly, it is inappropriate for alternative disposals to criminal penalties to be specifically provided for in individual pieces of legislation. Recent reviews of the summary and regulatory justice system in Scotland have resulted in far greater emphasis across the board on alternatives to prosecution, such as fixed-penalty notices, enforcement authority warnings, fiscal fines and community disposals that could include smoking cessation courses if that was deemed to be appropriate.

Those arrangements apply now to the whole ambit of Scottish criminal law, and any specific rules or guidelines that are felt to be necessary for dealing with offences in relation to specific legislation are set out in guidance. In some cases, that guidance will come from the Lord Advocate; in others, it will be set out in enforcement protocols that have been developed by enforcement and other relevant agencies, including the Crown Office and Procurator Fiscal Service, and that are published by the Scottish Government. That is the approach that we have taken, for example, in enforcing the smoking ban and for test purchasing, and I propose that it should be adopted in relation

to the bill. In the circumstances, I invite Richard Simpson not to move amendment 7A.

Likewise, Michael Matheson's amendment 8 will address the problem of adults seeking to circumvent the spirit of the law by knowingly purchasing tobacco for underage young people. I know, from my discussion with retailers, that that is something with which they are often faced. They are frustrated by the fact that, although they are held to account for their actions through ever-increasing enforcement activity, there is no recourse to the law to prevent someone from buying cigarettes on behalf of young people. Amendment 8 will create a new proxy purchase offence, making it illegal for someone aged 18 or over knowingly to buy or attempt to buy tobacco products or cigarette papers for someone who is under the age of 18. The Government supports the amendment and I urge the committee to vote in favour of it.

Richard Simpson's amendment 8A proposes to amend the proxy purchase offence provisions that are proposed in amendment 8 to provide for penalties for second or subsequent offences to be pitched at a higher maximum level. His amendment 46 proposes a similar approach for the main offence, which is provided for in section 4, of selling to underage young people. We believe that that is inappropriate. As a general rule, it is not the policy to provide different maximum penalties for first and subsequent offences in Scottish statute. Those were abolished or allowed to wither away by paragraph 4 of schedule 1 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995. The legislation sets out the maximum level of penalty. In practice, it is highly unlikely that a sheriff would impose the maximum penalty for a first offence unless there were very special circumstances. We therefore need to determine whether the maximum level of fine that is currently set is appropriate. I have given the matter a great deal of consideration and I am prepared to concede that we should raise the maximum penalty for the offence of proxy purchase to level 5. I therefore invite Dr Simpson not to move amendment 8A or amendment 46. I will lodge a Scottish Government amendment at stage 3 to raise the maximum penalty for proxy purchase to level 5.

Richard Simpson's amendment 47 is a variation on the proposed new proxy purchase offence that is provided for in amendment 8 and would make it an offence for someone aged over 18 to buy or attempt to buy tobacco products or cigarette papers with the intention of selling or supplying them to a person aged under 18. We believe that that is unnecessary, as selling to under-18s is already covered by the bill and supplying without selling seems unlikely. The real harm—buying on behalf of a person who is aged under 18—is

tackled in amendment 8. The provisions in amendment 8 match those that are provided for alcohol in the Licensing (Scotland) Act 2005. Amendment 47 is, therefore, superfluous and I invite Richard Simpson not to move it and not to move the related amendment 47A.

My amendment 9 updates the existing power of confiscation, which has been in existence since 1937. That sends out a very clear message to underage young people that tobacco is a dangerous product that should be avoided at all costs.

11:30

Richard Simpson's amendment 9A proposes to give the police powers to arrest without warrant a person under 18 who refuses to surrender on request a tobacco product or cigarettes. As the provision matches that for alcohol, I am prepared to support the amendment.

My amendment 10 is a consequential amendment arising from the proposed new offences of underage purchase, set out in amendment 7, and of failing to comply with a request to surrender a tobacco product or cigarette papers, set out in amendment 9. As all offences in chapters 1 and 2 may be subject to fixed-penalty notices, the amendment seeks to ensure that such notices are not issued to someone under 16 who breaches the law by buying or attempting to buy cigarettes. In reality, of course, the enforcement authorities will use the range of alternative disposals, such as warnings and so on.

I have almost reached the end of my comments, convener. I stress to members that the amendments on underage purchase, proxy purchase and confiscation represent substantive changes to the bill. As those matters were not covered in pre-legislative consultations, we consulted key stakeholders, including young people, before agreeing to lodge the amendments, and the consultations suggest that there is a strong level of support for strengthening the bill as proposed.

I ask Richard Simpson to withdraw amendment 46 and not to move amendments 7A, 8A, 47, 47A and 59.

**The Convener:** Thank you, minister. You may rest for a moment.

**Michael Matheson:** I am grateful to the minister for explaining my amendment. [*Laughter.*] As members will recognise, amendment 8 is in line with the recommendation in the stage 1 report to make it a criminal offence for a person over 18 to knowingly purchase or attempt to purchase



tobacco with the intention of passing it on to a person under 18.

I welcome the fact that the Government consulted a range of organisations before lodging some of the other amendments to this section. A Scottish Youth Parliament representative made it clear to us that a majority of young people support the proposal to make proxy purchasing illegal. The measure is also widely supported by the retail sector and, as the minister mentioned, ensures that the approach to tobacco control will be similar to the approach to alcohol.

I hope that members will support amendment 8.

**Ross Finnie:** Like Michael Matheson, I am grateful to the minister for explaining everything, as it means that we will not have to go back over those points.

However, I have very real concerns about Richard Simpson's amendment 46, which seeks to differentiate between the punishment for first convictions and that for second and subsequent convictions, and his amendment 7A, which seeks to specify how a court should decide whether a person goes on a smoking cessation course. The amendments might well affect the application of Scots law in a number of very important ways and, indeed, will have severe ramifications for every other piece of legislation on the statute book. If we prescribe in law sentencing policy for a first offence and, in a separate provision, set out how a court should dispose of second and subsequent offences, we will severely bind the judiciary's hands.

I have heard no evidence during consideration of the bill that leads me to support such a move. I know that the Government is considering such proposals for other legislation and that it has been suggested in other submissions. However, on this matter, I have to confess that I prefer the evidence provided by the Law Society of Scotland on a piece by the former Lord Justice General, Lord Cullen, who emphasised the need for the judiciary to have discretion. After all, it is the judiciary who hear the case, look at the facts and consider the accused's particular circumstances.

I perfectly understand Richard Simpson's motives for lodging these amendments, but the fact is that they raise an important matter of principle that is applicable not only to this bill. If we accept the principle in this case, it could easily be applied to other, similar legislation. I am therefore opposed to tying the hands of the judiciary in that way, and I am bound to say that I wholly support the minister's conclusion. We should be concerned about whether the maximum fine that Parliament sets is appropriate in the circumstances, and we can then delegate to the bench the decision about the appropriate point of

the scale at which to fine the person. So the minister's willingness to amend the maximum level of fine for proxy purchasing illustrates perfectly the principle that ought to apply. If Parliament is unhappy about the maximum level of fine, that is the matter that it should address. We should not attempt to tie the hands of the judiciary by setting the exact penalty.

How the court applies the levels of fine is also important. If we suggest that level 3 is to be used only for a first offence and level 4 is to be used for a second or subsequent offence, the implication is that for a second offence the court could only set a penalty that is in excess of the current level 3 penalty. That is an extraordinary position for the court to be in, not having heard the evidence or circumstances of the individual case. As it is a matter of principle, as opposed to making the legislation bear down heavily on those who commit offences through the sale of tobacco, I hope that Richard Simpson will not press his amendments.

On smoking cessation courses, I make the same point. As the minister has made clear, the issue is covered by the Lord Advocate's guidance; the point has been raised. Amendment 7A falls into the category that I discussed and is therefore inappropriate. If the amendments are not withdrawn, I will oppose them.

**Mary Scanlon:** I do not wish to repeat what the eloquent Mr Finnie has just said, but I agree that we should not be prescriptive about the levels of fines; that is a basic principle.

However, I want to put on the record the fact that the policy memorandum says of proxy purchasing that

"A child who starts smoking at 14 or younger is 5 times more likely to die of lung cancer than someone who starts to smoke at age 24 or over".

It is worth putting it on the record that all retailers support the measure, and it was proposed by retailers, so we should thank them for that. It is an excellent point and it illustrates the strong dialogue between us and how we have responded to such a positive suggestion for tackling smoking among young people.

**Helen Eadie:** I have a fundamental and pragmatic question for the minister. I hear what she says about the criminalisation of young people, and that the Lord Advocate will issue guidance. Has the minister had discussions with the court system, particularly the Crown Office and Procurator Fiscal Service, about whether they have the capacity to enforce the legislation and charge the individuals concerned? Taking into account the Crown Office's current workload, does it have the resources to attend to that? That is an important consideration.

I have no qualms about supporting Dr Simpson's amendments 7A and 47, and Michael Matheson's amendment 8, although that obviously depends on whether they decide to press the amendments, given what the minister has said.

I am keen to support amendment 9 in the minister's name, because it will ensure that the police will continue to have the power to confiscate tobacco from those who are under 18. That is currently the case under the Children and Young Persons (Scotland) Act 1937, although the provision will be repealed by this bill. By giving police officers the power to confiscate tobacco products or cigarette papers from anyone who is under the age of 18, tobacco is being brought into line with alcohol and fireworks, which are also age restricted. I also support amendment 9A, in the name of Richard Simpson, and amendment 10, in the name of Shona Robison.

**Shona Robison:** I will respond to Helen Eadie's point as well as I can. The main thrust of the bill is to provide a range of alternatives to disposal before a case goes to court, which will mean that cases can be dealt with much more swiftly and robustly than has been the case to date. The Crown Office and Procurator Fiscal Service sits on an enforcement group that will monitor the implementation of the legislation and be able to pick up issues of concern relating to how cases that come to court are handled. I do not think that I have any further comments.

**The Convener:** If anything comes to mind, I will let you back in.

**Shona Robison:** I have made my main point.

**The Convener:** Richard Simpson is at the starting gate.

**Dr Simpson:** I apologise for not speaking to amendments 7A and 47; I will do so when winding up. My purpose in lodging the amendments that introduce an escalating scale of penalties was not to undermine the Scottish judicial system or judiciary, but to suggest that level 4 is an inadequate level of penalty. I wrote the amendments in a way that would allow the judiciary to choose a fine anywhere between zero and £5,000 on the second offence and zero and £2,500 on the first offence. Having listened to the minister and my colleague Ross Finnie and having been assured that we will move to level 5 for everything, I can withdraw or not move the amendments that deal with escalating fines.

**Ross Finnie:** That is not correct.

**Dr Simpson:** I am sorry?

**The Convener:** Please continue.

**Dr Simpson:** In amendment 7A, my aim was, in part, to put on record the need for smoking

cessation. Mary Scanlon was right to say that, the younger children are when they commence smoking, the more likely it is that they will develop complications. We should seek not to punish people financially but to encourage them to give up smoking. Having heard the minister's arguments and having been assured that the Lord Advocate will issue guidance to ensure that we follow through on the basic principles of amendment 7A, I will not move the amendment.

The purpose of amendment 47 was to ensure that people could not supply product. Amendment 8, which I support, indicates that if someone is outside a shop, is asked to purchase, goes in and purchases, they are committing an offence. The amendment gives the individual the strength in law to say that they do not wish to do that because they would be committing an offence. However, others who are slightly older may purchase product on behalf of mates under the age of 18 and then supply it.

I take the minister's point about selling; amendment 47 as drafted may not be appropriate, because the bill covers that question. I was concerned about the selling of single cigarettes, which does occur—someone may buy a packet of cigarettes and sell them singly to people under the age of 18. From the minister's summation, I understand that that would be banned under the bill. However, supply of the product to someone who has not sought overtly to obtain it by getting someone to proxy-purchase it for them—in other words, by giving them the money to buy it on their behalf—would not be prohibited. I will not move amendment 47 but may return to the issue at stage 3, depending on the minister's response.

**Ross Finnie:** I seek clarification of a particular point. When Richard Simpson was summing up, he indicated that he would not move amendment 47 on the ground that the minister had undertaken to raise the level of offence from level 4 to level 5. I seek clarification on that because, unless I misheard the minister, I understood that, having considered the matter, she suggested only that she would lodge an amendment so that the level of offence referred to in subsection (2) of amendment 8, on proxy purchasing, would increase from level 4 to level 5. I think that that is an important distinction, and I seek clarification on it.

11:45

**Shona Robison:** I, too, was going to try to clarify that point, because it is important that we all understand it. What I proposed was the lodging of an amendment at stage 3 to raise the level of offence for proxy purchasing to level 5. I was not suggesting that the same should happen for the main offence of selling to underage young people

that is provided for in section 4 of the bill. I believe that the level 4 penalty is proportionate, particularly as the retailer can ultimately face a banning order for breaches. I believe that, unlike for proxy purchasing, other, far-reaching disposals can come into play for offences relating to retailers selling to underage young people. It is important that the committee understands that the commitment to a stage 3 amendment is in relation to proxy purchasing only.

**The Convener:** Thank you, minister. I ask Richard Simpson to clarify that he wants to withdraw amendment 46.

**Dr Simpson:** Yes, I do.

*Amendment 46, by agreement, withdrawn.*

*Section 4, as amended, agreed to.*

#### **After section 4**

*Amendment 7 moved—[Shona Robison].*

*Amendment 7A not moved.*

*Amendment 7 agreed to.*

*Amendment 8 moved—[Michael Matheson].*

*Amendment 8A not moved.*

*Amendment 8 agreed to.*

*Amendment 47 not moved.*

*Amendment 47A not moved.*

*Amendment 9 moved—[Shona Robison].*

*Amendment 9A moved—[Dr Simpson]—and agreed to.*

*Amendment 9, as amended, agreed to.*

*Section 5 agreed to.*

#### **Section 6—Prohibition of vending machines for the sale of tobacco products**

**The Convener:** Amendment 15, in the name of Rhoda Grant, is grouped with amendments 48, 48A, 48B, 49 and 17.

**Rhoda Grant:** My purpose in lodging amendment 15 was to allow the new system of radio-controlled vending machines to be tested to ascertain whether it worked. We received evidence that a huge number of jobs would be affected if vending machines were banned. In my opinion, vending machines are safe and secure ways in which to sell tobacco products, because the alternative is that pubs and the like would have to store tobacco products behind the bar and out of sight. Amendment 15 would give ministers the power to ban vending machines at a later date through subordinate legislation. That power would then put the onus on operators and licensed premises to make the new radio-controlled system

work; otherwise, they would face a ban that would be introduced through subordinate legislation.

Amendments 48, 48A, 48B and 49 seek to achieve the same purpose as amendment 15. Although I will move amendment 15, I am keen to listen to the debate on the other amendments because, in my opinion, they may better achieve what I set out to achieve in amendment 15. I will therefore listen to the debate and, depending on the issues raised in it, consider thereafter whether to press amendment 15 and move amendment 17.

I move amendment 15.

**Mary Scanlon:** Amendment 48 proposes to exempt from the ban vending machines that are remote controlled—including those that are radio controlled—and based in licensed premises.

The committee's stage 1 report states:

"The Committee notes the arguments that a ban on cigarette vending machines may have an economic impact on the licensed trade but recognises equally the opposing arguments".

Tobacco vending machine sales account for less than 1 per cent—it is estimated to be 0.8 per cent—of tobacco sales in Scotland.

As a Highlands and Islands MSP, I am concerned about the impact of the proposed ban throughout Scotland, especially in remote and rural areas and on the islands. The proposed ban has raised concerns particularly because of the closure of many filling stations, small village shops and post offices and the huge reduction in applications for licensed premises. In Orkney and Shetland, the number of such applications has reduced by more than 30 per cent. All those developments put more pressure on the licensed premises that remain open.

Staff training on the sale of alcohol is now probably the best that it has ever been, given the provisions of the Licensing (Scotland) Act 2005 that came into force on 1 September. The same staff would judge both whether a person was of an age to buy cigarettes from a vending machine and whether a person was old enough to be sold alcohol.

Scotland has 14 independent vending machine companies, which operate on 1,500 sites and employ 28 staff. By contrast, the explanatory notes on the bill state:

"The Scottish Government is aware of only one company operating in Scotland".

They go on to state:

"all staff employed in Scotland, totalling 14, would have to be made redundant."

Therefore, the estimated total number of job losses resulting from the bill is around 42.

On average, cigarettes purchased from a vending machine are 36 per cent more expensive than those purchased from a shop. Therefore, it is unlikely that young people with limited disposable income will choose to purchase from a vending machine.

Amendment 48 proposes that remote-controlled vending machines should be allowed, but only in licensed premises. The device will be demonstrated in Parliament—not until tomorrow, unfortunately—although it is not yet available in Scotland. After the customer has provided proof of age, staff would use a remote-control device, or radio-frequency control system, to send a signal that would activate the machine to permit a single vend. As I said, the system will be demonstrated in Parliament tomorrow, so I hope that MSPs from all parties will take the opportunity to see it in operation prior to stage 3 of the bill.

In written evidence, the largest Scottish independent company providing tobacco vending machines states:

“Banning vending machines will just put me out of business and make my staff unemployed without making any real difference to young people smoking.”

The company goes on to state its disappointment that the Scottish Government is not prepared to consider alternative ways of preventing underage smokers from purchasing from vending machines, such as through the use of the remote-controlled or radio-controlled machines that Rhoda Grant and I have highlighted.

The vending machines that are operated by such companies are located in licensed premises such as pubs, social clubs, golf clubs and bowling clubs, where the clientele is generally over the age of 18. Remote-controlled vending machines are used in several European countries, including Spain and Portugal.

Amendment 48 would ensure that the bill gave the same consideration to the needs of people in all communities throughout Scotland, particularly those in remote and rural areas.

**Dr Simpson:** I lodged amendments 48A and 48B in case the committee chose to agree to amendment 48, which is in the name of Mary Scanlon. If amendment 48 is agreed to, it should be made much tougher. One default should be enough for the machine to be removed. Amendment 48B would allow the minister to repeal the provisions on remote-controlled machines completely and institute the ban that was originally intended.

I start from the premise that I completely support the ban on vending machines. We are considering the potential for allowing a period of time to elapse to allow people to make adaptations. It seems to me that we are faced with a choice of having a

rather lengthy period before the ban comes in or allowing the experiment with remote-controlled machines to proceed.

I listened to Mary Scanlon. To say that golf clubs do not have young people in them—

**Mary Scanlon:** I used the word “generally”.

**Dr Simpson:** In the spirit of our pathways into sport report, we hope that there will be many young people in golf clubs. I have been in the premises of clubs to which I belonged as a junior on many occasions. Therefore, I am not sure that I can accept what was said.

I do not support Rhoda Grant's amendment 15, unless it allowed the minister, if she wished, to do the whole thing by regulation. I would prefer to include the ban in the bill.

**The Convener:** We will not inquire about your handicap in the past or your current handicap—that would be too much information.

**Helen Eadie:** I, too, start from the premise of supporting a total ban on vending machines. The committee has already agreed to the general principles of the bill, as members did during the stage 1 debate in the Parliament, and those principles include a ban on cigarette vending machines. We heard strong arguments in the stage 1 debate in support of a ban on cigarette vending machines, which are a big source of cigarettes for young people. By banning them, we can reduce the availability of cigarettes to young people.

Various figures have been bandied around. I remember the evidence that we heard from the tobacco companies. They said that they had not been consulted, but the Government said that they had. At the end of the day, we were convinced that there was a communication problem with the tobacco companies.

I recall that 56 jobs throughout Scotland are involved. That was the last figure that I read.

As with everything in life, a value judgment about what we prize most highly must be made. Do we value most highly people's lives, which are being put at risk through the availability of cigarettes? On Mary Scanlon's point about remote-controlled vending machines, at the Edinburgh Playhouse and other big, busy theatres around Scotland, a person can wait in a queue three or four deep to be served. How can we possibly expect busy bar-tending staff to check the veracity of someone's age in such circumstances?

If I am available tomorrow, I will go along to see the remote-controlled machine, but it is a great pity that we have not able to see it before now. That said, I am not inclined to support any moderation of the ban on vending machines. There should be

a total ban on them. I am listening to the arguments, but I feel strongly about the matter.

**The Convener:** I am interested in your confession about waiting in long queues for drinks. I am delighted that we are finding out interesting little nuggets about people during a very technical and businesslike committee meeting.

**Ian McKee:** I support the arguments for a total ban on vending machines that Richard Simpson and Helen Eadie have made. Perhaps I would be a little more sympathetic to the other arguments if there was not an enormous amount of evidence from throughout Scotland that the people who have vending machines in their premises and those who supply them are not in the slightest bit interested in keeping them away from young people. I have been in many premises in Scotland, including in the Highlands and Islands, in which the vending machine has been totally out of sight of the bar and young people could therefore purchase from it. Some young people have a considerable amount of money available to purchase things, and we have already agreed that many of them purchase single cigarettes. I think that people who sell single cigarettes put quite a high premium on them.

I also agree with Helen Eadie about the use of radio-controlled vending machines. It is not just a question of a young person queuing up and proving their age before the button is pressed to allow one packet of cigarettes to come out, because what is to stop an even younger person hanging by the machine until the button is pressed? The machine could easily be out of sight of the bar staff if a lot of people were in the bar, and the person who had given evidence of their age could say to the staff, "Look, I didn't get my packet. I want it now." There is plenty of scope for deception. The only answer is to take the vending machines away, and I support doing that.

12:00

**Shona Robison:** I will speak to amendments 15, 17, 48, 48A and 48B.

I was pleased to note from the committee's stage 1 report that most members of the committee agree with an outright ban on the sale of cigarettes and other tobacco products from vending machines. As I made clear to the committee before, I have a fundamental problem with a dangerous and addictive age-restricted product such as tobacco being sold from a self-service machine. Therefore, although I certainly do not take any job losses lightly, we conclude that a complete ban is the only way to be sure that under-18s do not access cigarettes from that source.

Mary Scanlon suggested that vending machine cigarettes are too expensive for young people and that the fact that the machines are in licensed premises prohibits young people from accessing them. That is not the finding of the survey this year in Oban, in which 23 sales from 25 machines based in licensed premises were found to have been to people under 18. That suggests to me that young people have no difficulty in accessing vending machine cigarettes.

I remain convinced that an outright ban is the right approach and see no justification for watering down our proposals as the amendments in the group would do. We are talking to vending machine companies about lead-in times and I am sympathetic to giving them the longest possible time to explore diversification.

Amendments 15 and 17 propose that the Scottish ministers take a power to regulate on cigarette vending machines, rather than the bill banning the sale of tobacco products from such machines outright. Amendment 48 takes a slightly different tack and proposes that vending machines that are fitted with remote-control disabling mechanisms be permitted if they are sited in licensed premises and are operable only by remote control by the person managing the premises or a member of staff. Amendments 48A and 48B appear to want to reduce the impact of amendment 48, including by giving Scottish ministers powers to repeal the provisions by negative resolution.

The easiest and cleanest way takes us back to the committee's judgment that a complete ban was the right way forward. Continuing to allow vending machine sales would undermine the shift in cultural attitudes to smoking that we all want to achieve. Therefore, I ask Rhoda Grant to withdraw amendment 15 and not to move amendment 17; Mary Scanlon not to move amendments 48 and 49; and Richard Simpson not to move amendments 48A and 48B.

**The Convener:** Normally, I would ask only the member who has the lead amendment—in this case, Rhoda Grant—to wind up. However, as Mary Scanlon also made some substantive points, I will let her make some further comments and will then ask Rhoda to wind up.

**Mary Scanlon:** The minister referred to self-service machines, but the machines to which amendment 48 refers would not be self-service machines. I do not wish to go over the points that I have explained.

Ian McKee makes a good point. Many vending machines that are in corridors, for example, are not within sight of the bar. If the onus is on the bartender to make the judgment, the machine should be within their sight, so I accept that point.

We have been told about the remote-control system, which sounds excellent. Some of my colleagues have seen it in operation when they were on holiday, and I believe that it was demonstrated at a Holyrood conference recently. It is unfortunate that committee members have not been able to see the radio-controlled device in operation.

Given that we are all in favour of making the proxy purchasing of cigarettes an offence, I suggest in response to Ian McKee and Helen Eadie that someone who purchases cigarettes from a vending machine and hands them over to someone who is under age is, in fact, committing that offence.

I would still like to go ahead and move my amendments—at the appropriate time, of course.

**The Convener:** I will come to that, Mary.

**Rhoda Grant:** I might not have made this clear enough in my opening remarks, but the fact is that, in many licensed premises, the alternative to vending machines is to stock cigarettes behind the bar, which under the bill would not be illegal as long as they were kept out of sight. My concern is that, in family-run pubs, such a system puts a temptation in front of the young people of the family who might have direct access to those cigarettes. Of course, they might not take them for themselves, but they might be open to peer pressure and bullying and there would be simply no check on the matter. On the other hand, vending machines are very secure and young people cannot access them without someone to operate the radio control or put the money in.

I understand and respect the views and opinions of other committee members on this issue. All I am asking is that we look at and test these machines. The amendments that have been lodged by Mary Scanlon and Richard Simpson would still allow the minister to introduce a ban through subordinate legislation, so the onus would be on the industry to get its house in order and make the system work. If it failed to do so and young people were still accessing cigarettes through radio-controlled vending machines, the minister could then ban them.

I understand what the committee is doing, but I want to make it clear that these amendments would still allow vending machines to be banned if there were no substantial changes to their operation.

**The Convener:** So you are pressing amendment 15.

**Rhoda Grant:** I seek leave to withdraw amendment 15 in favour of amendments 48, 48A, 48B and 49.

*Amendment 15, by agreement, withdrawn.*

*Amendment 48 moved—[Mary Scanlon].*

*Amendment 48A moved—[Dr Simpson].*

**The Convener:** The question is, that amendment 48A be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### FOR

Eadie, Helen (Dunfermline East) (Lab)  
Grant, Rhoda (Highlands and Islands) (Lab)  
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

#### AGAINST

Finnie, Ross (West of Scotland) (LD)  
Grahame, Christine (South of Scotland) (SNP)  
Matheson, Michael (Falkirk West) (SNP)  
McKee, Ian (Lothians) (SNP)

#### ABSTENTIONS

Scanlon, Mary (Highlands and Islands) (Con)

**The Convener:** The result of the division is: For 3, Against 4, Abstentions 1.

*Amendment 48A disagreed to.*

*Amendment 48B moved—[Dr Simpson].*

**The Convener:** The question is, that amendment 48B be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### FOR

Eadie, Helen (Dunfermline East) (Lab)  
Grant, Rhoda (Highlands and Islands) (Lab)  
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

#### AGAINST

Finnie, Ross (West of Scotland) (LD)  
Grahame, Christine (South of Scotland) (SNP)  
Matheson, Michael (Falkirk West) (SNP)  
McKee, Ian (Lothians) (SNP)

#### ABSTENTIONS

Scanlon, Mary (Highlands and Islands) (Con)

**The Convener:** The result of the division is: For 3, Against 4, Abstentions 1.

*Amendment 48B disagreed to.*

**The Convener:** The question is, that amendment 48 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### FOR

Grant, Rhoda (Highlands and Islands) (Lab)  
Scanlon, Mary (Highlands and Islands) (Con)

#### AGAINST

Eadie, Helen (Dunfermline East) (Lab)  
Finnie, Ross (West of Scotland) (LD)  
Grahame, Christine (South of Scotland) (SNP)  
Matheson, Michael (Falkirk West) (SNP)

McKee, Ian (Lothians) (SNP)  
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

**The Convener:** The result of the division is: For 2, Against 6, Abstentions 0.

*Amendment 48 disagreed to.*

*Amendment 49 moved—[Mary Scanlon].*

**The Convener:** The question is, that amendment 49 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**FOR**

Grant, Rhoda (Highlands and Islands) (Lab)  
Scanlon, Mary (Highlands and Islands) (Con)

**AGAINST**

Eadie, Helen (Dunfermline East) (Lab)  
Finnie, Ross (West of Scotland) (LD)  
Grahame, Christine (South of Scotland) (SNP)  
Matheson, Michael (Falkirk West) (SNP)  
McKee, Ian (Lothians) (SNP)  
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

**The Convener:** The result of the division is: For 2, Against 6, Abstentions 0.

*Amendment 49 disagreed to.*

*Section 6 agreed to.*

*Section 7 agreed to.*

**The Convener:** We have done quite well this morning. As previously agreed, we move into private for items 4 and 5.

12:09

*Meeting suspended until 12:14 and thereafter continued in private until 12:30.*





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