

HEALTH COMMITTEE

Tuesday 1 June 2004
(*Afternoon*)

Session 2

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CONTENTS

Tuesday 1 June 2004

	Col.
SUBORDINATE LEGISLATION.....	881
Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (Scotland) Order 2004 (SSI 2004/221).....	881
Feeding Stuffs (Scotland) Amendment Regulations 2004 (SSI 2004/208)	882
Food (Emergency Control) (Scotland) (Miscellaneous Amendments) Regulations 2004 (SSI 2004/210) .	882
Tobacco Advertising and Promotion (Specialist Tobacconist) (Scotland) Regulations 2004 (SSI 2004/211)	882
Primary Medical Services (Consequential and Ancillary Amendments) (Scotland) Order 2004 (SSI 2004/212)	882
BREASTFEEDING ETC (SCOTLAND) BILL: STAGE 1	883

HEALTH COMMITTEE

14th Meeting 2004, Session 2

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Janis Hughes (Glasgow Rutherglen) (Lab)

COMMITTEE MEMBERS

*Mr David Davidson (North East Scotland) (Con)
*Helen Eadie (Dunfermline East) (Lab)
*Kate Maclean (Dundee West) (Lab)
*Mr Duncan McNeil (Greenock and Inverclyde) (Lab)
*Shona Robison (Dundee East) (SNP)
*Mike Rumbles (West Aberdeenshire and Kincardine) (LD)
*Dr Jean Turner (Strathkelvin and Bearsden) (Ind)

COMMITTEE SUBSTITUTES

Robert Brown (Glasgow) (LD)
Paul Martin (Glasgow Springburn) (Lab)
Mrs Nanette Milne (North East Scotland) (Con)
Ms Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

David Barrie (Dundee City Council)
Vivienne Brown (Fife Council)
Malcolm Chisholm (Minister for Health and Community
Care)
Mike Dailly (Govan Law Centre)
Dr Linda de Caestecker (Scottish Executive Health
Department)
Gillian Grant (Perth and Kinross Council)
Dr Pat Hoddinott (University of Aberdeen)
Ellen Kelly (City of Edinburgh Council)
Jan Marshall (Scottish Executive Legal and Parliamentary
Services)
Kay Sillars
Elaine Smith (Coatbridge and Chryston) (Lab)
Jenny Warren (National Breastfeeding Adviser)
Joanna Wright (Scottish Executive Health Department)

CLERK TO THE COMMITTEE

Jennifer Smart

SENIOR ASSISTANT CLERK

Tracey White

ASSISTANT CLERK

Roz Wheeler

LOCATION

Committee Room 1

Scottish Parliament

Health Committee

Tuesday 1 June 2004

(Afternoon)

[THE CONVENER *opened the meeting at 14:01*]

Subordinate Legislation

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (Scotland) Order 2004 (SSI 2004/221)

The Convener (Christine Grahame): I welcome everyone to the 14th meeting of the Health Committee this year. I also welcome the Minister for Health and Community Care, Malcolm Chisholm, and Martin Reid, who are attending the committee for the first agenda item.

I refer members to the paper on the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (Scotland) Order 2004 (SSI 2004/221). The Subordinate Legislation Committee has made no comments on the instrument. Before I ask the minister to move the motion to approve the order, David Davidson has some comments to make.

Mr David Davidson (North East Scotland) (Con): I will be brief because the committee has a long day ahead of it. I do not support the order, for reasons that I have stated previously. There are ways to preserve public health that are acceptable to the European Union and the Food Standards Agency Scotland without damaging the economy, so I will not support approval of the order.

The Convener: Thank you. Does any member want to comment on the order?

Members *indicated disagreement.*

The Convener: In that case, minister, will you move the motion please?

The Minister for Health and Community Care (Malcolm Chisholm): Today's debate concerns an emergency order to ban the harvesting of king scallops in waters off Orkney. The order has been triggered because amnesic shellfish poison has been found to be above the action level set by Europe.

The measure is for consumer safety and public health because shellfish that contain high levels of the toxin can cause illnesses in humans. The effects can range from nausea, vomiting and headaches to short-term memory loss and, in extreme instances, death.

I move,

That the Health Committee recommends that the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (Scotland) Order 2004 (SSI 2004/221) be approved.

The Convener: The question is, that motion S2M-1353 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Hughes, Janis (Glasgow Rutherglen) (Lab)
Maclean, Kate (Dundee West) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)

AGAINST

Davidson, Mr David (North East Scotland) (Con)

ABSTENTIONS

Grahame, Christine (South of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)

The Convener: The result of the division is: For 5, Against 1, Abstentions 2.

Motion agreed to.

That the Health Committee recommends that the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (Scotland) Order 2004 (SSI 2004/221) be approved.

Feeding Stuffs (Scotland) Amendment Regulations 2004 (SSI 2004/208)

Food (Emergency Control) (Scotland) (Miscellaneous Amendments) Regulations 2004 (SSI 2004/210)

Tobacco Advertising and Promotion (Specialist Tobacconist) (Scotland) Regulations 2004 (SSI 2004/211)

Primary Medical Services (Consequential and Ancillary Amendments) (Scotland) Order 2004 (SSI 2004/212)

The Convener: There are four negative Scottish statutory instruments. I refer members to the paper that was circulated. The Subordinate Legislation Committee has no comment in relation to SSI 2004/210 and SSI 2004/211 but has commented on SSI 2004/208 and SSI 2004/212. Those comments have been circulated to members. No comments have been received from members of this committee and no motions to annul have been lodged. Is it agreed that the committee has no recommendation to make on the instruments?

Members *indicated agreement.*

Breastfeeding etc (Scotland) Bill: Stage 1

14:05

The Convener: Item 3 is consideration of the Breastfeeding etc (Scotland) Bill at stage 1. The minister is remaining for this part of the meeting. I will allow time for the other witnesses to join him. I remind members that they have an Executive memorandum from the minister.

I welcome Dr Linda de Caestecker—please advise me if I mispronounce your name—the head of the Health Department women and children's unit; Joanna Wright, from the women and children's unit; and Jan Marshall, a solicitor from Scottish Executive Legal and Parliamentary Services.

Shona Robison (Dundee East) (SNP): Minister, will the bill have an effect on breastfeeding rates in Scotland?

Malcolm Chisholm: As the Executive memorandum states, we are certainly very positive about the bill in principle. The bill can be approached from many points of view. I suppose it can be regarded simply as promoting a woman's right to breastfeed—and a child's right to be breastfed—wherever she wishes. That may be the primary argument in favour of the bill. However, I would expect that, in so far as the bill changed attitudes towards breastfeeding to some extent and possibly encouraged more women to do it, the bill would have a positive effect on breastfeeding rates.

As this is the first question, I should just say that there are two parts to the memorandum: a general, positive welcome of the bill in principle; but also a flagging up of enforcement issues that the Crown Office in particular has raised.

The Convener: We will come to those.

Malcolm Chisholm: If you are coming to those issues later, that is all that I need to say by way of introduction.

Shona Robison: I know that we are coming to the enforcement issues later, but I have a general supplementary question on them. How satisfied will you have to be with the responses on the enforcement issues before you are persuaded to support the bill? According to your evidence, if you are not sufficiently satisfied, you will not support the bill.

Malcolm Chisholm: I was going on to make the point previously that it is the Crown Office that has very much flagged up the enforcement issues. I would not in any way seek to tell the Health Committee how to go about its business, but I feel

that witnesses from the Crown Office would have to describe in more detail what their concerns are. I am not a lawyer. I could certainly talk in general terms about the concerns that the Crown Office has raised and I can see, even from a layman's point of view, why the Crown Office is homing in on the definition of "prevents". However, issues about who the accused is, corroboration and so on are very much a matter for the Crown Office.

I am not trying to duck your question, but I am conscious that I approach the issues as a layman. I would obviously have to be guided by advice from the Crown Office on enforcement. That is not to say that I might not challenge or question points that the Crown Office made. However, in general terms, I would have to be guided by what it said about matters such as enforcement.

Shona Robison: As the Minister for Health and Community Care, how do you balance your responsibility to improve the health of the nation—you acknowledged that the bill has the potential to do that—with enforcement issues that a different department has raised? How do you balance those and determine what is most important?

Malcolm Chisholm: That is the nub of the matter as far as the Executive as a whole is concerned. The questions that the Crown Office raised are not academic questions but practical ones. We could take the view that the bill is positive and would have certain beneficial effects. However, if we take the view that the bill could not work in practice—I emphasise "if"—presumably all the good things about the bill would automatically fall because it would not work. That is speaking rather hypothetically, but you will understand the point that I am making. It is only in so far as the bill could be enforced that it would have positive effects.

Mr Davidson: I refer you to the letter that you sent to the committee. I take it that the attached memorandum which, as the letter says, gives "the Executive's view", may be treated as evidence that you are submitting on behalf of the Executive. I would therefore like to press you on how the committee will get the evidence that it requires on enforcement, which is covered in paragraph 8 of the memorandum. You have just said to us that it is not for you to comment on it but, as far as I understand, you are the lead minister on the bill. How will that evidence come to the committee?

Malcolm Chisholm: I am perfectly happy to make comments and the lawyer sitting to my right might also be willing to make comments. However, I will preface them with the caveat that many of the matters that have been raised on enforcement are legal points that have been raised by the Crown Office, about which I do not necessarily have detailed knowledge or experience. I am quite happy to try to answer questions, but I imagine

that it would be helpful to take separate evidence from Crown Office officials if the committee wishes a more detailed legal explanation, rather than a more general, layman's explanation, which I am quite happy to—

Mr Davidson: It is not for me to argue about the procedures, which is the job of the convener, but this is supposed to be our final evidence-taking session. If you have somebody with you, then I would be grateful—

Malcolm Chisholm: I would also make the point that—as far as I know—nobody from the Crown Office was invited to the committee. The Executive solicitor with me can obviously speak about the law, but the views in that part of the memorandum come directly from the Crown Office.

Mr Davidson: In that case, convener, could I ask—

The Convener: Just a minute—I have just been trying to confirm whether the Crown Office responded to our call for written evidence. To our knowledge, it did not, but we will check that. This is the last oral evidence-taking session on the bill, but we can have the Crown Office involved at stage 2. However, we cannot deal with the matter today, as this is the last session for evidence at stage 1.

I can confirm that we did not receive a response from the Crown Office. Did you receive a response on the bill directly from the Crown Office, minister?

Malcolm Chisholm: As part of the Executive's consideration, we got comments from the Crown Office to inform our consideration.

The Convener: Well, the Crown Office did not respond to us. We will take that matter up.

Mr Davidson: All that I was going to ask was whether it would be possible to request a piece of written evidence from the Crown Office before the next stage, in advance of decisions being taken at stage 2?

The Convener: There is nothing preventing us from doing that, but we must clarify whether the Crown Office, despite having responded to the minister, did not respond to the committee's call for evidence, which would cause me some concern. We are perhaps at fault ourselves to some extent, for not having thought of this sooner, but this has been exposed as being an area that we will have to investigate further.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): I know that this is the last scheduled oral evidence session on the bill, but there is no pressing reason why we cannot ask someone from the Crown Office to come before us to pursue the matter—and still at stage 1, which is the most appropriate point at which to pursue the

matter. There is no time limit to which we must adhere, as I understand it.

The Convener: We would have to ask the Parliamentary Bureau to defer the stage 1 debate by a week. Could we leave the matter until we see what we get from the Crown Office in the form of a written response? It may be that we will then require to have somebody from the Crown Office before us to give evidence. We want to give the matter proper scrutiny, so we will find the mechanics and the procedures to deal with it. First, we will have to establish what responses we got, and whether we got one from the Crown Office at all.

Malcolm Chisholm: I have spoken to the Lord Advocate, who was willing and keen for his officials to speak to the committee.

The Convener: I am just surprised that we had no notification from the Crown Office.

Janis Hughes (Glasgow Rutherglen) (Lab): As you are aware, minister, the bill seeks

“to make it an offence to prevent or stop a child ... from being fed milk”

in public. Do you think that the use of criminal legislation in this way could lead to negative attitudes towards breastfeeding mothers?

Malcolm Chisholm: Opinion is obviously divided on that. I do not personally share that view, but I accept that some other people might take that view.

Janis Hughes: Given the Health Department's wish to encourage breastfeeding as the best start for a baby, will mothers not be further stigmatised by negative attitudes towards them, which will contradict the Executive's wish to promote breastfeeding?

14:15

Malcolm Chisholm: The bill intends to promote positive rather than negative attitudes. In the end, the effect that one feels that the bill will have is a balance of judgment. However, I tend to the view that it will be positive rather than negative.

Mike Rumbles: There is another point of view. Although most people would like to encourage a positive view of breastfeeding as natural and normal, is the creation of a new criminal offence the right way to go about that? That leads on from the previous question, but from a slightly different angle. Are we not seeking to create another criminal offence that is not necessary? If we are trying to create positive attitudes, why create a criminal offence?

Malcolm Chisholm: The Executive is conducting a programme of work on breastfeeding, which we can describe. Your next

witness is the national breastfeeding adviser, who can do that in even more detail. The bill is by no means the only action that is being taken, but you have to judge whether it would complement or enhance what is already being done, or whether it would be counterproductive. That is entirely a matter of judgment but, having read all the written and oral evidence that has been submitted and given quite a lot of thought to it, I feel that the balance of the evidence is that the bill would be positive, help women and send out a strong signal.

There is some international evidence from states in America that have breastfeeding legislation that breastfeeding becomes more of an accepted part of the culture in such states. That is not to say that a bill is the only way to change attitudes, but there is evidence that a bill would be helpful, although not in isolation.

Kate Maclean (Dundee West) (Lab): You have probably seen the *Official Report* of the committee's last meeting, at which there was quite a bit of discussion around the age limit of two that is in the bill. What do you think of that? If you end up supporting the bill, will you support the age limit?

Malcolm Chisholm: I read with great interest the arguments on that issue. It is not a matter about which I have tremendously strong feelings. I understand the argument that there should not be an age limit, but I also understood the point that Shona Robison made about tactics. I do not have strong feelings, but in principle there probably should not be an age limit. There seems to be some suggestion that one is required to clarify the bill and the law, but I cannot answer that question. I do not know whether my legal colleague can. I see no reason why there should be an age limit in the bill, but I do not have strong feelings about it.

Dr Linda de Caestecker (Scottish Executive Health Department): I agree. It is recommended that women should breastfeed for up to six months exclusively, but there is no reason why they cannot breastfeed for longer.

Kate Maclean: The debate was not about whether people should breastfeed for as long as they want and as long as the mother and child are happy with it. The point is that women are entitled to feed their babies and babies are entitled to be fed wherever they are, but once children get to the age of two or older, the child does not need to be breastfed. Mothers may still be breastfeeding at certain times of day, but a child of that age can and does eat and drink different things, so there is not the same necessity to be breastfed in public. The issue is not how long a mother chooses to breastfeed, but what is appropriate at what age. I would have thought that there are no health benefits from breastfeeding a child in a restaurant or a public place once they are older than two,

because they can drink juice and eat food, and be breastfed at another time.

Dr de Caestecker: That is a reasonable point. We do not have strong views on whether the age should be two, although we do not want to stigmatise women who want to breastfeed for longer than two years.

Mr Duncan McNeil (Greenock and Inverclyde) (Lab): Both the minister and Dr de Caestecker have said that they have no strong views but that they are inclined to go along with the good will for the bill and to legislate in order to promote a campaign for breastfeeding. Would seeing a woman breastfeeding a four or five-year-old in a public place encourage other women to breastfeed? Would that aid the campaign?

Malcolm Chisholm: Shona Robison made that point in last week's meeting—I understand the argument. A tactical judgment must be made but, at the end of the day, the bill is not ours, so we are not required to give a firm view. Jan Marshall might want to give a view, because there may be legal reasons why the age limit should be two. We should hear why that is the case from a solicitor's point of view.

Jan Marshall (Scottish Executive Legal and Parliamentary Services): Ultimately, the matter is a policy one and I understand the objective behind having an age limit. The Crown Office may have a view because the matter relates to prosecution. The view may be taken that, in the interests of legal certainty, there ought to be an age limit so that people know what the criminal offence is and who is liable to commit it.

Mr McNeil: To return to the point, given that we are proposing to take the unusual action of legislating to promote a campaign, we are not simply talking in legalistic terms. Would it aid the promotion of the campaign to give the impression that if a woman begins breastfeeding, they could be involved in that process for four, five or six years? I have spoken to women about the issue and I know that the thought of that would not encourage them to start breastfeeding or to continue doing so.

Malcolm Chisholm: It sounds as if you are making a good tactical point. We must imagine how breastfeeding will be portrayed and what effect the bill will have. The point is relevant. If people want to attack the bill by distorting and caricaturing it, the measure may give them an opening. I understand the argument entirely, but I genuinely do not have strong feelings about the issue—I understand both sides of the argument. Given that the bill is not mine, I do not have to make a decision about the matter at this point.

Dr Jean Turner (Strathkelvin and Bearsden) (Ind): It is difficult to judge how old a child is. I

would love to hear what the legal background would be to prosecuting somebody. Would people look at birth certificates and check whether a child was two years and one day? We are talking about a criminal offence. There are medical reasons why people might breastfeed their child beyond two, but they probably would not want to do it in a public place. We are talking about making it a criminal offence to do it beyond the age of two, but given that young babies can look much older, the bill could create problems for the legal administration.

Malcolm Chisholm: I have nothing further to add. There is a danger that the media will get sidetracked on to the issue. I understand both sides of the argument and I do not have strong views about the issue. The committee and ultimately the Parliament may have to make a tactical judgment.

The Convener: Perhaps the question should be whether your bill would include an age limit. That is a straightforward question.

Malcolm Chisholm: As no work has been done to advance an Executive bill on the subject, I cannot answer that question. All my thinking on the matter has been done in the past week on the basis of the evidence that the committee heard.

Jan Marshall: There was heated discussion about the age limit that was used in the anti-smacking provisions in the Criminal Justice (Scotland) Bill. The analogy is that the discussion was about the criminal offence of smacking a child. There was a lot of debate about where the line should be drawn, if a line was to be drawn. Ultimately, that is a policy matter.

The Convener: We will move on from that. It is another issue that we might want to raise with the Crown Office. We are checking whether someone from the Crown Office will be available next week, and, because Elaine Smith is giving evidence today, we intend for her to have the opportunity to respond to the evidence from the Crown Office, if she is able to come to that meeting as well. That is all hypothetical at the moment, but we are trying to set it up.

Elaine Smith (Coatbridge and Chryston) (Lab): Sorry, convener, do you expect me to come to that meeting as well as give my evidence today?

The Convener: Yes. I expect you to give evidence today, but if we hear additional evidence from the Crown Office, as we probably will, it would be only appropriate to give you the opportunity to respond to it. However, it is all hypothetical; we are trying to arrange it.

Elaine Smith: I do not know about the protocol of this because it is not a point of order, but Jean

Turner talked about the bill making it a criminal offence to breastfeed a child beyond two and the bill does not make that an offence.

The Convener: We will come to that in your evidence to us; you will get your shot at the end.

Helen Eadie (Dunfermline East) (Lab): In spite of all the controversy that surrounds the bill, should it apply equally to bottle-fed babies?

Malcolm Chisholm: My understanding is that that is part of the bill and that that is a change from the earlier version of the bill. I have no objections to that.

Helen Eadie: I will add to what other members have said on whether there should be a new criminal offence. Do you not think that it should be a criminal offence for a mother to be evicted from a big department store for wanting to feed her baby in public and for attendants in the store to say that breastfeeding is not allowed there? If you were a father sitting with a mother who was breastfeeding a baby, you would say, "Gosh, that's a crime. That mother should be allowed to feed her baby in that store. She shouldn't be put out of the store for that." Do you not think that the public will react empathetically towards mothers and that we ought to say that it is a crime for a woman to be put out of a department store? A mother might well find herself in a department store or on a train, as I was when I travelled up and down from London regularly. We are talking not about promoting a campaign, but about the right of a baby to be fed and the right of a mother to feed. It is other people's job to promote a campaign; we are talking about a bill to uphold the human right to be fed.

Malcolm Chisholm: I agree with every word that you have said. That is my view of the bill. The basic reason why I support the bill is because of fundamental human rights. I hope that the majority of people would empathise with the woman in the situation that you described and I would be rather horrified if they did not, but the fact is that some people do not empathise with her, and that is the problem that Elaine Smith is trying to address.

The Convener: I remind members and the minister that the bill refers not to "a mother" but to "a person", so the right will apply to a range of people.

Helen Eadie: The person who was breastfeeding would be a mother.

The Convener: The bill covers bottle feeding as well as breastfeeding, so we must remember that the right applies to a range of people. That may raise issues that we will want to take up with the Crown Office, because it might not be apparent who the person feeding the child is—I am getting myself in knots, but I know what I mean.

Helen Eadie: I agree in the instance of a bottle-fed baby, but the point is superfluous for a mother.

The Convener: That speaks for itself, but I am going where I do not want to go.

Mr McNeil: The bill would place a duty on the Scottish ministers to promote breastfeeding, but I note from your memorandum, minister, that you say that you are doing that already and that you could gain nothing from that provision in the bill. That is why I made my earlier point about whether it is essential for us to promote breastfeeding in public. I believe that there are other barriers to breastfeeding that, particularly in deprived areas, are equally as important as the attitude towards breastfeeding in public, if not more important than it.

The committee needs to be convinced that the bill would change the situation in some of our deprived areas, in which, despite everything that you have in place—you say that you can get nothing out of the bill that would help to promote breastfeeding more—breastfeeding rates are as low as 9 per cent, which compares with 75 per cent in affluent areas.

Section 4 is on the promotion and support of breastfeeding, about which what we are currently doing is not enough. To suggest that it is enough is complacent and to suggest that the bill could not focus or direct the work of the Executive is complacent and not acceptable. That is where I stand on the bill. Given all the benefits of breastfeeding to mothers and children, we should be doing all that we can to promote it. However, is the bill in this form necessary to promote breastfeeding and change the terrible figures in areas of deprivation?

14:30

Malcolm Chisholm: That section of the bill is about the promotion of breastfeeding in general, which we strongly support. I do not say that complacently and I am not saying that we are doing everything that we can do. Nevertheless, significant progress has been made in promoting breastfeeding in Scotland over the past few years, led by Jenny Warren, the breastfeeding adviser, who is your next witness. It is recognised at a United Kingdom level that Scotland has been more proactive in that area.

On the issue that you have raised, action in deprived areas is crucial. In particular, peer support groups are important. I visited a peer support group in Elaine Smith's constituency some time ago. In May, I launched the recent advert on breastfeeding, which you have probably seen on the television, in the greater Pilton area in my constituency. The launch was attended by local women who were acting as peer support for other

women in the area in an initiative that is being promoted by NHS Lothian. That kind of activity is absolutely crucial in the promotion of breastfeeding.

We need to promote breastfeeding as we are doing and beyond that. However, there is a question about whether the bill needs to talk about a specific duty to promote breastfeeding. As members will remember, there is a duty to promote health improvement in the recent National Health Service Reform (Scotland) Bill. The argument could be made—you might regard it as a weak or a strong one—that, if we have a general duty to promote health improvement, we should not pick out one thing. People might ask why only one thing is mentioned in legislation in the context of the promotion of health improvement, with other things left general. However, that is a weak argument. It is not that we do not support the promotion of breastfeeding; it is just that we have already legislated for the promotion of health improvement. Why should we pick out one thing to promote in legislation when we also want to promote physical exercise, healthier diet and so on? That point is made in paragraphs 5 and 7 of the Executive memorandum.

Mr McNeil: You point out a contradiction. You support the general principle of legislating in this area, but you would not necessarily support legislation for other health promotion initiatives. We are singling out breastfeeding. How will the bill change the low level of breastfeeding in deprived areas? How will it assist your programme?

Malcolm Chisholm: I remind you that it is not an Executive bill. We are doing a lot of things to promote breastfeeding, although I am not saying that there are not more things that we should be doing. I do not think that Elaine Smith is presenting the bill as a panacea. We need a range of measures to promote breastfeeding, which perhaps Jenny Warren will be able to describe if we are not asked about them.

The reality is that the bill adds a new dimension to the rights of women and children. It also contains a section about the general duty to promote breastfeeding. You can make a judgment about whether that section would, of itself, help all the other activities in deprived areas, for example. However, I do not think that it would, as we already have a duty to promote health improvement. We also have, as paragraph 5 of the Executive memorandum reminds us, a more general duty, under the National Health Service (Scotland) Act 1978,

"to promote a comprehensive and integrated health care service designed to secure the improvement of the physical and mental health of the people of Scotland."

I do not feel that section 4 will, in itself, make a difference. The distinctive contribution of the bill is

to do with the rights of women and children to breastfeed wherever the mother wishes.

Mr McNeil: Do you agree that, as we have been asked to support the bill, we should have some expectation that it will make a difference in the areas where there is a 9 per cent breastfeeding rate?

Malcolm Chisholm: We have every intention of making a difference and we have been focusing our efforts on that. I say for the third time that we need to do more; it is proving difficult to make progress on the issue. The point that I am making is that we will do more regardless of whether the bill is passed, but the distinctive contribution of the bill is to reinforce the rights of women and children in this area.

The Convener: Are you saying that because of the general duty under the 1978 act no other health legislation has in it sections similar to section 4 of the bill?

Malcolm Chisholm: The National Health Service Reform (Scotland) Bill, which was passed three weeks ago, made more specific the general duty to promote health improvement, but no other bills provide for a duty to promote a particular aspect of health improvement. That is the point that I am making. The other point that I should add to what I just said about the rights of women and children is that the general culture—

The Convener: That is not the point that I am making; I am making more of a technical point. Are you saying that other stand-alone pieces of legislation have in them sections such as section 4 of the bill?

Malcolm Chisholm: No. I am saying that they do not.

The Convener: Right. That is the point that I am making. That is because the provisions in section 4 are caught up in the general duty. That was just a technical point, rather than a substantive point.

Malcolm Chisholm: I think that Jan Marshall wants to say something on that.

Jan Marshall: As the minister said, we have recently amended the 1978 act to reinforce the general duty on health improvement. The convener asked whether there were specific measures, either in the 1978 act or elsewhere, that provide for a specific duty in relation to particular matters. I refer for example to section 38 of the 1978 act, which places a duty on Scottish ministers

“to make arrangements, to such extent as”

they consider

“necessary, for the care, including in particular medical and dental care, of expectant mothers and nursing mothers and of young children.”

Perhaps that is what the convener had in mind.

The Convener: Yes. I just wonder whether you would not include in stand-alone bills provisions such as those in section 4 as a matter of principle because there is already a catch-all general duty. Are you saying that there are such provisions elsewhere?

Jan Marshall: I am unable to assist the committee as to the policy intentions at the time when section 38 of the 1978 act was put on the statute book. Certainly, as the minister has said, the general duties would be sufficient to—

The Convener: I am not debating that. I just wonder whether that prevents our including specific sections in bills, which is much more useful in my view in drawing attention to something than is a general catch-all. It was just a technical point. Perhaps when I read the *Official Report* I will follow that technical argument.

Dr Turner: Minister, do you agree that the bill might enhance the work that you are doing in promoting breastfeeding? You might succeed in promoting breastfeeding of very young children, but something that holds back women from breastfeeding, whether they are wealthy or in a poorer wage bracket, is the prospect of getting back to work and getting out into the real world again. Many women feel that if they were to continue breastfeeding they could not get back among the public, doing their everyday things.

There is possibly a niche for the bill to enhance what the Executive is doing, because although it is doing a lot on many fronts, I know how difficult it is to promote breastfeeding successfully. Not all women can breastfeed and I would hate the bill to make other women feel that they were failures because they could not. However, for those who can, the bill is probably essential in allowing them to get back to work and to their everyday lives. Do you think that the bill would enhance what you are already doing in that respect?

Malcolm Chisholm: It would. Perhaps I was not as clear as I should have been. The point that I was trying to make in the previous series of exchanges was that I did not think that section 4 of the bill would in itself add anything to what we are doing. However, I think that the bill as a whole will do so. I talked about the matter in terms of rights, but the other big issue that I began to talk about a moment ago is changing the culture, which is fundamental. I think that you are talking about a further strand—about making women feel more able to go back to work or to go out to various places that they might not feel able to go to. I believe that the main thrust of the bill will have an important effect in helping to change the culture, by making women feel that they have more freedom to do what they want to do. To clarify the

point that I was trying to make, I do not think that section 4 will do that. It is the central thrust of the bill that will have that general positive effect, whereas the words of section 4 duplicate what we already have in more general legislation.

Shona Robison: I get the feeling that you are a bit half-hearted and woolly about the bill. One minute you are kind of for it and the next you are saying that it will not really do much to improve what we are doing already. I return to what you said about the duty to promote breastfeeding. You said that we are already promoting it, but if people believed that that was the case, surely we would not have the bill in front of us. There is clearly a feeling that not everything that could be done to promote breastfeeding is being done.

We have just had another week of stories and concerns about obesity and we know that breastfeeding is an important tool in reducing childhood obesity. Is there a case for saying that the duty to promote breastfeeding should rise above the more general duty to promote health improvement? How important is breastfeeding compared with other health improvement measures? Do you see it as being at the top of the list?

Malcolm Chisholm: It is extremely important, but a broad range of health improvement measures relating to diet, exercise, smoking and alcohol are all also important. That is my only reservation. It is slightly unfair to use the language that you have used to describe my attitude to the bill, because I have certainly been a lot more positive about the bill than a lot of people might have expected or supposed. I am making the point that there is a broad health improvement agenda and that that is why I might have some reservations about picking one thing out of that general range of measures. However, that does not diminish in any way the importance that I attach to breastfeeding.

You made a good point. All the publicity that, quite correctly, surrounds the issue of obesity provides another argument in favour of breastfeeding. Linda de Caestecker and others can speak better than I can about the evidence for that, but I think that there is certainly evidence that breastfeeding contributes to the attack on obesity.

Dr de Caestecker: As the minister says, we are supportive of breastfeeding because of its health impact, about which the committee knows. However, we support it within the whole context of improving nutrition for children. It is not the case that breastfeeding is the only important part of improving children's nutrition; we must ensure that women wean at the appropriate time with the appropriate foods and that they have access to those foods. Breastfeeding is one part of a healthy

nutrition strategy, but there are many other parts to it.

Shona Robison: Can I ask one final supplementary question?

The Convener: You said that so pleadingly.

Shona Robison: Is it the minister's hope and desire that the Crown Office's concerns be addressed, so that he and the Executive can support the bill?

Malcolm Chisholm: Absolutely.

Mr Davidson: I would like to pick up some of the comments made by the minister and his colleagues about other aspects of nutritional care. If the bill were passed in its current form, it would put a specific duty on you, minister, to promote breastfeeding. If that would require additional resources, how would you feel about the bill telling you what you ought to spend money on and where would you take the money from? In other words, you would be forced to reprioritise your objectives. I reinforce Shona Robison's question, to which your answer was less than specific. Where in the ranking of things do you place the bill and what importance do you place on the delivery of its objectives?

14:45

Malcolm Chisholm: Again, although I would be interested in the legal view of the matter, I am not clear that section 4 would necessarily lead to any of those things. We could argue legitimately that we are promoting breastfeeding, although that is not to say that we could not promote it more.

If we look at what has been done over the past few years, it would be hard to argue that the Executive does not promote breastfeeding. A whole programme of work has been done on the subject, not only centrally but by the boards. Jenny Warren will comprehensively describe that work in the next panel session.

Section 4 makes provision for a general duty to promote breastfeeding and, as a layman, I am not sure what difference it would make. As I said, the Executive promotes breastfeeding. Obviously, we can do more of it, but the wording of section 4 will not, of itself, make us do more of it.

Mr Davidson: Are you saying that the bill is not necessary to achieve the objectives that you have set out to deliver?

Malcolm Chisholm: I am aware that I am repeating myself, but section 4 would not make a difference although the rest of the bill would. In summary, my view is that the main thrust of the bill is in section 1 and it is section 1 that would help to change the culture and have the effect that Jean Turner described. Section 1 enshrines the rights of

women and children, whereas, as I said, section 4 would not, of itself, change anything.

Mr Davidson: In that case, is section 4 not necessary?

Malcolm Chisholm: That is what we have argued in our memorandum. We think that we have the general duties already and that we are promoting breastfeeding. I am perfectly willing to admit that we should promote breastfeeding more, but that is not what the bill says. Section 4 provides for the general duty, which is one that we discharge already.

The Convener: The bill also says that the Executive "shall make arrangements", which is a mandatory duty. Surely that would involve you in reprioritising.

Malcolm Chisholm: I am aware that I am repeating myself again. My comment is subject to legal views, but the reality is that we take action on breastfeeding already. I am not sure whether implicit in section 4 is the requirement for the Executive to spend so many millions of pounds on its promotion.

The Convener: "Shall" is mandatory; the word is not "may".

Malcolm Chisholm: I know, but my point is that we promote breastfeeding already.

Mike Rumbles: I want to develop the point somewhat. You are in favour of section 1, which sets out the right of a person to feed milk to a child under the age of two in a public place. You have just told us that you believe that the Crown Office has a problem with and doubts about enforcement when someone breaches the rights that the bill establishes. You have further confirmed that you think that section 4 is completely irrelevant. Is that a correct summary of your position?

Malcolm Chisholm: I am in danger of seeming to contradict myself, but I am not contradicting myself. The reality is that I could live with section 4, as it would not change anything.

Mike Rumbles: Is the provision good legislation if it does not achieve anything?

Malcolm Chisholm: My view is that, as the memorandum makes clear, section 4 is not necessary. It repeats what is stated elsewhere in law in general terms. Including it in the bill will not, of itself, change anything. At the same time, it does not do any harm.

Mike Rumbles: I want to pursue the point about whether we legislate for public-relations reasons instead of because we want to do something in reality. I think that Duncan McNeil hinted at that. I return to section 1, which is the section that you support whole-heartedly. If we give a person the right in law to feed milk to someone under the age

of two, nobody would have a difficulty with that. The problem that has come to the fore is what should be done if someone steps in to prevent a person from doing that. It is clear from her question that Helen Eadie takes the view that that is a crime. I suppose that that is what the bill is all about. My fundamental question is whether it is right for us to legislate to turn people who do that into criminals or whether our attitude should be that we disapprove of them. I know that the bill is a member's bill and not an Executive bill, but are we in danger of producing a piece of legislation that is basically window dressing?

Malcolm Chisholm: It is not my judgment that the bill would be window dressing. I do not suppose that anyone would support the bill if they thought that it was window dressing. If you have read all the written evidence, you will know that there are some horrific examples of people being told not to breastfeed in certain places. I was horrified that two or three of those cases occurred on health service premises—albeit that, in the main, they involved independent contractors. Given that it was horrifying just to read about that, if we use Helen Eadie's language of empathising with the women concerned, we can understand why people might want to take some action to tackle the problem.

Mike Rumbles: Should the health service be prosecuted for doing that? Is that your view?

Malcolm Chisholm: I gave two or three examples. As far as I remember, they included a dentist's and a general practitioner's surgery. In sections 2 and 3, the bill describes in detail who would be liable in such situations. There is obviously an issue of enforcement and fines; I do not think that we are talking about measures such as sending people to prison.

A judgment has to be made. Given that we think that breastfeeding is a major health issue and that women should be given every support to breastfeed if they want to, there is a reasonable health argument that they should have the backing to enable them to do what they want to do.

Mike Rumbles: My point is not about that but about the penalty. I want to focus on the penalty, not the rights.

Malcolm Chisholm: That is a different kind of legal question. Even a layman such as me can understand the concept that it is difficult to enforce a law if there is not some kind of penalty.

Helen Eadie: Among all the evidence that we have received is information advising us that, in Australia, there is legislation that enables women to breastfeed in public and that, in the United States, women have a right to breastfeed on all federal property. Would it be possible for your officials to provide us with information about other

countries in which legislation has been enacted to give women the right to breastfeed in public?

I would also like to know whether costings of the health benefits have been done. The submissions that we have received suggest that there is evidence that money could be saved through higher rates of breastfeeding. Weimer's 2001 study estimated that, in the United States, \$3.6 billion would be saved if breastfeeding rates increased to 75 per cent at birth and 50 per cent at six months. Those targets were set by the surgeon general. Has the health service in Scotland done any costings of the longitudinal health benefits that would accrue if mothers had the right to breastfeed in public?

Dr de Caestecker: Some evidence has been published on what the health benefits and the savings to the health service would be if more people breastfed. The figures are quite large—they amount to £3 million or £4 million—but they are not completely accurate. They are based on assumptions about reduced numbers of cases of asthma and some of the other problems that we know that breastfeeding can prevent. There have been some research studies on that, although they were conducted a few years ago. I agree that, if breastfeeding rates went up, the savings to the health service could be measured and would be substantial.

The Convener: Do we have the figures for Scotland?

Dr de Caestecker: Jenny Warren, who is a member of the next panel, might be able to answer in more detail on that. I think that the figures are for Scotland, although they might be for the NHS as a whole. I would be happy to look out some of that research and pass it on to the committee.

Helen Eadie: In her evidence, Dr Pat Hoddinott from the Highlands and Islands health research institute said that an action research study had been conducted. Interviews with families revealed that a number of women had been asked to leave cafes, restaurants and shops when they started to breastfeed. One of the issues is poverty. Women in more affluent families, who have cars, can go to their car and breastfeed in privacy there but, for women who do not have a car, the fact that buses are no use for that presents a problem. Should a mother leave her baby screaming its head off or should she allow the bus conductor to evict her from the bus because she is feeding her baby? That raises the question whether it should be a criminal offence to evict a mother from a bus when she is feeding her baby.

Malcolm Chisholm: That is an important piece of on-going research that is being supported by the chief scientist office. That issue should be

considered carefully. I do not disagree with the points that you are making. When Elaine Smith secured a debate on the subject three years ago, the example of someone getting thrown off a bus in Lothian was raised. In my response to the debate, I said that there was nothing that we could do about that, which might be an argument in favour of the bill.

Mr McNeil: In relation to what you said about the situation in GPs' and dentists' surgeries and Helen Eadie's point about what other Governments are doing in that regard, do you have powers at the moment to issue guidance to health service providers that provision should be made for breastfeeding mothers? Do we need legislation to enable you to ensure that that happens?

Malcolm Chisholm: We do not in relation to any health service premises. I am never quite sure about the position of independent contractors. Linda de Caestecker might be able to tell you more about that situation.

Dr de Caestecker: We are asking GPs, dentists and the rest of the NHS to become part of the baby-friendly initiative, which would ensure that they had facilities in which a woman could breastfeed a baby.

Mr McNeil: I just wonder why we cannot simply instruct them to do so.

Dr de Caestecker: We expect NHS boards to have breastfeeding strategies. We talk about the NHS being a good employer and allowing its many female employees to get additional breaks to enable them to breastfeed when they return to work. We expect that to happen, but it is not in legislation.

Mr McNeil: Do you have the powers to instruct the NHS to make it happen?

Malcolm Chisholm: My understanding is that we can instruct the NHS in that regard—if I am wrong, I will write to you to let you know. I am not aware that horrific situations such as the one in the written evidence, which involved someone being asked not to breastfeed in a dentist's or GP's surgery, are happening to any great extent. The fact that dentists and GPs are independent contractors might mean that we are unable to instruct them to act in a certain way. However, I will look into the matter and write to you later.

Dr Turner: Do you agree with the financial memorandum to the bill, which states that the new duty on ministers to promote breastfeeding will not require additional expenditure and that additional costs can be met through the redeployment of current resources? Paragraph 9 of your memorandum to the committee says:

"As we do not know the extent of the problem which this Bill aims to resolve it is difficult to predict the impact upon the police and the courts. However given current birth-rates and breastfeeding rates in Scotland we would predict it would not be substantial."

You then go on to say that it is difficult to assess how much it would cost to ensure that, if the bill were passed, all employers affected by the bill were informed of the new legislation so that they could take the appropriate steps to ensure compliance. Could you clarify your position?

Malcolm Chisholm: Paragraph 9 addresses the consequences of section 1 of the bill, which is the main section. My understanding—and that of the Finance Committee—is that there would not be huge cost implications because it is unlikely that there would be a large number of prosecutions.

The more important point about finance that you raise has to do with the promotion of breastfeeding more generally. As with most health expenditure, there are two parts to that question. There is some central health expenditure on breastfeeding, which we can itemise, but the most significant expenditure on breastfeeding comes from health boards. You will be familiar with those two dimensions from your work on the budget.

I do not think that any automatic financial consequences flow from section 4 of the bill, if that is what you are asking. Obviously, that is a continuum. We are doing something to promote breastfeeding but, as I said before, I do not think that anything in section 4 automatically has millions of pound signs written above it.

Dr Turner: Do you think that your literature covers the issue already? I have seen some posters that promote breastfeeding.

Malcolm Chisholm: We have been proactive in promoting breastfeeding. I hope that Jenny Warren has the opportunity to tell you about that work when you speak to her this afternoon. A lot of work has been done at health board level; nationally, there is the breastfeeding adviser and the Scottish breastfeeding group. NHS Health Scotland, which is funded out of the health budget, has done a lot of promotion work and produced the recent advert.

15:00

The Convener: I think that we have already been over this ground, and I am trying to move the committee along a bit. Mike Rumbles can ask a brief question; I will then invite Elaine Smith to ask some questions.

Mike Rumbles: The financial memorandum states that

"the number of prosecutions is expected to be extremely low."

Do you think that there will be any prosecutions?

Malcolm Chisholm: It is not for me to say, although somebody who recently described to me the situation in a state in America basically said that there were no prosecutions. I think that the intention of the bill is for there not to be any prosecutions, because breastfeeding in public places will become part of the culture. In the American state whose situation was described to me, the woman's ability to say, "This is my right," should stop the offence happening. That is the intention of the bill and that is what we would like to happen, so there will be no need for prosecutions.

Elaine Smith: I return to section 4. Despite the excellent work done by the national breastfeeding adviser and the Scottish breastfeeding group—as you said in response to an earlier question—work carried out at a local level entirely depends on the commitment of local health authorities. As a result, services tend to vary across the country. Jenny Warren might wish to comment on the number of boards that have strategies and on whether all boards have them.

Do you think that the ring fencing of funding could assist in the promotion of breastfeeding? That might relate to Duncan McNeil's point about it being imperative to try to get the breastfeeding rate up. I note that the funding for the peer support projects in Ayrshire and Argyll came out of the social justice budget. Even with section 4, the bill does not put any funding requirements on the Scottish Executive. There are different pockets from which funding could come. Might section 4 help in that regard?

Malcolm Chisholm: That is an important point for us to consider. Jenny Warren produced a good audit of NHS boards' activity, which is available on the web. We can show that there has been a lot of significant activity by NHS boards, the vast majority of which have strategies.

You ask about the extent and implications of section 4. Does it necessarily mean that every board will have to do certain things or that certain sums of money will have to be spent? I may be wrong, but my reading of the measures is that they are written in a general sense and that they do not necessarily imply the ring fencing of funding. There would be implications if ring-fenced funding was specified. If funding is ring fenced for anything, that will ensure that money will be spent on it—no one can dispute that. When we consider the budget, we have discussions all the time about the extent to which we should simply give money to boards and the extent to which we should ring fence funds for specific purposes. An argument can be made for ring fencing funding for any part of health policy, as that means that the centre can ensure that the policy is carried out. Equally, David

Davidson and others will claim that such ring fencing is more centralising control freakery from the centre.

The Convener: David Davidson does not get a right of reply to that comment.

Malcolm Chisholm: That argument can never be won—people get caught whatever they do. The point is that I do not think that section 4 implies ring fencing. My judgment is that, in itself, section 4 will not make a difference in that regard.

Elaine Smith: I move on to the issue of the nanny-state approach. You said that you have been promoting breastfeeding in hospitals and so on, which we know. Having persuaded women to breastfeed, does the state then have the duty to support that choice? To return to the beginning of the process—which now seems many years ago—a lot of people said that the problems that we have been discussing do not exist. The NHS Health Scotland advertisement targets feeding in public places. We have perhaps reached a stage at which we know that problems exist, which we recognise as off-putting for people.

To reiterate, do you have a duty to support and protect breastfeeding in public, having promoted it? What would the Executive do to tackle the issue if the bill were not passed?

Malcolm Chisholm: There is a whole programme of activity for carrying things forward from where we are now, which Linda de Caestecker and Jenny Warren might wish to comment on. Peer support is a key area that we want to develop. We also plan to reform the activities of the Scottish breastfeeding group, which Linda de Caestecker will describe. We certainly want to continue promoting breastfeeding. Whether or not the bill is passed, I hope that the substance of section 4 will be carried out but, obviously, we cannot deal with the substance of section 1 without the bill.

Dr de Caestecker: We are doing a great deal on issues such as staff training, the provision of facilities for breastfeeding and peer support, but changing the level of acceptability of breastfeeding among women in deprived areas is the issue on which we are making least impact. Women are not starting to breastfeed. We have done a lot to support women who start breastfeeding so that they now continue breastfeeding for up to six weeks, but we need to increase the visibility and acceptability of breastfeeding. Many of those young women who have babies will not have seen their mothers breastfeed, so we need to do more work with schools and education departments. The issue is the responsibility not just of the national health service but of other agencies as well. The bill is important because it would help to

increase the acceptability of breastfeeding, so that people see breastfeeding as much more normal.

Elaine Smith: I do not want to hog too much of the committee's time, but I have one final point. At the breastfeeding conference that I spoke at on Friday, the public health director who spoke after me apologised to the health service workers in the room who, as has been mentioned, do a lot of hard work in supporting breastfeeding once it has been initiated—indeed, the importance of their work is indisputable. However, he highlighted the fact that getting women to initiate breastfeeding is far beyond the ability of health service staff. He said that such changes to the culture depend on other things—he mentioned my bill—for which there needs to be a political will if we are to move society towards a breastfeeding-friendly culture. Obviously, such changes take time and do not happen immediately. I accept that the bill is not a panacea and must be part of a multifaceted approach, but do you agree that it could make a difference to initiation rates, given that those are clearly affected by many other cultural attitudes?

Malcolm Chisholm: As I have said already, the bill will certainly help to change cultural attitudes. Of itself, the bill will not change the culture, but we judge that the bill will have a positive impact by helping to do so and by promoting more positive attitudes towards breastfeeding.

The Convener: I thank the minister and his officials for giving evidence today.

While we wait for our second panel of witnesses, I remind committee members that, as I am trying to keep to a timetable for their sakes, it would be helpful if they could keep their questions short. I intend to allow Elaine Smith to ask questions as appropriate at the end of each evidence-taking session. She can sweep up any issues that we might have missed, as we often do.

Before next week's meeting, we hope to receive written evidence from the Crown Office, but it has not yet been resolved whether we will be able to take oral evidence from Crown Office representatives. We should know that by the end of tonight. Depending on members' views, I think that we should take oral evidence from the Crown Office in any event, notwithstanding whether we receive written evidence because—if members are listening to me and I am not speaking to myself—there are too many subtleties involved. If we cannot keep to the timetable, we will seek the leave of the Parliamentary Bureau to postpone the stage 1 debate for another week. The Crown Office evidence is too important to ignore.

That throws up another issue, which is that we have not heard from the Crown Office on the Prohibition of Smoking in Regulated Areas (Scotland) Bill either. We perhaps need to put the

Crown Office down on our list of usual suspects, if I may call our witnesses that.

Mr Davidson: I suggest that the convener write to the Lord Advocate on the committee's behalf to point out how our progress is being thwarted.

The Convener: It is disappointing that the Crown Office did not provide us with a response, but I understand that it did not respond to the minister either. It is not that the Lord Advocate has written to the minister and not to us, so we must not feel peeved, although there may have been a chat or discussion. Nevertheless, now that we have been alerted to the issue, we can write in the terms that I have described. Thank you. That has filled in the time while our witnesses were taking their seats.

I welcome Jenny Warren, national breastfeeding adviser, and Dr Pat Hoddinott, general practitioner and research fellow at the Highlands and Islands health research institute of the University of Aberdeen. Both were present for the evidence that we just heard.

Helen Eadie: The National Childbirth Trust has told us of research that found that hesitation and uncertainty over breastfeeding in public prevented women from choosing to breastfeed in the first place. Do you agree with the general principles of the bill?

Jenny Warren (National Breastfeeding Adviser): I welcome anything that removes a barrier that prevents women from being able to feed their babies in a public setting.

The National Childbirth Trust is right. During the past few weeks, I have made a point of speaking to women from breastfeeding support groups in deprived areas and they clearly feel unable to breastfeed in public because of the hostility that they fear they will meet.

The Convener: I am sure that members will have seen paper HC/S2/04/14/5, which is Dr Hoddinott's written submission.

Mr Davidson: I refer to Dr Hoddinott's paper. To what extent do the witnesses' organisations believe that the current culture is deterring mothers? Dr Hoddinott talks about the number of people who seek privacy and about how that is a vital issue for them, partly because of the intimacy of their relationship with the child and partly because of their inherent embarrassment, even with neighbours and family members. I ask Dr Hoddinott to expand on that, because there are no statistics in her paper that indicate the extent of that finding.

The Convener: Before Dr Hoddinott answers, I apologise for not mentioning Jenny Warren's paper, which is numbered HC/S2/04/14/4.

Dr Pat Hoddinott (University of Aberdeen):

Most of my research has been qualitative research using in-depth interviews, so statistics have not been a part of it. Banff and Buchan is quite a deprived area and has the lowest rates of breastfeeding in Grampian, where the rates are below the Scottish average. It is clear that each woman has her own definition of what is private breastfeeding and what is public. I have talked to women for whom breastfeeding in front of their own mother would be too big a hurdle.

We have set up breastfeeding peer support groups in Banff and Buchan where we invited pregnant women who are interested in breastfeeding to come to meet and talk with breastfeeding mothers. From the point of view of the research, the hidden agenda was to get them to watch breastfeeding. From that work, it came out clearly that women are not very confident about watching breastfeeding. If you observe such a group, you will see women who do not know where to look when they see a woman breastfeeding. However, after they have attended the group a few times, they are able to look slightly more closely. Many women have described to us how that has helped them to breastfeed in what they would call more risky situations—in front of fathers, fathers-in-law and their partner's friends, for example. The groups have been used as a rehearsal for breastfeeding in front of other people. Quite strong research evidence about that is to be published.

Mr Davidson: I know Banff and Buchan extremely well; some of my family come from there. There are two sides to the area: the deprived communities in and around Peterhead and Fraserburgh and one or two of the smaller coastal villages; and the rural hinterland. In your qualitative research, did you find any difference in the levels of acceptance of breastfeeding between the agricultural and coastal communities?

Dr Hoddinott: Yes. When we started the project, the breastfeeding rates were higher in the inland, agricultural communities than they were on the coast. However, we undertook a quantitative project in which we measured before-and-after breastfeeding initiation and duration rates as a result of our peer support programme. Results showed that there was a statistically significant increased rate of breastfeeding at two weeks. What is fascinating is that the biggest increase took place in Fraserburgh, which was the most deprived of the communities and had the lowest breastfeeding initiation rate to begin with. Guthrie data show that, when we introduced the project in 2000, only 28 per cent of women were breastfeeding at seven days. When we ended the project, that figure had increased by 6.8 per cent, which was statistically significant when compared with what happened in the rest of Scotland over

the same nine-month period. That research is unpublished, but we hope to publish it later in the year.

15:15

Mr Davidson: I have a final question. I appreciate that your research has been mostly qualitative. However, have you spoken to business owners and non-breastfeeding mothers in the community or chatted generally to people in the street?

Dr Hoddinott: Only as a GP. I have not done so as part of any qualitative research.

The Convener: Thank you for telling me that that was your final question, David. I think that conveners decide that.

Miss Warren, do you have any comments on this subject?

Jenny Warren: We now have about 150 breastfeeding support groups around Scotland, whereas 10 years ago we had only four. When I carried out a small study into the effect of those groups, the overwhelming message from the women was that being together gave them confidence and enabled them to look at and support one another while they breastfed. We hope that that gives them confidence to do the same when they go out into their communities.

Shona Robison: Dr Hoddinott, you have provided statistics on the percentage of women who feel comfortable feeding in public and so on. However, I see no figures for the number of women who have had bad experiences with public breastfeeding. Did you measure that in your study?

Dr Hoddinott: No, we did not measure that in the Banff and Buchan study. The statistics in my written evidence were taken from the Office for National Statistics' five-yearly survey, which gives the number of breastfeeding women who had problems with breastfeeding in public and the number of bottle-feeding women who had problems with bottle feeding in public.

Shona Robison: During your research, did you gather anecdotal evidence from women about their experiences?

Dr Hoddinott: Yes, very much so.

Shona Robison: What was the general picture? Were bad experiences common?

Dr Hoddinott: A minority of women reported bad experiences, but a majority of women were not even venturing out because they could not go anywhere to breastfeed. Because rural areas and, in particular, towns such as Fraserburgh do not have stores such as Mothercare or John Lewis

and because the supermarkets in those areas are outside town, women tended to shop at weekends with their partner when they had access to a car. The almost universal comment that I heard was, "There is nowhere to go to breastfeed my baby."

Shona Robison: So the barriers that you identified had more to do with comfortable locations for breastfeeding rather than with attitudes that people had experienced or stories that they had heard from other women.

Dr Hoddinott: Negative stories travel fast. All the groups had stories in which women who were breastfeeding were asked to leave restaurants and public places or were asked to go to the toilets. However, we did not measure that quantitatively. Indeed, in small rural communities, it is very difficult to find out the exact number of women who are represented in such stories or whether everyone is talking about the same woman.

Jenny Warren: When women experience problems, they do not complain formally. As Dr Hoddinott pointed out, we do not have a good feel for how often these incidents happen. When, during the 25 years that I have worked with breastfeeding women, I have offered to take the matter up on their behalf in various contexts, they have told me not to. They have not wanted things to be taken forward for various reasons and would prefer not to try to breastfeed in public.

The Convener: I was just thinking about John Lewis and Mothercare. We are happy that they have been mentioned, but perhaps there are other stores, too, although I do not want you to go through them.

Janis Hughes: As it currently stands, the bill would make it an offence to prevent—or stop—a child from being fed milk. Might the use of criminal legislation in such a way lead to a negative attitude towards breastfeeding mothers?

Jenny Warren: The legislation will make women feel confident about going out, as they will feel that they have the right to breastfeed wherever they have a right to be. Equally, a mother who is bottle feeding will feel that she can feed her child in public and be accepted. A few people will always react negatively to such legislation, but they are people who are terribly negative about breastfeeding as things stand. I think that such people will be few and far between.

Dr Hoddinott: I agree. When one considers the research evidence about what works in other countries—in Scandinavia, for example, and in states in America—it is important to remember that multifaceted approaches to promoting breastfeeding through such legislation are often seen as important, as opposed to simply leaving it to the health service to promote breastfeeding.

Mike Rumbles: I suppose that, with the previous witnesses, I fell into the trap of saying that the bill would give a right to people to feed milk to children. Of course, people already have that right under the common law in Scotland, so the bill does not do that. It simply concentrates on one thing—making it a criminal offence to prevent somebody from feeding milk to a child. I want to ask you about that. I think that everybody in the room would agree that the objective is to ensure that breastfeeding is regarded as nurturing, maternal behaviour that should be valued and welcomed by the Scottish people. However, is it right to create criminals through such legislation?

Dr Hoddinott: That is one way of looking at things. We heard earlier that the minister very much hopes that no prosecutions will result from the legislation. Again, I state that it is extremely important to support women in Scotland in being able to breastfeed their babies and in having a right to feed their babies when they are hungry. I support the bill whole-heartedly. Some people might be prosecuted and made criminals as a result of the legislation, but it is a baby's right to be fed breast milk and it is a mother's right to feed.

Mike Rumbles: But do not they have such rights at the moment?

Dr Hoddinott: Yes, but I still think that those rights are not widely acknowledged. Bringing the bill into the public arena will promote and raise the profile of breastfeeding in Scotland, which will benefit the health of mothers and babies.

Jenny Warren: I am not sure that a woman's right to breastfeed her child in a public setting is explicit in law. Breastfeeding can be construed as an indecent act or an act that is likely to promote controversy of some kind—it has even been suggested that it can promote a breach of the peace.

Mike Rumbles: But surely the evidence that we have from the police is that that is not the case.

Jenny Warren: I do not think that the situation is very clear. The police may have said that, but women and people in various public settings are obviously not clear about what the law says and what it does not say. Women have the right to breastfeed under human rights legislation in other countries. In the United States of America, 20 states have made it explicit in law that a woman has the right to breastfeed her baby in public. That was done to make it clear that breastfeeding is not a criminal offence, an act of indecent exposure or an act of nudity.

Clearly, other countries have felt the need to go further than say that breastfeeding is enshrined in human rights. The other side of that is that if a mother has a problem breastfeeding in a public setting in countries in which there is no explicit

legislation—for example, Australia and Canada—she must make a formal complaint to a human rights commission or whatever. That puts the onus on the mother. As I said earlier, many women just want to scurry away—they do not want to face the people who have given them a hard time. I suppose that that is why the women regard the bill's proposals as supportive.

The Convener: The bill does not change the onus, of course, which will still be on the person feeding the child to say that somebody tried to prevent them from doing so. Such prevention would be a criminal offence, so I presume that it would have to rely on the evidential test of beyond reasonable doubt.

Jenny Warren: The women would perceive that they were being supported to—

The Convener: I understand that, but you said that the onus is on women to report the fact that somebody prevented them from breastfeeding. Under the bill, the onus would still be on women to report that someone had tried to stop them breastfeeding. They would still have to report it.

Jenny Warren: There would be differences if the bill became law. For example, the establishment concerned would be able to support the mother in doing something about the situation, whereas, at present, she can be asked to leave.

The Convener: I am also getting at the fact that, because there would be a criminal offence, the evidential test would be that of beyond reasonable doubt, which is quite high. We will obviously have to go into the matter of corroboration in Scots law with the Crown Office.

Mr Davidson: I have a question for both witnesses. If the bill is passed and a criminal offence is created—with all the things that surround that—what percentage increase do you expect to see in the breastfeeding rate in Scotland over the next five to 10 years?

Jenny Warren: I would not hazard a guess, but I wait with interest to see what would happen. The strong message that comes from women almost everywhere in Scotland is that they fear the repercussions of breastfeeding in public. However, if they saw that there was further protection, that might well influence them to breastfeed in public settings. I indicated briefly in my short written submission that, if we interfere with the process of lactation by harassing women about breastfeeding, that can interfere with their hormones in the short and long term and could have an influence on long-term breastfeeding.

Dr Hoddinott: A further point is that once breastfeeding became acceptable in public, we would be more likely to see it on soaps such as *Eastenders* and *Coronation Street*, in which bottle

feeding is the norm at the moment. I undertook research in which I asked women whether they had ever seen breastfeeding on television. The majority had not, although I must admit that the situation has improved greatly with the recent NHS Health Scotland adverts, which were shown during breastfeeding week last year and this year.

We are looking for a cultural shift. As people who work for the health service, we would welcome the support of Parliament and legislation for all the hard work that we do to promote breastfeeding. Once we get breastfeeding on to soap operas, we will be running ahead. However, we are a long way from that and making breastfeeding part of normal, everyday experience is the first step forward.

Dr Turner: I agree with that, although I am supposed to be asking questions.

The Convener: Yes—short questions.

Dr Turner: I have a very short question. What do you think about the bill's stipulation that it will apply only to children who are up to two years old? Do you envisage any problems with that?

Dr Hoddinott: Personally, I do. I feel that having a cut-off age of two will make life very difficult. I believe that it is every women's right to breastfeed her baby regardless of the child's age. Certainly, the World Health Organisation supports breastfeeding for children of two years and older. Personally, I am not in favour of having an age limit in the bill for breastfed children.

The Convener: I remind witnesses that the bill is not just about mothers breastfeeding. It is far broader than that, because it refers to

"a person ... feeding from a bottle or other container".

15:30

Jenny Warren: Many people are unhappy about the inclusion of an age limit. The only reason for the age limit being two years is because the World Health Organisation's "Global Strategy for Infant and Young Child Feeding" refers to "two years or beyond". It was felt that there had to be an age in law.

The Convener: Does not the bill's reference to bottle feeding and feeding from containers muddy the waters? I see a bill called the Breastfeeding etc (Scotland) Bill and think that it is about breastfeeding, but it is not.

Dr Hoddinott: It is important to include bottle feeding.

The Convener: It also refers to other containers.

Dr Hoddinott: Yes, it refers to milk from any container. The bill is about informed choice. I

stated in my written evidence that the trend in the survey from the Office for National Statistics shows that the number of women who are prepared to bottle feed their baby in public has declined since 1990. The percentage of women who did not bottle feed in a public place was 24 per cent in 1990, 26 per cent in 1995 and 35 per cent in 2000, which suggests that the issue is feeding a baby any sort of milk in a public place.

My qualitative research shows that women time their trips to shops in between feeds and also that many women perceive that it is unacceptable to have a crying baby in public—that has not been mentioned at all. They will do anything to avoid their baby crying in a public place because it is hungry. That is an important point to consider in relation to including formula feeding as well as breastfeeding in the bill.

The Convener: Are the figures that you quoted figures for the UK?

Dr Hoddinott: Yes.

The Convener: Can we get figures for Scotland?

Dr Hoddinott: I have not asked the Office for National Statistics for them.

The Convener: Perhaps we should. It would be helpful for the committee to have figures, because we are legislating only for Scotland.

Dr Hoddinott: The survey was conducted when women's babies were five months old. As far as I am aware, the total sample in the UK was 9,492, of whom 2,274 were Scottish mothers.

The Convener: But there may be demographic differences.

Dr Hoddinott: The ONS would be able to separate out those statistics.

Jenny Warren: The problems experienced by families who give formula by bottle are much more likely to be mechanical and practical—for example, some people like to give the bottle of milk warmed—whereas for breastfeeding women the problems are emotional.

Shona Robison: I return to the age limit. Could it not be counterproductive to say that there should be no upper age limit for breastfeeding? You said that in a town such as Fraserburgh breastfeeding rates are low. If the legislation was perceived as enabling or allowing a woman to breastfeed a child of school age, for example, would that enhance the breastfeeding rates in Fraserburgh or elsewhere, or could it be counterproductive to encouraging women to breastfeed?

Dr Hoddinott: One of the strengths of the peer support groups that we have set up in towns such as Fraserburgh is that those matters are openly

discussed. The groups are woman-centred. There is no doubt that, for some women, seeing an older child—even one who is much younger than a school-age child, for example a 10-month-old baby—being breastfed is off-putting. However, that is partly because so little breastfeeding is visible in our communities. Once it has been seen once, twice and three times, it becomes more acceptable.

I still feel that to have an arbitrary cut-off age of two years is not constructive in conveying the overall message that we are trying to get across, which is that breastfeeding one's baby for any length of time is of positive benefit to the baby's health.

Shona Robison: At what age does a child stop being a baby?

Dr Hoddinott: I cannot answer that question. When does an infant become a baby?

Shona Robison: That is important, because we are making legislation. You refer to a baby, but I would not describe a three-year-old as a baby. What is your definition of a baby?

Dr Hoddinott: I would say that a baby is under a year old and an infant is aged between one and two years and becomes a child after two years. That needs further consideration, but I return to the question of human rights. It is every mother's right to feed her baby in the way that she chooses in a public place. It is also the right of every baby, infant or child to be fed by its method of choice in a public place, given that a child of three will have a preference.

The Convener: My point was about allowing for breastfeeding and bottle feeding to be covered by the same legislation. One can see that society might have objections to somebody breastfeeding a child over the age of two, but not to feeding three or four-year-olds from a bottle or cup. That is a problem with the bill. When Elaine Smith gives evidence, I will ask her whether bottle feeding was covered in the first bill. That point causes a problem in the legislation, which, as Shona Robison, Mike Rumbles and others said, makes prevention of breastfeeding in public a criminal offence. We cannot be casual about definitions.

Do you believe that the mixture of definitions—references to formula milk, containers and “a person” rather than the mother—make it more difficult to legislate? If we had kept to the words “mother” and “breastfeeding”, we could have done something.

Dr Hoddinott: It is absolutely crucial that the bill is supported and passed. If that entails including a cut-off age of two years, I support it. I would support whatever it takes to get the bill passed. I do not feel strongly enough about the age issue.

The Convener: I asked you about restricting the wording to “mother” and “breastfeeding” and removing references to “a person” and bottle feeding.

Dr Hoddinott: I have concerns about taking out references to “person” and “bottle” from the point of view of fathers and partners. I would hate to see legislation that increased the gender divide in families.

Mike Rumbles: The convener used the word “casual” about the bill—we cannot ask casual questions or have casualness from the people who answer the questions. The bill does not give rights to women to breastfeed. We should consider what deputy chief constable David Mellor of the Association of Chief Police Officers in Scotland said: breastfeeding constitutes neither an affront to public decency nor a breach of the peace. It is, in effect, a mother's right and her freedom of choice to breastfeed in public, and that is covered by Scots common law.

The bill focuses specifically on making it

“an offence deliberately to prevent or stop a person in charge of a child from feeding milk to that child in a public place or on licensed premises”,

which is contrary to common-law rights. I am conscious that today's questions and answers have focused not on what the bill is about, but on giving rights to people that they have already.

Jenny Warren: Most breastfeeding is baby led. Indeed, most feeding is child led, because children behave differently around food and they have different nutritional needs from the rest of us. Therefore, often it is babies who make the request to be fed, please, and feeding is not something over which the parent or other person has much control. That is particularly true with breastfeeding. We have all been happy to see children being silenced by getting the food that they request—they can be very noisy if their needs are not met.

Mike Rumbles: You have not answered the point that I was making. We have to examine the bill that is before us, which focuses specifically on making it a criminal offence to prevent somebody from exercising rights that they already have. I am not terribly happy with the responses that we have received, which seem to indicate that people think that the bill gives rights, which people already have. That is the point that I asked you to address.

Dr Hoddinott: We have heard countless stories from women about their being asked to leave a place when their baby is hungry—they have not been allowed to exercise their right to feed. It is important to address that. I support the bill because it would make people into criminals for asking a woman to leave premises.

Mike Rumbles: That is exactly what I am focusing on. We must be clear that the bill would not give people rights.

The Convener: I cannot stop myself from saying that the bill mentions "a person", not "a woman". The focus is much broader. I know why the witnesses are focusing on women, but the bill is about more than that.

Janis Hughes: The witnesses may have heard the minister's view that section 4 is unnecessary because breastfeeding is already promoted. What is their view about placing a duty on ministers to promote breastfeeding? Is section 4 necessary?

Jenny Warren: It would lend further support to the work that has been going on since the early 1990s and which is gathering momentum. The bill would contribute to, support and help to inform that work, but the minister was correct to say that much work is already going on and is bearing fruit. Women in Scotland are now more likely to continue breastfeeding than are women in any other area of the UK. Scotland is looked up to by every other country in the UK because we are making an effort and being innovative in supporting breastfeeding.

Janis Hughes: Will you elaborate on how the duty would be carried out? You are working to promote breastfeeding, but what work would be done if a statutory duty was placed on the Executive to promote breastfeeding, as defined in the bill?

Jenny Warren: The appropriate people would get round a table to discuss what further work should be done. The measure would create a focus, but that work is likely to be going on already. If the measure was introduced and there was an onus on the Scottish Executive to introduce a change, the important point would be that all the parties would get round the table. We are trying to include people from further afield. As has been said, we are trying to promote breastfeeding not only as a health issue but as something for which we are all responsible. Increasingly, that is happening, but section 4 would be a further spur to the current work.

Janis Hughes: To be clear, you think that more could be done that is not already being done.

Jenny Warren: Because of the nature of my commitment to my work, I would always say that there is more to be done. I take opportunities to make that known, fairly bluntly at times, to those who need to know.

The Convener: The minister's submission states that section 4 is unnecessary because the general duty under the National Health Service (Scotland) Act 1978 suffices. He also states that he would

"question the message that the introduction of duties in relation to a specific health improving behaviour"—

that is, breastfeeding—

"sends out in relation to other aspects of healthcare—ie are they less important?"

Will you comment on that?

Jenny Warren: Because of the nature of my post, I focus on infant feeding. A lot of research has shown that how we are fed as infants and small children has a huge impact on our health, not only at that time but possibly throughout life. The Dundee study, as we all call it, has been going on since the late 1980s. Researchers are finding that formula-fed children—and, in particular, children to whom solid food was introduced early—have higher blood pressures, are fatter and have higher cholesterol levels. It looks as if the impact of infant feeding on adult health is greater than we previously thought. Therefore, optimal infant feeding deserves our focus as part of healthy eating. There is a campaign on healthy eating and healthy living; perhaps breastfeeding can be slotted into that. Such things should be discussed.

15:45

Dr Turner: Do you have any figures on mothers' mental health? Producing such figures would be an extension of the work that ministers and the NHS are doing. It is important that mothers continue with their everyday life. Postnatal depression may not always be apparent right at the beginning, but often, as people are forced into their own home and are unable to mix with others, depression increases. Do you have any figures on that, based on the work that you have done?

Jenny Warren: Some statistics may be available, and Pat Hoddinott might be able to comment on them. Often, women who have had postnatal depression have been told by their general practitioners that they must stop breastfeeding so that they can be given drug treatment. I know of one mother who made a serious suicide attempt because she interpreted that advice as meaning that she was no good for anything. Breastfeeding was the last positive thing that she had to hold on to. Women can be more prone to depression if they are isolated.

Dr Turner: Figures could help to prove that being able to live a normal life with a young baby improves women's mental health.

Jenny Warren: I am sorry, but I do not have such figures to hand. However, there is information available.

Dr Hoddinott: The last time that I looked at the research evidence, I found it to be contradictory. In Banff and Buchan, we have collected a lot of

figures on postnatal depression, but they are still being entered into the computer so I have not had time to analyse them. In qualitative studies, we have reports of women saying things such as, "Going to a breastfeeding group prevented me from going mad. It got me out of the house." Such groups can offer women a place to have a cup of coffee and get support from other women. However, the issue of postnatal depression is not clear cut.

Kate Maclean: If the bill is passed, the people who uphold it and police it will have to know exactly the definition of "preventing or stopping" someone from feeding a child. What do you think constitutes preventing or stopping someone feeding a child? Does the definition in the bill cover it? From your responses to previous questions, it would seem to be more than simply saying to somebody, "You're not allowed to do that here." Obviously, there are other ways of preventing people from doing things.

Dr Hoddinott: I must admit that, when I read the written evidence, I realised that a very careful definition would be required. Does making negative comments constitute preventing somebody from breastfeeding? If a woman perceives a comment to be negative, she can lose confidence. If a woman becomes very anxious, her milk supply can dry up, impeding breastfeeding. A very careful definition is required, but I admit that I would find it difficult to comment further.

Jenny Warren: I agree. I would prefer to leave that to others.

Kate Maclean: Do you accept that prevention is difficult to define?

Jenny Warren: Yes.

Kate Maclean: If the proprietor of an establishment was standing with their arms folded, staring and tapping their feet impatiently while somebody was breastfeeding, that could be construed as preventing breastfeeding, although that would not be the situation in law.

Dr Hoddinott: If the bill is passed, there will be some negative responses. However, as breastfeeding becomes the norm in our society, one would hope that negative comments would decline and that women would feel empowered and more confident to resist such comments and to continue to feed their babies in public.

Mr Davidson: If premises were marketed as providing a high-quality breastfeeding area, would that imply to you that somebody would have to go to a specific area for breastfeeding? From the research that you have undertaken, do you think that that would be seen as negative?

Dr Hoddinott: Every woman should have a choice. My original research was about how women decide how to feed their babies. At the moment, quite a lot of women would prefer to have a private space, but those attitudes will change with time. It is ironic that, in our society, we have individual cubicles for trying on clothes in a fashion store, but baby-changing and baby-feeding areas are often in toilet areas of stores. I hope that, with time, and with the normalisation of breastfeeding in public places, more options will become available for people to feed their babies in whatever situation they choose.

I hope that the number of child-friendly eating areas will increase, because Britain as a whole—not just Scotland—does not cater for mothers who want to feed new babies, in particular babies who are under six months and who tend to cry a lot. People have very few places to go that are comfortable, allow them to feel confident that they will not disturb others and where they perceive that other people will not have negative feelings. Part of the problem is what women perceive other people to be thinking about them, whether that is true or not. The culture out there is negative. Women say that when their baby cries, they feel that everybody is looking at them and thinking what a dreadful mother they are.

The Convener: Quite a lot of us have been there.

Dr Hoddinott: That is a powerful feeling. The evidence from the Office for National Statistics is that those women stay at home rather than risk being in a public place with their baby crying. That is terribly sad and is likely to have an adverse effect on women's emotional and mental health.

The Convener: To keep to some kind of timetable, I will ask Elaine Smith to address points in her evidence session, rather than to ask questions now, as I have another two panels of witnesses. I thank the witnesses for their evidence. I will suspend proceedings until 5 past 4—we are almost on schedule.

15:53

Meeting suspended.

16:07

On resuming—

The Convener: I welcome our third panel of witnesses. We have before us David Barrie, a solicitor in the legal team of Dundee City Council, Ellen Kelly, equalities manager of City of Edinburgh Council, Vivienne Brown, health improvement adviser from Fife Council, and Gillian Grant, health improvement manager of Perth and Kinross Council. I thank you all for your written

submissions, which are in the papers that are before us.

Helen Eadie: I congratulate the witnesses on their evidence papers, which seem to show that they are doing a lot of positive work and policy development on promotion of breastfeeding.

I have a specific question for Perth and Kinross Council. I understand that the council places a condition in respect of breastfeeding on granting of children's certificates. Will you tell us about your experience of that condition?

Gillian Grant (Perth and Kinross Council): I think that you are talking about Dundee City Council.

The Convener: It is Perth and Kinross Council.

Helen Eadie: I think it is Perth and Kinross Council. The submission says

"nothing shall be done to prevent or dissuade breastfeeding from taking place".

It says that Perth and Kinross—

The Convener: I am sorry Helen—we are still trying to clarify from the written submissions which council has said what. I am sure that the witnesses know the answer while I am scrabbling around to find it.

David Barrie (Dundee City Council): In Dundee, the relevant condition states that during the hours when a children's certificate is in force, smoking shall be prohibited in all parts of the licensed premises of which the premises specified in the application for the children's certificate forms part. Dundee City Council is simply considering the prohibition of smoking in those parts of licensed premises that have a children's certificate in force. There is no breastfeeding provision in Dundee's conditions on children's certificates.

Helen Eadie: The document that I have read states that Perth and Kinross Council already places a condition on the granting of children's certificates that requires that

"nothing shall be done to prevent or dissuade breastfeeding from taking place."

Gillian Grant: I am from Perth and Kinross Council. I am new to my post, but my predecessor, who is on maternity leave, submitted a written statement. I have read that statement and what you say does not ring a bell with me. I am sorry, but if that is the evidence from my council, I cannot respond to that.

Helen Eadie: So you cannot—

The Convener: Please bear with me for a minute. We are all in a tangle here. You said that Dundee City Council's submission related to smoking. Where is the reference to that?

Helen Eadie: It is in the document that we all have in front of us.

Kate Maclean: Can I ask a supplementary question of the witness from Dundee City Council?

The Convener: Please do, while I sort myself out.

Kate Maclean: Being a member for Dundee, I have been contacted by various people who run public houses. I understand that the effect of allowing smoking is that licensees have not been applying for children's certificates. Is that the case? Do you think that the bill, if passed, would stop more people applying for children's certificates?

David Barrie: In the short term, our experience has been that, given the choice, licensees tend to choose to have smokers rather than children in their premises.

Kate Maclean: Smokers spend more money.

David Barrie: I have to say, however, that that is the very short-term experience that we have had since last October, when first we introduced the condition. I suppose that the question of whether there would be a further disincentive to apply for children's certificates if the bill became law is a matter for speculation. My view is, regrettably, that it might be cited as another excuse for not applying for a children's certificate, given the potential risk of prosecution.

Kate Maclean: How is the council monitoring compliance with the specific condition about smoking?

David Barrie: Given that a breach of that condition would be a criminal offence, it would be a matter for the police.

Shona Robison: What work—if any—is planned or is taking place to work with the licensed trade to turn that situation around? The aim that we all share is obviously to have more premises that welcome children, but the fewer children's certificates there are, the more the trend is in the opposite direction. Is there a plan to work with the licensed trade to encourage licensees to work around what they perceive as being the obstacles that are being put in their way?

David Barrie: I am sure that it is the licensing board's position that it would wish to encourage as many licensees as possible to apply for children's certificates and to comply with the condition. However, I am not aware of any specific work that is being carried out with the licensed trade in Dundee at present.

Shona Robison: Have you ever had to take enforcement action as a result of a breach of the condition?

David Barrie: The board is not aware of any breach of the condition to date. I should explain that the introduction of the condition was not, as it were, a big bang on a single day, when it suddenly applied to every public house or hotel in Dundee. The condition is being imposed as and when the parent licence is up for renewal on a three-yearly basis. Between last October and now, a small percentage of licensed premises that could be covered by the condition have been covered by it.

Janis Hughes: In our previous evidence-taking session, we heard from representatives of the Association of Chief Police Officers in Scotland, who suggested that it might be preferable to include provision in the charters and licences of public establishments, rather than to create a criminal offence. What is your view on that?

16:15

David Barrie: I would disagree with the police evidence. If there is to be legislation to cover this activity, it should be clearly stated in criminal law rather than in more vague and aspirational non-statutory material.

Janis Hughes: Have you arrived at your opinion with the benefit of hindsight? Has that approach been tried and found to fail?

David Barrie: I am not sure whether that approach has been tried. I expect that such provision has not been included expressly in any charter or other piece of aspirational documentation.

On enforceability—for example, if a licensing board wanted to take action against licensees who were guilty of misconduct—a clear statement in criminal law would be advantageous.

The Convener: We have clarified where the information about Perth and Kinross came from. Have you received that clarification, Helen?

Helen Eadie: Yes.

The Convener: Do you want to return to the issue now?

Helen Eadie: The Scottish Licensed Trade Association gave an example of a situation in which Perth and Kinross Council attached to its guidance note to establishments the condition that “nothing shall be done to prevent or dissuade breastfeeding from taking place.”

However, in the light of the fact that the young officer has only recently taken up her post, I do not know whether she will be able to answer my question, which relates to whether that condition has had an effect on the number of certificates that have been issued. Perhaps she could get back to us.

Gillian Grant: Certainly.

Mr Davidson: This week and last week, witnesses have told us that it would be preferable to encourage businesses to provide accommodation for feeding babies. Earlier, Dr Hoddinott said that she would like breastfeeding facilities to be available as a matter of choice. Have any of you discussed with businesses in your council areas provision of facilities for breastfeeding or bottle feeding of babies? Do any of you think—particularly in the light of David Barrie’s comment a minute ago—that there should be statutory guidance relating to such facilities, perhaps depending on the size of the premises?

Gillian Grant: Breastfeeding is a priority in our joint health improvement plan and we are working with our community planning partners in the Tayside joint breastfeeding initiative to examine the possibility of increasing the number of breastfeeding-friendly premises in Perth and Kinross. We have not had conversations with businesses yet, but we will explore that in the coming couple of years as part of our health improvement plan.

On private facilities, we agree that women should have a choice. However, they should not be made to feel that they must use those facilities—“private facilities” often means simply the toilet. We will continue to work in this area, but the initiative is a new one for us.

Vivienne Brown (Fife Council): In Fife, we have a breastfeeding-friendly directory, in which premises from any sector can be listed. We are also working with people who are involved in the Scottish healthy choices award, which dictates that premises that receive the award must be supportive of mothers’ right to breastfeed, and gives guidance on how to deal with customers who complain about breastfeeding mothers. Neither of those two initiatives suggests that there needs to be a separate facility for breastfeeding mothers, unless it is specifically asked for. Both initiatives are targeted at changing attitudes to breastfeeding by making breastfeeding acceptable within the main areas of restaurants, cafes or services.

Ellen Kelly (City of Edinburgh Council): I have no specific comment to make on private businesses in Edinburgh. I say merely that the council—horror and scandal—is a very large business with a great number of outlets; there are more than 20 libraries and more than 23 community centres, many of which run restaurants and cafes. Trusts such as Edinburgh Leisure also run restaurants and cafes. Our position has always been clearly stated: we will provide, or attempt to provide, a private or semi-private place that is not a toilet. However, in the vast majority of cases, mothers simply breastfeed wherever

seems to be most appropriate to them. Some mothers feel more comfortable tucked away in a corner of a library on a chair, whereas others are quite content simply to sit at one of the children's reading tables because they are there to facilitate their child's participation in reading sessions, for instance.

Mr Davidson: I have a general question for anybody who wants to answer it. Gillian Grant mentioned health improvement plans, in which all councils are involved. She suggested that there will be a two-year programme. Will the bill, if passed, pre-empt your developing your own policies and strategies?

Vivienne Brown: Fife Council already has policies in place and we are moving towards developing more to encourage breastfeeding. That is, however, different from ensuring that people take on responsibilities for not preventing mothers from breastfeeding. The policies, guidance or support that Fife Council has provided until now have been about encouraging and promoting breastfeeding, which is all that the council has the power to do and is probably separate from what the bill suggests.

The Convener: Licensed premises will have a proactive role if the bill becomes law. If a procurator fiscal decides not to prosecute someone who is in breach of the legislation, but you have the option to revoke a licence, what would the standard of proof for that be?

David Barrie: I am pretty confident that the standard of proof in such circumstances would be not the criminal standard of proof but the civil standard of proof, which is the balance of probability.

The Convener: I take it that a business's licence would be revoked and that it would be given a different kind of licence; there would be options open to you. The penalty to owners of businesses would be that they might lose some of their livelihood or suffer disruption to their businesses on the basis that a lower standard of proof would be required than if a criminal offence was being pursued. I see a conflict there.

David Barrie: Yes, but that is the position with regard to every instance of misconduct that might be a criminal offence. The same circumstances may form the basis of a suspension of a liquor licence or a civic government licence. However, the law seems to be that, in revoking or suspending a licence—which I accept might have the consequences that you described—a lower standard of proof is required than for criminal cases.

The Convener: That must cause difficulties. There are perhaps difficulties with definitions. Quite rightly, there is no definition of "stopping" or

"preventing" in the bill: that will be determined in individual cases or in the findings of licensing boards. Do you have any such definitions that you would use if you were sitting on a licensing board and a case came before you?

David Barrie: One could conceive of an infinite number of examples of how someone may directly or indirectly stop or prevent a person from doing something. Examples were given earlier, including that of a person standing beside another person and tapping their foot. To go from one end of the spectrum to the other, another example might be that of a bouncer simply enforcing the house policy. I would have great difficulty in assisting the committee with a comprehensive definition of "preventing or stopping" a person from doing anything.

The Convener: I did not really mean that you should give me a comprehensive definition—even a judge or a sheriff could not possibly do that. I would just like to have an idea of any difficulties that you see in the bill, particularly given your role with the licensing board. Let us say that the board has to decide on the balance of probabilities whether a woman who has been breastfeeding was prevented from, or was stopped, breastfeeding her child and whether the person whom she has accused has done so. Can you see difficulties for boards in dealing with such cases?

David Barrie: As a lawyer, I foresee difficulties in cases in which attempts were made to provide a helpful definition to a licensing board as to what would constitute "preventing or stopping".

The Convener: Am I correct to say that there is no necessity for corroboration?

David Barrie: That is correct. There is no necessity for corroboration in the civil setting of a licensing board hearing.

The Convener: Okay. So there would be evidential difficulties for boards.

David Barrie: I am pretty sure that, in some cases, there would be a difficulty at the margins in respect of the terms that are used in the bill.

The Convener: Thank you.

Mr Davidson: To develop the convener's point, let us say that a lady makes a complaint that she has not been allowed to feed her child. The lady takes her complaint to the police, they pass it to the procurator fiscal, but the procurator fiscal refuses to take action. If the bill is passed, the offence would have to go through the due process of criminal law. What would give councils the right to take a second bite at that particular cherry?

David Barrie: I am sure that I can speak for all licensing boards. Very often—in our experience—there are circumstances in which the police will not

put a case through the criminal machine, as it were, but will refer the matter as a complaint to the licensing board. I assume that the police feel that the board has more effective remedies for dealing with such matters. Ultimately, the board can suspend or revoke a licence.

Mr Davidson: So, despite the fact that—if the bill is passed—the offence would be a criminal offence, licensing boards could take action in such cases even if the criminal process did not happen.

David Barrie: Yes—that happens frequently with regard to other areas of criminal law.

Mr Davidson: Thank you.

Dr Turner: I do not know much about the law in such cases, but I wonder whether, if the bill were passed, there could be a honeymoon period, so to speak, in which the offence would not be criminal. In effect, could the act be brought gently into use, unlike the legislation on use of telephones in cars, in respect of which everybody thinks they will not be charged if they are on the phone, although the reality is that they will be charged if they are seen by a policeman? Do you envisage that, if the bill is passed, criminal charges might not be made in the first year or two?

David Barrie: There may well be a period of grace, although it would—of course—be a non-statutory period of grace. The police might make the active choice to refer an offence to the licensing board, rather than take the criminal law route.

The Convener: If the bill becomes law, will licensing boards issue guidance? Would they think that they had an obligation to do that? Perhaps national guidance could be issued on what constitutes stopping or preventing, in order that boards are given assistance and know where they are. Such guidance would also ensure that there was a level playing field throughout Scotland. I assume that if a licensing board in one area were to say something different from what was being said in other areas, a case could go to appeal at the sheriff court, and so forth.

David Barrie: Normally, the guidance that we, as lawyers, receive is guidance on interpretation of the law, which we receive from the courts. We also rely on central Government guidance by way of circulars. It may even be that it would be an error of law for licensing boards to state in advance what they would do in any given set of circumstances, because boards must deal with each case on its merits.

The Convener: That said, do you think that section 4 should remain, which would remove the financial burden from local authorities? The section states that

“The Scottish Ministers shall make arrangements”

and that

“The Scottish Ministers shall have the power to disseminate, by whatever means, information promoting and encouraging breastfeeding.”

Would ministers not be able to issue guidance under that section? There would be national guidance on what constitutes “preventing or stopping”.

16:30

David Barrie: There is scope in section 4 for Scottish ministers to provide such guidance.

The Convener: Do you support that provision?

David Barrie: Certainly.

Dr Turner: The bill is not meant to impose any additional financial costs on local authorities. Do you believe that it may do so?

Vivienne Brown: Any bill that is about changing attitudes and culture has resource implications. Reference was made to a cooling-off period during which people would get to understand the bill's implications. There would be an opportunity to raise awareness, to train people and to provide guidance. Local authorities, along with their community planning partners, would have a key role in that work, which could not be done without resources. The financial memorandum suggests that the bill would impose no additional costs, but no change to environment and culture comes without costs. Someone must raise awareness and provide training, leaflets and information, so that people do not unknowingly commit an offence. People must be supported in understanding the benefits of not committing that offence and why it is important that people be able to feed their babies milk in a public place. That will take a great deal of time and energy. If it does not happen, the bill will merely criminalise people for doing something that they are not clear about.

Dr Turner: If the bill were passed, would you expect financial help from central Government in order that you could do such work?

Vivienne Brown: Yes. One of my concerns was that the financial memorandum suggested ring fencing money that is already provided, or seeking money from the health improvement fund or the sure start programme. Those moneys are already committed, sometimes to projects relating to breastfeeding among the most disadvantaged mothers. If we had to put some of that money—decisions about which are taken by community planning partners, rather than NHS boards—into raising awareness of a new act and into auditing and enforcing the law, resources might have to come from projects such as breastfeeding peer support groups that we already fund.

Ellen Kelly: At the risk of disagreeing slightly with colleagues, I point out that much of the bill is analogous to other equalities law. Local authorities already have a duty to promote race equality. Later this year they will have a duty to promote disability equality. Local authorities and all other public authorities will be liable for both duties. We do not receive any additional resources for that, but are expected to adjust our work programmes accordingly.

I cannot comment on the situation in other areas, but in Edinburgh the licensing board does not meet in grandeur and act apart from its constituency of interest. There is an advisory group and there are liaison groups. There is considerable interface between licensees and the council and not just in the strictly formal sense, within the board. My staff already work with groups of licensees to provide training and advice to them on disability discrimination. The reasonable adjustment concept is flexible. No set of premises is the same as another, so the adjustment that must be made to meet the requirements of the Disability Discrimination Act 1995 must be flexible—bearing it in mind that the primary purpose is to facilitate equal access, on equal terms, by disabled people. We receive no additional money for that, and it would be unreasonable to expect any.

I am not qualified to talk about criminality and will not do so, but if the objective of the bill is to promote a culture that is inclusive and accepts breastfeeding of children in public places as being natural, then local and other public authorities must play their part in that process. In principle, it is no different from promoting race equality—a much wider issue—and disability equality.

Shona Robison: Have we had any clarification of Perth and Kinross Council's written statement on breastfeeding and children's certificates?

Helen Eadie: I clarified that that comment came from the Scottish Licensed Trade Association's guidelines to licensing boards, which was mentioned in a Scottish Parliament information centre briefing note that—

Shona Robison: Was it only in the evidence from the Scottish Licensed Trade Association?

Helen Eadie: It was.

The Convener: I will let the clerk answer, because it was part of the background papers.

Jennifer Smart (Clerk): My understanding is that Perth and Kinross Council's licensing board issues children's certificates under the condition that breastfeeding not be prevented, but perhaps the officer who gave evidence was unaware of that.

Shona Robison: It is not the officer's fault, because she is new. I suggest that we drop a note to Bernadette Malone, because she does not mention the breastfeeding condition in her written evidence, although it would seem to be the most pertinent point for Perth and Kinross Council to give evidence on. That put the council's representative in a bit of an awkward position. It would be helpful to write to the council for clarification on that.

The Convener: We will write, but I suspect that Bernadette Malone will read the *Official Report* of the meeting, knowing that her name has been mentioned.

Mr Davidson: Ellen Kelly made a comment on freedom for those with disabilities to conduct a certain activity. I know that you do not want to talk about criminalisation, but you are here to represent a council; if you cannot answer my question, perhaps somebody will drop us a note about it. Is it necessary to go as far as to introduce the criminal offences that the bill proposes, or should breastfeeding simply be left as an ideal to be promoted?

Ellen Kelly: After more than 25 years in local government, I can say that people do not do things unless they are compelled to do so, particularly in the field of equality. No advance in equality has been achieved without accompanying legislation and it is not often stated that people are committing offences. For instance, an employment tribunal to which an employer might be taken on the ground of sex discrimination is a court and makes a legal judgment. The bill would have exactly the same element of compulsion. What has been said this afternoon makes it clear that the compulsion should be a last resort; in that way, the bill is analogous to the Disability Discrimination Act 1995, under which compulsion is a last resort. Most people do not change, because it is not convenient for them to do so; to many people, change means having to think about a well-known process and it can sometimes mean expense. Above all, changing one's attitude requires one to think about the issue in the first place, and most people are not good at putting themselves in others' shoes.

The Convener: We have considered the role of the licensing boards, but I do not know how far we can consider public places other than licensed premises. Would it have been useful to consider civil penalties of some kind for breaching the law? There is an issue about criminalisation. Perhaps the bill uses a hammer to crack a walnut.

David Barrie: It might be an option to consider creating a civil offence of preventing a person from feeding milk to a child and to make the offence a matter for the sheriffs to decide.

The Convener: That would also ease the burden of proof.

David Barrie: We would be looking at the balance of probabilities.

The Convener: The evidence would be easier.

David Barrie: It would be less stringent.

The Convener: Perhaps “easier” was the wrong word to use.

I thank the witnesses on the panel for coming and for waiting so long.

I welcome Elaine Smith MSP, Mike Dailly, who is from the Govan Law Centre, and Kay Sillars, who is a researcher. They are our final panellists of the evening—which it almost is.

Janis Hughes: I have asked a few witnesses this question today. What is your view on the criminalisation element of the bill in relation to breastfeeding in public places? Could it lead to a negative attitude towards breastfeeding mothers?

Elaine Smith: We live in a culture that is negative towards breastfeeding, and we have to take things from that starting point—unfortunately, Scotland has a non-breastfeeding culture at the moment. There were various reasons for taking the criminalisation route, and many of the decisions were arrived at after much discussion in the steering group, which was made up of a wide range of people and organisations. Civil legislation would put the onus on the woman—or the parent, as the convener keeps pointing out; the bill is now wider in scope than it was originally. The route of statutory obligations would be difficult, and I think that the provisions would be more wide ranging.

The bill seeks to protect people who choose to breastfeed and carry out other forms of feeding in public, and to protect children. It also seeks to act as a deterrent. If we have criminal legislation, we must define the sanctions to go with it. I will ask Mike Dailly to comment further on that, if members do not mind.

The Convener: Absolutely—we will go to the lawyer sitting at the end.

Mike Dailly (Govan Law Centre): Coming from Govan Law Centre, I can tell you that, over the years, the availability of civil legal aid has decreased. The only people who want to raise civil litigation and who qualify for legal aid are incredibly poor or incredibly well off. I would not raise civil litigation, for fear of the consequences. To be realistic, I would say that the civil route could be a good way to go, but only if people were able to raise litigation. We know that financial exclusion would play a part, because even those who are on a low wage have to pay a big contribution to the Scottish Legal Aid Board to get

civil legal aid. That is a question of priorities for the Legal Aid Board—it is a harsh fact of life.

If we accept as a starting point the fact that the bill needs to have some teeth, and if we accept that the civil system would be extremely problematic and would result in financial exclusion, the only thing that we have left, other than the question of licensing, is the criminal system, which seems the obvious route.

Helen Eadie: I turn to the issue of deterrence and ensuring that people comply with the law. Deputy Chief Constable David Mellor’s view was that the bill

“would be good law in that it would be symbolic, it would reinforce the aims of the bill and it would exist as a threat.”

Do you think that people sometimes need a threat so that they change their attitudes and their behaviour? Speaking in support of the bill, David Mellor went on to say:

“I anticipate that prosecutions would be few in number.”—[*Official Report, Health Committee*, 11 May 2004; c 868.]

Elaine Smith: David Mellor also said:

“It is perfectly legitimate to create a criminal offence as part of a strategy to change attitudes.”—[*Official Report, Health Committee*, 11 May 2004; c 866.]

The bill is largely about creating a deterrent. However, the law would be symbolic because, at the end of the day, there would be few prosecutions. Mike Dailly will answer in more detail.

Mike Dailly: There are few prosecutions for not wearing seatbelts or for using a mobile phone in a car, for example. However, I believe that the relevant laws act as deterrents. That is what the Breastfeeding etc (Scotland) Bill is trying to do.

16:45

The Convener: I heard what you said about choices and I know all about the difficulties of obtaining civil legal aid. However, why would the person who was feeding the child necessarily have to pursue a civil action? The bill refers to “in a public place”; an obligation could be placed on the proprietor, or whatever, of a public place—for example, a local authority that is responsible for a park or a commercial company that owns a shop—to be the party who pursued the case on behalf of the mother, who could simply be a witness in the cause. That would lift the burden off the individual. I am sure that you have explored that idea and that you will tell me why you ditched it.

Mike Dailly: Indeed. The big problem is that nobody wants to spend the money to raise litigation. For example, I deal a lot with noise

nuisance cases in Govan Law Centre. Local authorities serve section 80 notices under the Environmental Protection Act 1990 on people who cause noise problems. It is rare even for a council to raise summary application proceedings, because doing so costs a fortune and they run the risk of getting caught up in lengthy litigation.

What you suggested for the bill could be a solution in principle, given all the practicalities, but the problem is that it would probably result in piecemeal application of the bill throughout the country, because prosecutions would depend on individual organisations and different people. I must state candidly that I do not believe that such folk would want to use their own funds to raise an action in a sheriff court.

The Convener: You are saying that the function of the criminal consequences that would arise from the bill is to be a deterrent. You do not expect there to be many prosecutions.

Mike Dailly: Indeed, convener.

Elaine Smith: The Association of Chief Police Officers in Scotland said in evidence that it did not think that the civil route was appropriate. I am sure that that is in the *Official Report*.

The Convener: I appreciate what ACPOS said, but I am interested in how the provisions in the bill developed. Did you have a hand in drafting the bill?

Mike Dailly: I drafted the bill.

The Convener: I am interested in knowing why you included certain things rather than others and why you went down the criminal route rather than the civil route.

Mr Davidson: My question is for Elaine Smith. I understand that the principle behind the bill is the promotion of breastfeeding. Paragraph 3.3 of your written submission gives a list of conditions that would be minimised, if not avoided, if more children were breastfed. To achieve that aim, you want to go down the criminal route. If you support the notion of using the criminal route to change societal approaches to what is basically health provision for babies, is there any particular reason why you did not include in the bill, for example, making it a criminal offence for a mother to smoke while she is breastfeeding or while there is a child in the home? Those behaviours, equally, have huge effects on children's later lives because of the transmission of chemicals through skin contact and so on. If you are going to use the criminal route to solve a health problem, do you agree that it should also be used to change societal attitudes?

Elaine Smith: As Duncan McNeil said earlier, the bill is not, in and of itself, legislation to promote a campaign; it is legislation to ensure that the right

to feed infants and children in public is protected and that there is a deterrent to support that. That is what section 1 of the bill is about. The bill is very much about saying that we, as a society, will no longer thole women and other people who are feeding children being put out of public places for doing so. That relates specifically to breastfeeding, because the anecdotal evidence is about breastfeeding mothers having such problems.

Of course, other issues are involved. For example, the previous panel of witnesses asked whether allowing smoking in restaurants would somehow prevent breastfeeding in those places. However, the issue is about parents making choices rather than anyone dictating to them; once those choices have been made, it is about how to feed the infant or child. The important thing then is for society to support the choice to feed in public.

Much time has been spent considering the bill's impact on cafes and restaurants, but the bill would apply to all public places. Earlier, Pat Hoddinott asked whether people thought that preventing someone from breastfeeding should be viewed as a crime, but that is what the bill is about. Under the bill, it would be a crime to tell someone, "Sorry, you can't do that here. Please leave." Feeding choices are up to parents, but the bill is about supporting those choices once they have been made.

Mr Davidson: I notice that you did not use the parallel that I suggested. For the record, will you clarify that the bill is not about promoting children's health but about giving mothers the right to feed a child under the age of two, whether by bottle or by breast, anywhere that they chose?

Elaine Smith: The bill is child centred, so it is about the right of children under the age of two to be fed in public places. It is also about supporting feeding choices once those choices have been made. Section 4 deals with promotion of breastfeeding, which the committee has spent some time discussing with the minister and with other witnesses. Paragraph 3.3 of my submission explains the need for that promotion section in the bill and why it is good for children to have breast milk. However, section 1 establishes a criminal offence and is definitely about acting as a deterrent.

Mr Davidson: However, the issue that is covered in paragraph 3.3 of your submission is incidental to the bill's main objective.

Elaine Smith: The bill is not a panacea but, as part of a multifaceted approach, it will help improve the rates of breastfeeding, which research shows has many health benefits. As such, the bill will be a positive factor in the health of future generations in Scotland. The bill and my submission embrace a lot of issues—perhaps my

submission was a bit long—but I wanted to give the committee as much background information as possible on the kind of things that the steering group discussed when the bill was being prepared. The main thrust of the bill is about ensuring that parents can go out and about in public with their children and access public services without being challenged about the way in which they feed their children.

Janis Hughes: You mentioned the evidence from ACPOS, but it also suggested that, rather than make the prohibition of breastfeeding a criminal offence, it might be preferable to include a statutory provision on breastfeeding in the licences and charters of public establishments. What is your view on that?

Elaine Smith: That would be rather more limited. The media in particular have sometimes misconstrued the bill as applying only to cafes and restaurants, but although it is nice that people can go out for lunch, it is imperative that they have access to public services. Going down the route that has been suggested would be rather limiting, because it would not encompass the amount of public places that would be covered by the bill. Mike Dailly will give the committee more detail on that.

Mike Dailly: To repeat what Elaine Smith has said, simply including a provision in licences would mean that public places would be missed out. For example, if someone is standing at a bus stop, they are not in a place that is licensed. The bill tries to encompass all public places and licensed places where persons might want to feed their child.

Mr Davidson: This question follows on from the previous one. We heard today that half of breastfeeding women would prefer to feed their children in a private place. Would it be preferable to encourage businesses and public premises to provide separate facilities for breastfeeding and bottle feeding, both of which are mentioned in the bill?

Elaine Smith: It is important to make it clear that the bill would make no requirement for such facilities. At the moment, 50 per cent of women might say that they would prefer to have private places, but that might be because of public attitudes. Is it preferable to hide in a private place because cultural attitudes mean that people fear that they will be embarrassed by someone telling them, "You cannot do that here—please stop"?

We are talking about a mixture. If mothers and parents want to choose to go somewhere private and there is somewhere for them to go, that is fine, but the bill imposes no requirement in that regard. I understand that some places—such as Boots the chemist—are considering such

provision. I will probably get a rap from the convener for mentioning a company.

The Convener: No, that is fine.

Elaine Smith: Such companies are considering the provision of nicer private facilities for people to access.

The other problem is that, if a woman is breastfeeding in the cafe of a department store and someone tells her that the store has a private breastfeeding room and asks whether she would like to go there, that can often upset the milk. It might seem that the woman is being told that she must go there. If such choices are on offer and women know about them, they can make their choice freely. That is fair enough, but I reiterate that the bill does not seek to impose the provision of such facilities on any public places or licensed premises. If we are to have a more breastfeeding-friendly culture in which we encourage people to think about breastfeeding as the norm, it is important that we see breastfeeding going on round about us as we do when we go to many other countries. Kay Sillars might want to comment on public attitudes.

Kay Sillars: Although some research suggests that it is half and half whether women want to breastfeed in private, the research has not explored why that is the case. Other research indicates that more than two thirds of women believe that other people find breastfeeding in public unacceptable. Although they would happily breastfeed in public if they knew the response that they would get, they say that they would rather do it in private because they fear other people's responses.

As regards the other half of the bill, which is about increasing the breastfeeding rates in Scotland, there is a lot of evidence that suggests that the more people view breastfeeding as part of normal life, the more they are likely to consider it as a choice for themselves. If the bill had gone down the road of demanding more private spaces for women to breastfeed in, that would not have enabled women to see breastfeeding as something that they can do easily as part of their lives and therefore as something that they would consider for themselves. That applies in particular to women from low income areas, who do not get to see breastfeeding in more private places, such as their homes or the homes of their friends and family.

The Convener: I am not suggesting that it is a question of having breastfeeding in private or breastfeeding in public but, if both were possible, we might find that, incrementally, women who would not have breastfed at all will start off using a facility and that that will give them the self-

confidence to move into public spaces. That could be an advantage.

Kay Sillars: My experience of breastfeeding is that women go through different stages—at some times and in some places they are quite happy to breastfeed, whereas at other times and in other places they might need a more private space. I do not think that, as part of the bill, it is being suggested that the provision of breastfeeding rooms is necessarily a bad thing.

Shona Robison: On that point, breastfeeding is surely a matter of choice. As you have just said, sometimes a woman might want peace and quiet and to be away from other folk, but at other times she might not. I would have thought that it would be a good thing if one of the bill's consequences was that more quality private areas would be provided for the women who chose to use them when they wanted to. Even if it is not a stated intention of the bill, would it not be a positive consequence if, in addition to encouraging women to breastfeed in public, the bill produced an improvement in the quality of private areas and an increase in their number?

Elaine Smith: I reiterate that the bill is about supporting choices—it is about supporting the feeding choices that are made and the availability of choice when women are out and about in public. At the moment, there are not many comfortable places to go to. As I think I told the Finance Committee, in Ayrshire I saw a notice on a wall that said, “Ladies and nursing mothers”. When I went to investigate, I found that it was referring to a public toilet. That is just not acceptable; it sends out a very bad message. If places are available and people choose to use them, that is fine. The bill would add to the good work that people in the health service, the Executive and the voluntary sector are doing. If it helped over time to make Scotland's culture more breastfeeding friendly, people might have less need to seek out private places.

17:00

Helen Eadie: One area of controversy in relation to the bill is the proposed age limit. Some witnesses agree that an age limit should be set and others say that it should not. Would the age limit make people think that it was illegal or wrong to feed in public a baby who was over that age limit? The World Health Organisation has not set an upper age limit, but it quotes 4.2 years as the average natural weaning age for a child. Will you comment on that?

Elaine Smith: I am happy to comment. I am not surprised that the matter has been the subject of much debate and differing views, because the steering group had exactly the same debate over

a few meetings. The age that has been chosen is not arbitrary. The WHO refers to two years and beyond; it does not say three years, four years or one year and beyond. I have no particular feelings about the age at which babies choose to wean or mums think that it is time to wean them. That matter is entirely between mothers and their children. That can also be a cultural issue. However, in discussion of the bill, we felt that it would be better for clarity in the law to set an age limit, so we had to decide what age made sense. The figure was not plucked from the air.

The bill would not make it illegal to breastfeed or bottle feed in public a child who was more than two years old. The status quo would prevail. We must make progress in small stages. We have problems now because wee hungry babies are being thrown out of public places and licensed premises. If we can create a breastfeeding-friendly culture over time, that may have a positive effect on whether people see breastfeeding as acceptable.

Dr Turner: Do you see no practical problems with the age limit of two years, given that the bill will create a criminal offence?

Elaine Smith: Other legislation has age limits. Mike Dailly will comment from a legal point of view.

Mike Dailly: We need to define the word “child” in the bill as a matter of good law. The age of a child is a matter for Parliament. I think that you have said that the age limit of two could be difficult if a baby happened to look older than that. However, that is the position with under-age drinking when under-age people buy alcohol unlawfully. If a shopkeeper is to be prosecuted, birth certificates will be lodged in evidence, if the prosecution goes that far. For an offence under the bill, the situation would be no different. The question is: what age should the Parliament decide on? The word “child” needs to be defined, as otherwise it would be meaningless as a term in the bill. We must grapple with that issue, which is a matter for Parliament.

Dr Turner: We are trying to de-stress a woman in such a situation. Thinking about the age of her child, what her child looks like and whether that will pose a problem could stress a woman. You talked about under-age drinking—do people not have identity cards? Is a woman to carry her child's birth certificate around with her?

The Convener: I think that identity cards for babies were a Conservative suggestion.

Mike Dailly: To be fair, I do not expect the situation that Jean Turner described to happen.

Dr Turner: So you expect no difficulties.

Mike Dailly: Apart from the reasons that Elaine Smith gave, one reason for setting the age at two or under was that we wanted to take as many people with the bill as possible. We need to be realistic—some people might be especially offended if older children were being fed. I am the father of a two-and-a-third-year-old child. The point has been made that if a person has a wee baby, they cannot negotiate with it about feeding—

The Convener: We all know that.

Mike Dailly: I am preaching to the converted—I will say no more.

Elaine Smith: If the bill goes to stage 2, I would be happy to discuss amendments. I can only tell the committee my reasons for putting an age in the bill.

Shona Robison: Mike Dailly hit the nail on the head. We are talking about whether a woman who is breastfeeding a four-year-old could be asked to leave a place because the legislation had an age limit of two or under. However, to return to a point that was made earlier, the bill is about public perception. A mass of the public will not know the ins and outs and the details of the bill, but they will see how it is perceived and presented. It would be unfortunate if the bill's good elements were lost because of a hang-up or obsession with the fact that a mother who was breastfeeding a 10-year-old could not be thrown out of a restaurant. I use that as an extreme example, but some people will use such examples to undermine the bill. Evidence that we have heard from people who have suggested that there should be no upper age limit is perhaps a tactical mistake on their part because we must start from where people are and take them with us, as Mike Dailly pointed out. I take it that Mike Dailly would agree with that.

The Convener: David Davidson has a question.

Mr Davidson: Right. I am sorry—I was waiting for an answer to what Shona Robison said.

Mike Dailly mentioned underage drinking. Many premises now display signs that say "Proof of age required", for example, and everybody says that that is a good thing. Under the bill, if a sign were put up in premises that said, for example, that breastfeeding and feeding milk from a receptacle are fine and are permitted for children up to the age of two and that proof of age may be required, that would be in the spirit of the bill in practical terms. Somebody might become very upset because of the attitude that that would display but, according to the bill, it would be legal. Somebody could go down the road, get very upset, write to the press, go to the local bobby or whatever else and get the answer, "No matter how sensitive you are about the situation, that's what the law says." Have you considered that that could happen?

Elaine Smith: With due respect, people could put up such notices now, without the bill, for all infants and children, but I am not sure that that happens. People tend to put up notices that say that breastfeeding is welcome in premises. The committee heard earlier about peer support groups going round and trying to identify places from which mothers and babies will not be thrown out and in which they will not be treated disparagingly, harassed or segregated. That said, things do not always work in practice. When mystery breastfeeders try out premises, what people have said and what signs say do not always turn out to be true. I would be surprised if anybody would take the time to put up such notices but, over time, I would hope that such attitudes would change anyway once the bill is embedded in Scottish law.

Mr Davidson: I raised the matter simply because what I described would still be legal within the definition in the bill. Before the bill is ever considered by the Parliament, we must decide whether it is reasonable and properly written and whether all the objectives have been thought about.

Elaine Smith: Perhaps I could ask the person who drafted the bill to say something, if you do not mind.

Mike Dailly: I do not see a problem with having a notice that says "Breastfeeding mothers welcome". The notice that David Davidson described might not be as nice as that, but the point is that a notice can be put up that says "Breastfeeding mothers welcome".

In fact, the bill is quite neutral in respect of not altering licensing law or, indeed, the law in any respect. The key point about the bill is that it will apply only in places in which a child is lawfully permitted, which is why we need to bring the debate back to the reality of commerce. There has been a bit of a red herring to do with how the bill will affect pubs. The committee has heard evidence that most pubs do not apply for children's certificates. I assume that that is because they want people to smoke and to buy booze—fair enough; that is what pubs do. A small number of pubs want to attract a niche market of families and kids. That is a matter for them and of course the bill will in no way alter that or tell anyone what to do. The bill will merely engage with pubs that have a policy of allowing children under two on the premises; it will have no relevance for pubs that lawfully do not allow kids under two on the premises.

Mr Davidson: The council officers who gave evidence earlier said that someone might not be prosecuted for an offence under the bill, but a licensing board might take a different view. Will you comment on that?

The Convener: I take it as a compliment when Conservatives ask my supplementary questions.

Mr Davidson: I am glad. I am just getting my revenge because you regularly do that to me.

Mike Dailly: I was not convinced that what the council officers said was an accurate statement of the law, because the bill will create a criminal statutory offence and not a civil law wrong, which is different. For example, the Rent (Scotland) Act 1984 creates an unlawful offence—

The Convener: The officers suggested that the licensee would have to comply with certain conditions of the licence.

Mike Dailly: That would be a different matter. If a condition were made—

The Convener: The comments were made in the context of the mystery that arose earlier about Perth and Kinross Council's policy. I am sorry to interrupt you, but I just wanted to explain what the discussion was about.

Mike Dailly: It would not be unreasonable to make it a condition of the licence that the licensee must comply with the provisions of the bill. However, the licensing system has an appeals procedure. Licensing boards must comply with the Human Rights Act 1998 and be impartial and fair. People would get a chance to say, "Hang on. Is this proportionate?" For example, there might be a human rights issue if the revocation of a licence would deprive someone of their livelihood. Councils would have to tread carefully, because someone's livelihood could be taken away on the basis of a small piece of evidence. That might cause problems in the context of the Human Rights Act 1998.

I am not convinced that there would be a big problem. The minister sought clarification on various issues and perhaps it would be legitimate to consider the matter. No one has asked me to do so.

Shona Robison: Has anyone from the Crown Office been in touch with you to discuss enforcement?

Mike Dailly: No.

Shona Robison: For the record, I find it strange that the Crown Office has not discussed with the bill's proposers some of its concerns to do with enforcement. I would have thought that that would be its first port of call.

Concerns have been expressed that the bill does not specify what is meant by

"to prevent or stop a person in charge of a child from feeding milk to that child".

Earlier, a witness envisaged a situation in which someone was tapping their feet and staring at a

person with the clear intention of making them feel uncomfortable. Would that be an offence?

The Convener: No—I try that approach from the chair and it does not prevent or stop members from doing anything.

Mike Dailly: It is legitimate to ask those questions. The minister said that he needs to be satisfied that various matters are resolved and I might be able to resolve that issue now. The position is not complicated, but there has perhaps been a misunderstanding about it.

People have asked what "prevent" means and who would be the accused. The bill uses the phrase, "deliberately to prevent". As the convener knows, the word "prevent" relates to the actus reus of the offence—the physical action—but to convict someone of an offence, there must also be the mens rea—the intention—which is reflected in the word "deliberately". Section 1 of the Protection of Wild Mammals (Scotland) Act 2002 uses the same terminology.

If a woman on a bus were breastfeeding her baby and a person on the bus disapproved and decided to stare at her, would that person be committing an offence under section 1 of the bill? The answer would be, on the face of it, no, because it would have to be shown that the person was deliberately trying to stop the feeding of the child. Some people might stare just because they are a nosey parker or they are curious, so one would need to go beyond that. If the person on the bus then said—

The Convener: Can I stop you for a minute? Does the Protection of Wild Mammals (Scotland) Act 2002 say "deliberately to prevent" or does it just say "to prevent", with "deliberately" implied?

Mike Dailly: The word is there—"deliberately".

The Convener: But it is not in the bill.

Mike Dailly: It is in section 1(1).

The Convener: I beg your pardon. I see it. It has been a long day.

17:15

Mike Dailly: The Crown Office knows the law, so I am surprised that it is asking who the accused is and who will enforce the bill—obviously, it will be enforced by the criminal justice system. The law currently uses the concept of "deliberately to prevent". Other examples of words that are used include "wilfully", "knowingly" or "recklessly". That is the mens rea, or intention part of it.

If the situation that has been described happened, and the woman on the bus said, "That's disgusting. Get off this bus right now. That's outrageous," I think, given their evidence,

that the police would have a word with that person and say, "Come on, don't you realise that this is now the law? You can't do that any more," and send them on their way. In more serious persistent cases an offence might have been committed. There might also be a breach of the peace, if the situation is that serious.

The Convener: It is a question of degree.

Dr Turner: Would it not need a great deal of publicity to make a campaign accompanying the bill work and would that not have financial implications? The public need to be educated about the bill. As Shona Robison said, nobody is going to read the detail, but it will come out at them if the bill is passed.

Elaine Smith: I looked into this. You mentioned previously the law on the use of mobile phones in cars. That was publicised through the usual channels: the media and the usual advertising methods. NHS Health Scotland has an advertising process, which it uses during breastfeeding awareness week—the committee might have seen the current advert. One previous campaign asked, "What is this miracle food?" and was about how good breast milk is. The current campaign has picked up on problems associated with breastfeeding in public. Public education could be provided through such advertising. Awareness could also be raised through normal training procedures, which could state briefly, "This is the law," or there could be more intensive training that is part of equal opportunities or induction training. Ellen Kelly said a little bit about that.

The financial memorandum states that the bill would not put an onus on the Scottish Executive to spend a lot of money promoting breastfeeding, other than what it currently spends. If it wished to promote breastfeeding, that would be a good thing. It would be a matter of getting media coverage of the fact that the bill had become law—some people already think that it is law, given the coverage that the subject has received over the past couple of years.

Prosecutions would be few and far between, given what Mike Dailly just said. The police indicated that they would always try to mediate before they used the ultimate sanction.

The Convener: In its report on the bill, the Finance Committee repeated the recommendation that it made on the financial memorandum to the Fire Sprinklers in Residential Premises (Scotland) Bill, which was that the Executive should produce an assessment of the financial impact of members' bills to inform committees. That is only fair, because you do not have the resources that ministers have. Many of us would like to see that happening with members' bills.

Mr Davidson: I refer members to Keith Harding's Dog Fouling (Scotland) Bill in the first session. The Executive offered its support when the bill got to a certain stage, but it also put up a pot of money—I am not sure whether it was £200,000 or £300,000, but the amount was of that order—for councils to spread the gospel that the law existed, so that people were not ignorant and had no excuse or defence that they did not know. Presumably, you will require the same for your bill.

Elaine Smith: In my answer to Jean Turner, I said that the bill does not absolutely require that kind of funding. However, given that the Executive provided funding for the bill on dog fouling—which involved fines, if I remember correctly—it would be most welcome if it wanted to do something similar with this bill, to help with promotional work. However, there is nothing in the bill that absolutely requires the Executive to spend any money. The Finance Committee has agreed with my analysis of that. However, we could make the point to the Executive that the costs of any promotional work could be offset against the health benefits that would result from an increase in breastfeeding. I was a little disappointed in the Executive's submission. It talked about some of the costs but did not talk about the kind of savings that could be made from encouraging an increase in breastfeeding.

Mr Davidson: Convener, may I ask a question about the example Mike Dailly used of a lady on a bus?

The Convener: Yes—although I have a question to ask that has not been asked before.

Mr Davidson: Is it expected that a member of the public who caused problems would be prosecuted? The bus driver might not be able to see what is going on and the bus company would not be involved if it was not a member of staff who had said something. What would happen in that situation?

Mike Dailly: If there were a stushie on a bus, I would have thought that the bus driver would know the position. As Elaine Smith has said, such training can be tagged on to existing induction courses for employees, and people have to keep up to date with health and safety obligations.

If the bill becomes law, I would think that a driver would be able to say to a member of the public who was protesting, "You can't do that, because it's against the law." I would hope that that would resolve the problem. If someone was being abusive—and let us be honest, that can happen—to someone who was feeding their child, the bus driver might pick up the radio and get the police. However, I think that most people would calm down before that stage was reached.

Elaine Smith: That is the opposite of the situation that we had a few years ago in Edinburgh, when a woman was put off the bus for the heinous crime of breastfeeding a baby. As the minister Malcolm Chisholm said at the time, there were no powers to do anything about that. This bill will provide those powers. In my view, the Parliament would show vision by passing it.

The Convener: I am uncomfortable with the “etc” in the title of the bill—the Breastfeeding etc (Scotland) Bill—which is there because you include bottle feeding and other stuff. The information that we received from SPICe talks about

“a division of opinion among respondents”

about including bottle feeding. I do not think that it was in the bill the first time that you proposed it. What was the division? Was it 50:50? I know that not all opinions have the same weight, but what was the division?

Elaine Smith: I do not think that it was 50:50 at all. People had various reasons for feeling that bottle feeding should or should not be included but, if I remember correctly, most respondents felt that it should be included.

Mike Dailly: I think that that is right. However, it is reasonable to say that if the bill had not been inclusive, it would have been beyond the competence of this Parliament under the Scotland Act 1998.

The Convener: So the reason is technical.

Mike Dailly: There are several reasons and inclusivity is one of them. An issue arises over the suggestion that women who are bottle feeding should really be breastfeeding and that, if they are not, they are not being a good mum. However, the technical legal reason is that, because the bill deals not only with breastfeeding mothers but with breastfeeding women and people who are feeding milk to a baby, it can come within the ambit of the Scotland Act 1998.

The Convener: In the SPICe briefing, one of the arguments against including bottle feeding is that doing so would

“equate the benefits of breast milk with formula milk”.

We know that that is not the case. You are promoting breastfeeding, but it seems to me that you are getting a bit politically correct by including everything. I would have preferred the bill to be simply a breastfeeding bill, without the other stuff. The bill could then have been tested for its inclusivity with the Executive.

Elaine Smith: The bill was tested with the Presiding Officer, who has to decide whether a bill is competent before it can progress. In the previous session, when the bill was drafted as you

suggest it should be, it was decided that it was not competent for this Parliament and was a matter for Westminster. That was a matter of opinion, but that was the opinion that was given. The bill was then redrafted and the current Presiding Officer decided that the redrafted version was competent under the Scotland Act 1998.

The bill was redrafted to make it child centred—which I think is right—and to ensure that people were supported once they had made their choices.

The Convener: Why was the first bill deemed competent only for Westminster?

Elaine Smith: It is a matter of legal opinion, but equal opportunities issues arise if the bill is only on breastfeeding.

Mike Dailly: The first draft was very specific and would have kept the bill nice and short and to the point. However, because it dealt only with women, issues of discrimination arose. There are things that the Scottish Parliament can do to promote equal opportunities, but it cannot change laws on discrimination. The view was taken that the bill would not be competent. We were faced with the possibility that Elaine would never be able to push this issue forward in the Scottish Parliament, which would have been unfortunate and incredibly frustrating. However, we managed to come up—as lawyers often do—with a solution.

The Convener: That is very helpful. You have explained why bottle feeding is included; I am still a bit uncomfortable with that, but I now know why it is there.

Thank you for your evidence. It has been a long haul, but I hope that we have done our bit in testing the bill today.

Meeting closed at 17:26.

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