

HEALTH COMMITTEE

Tuesday 8 June 2004
(*Afternoon*)

Session 2

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HEALTH COMMITTEE

15th 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 ALSO ATTENDED:

Mr Stewart Maxwell (West of Scotland) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Shona Barrie (Crown Office)

Simon Clark (FOREST)

Mike Dailly (Govan Law Centre)

Dr Laurence Gruer (NHS Health Scotland)

Stephen Leckie (British Hospitality Association Scotland Committee)

Tim Lord (Tobacco Manufacturers Association)

Andy Matson (Amicus)

Maureen Moore (Action on Smoking and Health Scotland)

Arun Randev

Elaine Smith (Coatbridge and Chryston) (Lab)

CLERK TO THE COMMITTEE

Jennifer Smart

SENIOR ASSISTANT CLERK

Tracey White

ASSISTANT CLERK

Roz Wheeler

LOCATION

Committee Room 1

Scottish Parliament

Health Committee

Tuesday 8 June 2004

(Afternoon)

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

Subordinate Legislation

National Health Service (General Medical Services Contracts) (Scotland) Amendment Regulations 2004 (SSI 2004/215)

National Health Service (Primary Medical Services Performers Lists) (Scotland) Amendment Regulations 2004 (SSI 2004/216)

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Amendment Regulations 2004 (SSI 2004/217)

The Convener (Christine Grahame): Good afternoon and welcome to the Health Committee's 15th meeting this year. I ask committee members and members of the public to ensure that all mobile phones are turned off.

I tender apologies tentatively for Jean Turner, who I know is not very well. If she turns up, I will withdraw her apologies, but I suspect that she will not make today's meeting. Stewart Maxwell is present and Elaine Smith will come along later. I also welcome Karin Phillips, head of clerking at the National Assembly for Wales, who will listen to our deliberations.

Agenda item 1 is subordinate legislation, for which I refer members to paper HC/S2/04/15/1. We need to consider three negative Scottish statutory instruments: SSI 2004/215, SSI 2004/216 and SSI 2004/217. The Subordinate Legislation Committee had no comment to make on SSI 2004/215 and SSI 2004/216 and its comments on SSI 2004/217 have been circulated. No comments have been received from members and no motions to annul have been lodged. The recommendation is that the committee does not wish to make any recommendation on the aforesaid SSIs. Is that agreed?

Members indicated agreement.

Prohibition of Smoking in Regulated Areas (Scotland) Bill: Stage 1

14:02

The Convener: If members can keep up, we move on to agenda item 2, which is stage 1 consideration of the Prohibition of Smoking in Regulated Areas (Scotland) Bill. Papers HC/S2/04/15/2 through to HC/S2/04/15/8 have been circulated.

As I have previously advised, we hope to have three sessions of approximately 45 minutes. If crisp questions and crisp answers mean that we get through the sessions faster than that, so much the better for life. I propose that we have a break before we take evidence on the Breastfeeding etc (Scotland) Bill.

Before I call our first panel, I ask the committee that it delegate authority to me to deal with witnesses' expenses. Is that agreed?

Members indicated agreement.

The Convener: I welcome panel 1, which consists of Maureen Moore, who is chief executive of Action on Smoking and Health Scotland, and Dr Laurence Gruer OBE, who is from NHS Health Scotland. We will move straight to questions. I think that I have the first question—I am going too fast even for myself—so let me ask that. Witnesses should feel free to answer, but they should not feel obliged to answer each and every question.

FOREST—Freedom Organisation for the Right to Enjoy Smoking Tobacco—and others claim that the risk from second-hand smoke has been exaggerated. How do you answer that criticism?

Dr Laurence Gruer (NHS Health Scotland): The accumulation of evidence over the past few years has been substantial. There is undeniable evidence that environmental tobacco smoke is noxious and that it contains a number of chemicals and gases that are harmful to health. A variety of different studies have shown that people who are exposed to environmental tobacco smoke over the long term are at increased risk of conditions that are associated with smoking, such as lung cancer and heart disease. The excess risk compared with the risk for non-smokers is between 20 per cent and 30 per cent.

Evidence suggests that, if people who have pre-existing heart disease are suddenly exposed to tobacco smoke, their blood circulation and blood flow to the heart go down very quickly. It is beginning to look as though people can have a heart attack that is precipitated by being exposed

to that situation. We also know that people who have a tendency to asthma can either develop asthma or have it worsened by exposure to tobacco smoke. There are a range of conditions in young children, which I could elaborate on.

The Convener: Could you name some?

Dr Gruer: There is clear evidence that women who are exposed to passive smoke during pregnancy have lighter babies on average than women who are not exposed to passive smoke. The amounts are small—the babies are perhaps an average of 40g to 50g smaller—but the evidence is consistent, so it looks as though babies are failing to develop properly in that situation.

The Convener: Where does the figure of 40g to 50g come from? What kind of cigarette smoking is going on for that to be inhaled by a pregnant woman?

Dr Gruer: Sorry?

The Convener: What does that figure relate to in terms of smoking?

Dr Gruer: It relates to the weight of the baby.

The Convener: I see. Sorry.

Dr Gruer: If a baby is on average 2.5kg—

The Convener: I am a pounds and ounces person. I am sorry. That is how I got lost.

Dr Gruer: The difference is about an ounce and a half; it is a small amount, but it is consistent.

Babies are also more likely to develop ear infections, upper respiratory tract infections and asthma, and there is a higher incidence of sudden infant death syndrome in the very young.

The Convener: Is that from passive smoking by the baby?

Dr Gruer: That is right.

Maureen Moore (Action on Smoking and Health Scotland): It is important that people understand that FOREST, which represents itself as being for the rights of smokers, is a tobacco industry-funded group—it gets 98 per cent of its funding from the tobacco industry. The tobacco industry has consistently tried to oppose the introduction of bans on smoking in the workplace.

The evidence is clear and irrefutable. The Scientific Committee on Tobacco and Health concluded that there is a cause and effect relationship between passive smoking and ischaemic heart disease and, as Laurence Gruer says, cancer.

It is important to bear in mind the context within which FOREST operates.

Mr Duncan McNeil (Greenock and Inverclyde)

(Lab): This is a debate for the experts. Rather than FOREST, we will go straight to the Tobacco Manufacturers Association and to the problem that it highlights in relation to communicating the risks in the debate. The submission states that analysis of studies

“reported an estimated excess risk in non-smokers living with smokers, as compared with non-smokers living with non-smokers, of 26% in respect of lung cancer. This, to the ordinary person unfamiliar with risk assessment and statistical method, gives the impression of the risk being high. In fact, what the figure means is that, in the case of a non-smoker living with a smoker, the risk is 12.6 persons per 100,000 people, as opposed to 10 per 100,000 for non-smokers living with non-smokers.”

The Convener: Will you state, for the *Official Report*, from which submission you are quoting?

Mr McNeil: The submission from the Tobacco Manufacturers Association, not from FOREST.

Maureen Moore: The tobacco industry.

Mr McNeil: Yes. Does that not highlight the problem that we have with communicating with people? We all accept that smoking kills. The debate is about whether passive smoking has the impact that you say it has. We are not communicating that effectively. We are not winning the argument. There seems to be a standstill, with scientists on one side or the other.

Maureen Moore: Do you mean that we are not communicating effectively to the Scottish public?

Mr McNeil: Yes. Volume does not equal substance in those studies.

Dr Gruer: It is undoubtedly the case that the risks from passive smoking are much less than the risks for people who smoke cigarettes. It is clear that people who smoke inhale far larger quantities of the poisonous substances than do people who inhale them through exposure to other people's smoke, but the extra risk is certainly significant compared with the risk for a person who is not exposed to tobacco smoke, and the risk accumulates over time. The more smoke that someone is exposed to over a longer period of time and the more dense the smoke, the more likely they are to be affected. Moreover, as I said earlier, we are talking not only about death but about the exacerbation of existing conditions such as asthma and bronchitis. We are talking about a lot of people.

Mr McNeil: Will the bill reduce the level of smoking at home or will it increase it? Will people stay at home and drink and smoke more—in front of children, spouses and other members of the family?

Maureen Moore: We commend Stewart Maxwell for introducing the bill. ASH Scotland

wants a ban on smoking in the workplace, to protect people there. If we bring down smoking rates in the workplace, it helps people to stop smoking. There is a cause and effect, and the effect will also go back to people's homes. The areas with the highest rates of smoking are the areas of deprivation, where smoking is almost normalised. Workplace smoking policies are poor. We are trying to send out a message to young people that smoking is dangerous, yet it is normal to allow smoking everywhere, which encourages people to smoke. We go round in a continuous circle, which new smokers join; we must cut that circle. One of the most important policies that we should put in place is getting smoking out of the workplace in Scotland.

The Convener: I think that Duncan McNeil was referring to displacement smoking. Would Dr Gruer like to comment on that?

Dr Gruer: I could not exclude the possibility that some people might smoke more at home if they could not smoke in a restaurant, but I have not seen any evidence to suggest that that would happen.

I endorse what Maureen Moore has said. Although we welcome the focus on reducing the general public's exposure to smoke in areas where food is consumed, we do not see, from a public health point of view, a rational distinction between exposure to smoke where there happens to be food and exposure to smoke in any other public situation. What is needed is much wider control of exposure to passive smoking, rather than control only where food is consumed. Evidence suggests that wider control is likely to create environments that not only protect people who are not smokers but encourage people who are smokers in their efforts to give up. It is often very difficult for people to give up, so we should reduce their exposure to the cues to smoking. There is often a link between cigarettes and eating a meal, or between cigarettes and having a drink.

Mr David Davidson (North East Scotland) (Con): I want to go back to what Maureen Moore said about deprivation and about how protecting people in the workplace could lead to people stopping smoking. People who are not in employment—and there will be many of them in areas of deprivation—will not be encouraged to stop smoking by a workplace ban. What is ASH's view on that?

Maureen Moore: People who are not in work go to community centres and other places that are workplaces, so they would be protected by a workplace ban. People who are not in employment do not just stay in their houses, do they? They go out to public places. Therefore, if we bring in a ban that covers all workplaces in Scotland, where the

majority of people are, it will also have an impact on unemployed people.

Mr Davidson: I take your point. Does ASH have any figures on where unemployed people attend and where they occupy themselves?

Maureen Moore: I do not have figures with me but we have an information service that could find out for you.

The Convener: We would be grateful if you could provide the committee with those figures.

Janis Hughes (Glasgow Rutherglen) (Lab): In ASH Scotland's written submission, you suggest that the explicit relationship in the bill between food and a smoking ban reinforces the view that the bill is more about comfort than about health. Will you elaborate on that view?

Maureen Moore: We are concerned about the limitations of the bill. If it is brought in for only one section of the population, people will find ways round it. They will stop serving food, and smoking will continue.

Janis Hughes: Do you have any evidence from places where smoking has been banned to suggest that that will happen?

14:15

Maureen Moore: The international evidence is that a ban should be introduced through workplace legislation. Smoking should not be banned in only one sector such as pubs or the licensed trade. I am concerned that, in Scotland, the debate continues to be about customers in pubs and clubs. A ban should protect people in the workplace. People who work in bars do not have the choice of leaving the bar, because they must earn a living, so they should be protected.

Mr Davidson: I will continue on the same theme. In your submission, under the heading "International Perspective", you say that, in Glasgow,

"fewer people a year would die of heart disease, respiratory disease and cancer",

and you refer to other people's work. You also suggest that statistical evidence shows that smoking bans produce

"higher rates of smoking cessation".

Could you give us some figures now for the *Official Report*?

Maureen Moore: My submission says:

"A recent calculation of the possible impact of a smoking ban in workplaces in Glasgow alone suggested that up to 1,000 fewer people a year would die of heart disease, respiratory disease and cancer".

That was sourced from the chief medical officer's annual report of 2003. What other figures did you want?

Mr Davidson: It would help to have the direct reference for the information further down the page.

Maureen Moore: Are you talking about total workplace bans?

Mr Davidson: Yes.

Maureen Moore: Moher et al say that there is

"Consistent evidence that workplace tobacco policies and bans can decrease cigarette consumption during the ... day by smokers".

That was based on a systematic review of the Cochrane tobacco addiction group's trials register in November 2002, abstracts from international conferences and checks of bibliographies of identified studies and reviews for additional references. We can send you that information.

Mr Davidson: The references are fine. I just wanted them to be on the record as the basis of your comment.

Dr Gruer: We submitted the abstract of one such study, which was from Finland. It suggested that one year after enforcement of the legislation there to implement no-smoking policies in the workplace, the average prevalence of smoking among the workers who were studied had decreased from 30 per cent to 25 per cent. The 5 per cent drop in that year remained for the next three years.

The Convener: As David Davidson knows, all the references should be in the public domain through the papers that have been submitted for this meeting and previous papers.

Mr McNeil: Dr Gruer mentioned a Finnish report that described a drop in the prevalence of smoking after a ban. Was that ban supported by measures such as buddy systems or patches? People are suspicious about the debate and the organisations that are involved in it because the selective use of facts damages their case. Organisations do not want to be painted as wanting to make tobacco illegal. It is important to say that some such studies were supported by patches and other initiatives that should have to be adopted before a ban.

Dr Gruer: Any sensible approach to dealing with tobacco in society would ensure that a measure such as the one that is proposed is accompanied by support to help people to stop smoking altogether. As smoking is an addiction, many people find it extremely difficult to stop. We know of ways to increase the success rate significantly by providing different sorts of support.

Maureen Moore: That is absolutely right. It should be in a tobacco act. The Executive has just launched a new tobacco action plan, of which smoking in public places is only one arm. There must also be cessation support, action on smuggling, prevention and education for young people. A ban on smoking in public places should sit within a whole tobacco action plan.

Shona Robison (Dundee East) (SNP): You said earlier that ASH wants a total workplace ban and that you do not feel that Stewart Maxwell's bill goes far enough. For the record, do you see Stewart Maxwell's bill as progress and as something better than what we have at the moment, and will you be supporting its aims?

Maureen Moore: Absolutely. We support Stewart Maxwell's bill and, despite the caveat that you mentioned, we commend him for taking this action.

Janis Hughes: You say that a blanket ban on smoking in all public places would be preferable, but do you not think that such a ban would be difficult to enforce and would place an undue demand on enforcement agencies?

Maureen Moore: No. Ireland has just introduced a ban. It is still early days, but the Office of Tobacco Control in Ireland has done some work on the enforcement of the ban since its introduction. Its report found that 97 per cent of premises inspected under the smoke-free workplace legislation were compliant with the law. That is a high compliance rate. When we knew that getting into a car without a seatbelt could kill us, we legislated overnight to get people to use seatbelts. The legislation was accompanied by education and continual reinforcement, and people now use their seatbelts. Our work shows that smokers respect restrictions when they are in place. Some people may over-egg the pudding in relation to ensuring that people are not abusing a law that is in force. Evidence from New York is very positive indeed, and smoking rates there have come down by about 11 per cent since smoking was banned in the workplace.

Janis Hughes: So the ban is seen to be effective not due to the enforcement agencies but due to voluntary means?

Maureen Moore: The enforcement is there in Ireland, but inspectors have found that people are complying with the ban because they support it. A recent MORI poll showed that people in Scotland support a ban on smoking in the workplace and in public places. Nobody wants to put their health at risk to that extent. If your risk of heart disease and lung cancer is raised by between 20 and 30 per cent because of people smoking, that is unacceptable.

Janis Hughes: The voluntary scheme that has been in place has not been very successful. If it has not been successful, why do you think that the public will suddenly become compliant with a legal ban and not put undue demand on enforcement agencies?

Maureen Moore: The voluntary charter that is in place just now is for the leisure industry, and that approach is fundamentally flawed, because it is not about extending smoke-free areas but about informing customers that premises are smoking or no smoking. All that people have to do to comply with the voluntary charter is to put up a sticker, so of course that will not extend smoke-free areas.

Dr Gruer: A ban would be successful if its overall conditions were broadly acceptable to the great majority of the public, but there would have to be sufficient teeth to enforce the ban and to ensure that the small proportion of people who might try to evade it could be brought to book. That seems to be the case in Ireland, where there are significant fines for the premises if someone is found to be smoking, so there is a big incentive for the owner of an establishment to ensure that people comply. That seems to be quite a clever mechanism for ensuring enforcement.

Mr McNeil: It is fairly important to record that, when we legislate, it should be in support of public opinion. Only a few months ago, Mac Armstrong said that Scottish public opinion was not ready for a smoking ban. Tom McCabe, the Deputy Minister for Health and Community Care, has put on record his recognition of the gains that have been made from the voluntary charter. Given that background and given that the bill creates three criminal offences, do you think that the proposed legislation is proportionate to the problem?

Maureen Moore: Are you asking about a ban on smoking in the workplace?

Mr McNeil: I am asking whether it is proportionate for the Parliament to legislate to put in place three criminal offences: smoking in a regulated area, permitting smoking in a regulated area and failing to display mandatory signs. The bill does not say how we should enforce those measures, which is a serious omission.

Maureen Moore: A ban on smoking in public places should be enforced. Such bans have never been respected in countries where they have been introduced. That is why I was trying to convey my anxiety about enforcement of the ban against all those people who decide to smoke where it is not allowed. For us, the limitation of the bill is that it does not ban smoking in the workplace. ASH Scotland believes that there should be such a ban, to protect the health of workers in Scotland.

The Convener: I have seen somewhere that it is not within the competence of the Scottish

Parliament to ban smoking in the workplace, although I may be wrong.

Maureen Moore: You are right.

The Convener: There are restrictions in the bill in order to make it competent.

Mr Davidson: Members of the Irish Government sat in this room and told us that it took 14 years to get to the position that they have reached. You appear to want us to get there overnight. That means that we would not be winning hearts and minds, proceeding on a gradual basis and allowing an educational process to work. Have you given up on that approach? Do you think that legislation is the only way in which to solve the smoking problem, bearing in mind that the bill covers only one aspect of that?

The Convener: I ask Dr Gruer to speak first.

Dr Gruer: In Britain, there has been a gradual change in attitudes towards smoking in public places over a number of years, as evidence has built up. That development seems to be accelerating, as people recognise that the approaches that have been taken in other countries are bearing fruit. We can learn rapidly from other countries. We do not have to spend another 14 years cogitating on what is happening if we can see that a country next door is able to achieve something worthwhile.

From recent surveys of the general public, there appears to have been a substantial shift in mood. People have seen huge benefits in places where smoking has been banned, such as the London underground, trains and planes. We are seeing the benefits of the restrictions that have been placed on smoking in a number of areas in the past few years and we can build on those.

Mr Davidson: Where does education sit in this process? The bill would hit adults who already smoke. What about the next generation? Is education finished, or does it have a role?

Dr Gruer: Education has an important role to play. We have not done nearly enough to get across to young people—especially kids under the age of 13, many of whom have already started to smoke—exactly what they are getting themselves into when they smoke. They have no idea that smoking is a powerfully addictive behaviour. They think that they can have a few puffs and stop whenever they like. Evidence demonstrates that very quickly—often in a matter of weeks—kids are addicted to cigarettes and find it very difficult to stop smoking. We are not getting across to kids well enough the true dangers of cigarettes.

The Convener: I would like to develop that point, but we should keep to the bill. David Davidson has asked about education, which is an interesting issue, but we should bear in mind the

fact that we still have many questions to put. We are aware of the background of failed campaigns and of the invincibility of youth.

Shona Robison would like to ask a supplementary. She should relate that to her previous question to Maureen Moore, so that we can move on.

14:30

Shona Robison: David Davidson mentioned the need to win hearts and minds. Will you remind us of the results of the recent MORI poll? Do the results suggest that the public might be ahead of politicians in considering not just a ban on smoking in places that serve food, but a wider ban?

Maureen Moore: We must bear in mind the fact that different polls ask different questions. Certainly, a MORI poll in the United Kingdom that extrapolated the figures for Scotland showed something like 77 per cent support for a ban on smoking in public places.

Shona Robison: Do you deduce from that that the public might be ahead of politicians in wanting things to move ahead quickly?

Maureen Moore: There is real anxiety that a ban might turn people off, but the evidence does not suggest that that is the case. I know that the people who telephone ASH Scotland probably represent just one section of the population, but I consistently hear from, for example, people who have heart disease, people who have young children and pregnant women who do not go to public places because they are worried about their health. I hear from people who are concerned that they can take no action to protect their health in the workplace. We should not underestimate the concerns of the Scottish population.

Mr McNeil: I think that you acknowledge that there is a difference between asking a member of the public whether they support a ban on smoking in public places and whether they support restrictions on smoking in public places.

The Convener: Was there a question in there?

Mr McNeil: No, I just say that for the record.

Shona Robison: Can we clarify what question the MORI poll asked?

Maureen Moore: I have not seen all the questions. There are different polls and tabloid newspapers run their own polls, which produce different results.

The Convener: The committee can find out what the question was so that we can establish to what the figure of 77 per cent related.

Helen Eadie (Dunfermline East) (Lab): In some large public offices, smoking policies exist that restrict smoking to a designated smoking room. Often, however, there is a problem with the waft of smoke to neighbouring rooms. Do you have a view on the bill's provision that a "connecting space" that is adjacent to a regulated area should also be a non-smoking area?

Maureen Moore: Yes. The problem when smoking is restricted, especially in big pubs, is that smoke wafts across. The smoke must be eliminated completely, so there must be a door or wall between smoking and non-smoking areas.

Helen Eadie: Is that adequate? Smoke, by its nature, is insidious and creeps everywhere.

Maureen Moore: A room would have to be physically protected from the smoke.

Helen Eadie: Extractor fans are needed, too.

Maureen Moore: Ventilation systems do not protect people from the health risks of passive smoking. We want smoking to be eliminated from the workplace.

Kate Maclean (Dundee West) (Lab): I was interested in what you said in your submission about ventilation and workplaces, because I am concerned, as is NHS Health Scotland, that the bill would protect some categories of employee but not others, depending on the nature of the business of the establishment. I was interested to read that even when the ventilated air in a bar has been judged safe, because the ventilation system provides for

"a minimum of 12 air changes per hour",

it is estimated that

"5 out of every 100 bar staff will die from job-related passive smoking-induced heart disease or lung cancer".

Have I understood your submission correctly?

Maureen Moore: Yes. Bar staff are the most affected because they work in the places where there are least likely to be smoking policies.

Kate Maclean: In effect, you are saying that, even if what might be regarded as good ventilation is in place and people are not made uncomfortable by smoke, five bar staff out of every 100 will contract a smoking-related illness.

Maureen Moore: Ventilation does not protect people, but it is being promoted by the tobacco industry, which says that the issue is about choice. It says, "Put ventilation in. That is the answer." A lot of people are spending thousands of pounds doing that, rather than removing smoke from the workplace.

Kate Maclean: I am concerned about that, because in some of the evidence that we have

heard and in some of the written submissions that we have received ventilation has been proposed as a solution. I know that, although people can feel quite comfortable when they are in a ventilated area, they can still be suffering the effects of passive smoking, so only an outright ban would effectively protect employees.

Maureen Moore: Yes.

Dr Gruer: I agree. Ventilators do not filter out a number of the most noxious constituents of tobacco smoke, so ventilation gives a false sense of security. Ventilation systems work even less well if people who are smoking are close to those who are not smoking, because the smoke drifts across. Anyone who flew in an aeroplane before there was a complete ban on smoking in aircraft will know that, if they sat with someone smoking behind them, the smoke—even though it was supposed to be taken away at the rear—wafted around, which was unpleasant.

Kate Maclean: I realise that the issue of employee safety is reserved to Westminster, but we have a health interest in employees' safety. An outright ban in all public places would be most effective in health terms.

Dr Gruer: That is the ideal, if your aim is to ensure that people who do not want to breathe tobacco smoke are not obliged to.

Mr McNeil: To achieve what you want to achieve, is the ultimate aim that people should not be allowed to smoke at all, including in, for example, public parks? Other countries are moving to the next phase—they are going beyond banning smoking in public spaces to banning it on public highways and in parks. Is that where ASH wants to go? Does it support a complete ban on smoking?

Maureen Moore: I speak for ASH Scotland. We want a ban in the workplace or in public places that are semi-enclosed or enclosed buildings. That does not mean public parks. There are rules for lots of things in society. When we have a product whose use affects other people's health, we should take action to ensure that public health is protected. We do that with speed limits and we do it with seat belts. We do not allow other carcinogens in the workplace and we certainly should not be allowing this carcinogen in the workplace.

Mr McNeil: Do you support a total ban—

Maureen Moore: In the workplace.

Mr McNeil: Just in the workplace?

Maureen Moore: Yes.

Mr McNeil: You could never see yourself supporting a ban in a picnic area.

Maureen Moore: Why would we do that?

Mr McNeil: Because somebody could be smoking next to somebody else.

Maureen Moore: We hope that people will respect the people whom they are with. I have lots of smokers in my family and I know lots of smokers—

Mr McNeil: Some of my best friends are smokers.

Maureen Moore: I used to smoke. This is not about getting at smokers; it is about protecting public health and ensuring that we have policies to do that. That is all. ASH Scotland is not an organisation—

Mr McNeil: We will hear evidence later that some states in America are moving on from public enclosed spaces to outdoor spaces. I put on the record the fact that I am a reformed smoker; I stopped smoking 22 years ago. I believe that smoking kills and that people should not start smoking. However, we may have different views on how we encourage them to stop smoking and whether we should use legislation to do so.

The Convener: Not everyone should feel that they have to declare how long ago they stopped smoking.

Mr McNeil: I was responding to the implications of the witness's statement.

The Convener: I understand, but I meant what I said. I do not want to take up time. If committee members are finished, I invite Stewart Maxwell to ask some questions.

Mr Stewart Maxwell (West of Scotland) (SNP): I want to clarify a couple of points that have come up. On public attitudes, you mentioned the MORI poll. Do you know of any other polling or survey evidence that supports the view that the public in Scotland support a full ban in public places?

Dr Gruer: No. However, given yesterday's announcement by Tom McCabe that the Executive would start a public consultation on banning smoking in public places, we can expect that a substantial amount of excellent information on what the public think will become available over the next three or four months. By the end of that period, we will be in a good position to know exactly what the public's attitude is.

Mr Maxwell: Is Maureen Moore aware of any other surveys?

Maureen Moore: There is other evidence, but I tend not to talk about the polls because I would need to see the questions that they asked. We could find more evidence if you like.

Mr Maxwell: I am simply trying to clarify that polls other than the MORI poll have shown support for a ban on smoking in public places. In front of me, I have a list of at least eight other such polls and surveys. As I am sure you are aware, the survey that was conducted by the Office for National Statistics also showed public support.

At present, the bill would apply only to places where food is supplied and consumed. That follows examples from other countries across the world that have started by banning smoking in those areas and have moved on to wider bans. The bill should be viewed in that light and as a progressive measure. If the will of the Parliament is not to go for a full ban in one go, would it be reasonable for it to legislate progressively towards a complete ban on smoking in public places?

Maureen Moore: We support the bill because we see it as a positive first step forward, but we expect that the ban would be extended. We want smoking in the workplace to be outlawed eventually.

Dr Gruer: If the next few months were to show that there was no support for an overall ban, a ban on where food is served could be a useful first step. However, now that we have seen what has happened in other countries, there is a realistic prospect of moving a bit more quickly. The problem about starting where the bill suggests is that it might then take a long time before we could move forward to other areas. It is also a little hard to determine the rationale behind focusing simply on places where food is consumed when places serving food such as crisps and other snacks would be excluded. That seems a rather arbitrary distinction. We are talking about finding a way of preventing members of the public and employees from being exposed to tobacco smoke, whether or not they are in a situation where food is being consumed.

Mr Maxwell: David Davidson mentioned education programmes. Should the attempt to de-normalise smoking among adults and in society in general be part of such programmes so that we educate young people that smoking is not normal?

Dr Gruer: Absolutely.

Mr Maxwell: I assume that Maureen Moore agrees with that.

Maureen Moore: I support that. NHS Health Scotland recently had a whole load of adverts on passive smoking in the workplace, in the pub and at home. That covers the whole spectrum.

Mr Maxwell: On the voluntary charter, can you confirm that it is perfectly possible for pubs and other licensed premises to comply with all four parts of the charter without providing any

protection against the dangers of passive smoking?

Maureen Moore: Absolutely.

Dr Gruer: That is correct.

Mr Maxwell: In other words, the fact that premises comply with the voluntary charter does not mean that there is protection for workers or customers in those premises.

Maureen Moore: Yes.

Dr Gruer: That is right.

The Convener: Stewart Maxwell has asked what we in the trade call leading questions. Does anyone have any further questions?

Mr Davidson: Maureen Moore said that the ban would not be an attack on smokers. What element of choice should people have?

Maureen Moore: What do you mean by "choice"?

Mr Davidson: People want to do different activities. You said that any attack should not be against smokers as such but against smoking, which we hope to wean people off. If I may link back to what I said earlier, we want to prevent a new generation from smoking, but we have a current generation that is in the middle of it all. What provisions of choice should those people have or do you not believe that they should have any choice?

Maureen Moore: If a person uses a product that affects other people's health, they must use it responsibly. Whatever a person does, they must do so responsibly. A ban on smoking would be no different from the speed limit, which I have to drive within and which is a public health initiative to protect people. Of the Scottish population, 70 per cent do not smoke and 30 per cent smoke. Most smokers want to stop. A ban in the workplace would help smokers to stop—as Laurence Gruer said, it would reduce their exposure to the cues to smoking. A ban would be positive for everybody. If somebody wants to smoke, they can do so, as long as it does not affect other people.

14:45

Dr Gruer: In a just and fair society, we must provide choice within limits. It is up to society to determine to what extent people can exercise their choices. If an action is potentially harmful to other people, we must consider carefully how the choice to act in that way might be limited for the benefit of the wider community. If a choice has no impact on other people, I am happy for people to exercise it.

The Convener: That concludes our questions. I thank both the witnesses.

We will now hear from the second panel. While we wait for the nameplates to be changed, I remind members that the relevant papers are HC/S2/04/15/4, from FOREST, and HC/S2/04/15/5, from the Tobacco Manufacturers Association. I welcome Simon Clark, the director of FOREST, and Tim Lord, the chief executive of the Tobacco Manufacturers Association.

Mr Davidson: What evidence can the witnesses produce to back the view that environmental tobacco smoke is not a significant health risk?

Tim Lord (Tobacco Manufacturers Association): That is a good point with which to start. All the various epidemiological studies demonstrate that the risk factor involved in passive smoking would not normally be deemed to be significant. Normally, in epidemiology, studies look for a risk factor in excess of 2, or sometimes 3, but studies on passive smoking show an average risk factor of about 1.25 or 1.26. The studies that have been undertaken are not conclusive proof that passive smoking causes disease and are not sufficient in themselves to warrant a ban on smoking in public places.

The issue is complicated. If I may be so bold, I encourage the committee to have experts on epidemiology explain the background. Rather than take my word for it, committee members should hear from epidemiologists about relative risk and the studies that have been done so that they can understand the evidence. The Greater London Authority did that when it considered the issue and it concluded that the evidence was not sufficient to justify a ban on smoking in public places.

Simon Clark (FOREST): In recent years, there have been several investigations into the effects of passive smoking. For example, in 1999, the Health and Safety Commission carefully examined the issue, because it was thinking about introducing an approved code of practice on smoking at work. After taking evidence from all sides of the smoking debate, it concluded that the state of the scientific evidence made it very difficult to prove a link between passive smoking and ill health. Members might well point out that that happened in 1999, but the approved code of practice has never been introduced. Presumably, if outstanding proof of a link existed, a code would have been introduced.

Tim Lord mentioned the GLA, which set up a special committee to examine the matter. That committee met in November 2001 and, like this committee, took evidence from all sides of the smoking debate. When it published its report in April 2002, Angie Bray, one of the co-authors, said:

"After taking evidence from all sides, including health experts, it was decided that the evidence gathered did not justify a total smoking ban."

Last year, the *British Medical Journal* published the results of a huge American study that covered a database of 116,000 people over many years. The study, which went through a rigorous peer review process before it was published in the BMJ, concluded that the health risks of passive smoking might have been exaggerated. Although it is very difficult to prove that passive smoking is not harmful, bodies such as the Health and Safety Commission and the GLA have spent much time and effort taking evidence from all sides and have found it impossible to justify the introduction of legislation that bans smoking completely.

Mr Davidson: What about the statistics on which other groups in favour of the bill have based their evidence?

Simon Clark: I find it interesting that, a couple of weeks ago, the Royal College of Physicians published a report claiming that one bar worker dies a week as a result of passive smoking. My simple question is: where is the hard evidence for that? The RCP has been quick to come up with estimates and calculations, but I am afraid that it has produced no hard evidence whatsoever. Estimates and calculations are not sufficient when it comes to formulating legislation that will provoke a severe social change throughout Scotland and the United Kingdom. We have to be careful with statistics because people can use them to make all sorts of arguments. People who say that passive smoking kills must come up with some hard evidence.

Again, I will quote the editor of the BMJ, Dr Richard Smith, who is no fan of tobacco. In fact, he resigned a previous post at the University of Nottingham because it took sponsorship from British American Tobacco. Last year, he said:

"We must be interested in whether passive smoking kills, and the question has not been definitively answered."

The question needs to be answered definitively before we pass draconian legislation that bans smoking in all public places.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): I want to direct my question at Tim Lord. Does your product kill people?

Tim Lord: Yes, through direct smoking.

Mike Rumbles: So you accept and believe that your product kills people. In light of the responses that you and your colleague have just made, do you believe that passive smoking kills people? A yes or no would be helpful.

Tim Lord: No, I do not.

Mike Rumbles: That is very helpful.

I strongly believe in an individual's freedom to choose what they want to do with their lives. You have accepted that smoking kills people and I feel

that it is up to them whether they want to smoke cigarettes and kill themselves. However, the bill is about the effect of people's choices on other people. Do people who go into a restaurant or a bar that serves food have a right to breathe clean air?

Tim Lord: In this day and age, it is completely reasonable for pubs and restaurants to have smoke-free environments to allow people to choose whether to smoke when they go in—

Mike Rumbles: Do they have a right to breathe clean air? I would prefer a yes or no answer to that question.

Tim Lord: I am not willing to give such an answer, because it is premised on whether breathing in other's people smoke—in other words, passive smoking—is harmful or not.

Mike Rumbles: I will give you an example of what I mean, if I may. Two people walk into a restaurant. One of them has a problem with their lungs and they are offered a seat in a no-smoking area. They are enjoying their meal out together, when somebody lights up a cigarette at the other end of the room and the smoke comes across. The person with the lung problem suffers because of the cigarette smoke wafting into the area. Are you trying to tell me that that scenario does not happen?

Tim Lord: Of course not, because there are restaurants in Scotland in which there are smoking sections and no-smoking sections in the same room. We believe that there should be a greater provision of smoke-free areas; the issue is how to achieve that and whether legislation is needed. If we believed that passive smoking was a cause of disease, the debate would be different. All that we are saying is that the evidence does not demonstrate that it is a cause of disease. We ask you to examine that evidence and have an expert in epidemiology explain it to you so that you can make an informed judgment.

The Convener: It would be for the committee, having had all the evidence, to decide whether it wished to take any such further evidence.

Mike Rumbles: To sum up—I want to ensure that this is absolutely clear—you admit that smoking kills people, but you do not admit that passive smoking kills people.

Tim Lord: Correct.

Mike Rumbles: You also refuse to answer my specific question about whether people in Scotland have the right to breathe clean air if they go out for a meal. You will not say yes or no to that.

Simon Clark: May I answer that question?

Mike Rumbles: I asked Tim Lord.

Tim Lord: I am saying that there should be greater provision of smoke-free areas and smoking areas, because people may or may not like to have smoke around them when they are eating. I am also saying that people should have that information before they walk into a bar or restaurant so that they know what to expect.

Mike Rumbles: Are you saying that, if somebody walked into a completely free and clean atmosphere and somebody else lit up in another part of the room, they would have no right to eat in a clean atmosphere?

Tim Lord: If a room is designated as a no-smoking area, nobody should light up in it. There are things that all pubs and restaurants should do: they should have signage up at their entrances telling customers what to expect so that the customers know. A bar or restaurant is a private place that is owned by a businessman and individuals do not have to go into it. It is important that people know what to expect when they walk into the bar or restaurant; the need for more no-smoking areas is consistent with that. Pizza Hut is a good example of that, as I am sure you are aware. The company knows that parents go to its restaurants with their children, so it decided to ban smoking, because it felt that the restaurants were an inappropriate place for children to be exposed to smoke. I think that that is absolutely right.

The Convener: I will let Mr Clark in when I get supplementary questions.

Kate Maclean: Mr Lord, in your submission and in response to David Davidson's question, you said that a number of epidemiological studies have been carried out. How many studies have been carried out and when were they carried out? Moreover, your submission says that the studies assessed the risk of lung cancer in non-smokers who lived with smokers. Have any other assessments been made of other smoking-related illnesses in passive smokers or non-smokers who live with smokers?

Tim Lord: There certainly have been other studies on risks other than lung cancer, which produced the same sort of risk factor as the one that I mentioned. On the number of studies, I think that there have been about 60 on lung cancer, but I will have to confirm that for you, which I will be happy to do after the meeting.

Kate Maclean: Do you know when the studies were carried out?

Tim Lord: Not off hand, but I will give you the answer to that with pleasure.

15:00

Kate Maclean: You and Mr Clark will both be interested in studies that have been conducted on

passive smoking. Are you aware of whether more scientific evidence comes down in favour of your argument or in favour of the argument that passive smoking affects other people's health?

Tim Lord: I think that about 60 studies have been done on lung cancer. From analyses of those—work that third parties have done, not that we have done—the average risk factor is 1.26 or, sometimes, 1.3. Those numbers are quoted to demonstrate a higher risk of someone getting cancer if they live with a smoker as opposed to a non-smoker. The numbers are frequently headlined as showing a 26 per cent or 30 per cent increase in the risk of getting cancer. That is a misleading way of representing the results of those studies. In fact, we quote in our submission what the percentages represent, which is a marginal increase in the risk of getting cancer. In epidemiology, when the risk factor is below two, the risk is not normally deemed to be significant, as the result could be explained by external factors such as biases, confounding factors and so on. In the language that many groups use, there will be a 100 per cent increase in risk, but that will not normally be deemed to be significant if the risk factor is below two. That is not me talking; that is epidemiologists talking.

The Convener: It would be helpful to the committee if you were to give us a list of those research surveys that contain that information so that we can examine it.

Kate Maclean: The majority of people in Scotland have a general impression that passive smoking is dangerous to health. It would surprise me if that were not the case. I would have thought that well-funded organisations such as yours would be able to refute that impression if it were not the case.

Tim Lord: It is a matter of interpretation of the statistics. For reasons that are difficult to understand, many people interpret those kinds of risk factors as demonstrating significant increases in risk, but epidemiologists around the world would not agree with that interpretation.

Simon Clark: I return to the original question: do people have a right to breathe clean air? I have no doubt about my answer to that—people do not have a right to breathe clean air. Let us get the question into perspective; we have to be practical about the matter. We live in an urban, industrial society. We are surrounded by car fumes; we are surrounded by chemicals from furnishings, carpets, wallpaper and paint work. In our society, nobody has a right to breathe clean air. In a perfect world and a utopian society, of course we would all like to breathe clean air, but that is not how the world is.

Therefore, we need to come up with practical solutions, which is what this situation is all about. It is not about ideology and telling people that they have to give up smoking because it is a dirty, disgusting habit; it is about accepting the fact that there are still 1.2 million smokers in Scotland and 13 million smokers throughout the UK. Some of those people want to give up smoking, but a great many wish to continue. Therefore, we have to find ways of accommodating smokers without inconveniencing the non-smokers.

I agree completely with what Tim Lord said earlier—that we are moving in the right direction. The hospitality industry has made great strides in recent years to introduce more non-smoking areas and to improve ventilation—perhaps we can go into ventilation in more detail later on. A number of pubs in Glasgow and Edinburgh are already going non-smoking and that trend will accelerate over the next few years. For example, by the end of this year, the Laurel Pub Company hopes to turn 50 or 60 of its 630 pubs into non-smoking pubs. I reckon that if that company is left to its own devices to pursue those types of policies on a voluntary basis, probably 200 or 300 of its pubs will go non-smoking over the next two or three years. The company has said clearly that it does not want all its pubs to go non-smoking and it certainly does not want legislation to force it to ban smoking completely because it says that, in some of its pubs, 70 per cent of the customers smoke. It is a question of finding some acceptable compromise. I do not accept that people in an urban, industrial society have a right to breathe clean air. To speak of rights in this argument is dangerous; we do not talk about smokers' rights. We have dropped that type of language, which was used 10 or 15 years ago.

The Convener: It seems that you are talking about the rights of someone to choose or choose not to smoke.

Simon Clark: I disagree—I think that it is a question of being practical. Many people choose to smoke, but they do not have a right to light up wherever they want to—that is the point. Ten to 15 years ago, people would say, "If I want to smoke, I'll smoke," but I do not know any smoker nowadays who thinks that they can walk into a room such as this one—in which, I presume, there is a no-smoking policy—and light up. That is what I mean by rights. We have dropped talk about smokers' rights in that respect.

Equally, it is important to discuss examples such as that which Mr Rumbles mentioned involving somebody suffering from a problem with their lungs and walking into a pub in which people are smoking. A person in such a situation—which is not common—will have to adapt their lifestyle to suit their illness, just as a person who suffers from

asthma must adapt. My wife suffers from asthma, which is set off by cat and dog hair, and she must adapt her life accordingly. She does not demand legislation that bans cats and dogs. An interesting fact is that the number of asthma cases has tripled in the past 30 years, while the number of smokers has halved, so it is wrong to draw a connection automatically between asthma and smoking. Furthermore—

The Convener: I do not think that the committee would say that the increase in the number of asthma cases could simply be put down to cigarette smoke. There are other reasons for that increase in society.

I would like to stop you there, if I may. I was going to let in Mike Rumbles to deal with the right to clean air. Shona Robison can then ask a supplementary question and we can go straight on to the next issue.

Mike Rumbles: I am grateful for Simon Clark's response because his colleague was reluctant to—

Simon Clark: He is not my colleague. We represent separate organisations.

Mike Rumbles: Your fellow witness was reluctant to give me a yes or no answer. You have been straightforward and have made the remarkable statement that nobody has the right to clean air. I also noticed that you did not deal with the example that I gave. If I may be so bold, I said that I have experience—let me put it that way—of trying to find hostellers and restaurants in which people do not smoke, so that a person can sit down of an evening and have a meal out. You are saying that it is up to them and that they can go somewhere else. You have no sympathy whatever with anybody who has a health problem or a disability who is trying to get out of the house and have a social life. I am thinking of the Disability Discrimination Act 1995. Are you saying that such people can go somewhere else?

Simon Clark: Of course I have sympathy. I loved the way in which you dropped in the word "discrimination". If the bill were to be passed, you would be discriminating against the quarter of the Scottish population who smoke. You would be preventing them from going out and enjoying themselves socially.

Of course I have sympathy. We are saying that we are clearly moving in the right direction because the hospitality industry has made great steps voluntarily in introducing more no-smoking areas and ventilation systems exist that can prevent smoke drift. That is one of the problems that people have mentioned. The fact that there is a certain amount of smoke drift from smoking areas into non-smoking areas is a valid criticism.

However, ventilation systems exist that can provide an air curtain.

One of the other options that we have not discussed is having separate smoking and no-smoking rooms in pubs and restaurants. A person would have to be an anti-smoking fanatic to object to there being a smoking room and a non-smoking room. It is extraordinary that, in relation to public transport, for example, there used to be the perfect compromise in the form of smoking compartments on trains. I am pleased that Great North Eastern Railway still offers such a choice. One out of 12 coaches is for smokers and the other 11 coaches are for non-smokers. That provides choice and smokers are kept away from non-smokers. The argument is about providing choice and the sad thing about the anti-smoking lobby is that it does not want to compromise in any way, shape or form. However, we do and we want to come up with an acceptable compromise.

I have sympathy with the example that Mr Rumbles gave and I think that we will see more no-smoking pubs and restaurants over the next few years. It is clear that there is a niche market and I hope that people such as those whom Mr Rumbles mentioned will have more places to which they can go. Many places to which people can go now have no-smoking areas. We should put matters in perspective. Some 86 per cent of companies in the United Kingdom now have a smoking policy that involves either severe restrictions on smoking or a total smoking ban. Smoking is banned in most workplaces and offices, on most forms of public transport, in most shops and in cinemas and theatres. It is not impossible for a person to go out and avoid a smoky atmosphere. I am happy to stand by what I said about the right to breathe clean air. If a person believes that people have a right to breathe clean air, they should go out into Princes Street. I am sorry, but we are not living on the same planet if such people think that the air in Princes Street is clean. Those people should also campaign to ban all cars.

The Convener: I would like to move on, please. Shona Robison has a question.

Shona Robison: You say that passive smoking has no detrimental health effects.

Simon Clark: No. We are not saying that passive smoking has no side effects, but that the evidence does not justify a total ban on smoking in public places. I am aware of 123 studies.

Shona Robison: I turn to the evidence. Are you aware that the United States Environmental Protection Agency has classed environmental tobacco smoke as a class A human carcinogen—a cancer-causing agent? Do you think that the agency is wrong?

Simon Clark: Let me put it this way. As long ago as 1992, the US Environmental Protection Agency claimed that there was a link between passive smoking and lung cancer. In 1997, its report was thrown out by a federal court in the United States because it was alleged that the agency had fiddled the figures to come up with its results.

Shona Robison: I did not ask you about that. I asked whether you disputed the claim that environmental tobacco smoke is a class A human carcinogen.

Simon Clark: I am sure that there are carcinogens in environmental tobacco smoke, but there are also carcinogens in cups of coffee. Why are we picking just on cigarettes?

Shona Robison: Because environmental tobacco smoke is a class A human carcinogen. The Environmental Protection Agency has not classed a cup of coffee as a class A human carcinogen, but it has classed tobacco smoke in that way.

Simon Clark: That may be true, but it is still necessary to provide hard evidence that people are dying as a result of passive smoking. That case has not been proved.

Shona Robison: Let us argue through the issue. If you accept that tobacco smoke is a class A human carcinogen, do you not also accept that it is unlikely to be good for human health?

Simon Clark: That is like trying to prove a negative. It is up to you to prove that passive smoking is killing people and clearly that case has not been made. The Health and Safety Commission has examined the matter.

Shona Robison: Is your argument not reminiscent of the way in which the tobacco industry used to argue that smoking was not dangerous to human health? It is not long since the tobacco industry argued that it was for others to prove that smoking was dangerous.

Simon Clark: The issue of passive smoking was first raised as long ago as 1975, so the anti-smoking lobby has had almost 30 years to prove the case that passive smoking is killing people. Clearly, it has still not done so. I will give members a brief history lesson.

The Convener: No—we do not want a brief history lesson.

Shona Robison: How long did it take the tobacco industry to accept that smoking was dangerous?

Simon Clark: You are addressing that question to the wrong person. Tim Lord represents the tobacco industry.

Shona Robison: FOREST is funded by the tobacco industry.

Simon Clark: What point are you trying to make?

Shona Robison: I am making the point that your interests may be similar in some respects.

Tim Lord: Believe or not, we are trying to be reasonably objective. We do not conduct studies of passive smoking. Such studies have been done by third parties over a considerable period and have produced results. The results show what epidemiologists call risk factors. As I have said before, those factors are not at a level that would normally be deemed to show a significant relationship. The risk factors for other products, such as diesel fumes, are much higher, but it is not concluded that there is a need for legislation in those areas. That is why I suggested, slightly boldly, that it would be good for the committee to have an epidemiologist explain to it exactly how the methodology works, what a reasonable result is and how to interpret results. We do not see that there is a relationship of the sort that has been suggested. We do not say that passive smoking is not detrimental to human health, but that we do not know and we do not think others know.

We are talking about smoking in public places. All studies of passive smoking have been done in the home. Some have been done over 30 or 40 years; one has been done over 20 years. People are asked how much they were exposed to smoking more than 20 years ago by their spouse, who will often have passed away. First, there is a recollection issue. Secondly, the studies relate to in-home smoking, rather than smoking in public places, which we are discussing today.

Shona Robison: I am sure that the committee will want to examine the studies in more depth. In your evidence you say that preventing people from smoking amounts to social engineering. Is discouraging smoking not a social good?

15:15

Simon Clark: We have always said that Government has a clear role to play in educating people about the health risks of smoking, of eating too much and of drinking too much, but when it comes to enforcing a smoking ban in order to make people give up, that is a form of social engineering, which is wrong. It is not what democratic Governments should be about. There is a clear element of choice in this argument.

There are two reasons why the people behind the bill would like to ban smoking. First, it is to encourage and help people to give up. Secondly, it is because of passive smoking. Perhaps we have gone round in circles with the passive smoking

argument, but we do not believe that it is the role of a democratic Government to introduce legislation to force people to give up. By all means educate, but we should have education, not legislation.

Shona Robison: Your submission states:

"It ignores the important concept of personal responsibility and adopts the outdated notion that 'nanny knows best'."

Does nanny know best about making people wear seat belts?

Simon Clark: Personally, I do not think so, but people have accepted that law over the years. I do not think—

Shona Robison: Did you disagree with that law being brought in?

Simon Clark: I was only a child when it was brought in, so I did not have a strong view on it.

Shona Robison: Do you think that it is unnecessary?

Simon Clark: It is one of those things that people have accepted over the years. Government has to draw a line as to how far it goes. For example, there is a lot of talk in the obesity debate about banning junk food advertising that is aimed at children. There is talk about increasing taxation on fatty foods and dairy products. That is relevant to this debate, because we have to start asking ourselves how far Government is going to encroach on people's lives and choices. I believe strongly that people should be allowed to make choices.

To return to what Tim Lord said, we must emphasise that we are looking at a compromise solution. We do not believe that people have a right to smoke wherever they want. We are saying that there are some people who want to give up smoking, and no doubt a smoking ban will help them, but why should other people be discriminated against just because there are some people who wish to quit? Surely the ideal scenario is a society in which there are bars and restaurants and other public places where people who wish to smoke can go, and there are plenty of other, no-smoking places where those who wish to give up and do not want to be tempted and non-smokers who are bothered by other people's tobacco smoke can go.

I am a non-smoker, and I can honestly say that I have never been bothered by other people's tobacco smoke. I know a lot of people like me. It is a question of coming up with choices.

The Convener: I do not share that view. Meals and atmospheres are destroyed by cigarette smoking.

You say that people have choices, but what choice do workers have, even if there are designated areas, when they have to go in and out of them? If one accepts that passive smoking endangers health and can endanger life, why should those people be put in that position?

Simon Clark: I do not want to be boring, but I return to the point that it has never been proven conclusively that passive smoking—

The Convener: But if you accept that premise, having designated areas will not work.

Simon Clark: I accept that, but there are many of us, including some scientists, who do not accept that premise, which is crucial to the argument.

Bar workers do have a choice. I have never seen a bar worker in handcuffs being frogmarched into a pub and being told to work behind the bar. It simply does not work like that. In a few years' time, there will be a lot of no-smoking bars and restaurants, where those people who choose to work in a completely smoke-free atmosphere can work.

We have made great improvements in recent years in the number of no-smoking areas. We have no problem with, for example, a ban on smoking at the bar. If people choose to exert that option, that is fine. It is up to the individual owner to discuss those things with their work force. That is what real local democracy should be about. It is for the owner to speak to his customers and work force and find a policy on smoking that they are happy with. There will then be a range of different venues that people can choose to go into and work in.

The Convener: Does Tim Lord wish to comment on the effect on employees of having designated areas?

Tim Lord: The industry feels that the current situation is unacceptable. We feel that there should be many more no-smoking bars and no-smoking facilities. The question then is how we get to that point. Independent of the science, our view is in some ways the same as the view that lies behind the bill, but we are asking how we can deliver more smoke-free places—for the benefit of workers and the smoking and eating public—without going so far as to have a ban. May I talk a little about how that might be done?

The Convener: I will certainly let you back in later, but a couple of members have supplementary questions, so you may develop the point with them.

Mike Rumbles: This evidence session has convinced me as never before that I will support the bill. Because of the strength of the evidence that we have heard, I waive my right to ask any further questions of these witnesses.

Kate Maclean: I want to ask a brief question that I hope will require only a yes or a no. It is about choice. If we have the status quo, or a situation in which there are smoke-free areas in restaurants and bars, should someone who has a baby or a child be allowed to take that baby or child into the smoking areas?

Tim Lord: Common sense suggests that that would be very unwise.

Kate Maclean: But should they be allowed to?

Tim Lord: By law?

Kate Maclean: Or by a voluntary code.

Tim Lord: It would be very unwise to expose children and babies to smoke in any form. Doing so would not make sense.

Kate Maclean: If passive smoking carries only a negligible risk, why would it be a problem to allow children to be exposed to it?

Tim Lord: I accept that there is an inconsistency, but I just think that it would be unwise. That is why I support what Pizza Hut did. Pizza Hut understands who go to its restaurants—children and their parents—and understands that parents want their children to eat their pizzas and drink their cokes in a smoke-free environment. Pizza Hut delivered that, which showed common sense.

Kate Maclean: What does Simon Clark think?

Simon Clark: It is interesting that the local council in Dundee gave bars the choice: either they could have a children's licence or they could allow people to smoke.

Kate Maclean: Well, the condition for the children's certificate was that bars would have to provide a smoke-free area for children.

Simon Clark: Yes and I thought that that was a good compromise. It gave an element of choice to owners as to whether they wanted to aim their businesses at a family clientele, or at adults only, allowing smoking throughout. The compromise reached was reasonable and could be considered nationally.

Kate Maclean: But interestingly, all the Dundee licensees withdrew from having children's certificates. However, my original question was, if we do not legislate and instead leave things to choice—and obviously it will be parents who make the choice because children and babies cannot—should parents be allowed to take children or babies into the smoking part of the restaurant rather than the non-smoking part?

Simon Clark: I do not think that you can legislate for that. Ultimately, the argument comes back to what Tim Lord was saying about smoking

in the home. If you legislate to stop parents taking their children to a smoking area, you will find a fine line between that and legislating to stop parents smoking in the home, which would be a dangerous road to go down. If you were realistic, you would say that if there is a risk to children, it will be in the home and not in public places.

I am a parent with children aged nine and seven, and I have no problem finding bars that are virtually smoke free. I take them to J D Wetherspoon, for example, which has very large no-smoking areas and I can honestly say that we are not surrounded by a fog of cigarette smoke.

Helen Eadie: I want to ask about a theme raised by the convener—that of the rights of employees. I remember that, in 1995 or 1996, a particular court case featured heavily in the national newspapers, in which an individual had taken their employer to court. Was there an outcome to that case, and how many such cases have come to court? How many industrial tribunals have there been? Have things always been settled out of court? What sort of figures have been involved?

Simon Clark: I cannot claim that my knowledge is definitive, but I understand that in the 25 years since the arguments about passive smoking were first made, only two cases have come to court in the United Kingdom in which an employee has tried to sue their employer over illness caused by passive smoking. One of those cases was in Scotland—that is probably the case to which you are referring—and one was in England. In both cases, the plaintiffs lost due to a lack of evidence. Last year a person who had worked for about 13 or 14 years in a Chinese casino in London received £50,000 in compensation, but the casino did not admit liability. I think that one or two other cases might have been settled out of court in which people received about £4,000 or £5,000, but I would have to look that up.

Obviously, it is a difficult area. Inevitably, some companies settle out of court because they do not want to bear the cost of an expensive court case. If they win—and the evidence suggests that they probably will win, because no such case has been proved in court—they will probably not recover their costs from the plaintiff.

The Convener: The flip side is that if they were to lose the case, a principle would be established in the law and many cases would be opened up.

Simon Clark: Sure. However, to my knowledge, that has not happened yet.

The Convener: I just added that for balance.

Tim Lord: I would be happy to write to the committee if it wants a more definitive answer.

The Convener: We can find out for ourselves whether there has been litigation in the Court of Session or in tribunals.

Janis Hughes: What are your views on the potential economic impact of the bill?

Tim Lord: That question might be best asked of people in the hospitality trade. The people who run pubs and restaurants understand their business better than I do. I can report only what I have heard about the impact on businesses in other parts of the world, but there are not many countries in which smoking has been banned in public places.

In Ireland, where the ban has been introduced only recently, there seem to be two issues: compliance; and the economic impact. Compliance seems to be quite high. Indications from the Government and the hospitality trade are that the percentage of compliance with the ban is in the high 90s. Recently the Licensed Vintners Association of Ireland produced a report that said that its pubs are reporting that business is down by 12 to 15 per cent.

Simon Clark: We heard that news from Ireland just last week.

In New York, both sides are spinning like mad to try to prove that the hospitality industry is losing money or that it is making more money. The United Restaurant and Tavern Owners of New York has clearly said that some bars—not all, but some—have lost as much as 40 per cent of their business since the smoking ban and the New York Nightlife Association says that some clubs have lost up to 15 per cent of their business. Why would those organisations make those figures up? Believe me, the hospitality industry is not in business to keep smokers happy; it is in business to make money. If the industry thought that it was making more money as a result of the smoking ban, I am sure that it would be delighted and that its representatives would be the first people to say so. However, reports from New York and now Ireland indicate that there is a problem.

I will mention what happened to some non-smoking pubs in this country. Some pubs have reported that their policy has been a great success and I have no doubt that that is true. Because relatively few pubs introduce a no-smoking policy, the ones that do so get a lot of publicity, which means that they get more customers. Equally, however, many pubs have been forced to reverse a ban on smoking a few months after introducing it. For example, last year on the Isle of Man a pub banned smoking but reversed the ban three months later because it had lost revenue. The same thing happened in Chester, where the first pub in the town went non-smoking in December but reversed the policy in March. There was a

well-publicised case in February when the University of Leeds student union bar—the biggest student union bar in Europe—banned smoking. In a month, it lost £26,000 in revenue and had to reverse the ban. It is a bit hit and miss at the moment.

I think that there is a niche market for no-smoking pubs and we would welcome such an initiative. We would be the first people to support any individual pub or restaurant that goes no smoking because we genuinely want there to be more choice. If more pubs and restaurants go no smoking, that supports our argument that the hospitality industry can be left to devise a reasonable choice of policies of its own volition, without the need for legislation to force it down that route. We very much support no-smoking pubs, but banning smoking in a pub is an economic risk. That is why the hospitality industry is naturally nervous about doing it.

In a widely publicised statement a few weeks ago, Tim Martin, the managing director of J D Wetherspoon, said that he would support a blanket ban on smoking by 2006, because he wanted a level playing field. He said that if Wetherspoon unilaterally banned smoking, it would lose business to other pubs, so it is clear that the industry is nervous about it.

Janis Hughes: You mentioned evidence from New York and I notice that you have also referred to it in your written submission. Is there any published evidence to back that up?

Simon Clark: Yes. I can give you the quotations that we have received from the United Restaurant and Tavern Owners of New York.

Janis Hughes: Those are quotations, but I am interested in the statistics to back them up. We have heard of a report that says that business tax receipts were up by 8.7 per cent in the nine months to January of this year.

15:30

Simon Clark: That came from the city authorities, but we must bear it in mind that smoking had already been banned in restaurants in New York, so the city authorities were just tying up the loose ends by banning smoking in bars. When they talk about the hospitality industry, they include Starbucks, McDonald's and all those sorts of places. We have to remember that New York has been recovering from a severe downturn after 9/11, so the economy was on the way up anyway.

Tim Lord: It is fair to say that the figure that you have quoted is an accurate number and one that I have heard mentioned before. The other number that I have seen is the statistic on employment in New York city, which shows that after 9/11

employment levels in the so-called hospitality industry dropped dramatically but have now risen to the same levels as at 9/11. In the whole of New York state, the number is up by about 10,000. To say that that rise of 10,000 and the 9.2 per cent increase in receipts—I think that that was the figure that you quoted—are purely due to the smoking ban is a jump because, at the same time, there has been an uplift in the US economy. Having lived in New York myself, I know that the economy there tends to go up and down quite dramatically. It would be interesting to get that analysis done. I have not seen an analysis that can relate rises in employment or in receipts solely to the smoking ban.

Simon Clark: The New York Nightlife Association polled 240 New York establishments; 78 per cent of respondents said that the smoking ban had had a negative effect on business and 28 per cent said that revenues had dropped dramatically. On average, establishments reported a 17 per cent decline in the numbers of waiters and waitresses they employed and there was an 11 per cent decline in the number of bartenders.

The Convener: From what paper are you quoting those figures? Can we have a copy of it?

Simon Clark: Of course you can. The information is from our website, but we got the figures directly from the New York Nightlife Association. I can get you the original fax.

Janis Hughes: How do you respond to the argument that, as 70 per cent of people do not smoke, a smoking ban would benefit bars because people such as me would be more inclined to go to them if they had a smoke-free environment?

Simon Clark: There are many non-smokers, like me, who do not mind a slightly smoky atmosphere. We are no longer living in the 1950s, when 80 per cent of the male population smoked and when, by all accounts, pubs, bars, restaurants and even business venues were incredibly smoky places.

Janis Hughes: Some of them still are.

Simon Clark: I accept that there are still places like that, but there are many places where one can go these days that are not particularly smoky and where a little smoke does not bother many of the people. Again, the matter comes down to choice. Some non-smokers would be attracted to smoke-free bars, but the results of bans so far have been a bit hit and miss. I mentioned some pubs in the UK; some have done quite well by banning smoking and others have found that their revenues have dropped dramatically.

Helen Eadie: The bill proposes a ban on smoking in regulated areas. Do you have a view on which areas should be regulated?

Tim Lord: I do not think that we should have regulated areas and I do not think that we should have legislation to ban smoking. However, I believe, and the industry believes, that there should be many more smoke-free restaurants and pubs, either through a regime of completely smoke-free restaurants and pubs or through a system of partially non-smoking places.

We think that the solution to that would be for the Scottish Executive to set targets for the hospitality industry on smoke-free pubs and areas, and on preventing smoking at the bar, for example. Although people are not very happy with the outcome of the charter that is referred to in the policy memorandum to Mr Maxwell's bill, it is interesting to note that, with one exception, all the targets that the Scottish Executive set were exceeded dramatically, so it appears that the hospitality industry can deliver.

We suggest that the fifth option in Mr Maxwell's bill ought to have been a second voluntary agreement that set aggressive new targets with timescales within which they should be delivered. Legislation should be brought in if the industry could not deliver on that.

Helen Eadie: May I ask a supplementary question, convener?

The Convener: I was trying to keep to the specific issue of which areas should be regulated. I take it that the witnesses have no views about that.

Tim Lord: No.

The Convener: That is really the answer.

Helen Eadie: I wanted to ask about the Health and Safety Commission's approved code of practice on passive smoking. I am told that, when that is implemented, it will have the effect of banning smoking in most working places. Do you not support the view that there should be a designated area?

Tim Lord: There is not an ACOP on the table at the moment.

Helen Eadie: We have received evidence that states:

"The Health and Safety Commission's Approved Code of Practice on Passive Smoking will, when implemented, effectively ban smoking in most workplaces."

Tim Lord: I am sorry. My understanding is that, although the Government was considering having an ACOP—it was in the Government's white paper, "Smoking Kills", in 1998—the idea has since been shelved. From talking to a member of the House of Lords, where the matter was being discussed, my understanding is that the Health and Safety Commission is no longer progressing the ACOP.

Helen Eadie: Perhaps we can check that.

Mr Davidson: I have a follow-up to Helen Eadie's question about regulated spaces. Mr Maxwell's bill refers to an area that is called a "connecting space"—in other words, a space that creates an air lock, as opposed to just a door, which can blow backwards and forwards and allow smoke to pass through. What is your view on that as part and parcel of the proposal that separate areas be provided in pubs and restaurants?

Tim Lord: That and the five-day rule will make the bill very complicated to implement. Given the geography and layout of many pubs, it would be difficult to maintain choice. The designation of a "connecting space" seems to be an unnecessary complication. Does that answer help?

Mr Davidson: Yes.

Simon Clark: I agree with Tim Lord. Individual proprietors need the flexibility to develop policies that suit their businesses. In a large pub or restaurant, there is obviously a much greater opportunity to have a separate smoking room that keeps the smokers well away from the non-smokers.

Other bars could implement a ban on smoking at the bar. A few months ago, I was in Swansea, where the first no-smoking bar in Wales had recently been introduced. We welcomed that. Just down the road from that bar, there is a pub where the landlord is a smoker and, because he does not want children in his pub, the clientele is made up entirely of adults. He has, however, introduced a ban on smoking at the bar, on the ground that it is not pleasant for his bar staff to have smoke wafting over the bar. He has enforced that by telling customers that they will not be served if they smoke at the bar. Everyone accepted that amicably and I think that that is the way we should be looking to go. Each individual bar or restaurant should devise a policy that suits its circumstances.

Mr Davidson: The bill states that, as well as the regulated area, there would be an air lock—a clean area—between the regulated area and the smoking area. What do you think about that? It will continue to be part and parcel of Mr Maxwell's bill if the bill is agreed to in its present form. Obviously, there is an economic issue. An area away from the bar in which smoking was allowed would not be the same as what would be required under the bill: we want opinions specifically on the bill.

Simon Clark: My feeling is that that provision would complicate matters. I suspect that it is designed to make it harder for places to have smoking areas and that its result would be, in essence, a smoking ban. I do not understand how the idea of an air lock, or space between two areas, would work.

Mr McNeil: References have been made to the white paper "Smoking Kills". ASH's written submission states that the measures in that paper would clearly not be effective. You will have a chance to respond on that point. ASH also cites the Health and Safety Executive's point that

"ventilation systems cannot be seen as an acceptable solution"

and argues that, as a consequence, the voluntary charter is unworkable. Given the questions about how quickly the hospitality industry has reached the present situation and the problem of complacency, are we facing legislation because of the industry's inactivity and failure to address the issues by providing smoke-free spaces?

Tim Lord: I will talk about the charter in Scotland, although there is also a charter for the UK. In the "Smoking Kills" document, the Government's strategy on passive smoking had two aspects. One was a possible approved code of practice, which has been shelved, and the other was a public places charter with targets, which was a voluntary agreement between the hospitality industry and Government.

The Scottish Executive set specific targets in its charter, which are referred to in the policy memorandum to Mr Maxwell's bill. The target for sites with smoking policies was 46 per cent, but the industry hit 68 per cent. I will not go through all the targets, but my point is that the hospitality industry over-delivered on what was asked of it in the charter, with the exception of one target, on which it was 1 per cent down. The industry delivered what was asked of it.

It is different to consider whether the requirements in the charter were aggressive enough. As I said, the hospitality industry in Scotland has delivered when it has been asked to. People are now saying that what was done was not enough, which is fair, but as the next step, why not ask for what you want—such as no smoking beside bars, or smoke-free pubs—and set targets in conjunction with the industry to give it time to deliver? So far, the industry has delivered what has been asked of it. My interpretation is that people are now saying that the targets were not aggressive enough and that there has not been enough change, but it is unreasonable to say that after the event. Why not set aggressive targets and timescales and give the voluntary approach a chance? If the industry does not deliver, Parliament could legislate.

Mr McNeil: The point is that the industry's response seems to have been lacklustre given that, in the meetings that we have had with the industry, the representatives have been screaming foul. From your description, the industry was able to better the targets, but if the industry had

approached the problem in that way, you would not be sitting here today.

Tim Lord: I do not know about that. The industry feels that it has overachieved on many of the targets on which the Scottish Executive asked it to deliver. We are surprised by the fact that the response has not been, "Well done; you did good." Given that the industry has over-delivered, I am not sure that its response has been lacklustre. If you are now saying that you want a different picture, I am sure that the industry will not say that it will not do that. I am sure that the industry can deliver on new targets if you make it clear what you want.

The policy memorandum for Mr Maxwell's bill mentions four options on how to address passive smoking, one of which is the existing voluntary approach. We feel that there should be a fifth option, which is to take the voluntary approach, to ratchet it to where you want it to be and give those targets to the hospitality industry, talk to its members and so on. That is not our business, but there is no reason why that could not be done, given what the industry has achieved to date.

Mr McNeil: What proposals have been made by organisations to ratchet that approach up and create another option?

Tim Lord: I am aware that there have been conversations with the Deputy Minister for Health and Community Care in Scotland. It is not my business.

Mr McNeil: Is nothing in the public domain yet?

Tim Lord: There is nothing that I am aware of. The hospitality industry is a different industry—it is not our industry. Debates are taking place and I know that down at Westminster there are debates between the hospitality industry and the Secretary of State for Culture, Media and Sport and the Secretary of State for Health on how to move forward. That strikes me as being a pragmatic United Kingdom way of going about dealing with the situation on the basis of what is successful. The figures are in Mr Maxwell's policy memorandum.

15:45

The Convener: I will bring in Stewart Maxwell. Will five minutes be enough?

Mr Maxwell: I hope so.

The Convener: We want to move on.

Mr Maxwell: I will cover as much as I can in as short a time as possible.

I will start with health. Do you accept that smoke contains 4,000 chemicals, 50-plus cancer-causing agents, 47 regulated hazardous wastes and a

variety of other noxious contaminants? Are you trying to argue that those carcinogens and chemicals do not do people any harm just because they do not happen to be holding the cigarette?

Tim Lord: Exhaled smoke, second-hand smoke, passive smoke—whatever you want to call it—is completely different from the smoke that someone inhales into their lungs when they put a cigarette to their mouth. Such smoke is severely diluted, aged and, in measurable terms, contains fewer components. It is different from the smoke that someone who smokes a cigarette inhales into their lungs.

Mr Maxwell: Are you saying that it does not contain 50 known cancer-causing agents, 47 regulated hazardous wastes and 4,000 chemicals?

Tim Lord: I am saying that it is completely and utterly different from what someone who smokes a cigarette inhales. I am not sure of the exact figures or exactly what it is. You are at an advantage over me in having the figures in front of you.

Mr Maxwell: I have scribbled them down on a bit of paper. The figures are widely known. The British Medical Association and many others have published analyses of what is contained in second-hand smoke. I wondered whether you agree or disagree with that, but we will move on.

Tim Lord: I cannot disagree specifically with the figures that you have quoted, but what I can say is what I did say, which is that such smoke is fundamentally different to the stuff that a smoker inhales. That probably explains the different results that are produced in epidemiology.

Mr Maxwell: We will agree to disagree on that point and I will move on.

On choice, you mentioned earlier that there would be no choice for smokers if a ban was introduced and that they would have to stay at home. Could you point to the section of the bill that forces smokers to stay away from bars if a smoking ban is introduced?

Tim Lord: I do not think I said what you suggest. Have I written that somewhere?

Mr Maxwell: You said that smokers would be given no choice and that they would be forced out of bars and restaurants.

Tim Lord: I accept that your bill is a halfway house—as I think you said last year—in the sense that it is not a complete ban, but a ban on smoking where food is served. That means that if your bill were to be put on the statute books there would still be smoking areas or smoking pubs that did not serve food. There would be less choice.

Mr Maxwell: How would there be less choice? What would stop a smoker going into a restaurant if the bill were passed?

Simon Clark: Of course, there would be nothing to stop a smoker going into a non-smoking pub, but you would be discriminating—I used the word discrimination earlier—against people who choose, when they go out in the evening, to go to a pub or a restaurant and smoke. What I find disagreeable about your bill is that it would introduce a blanket ban on smoking in all places where food is served. That means that there would be nowhere for smokers who like to go out in the evening and smoke with their food or have a drink to go. That seems to be extraordinarily draconian. We are not saying that every place that serves food should allow smoking. We would have no problem if, in a few years' time—and if there were overwhelming public demand—the majority of restaurants and pubs were no smoking.

Why should we ban smoking in all places where food is served? The bill is wrong, because it does not distinguish between restaurants and pubs that serve food. There are many pubs that serve only pies and sandwiches, for example. I presume that they would, under the bill, have to choose between allowing people to smoke and selling pies and sandwiches.

Mr Maxwell: I thought that you would support that approach, because it involves choice.

Simon Clark: The member is right. However, consumers would have less choice because they would not be able to have a pie and a pint in a pub. The bill would reduce choice. It would mean that a heck of a lot of people would drink without having anything to eat. Given all the drinking problems that exist, that is not a particularly good idea.

Mr Maxwell: For a moment, we will stick to the argument about choice. What would you say to a young person with asthma who wants to pursue a career in the bar and restaurant industry? What should be their career choice? Should they accept that they will have to damage their health further by working in smoky atmospheres, or should they give up their ambition to work in the hospitality industry?

Simon Clark: We are working towards a situation in which there will be more no-smoking bars and restaurants. I cannot emphasise enough the fact that we are not against proprietors' introducing a ban if they think that it would be good for their businesses. However, the reality is that if a person has an ailment they must sometimes adjust their life accordingly. Many people have nut allergies, but do we ban every food that contains nuts? We must adapt our behaviour according to our circumstances. I hope

that we are moving towards a situation in which many more people who have asthma will be able to work in a non-smoky atmosphere. One cannot always blame asthma on smoking. There is now a considerable amount of research that suggests that it is related to diet and genetic factors.

The Convener: I know that Stewart Maxwell would like to ask a lot of questions, but we have another batch of witnesses to hear from. He may ask one long last question, including as many bits as he likes. Later he will be able to give evidence to us and to respond in his own time to what has been said.

Mr Maxwell: I will make a couple of quick points. The publication from New York to which I referred concerns specifically bars and restaurants, rather than the wider hospitality industry. Earlier, you asked why I was not seeking to ban cars, which produce far worse toxic fumes than cigarettes. The New York study addressed that question. The study states:

"The Department found that the average air pollution levels in bars that permitted smoking were as much as 50 times higher than at the entrance to the Holland Tunnel at rush hour."

Do you accept that that is the case and that the issue of fumes from cars, which you mentioned earlier, is a red herring?

Simon Clark: I do not accept that argument and would need to examine the research to which the member refers. Even if the statement were true, we must still ask whether passive smoking is harming people who work in pubs and restaurants. I do not think that Mr Maxwell has proved that.

The Convener: I am sorry to interrupt Stewart Maxwell's questioning, but he will have a fair cut at the witnesses' evidence when he gives evidence and we put those points to him. I thank our second panel of witnesses.

I refer members to papers HC/S2/04/15/6, HC/S2/04/15/7 and HC/S2/04/15/8. Here is a man who is ready for business; he has got the jacket off already and the sleeves rolled up.

Andy Matson (Amicus): No, convener, it is too warm. Some ventilation might be helpful.

The Convener: It is very warm in here. I take it that the witnesses sat through the previous evidence, which is helpful. I welcome Andy Matson, regional officer of Amicus; Stephen Leckie, chairman of the British Hospitality Association Scotland committee; and Arun Randev, a proprietor. I invite Helen Eadie to start the questions.

Helen Eadie: Thank you—

The Convener: I beg your pardon, but it is Janis Hughes to start. The lack of ventilation is getting to me, too.

Janis Hughes: My question is similar to one that I asked of the previous panel and it is directed to all the witnesses. What are your views on the bill's economic impact?

Andy Matson: The Amicus written submission concentrates primarily on what we regard as being omissions from the bill on employment matters. I am sure that it will come as no surprise to the committee to hear that trade unions take a view on legislation that might impact on the security or otherwise of employment, whether that happens to be this bill or legislation that would impact, for example, on the business of BAE Systems or Thales Ltd. Our approach is at least consistent.

Janis Hughes: I want to ask you specifically about your written submission, which states:

"The Bill should make provision for those workers who may face job security or redundancy as a direct result of the Bill's implementation."

Can you say more about that? What kind of provisions would the bill need for your concerns to be allayed?

Andy Matson: It becomes difficult to say that something has happened as a direct result of a piece of legislation. Issues are going through various chambers in Scotland and south of the border, from considering whether to ban the advertising of tobacco products to regulations that would have point-of-sale implications. All those, in conjunction with the bill, could impact on jobs. We believe that special provision should exist in statute to compensate individuals who find themselves out of employment, where it can be clearly demonstrated that job X, Y or Z has been lost as a direct result of legislation's impact on a particular sector of the economy, rather than its happening through employees' choice or that of their employers.

Janis Hughes: Do you accept that it would be difficult to prove such a direct result?

Andy Matson: I think that I said that. Over the years, employers have given copper-bottomed guarantees to trade unions that there would be no redundancies as a result of the introduction of new technology, but redundancies have continued to take place.

The Convener: Do you not also agree that it would set a dangerous precedent in law if people were compensated because it was deemed that they had lost their jobs or some of their income through the introduction of new legislation? I remember discussion of that issue during consideration of the Protection of Wild Mammals

(Scotland) Bill. Such compensation would set a precedent that would open up the coffers.

Andy Matson: I am sure that it would set a precedent, but one must sometimes be bold and radical.

The Convener: I do not know why you looked at me when you said that. I put it to you as a supplementary observation merely that such compensation would cause huge difficulties in law.

Andy Matson: I accept that there are obvious difficulties in many areas, but if there is willingness, a degree of radicalism can sometimes be helpful.

The Convener: You need to speak to Andy Kerr about that.

Mr Davidson: I will ask the same question that I asked the previous panel, on the requirement for smoke-free areas between regulated areas. Before I do so, will the two witnesses who represent the industry—who provide the service and who have invested in it—like to comment on the general implications and the practicality of provision of regulated areas?

16:00

Arun Randev: I have had no problems at all in implementing such areas in my business. My restaurant is 100 per cent non-smoking, and people are not allowed to smoke within three feet of the bar.

Mr Davidson: Is there a direct connection between the dining area and the drinking area?

Arun Randev: There is a void area, or a passing area.

Mr Davidson: Is there a physical gap?

Arun Randev: There is no physical gap—it is just a void area.

Mr Davidson: The bill suggests that there should be physical barriers and physically distinct spaces between non-smoking areas where food is served and smoking bar areas. How would the practicalities of that affect you?

Arun Randev: I would have to consider that at the relevant time and place but, like most people in the trade, I would find that difficult to implement because it could—depending on the logistics of the premises—be difficult to create separate areas.

Mr Davidson: So the matter depends on the practicalities of individual premises.

Arun Randev: Yes.

Stephen Leckie (British Hospitality Association Scotland Committee): I represent the British Hospitality Association in Scotland, but I

am also a hotelier in my own right. I manage and direct Crieff Hydro, which is Scotland's leading leisure hotel—I say that in case members have not come across it.

The Convener: That is the plug. However, I do not think that many people read our *Official Report*.

Stephen Leckie: The British Hospitality Association's view is set out pretty clearly in our letter of 20 April to the committee. The only change that I would make to that letter is that, on regulated areas, we refer to "corporate hostility" instead of "corporate hospitality".

As far as the economic impact on hoteliers and the hospitality industry is concerned, our view is that the voluntary approach works for us, and we continue to sustain that view. The Government or Parliament might decide that that approach is not working, but our view would be that Stewart Maxwell's bill is not enough because it is a halfway house and there are too many anomalies and question marks in it. Those include, for example, the five-day rule and the questions about what food is and where it will be served. If the bill's aim is to help people not to suffer from the effects of passive smoking, what about pubs that do not provide food at all? Our view is that we should stick to the voluntary approach and in future years, if need be, after consultation has taken place, we can go for a formal nationwide ban on smoking in public areas.

Mr Davidson: You have been here for most of the afternoon, so you heard the evidence from other groups about the practical aspects of providing choice and separate areas. Do you agree that if there is to be real choice, there must be physical separation?

Stephen Leckie: Yes. I also accept that there is some argument and debate about ventilation—some people say that ventilation works and some say that it does not. In our little establishment at Crieff Hydro, we have ventilated spaces. Someone on one side of a counter—a five-foot high barrier—might tell me that they can tell that smoking is taking place on the other side. However, that depends on the power of the ventilation, on how much one is prepared to spend on it, and on whether the air is brought in from outside or recirculated. We could debate ventilation all day long.

Mr Davidson: When Mr Maxwell eventually gives evidence, we will probably ask him why his bill would require the additional space—I think he believes that one physical barrier is not sufficient. Does the BHA subscribe to the idea that research is needed to establish whether ventilation barriers are effective, or is the onus on Mr Maxwell?

Stephen Leckie: We would ask for further evidence and proof that such barriers work. As far

as the practicality of providing barriers is concerned, establishments and premises are all different. Some pubs and restaurants of a certain size may not be able to fit in a separate room. I do not think that it is possible to create a real barrier unless one adds ventilation, and that has a considerable cost. Our members would be unhappy about going down a route that involved such costs while the consultation that was announced yesterday was taking place and the jury was still out on what was going to happen. They will not commit to costs until they know where the Government intends to take us.

Shona Robison: You talked about the current consultation and seemed to suggest—you can correct me if I am wrong—that it may end up coming down on the side of a total ban. In your view, would the industry learn to accept that and get on with it?

Stephen Leckie: Yes. That is what I believe and it is what the BHA believes. If the voluntary charter is not working, and however the results of the consultation process are marketed, if a total ban is the view of everybody in Britain, a nationwide ban should prevail rather than one that is sectorised to some areas in Scotland.

Shona Robison: Do you think that that is going to happen?

Stephen Leckie: Would you like me to reach for my crystal ball?

Shona Robison: What is your gut feeling?

The Convener: That was put so charmingly to woo you into answering.

Stephen Leckie: Is it working in Dublin? Yes, it is working in Dublin. We have been through all that this afternoon. Before I answer your question, however, I would like to know who sponsored the research that showed that businesses there have done better or worse as a result of the total ban. I am not clear about the truth of that. The policy memorandum to Stewart Maxwell's bill states:

"There were 21 studies which met all three criteria, all of which found that smoke-free restaurant and bar laws had no negative impact on revenue or jobs."

However, that is diametrically opposed to what the earlier witnesses referred to. I do not think that any of us around this table is able to anticipate the effect of a nationwide ban on smoking in public places.

Shona Robison: Let us go back to something that you said about ventilation. You suggested that someone in the ventilated space in your hotel would not know that someone was smoking on the other side of the barrier. Do you not accept that it is not about whether someone can smell the smoke, but about the health arguments

surrounding what is in the smoke and the chemicals that are left in the air? Those chemicals would remain in the air even if people could not smell the smoke. Are you aware of that argument?

Stephen Leckie: Yes, but I have yet to be convinced that that is the situation. If someone cannot smell the smoke, does it exist? If the smoke has been tucked away, surely the particles have been shut away. I am not yet convinced by that argument.

The Convener: Would you care to comment on the fact that, although the Irish have gone down the road of a total ban, it does not seem to bother them that that might affect the economy?

Stephen Leckie: That is what they are claiming. If that is the case, that is good news from the point of view of the hospitality association. However, our starting point has to be that the voluntary approach is working and has increased the number of people who have adopted some sort of smoking policy.

The Convener: I understand that but, in Ireland, it is felt that the economic argument has been made as well as the health argument.

Stephen Leckie: Having read the documents supporting Stewart Maxwell's bill and heard the evidence that was given this afternoon, I do not think that the economic argument has been put to bed yet. Some claim that the economy is up; some claim that it is down; some claim that there is no difference.

Mike Rumbles: I would like to pursue that point, as I am a little confused about what you believe. You said clearly that you prefer the current scenario of a purely voluntary approach. I understand that. However, you then said that you do not like the halfway-house approach that the bill takes, which is to ban smoking only where food is served in enclosed spaces. You would prefer us to go the whole hog—I think that is the phrase that you used. I do not quite understand the logic of that approach. Could you elucidate, please?

Stephen Leckie: It is difficult for us to disagree with the aim of the bill, which is to prevent people from being exposed to smoking. Nevertheless, the question is whether the bill is the right solution. In our view, the answer is no because there are too many anomalies, inconsistencies and flaws that leave it open to debate and interpretation. An example of that concerns places where food is being served. The five-day rule would create huge issues for the hospitality industry. If, for instance, you were to have a week-long conference in the room that we are in and serve food at the end of the week, you would have to say that people could smoke on Sunday but not on Monday because food would be served in the room in five days' time. What would happen if the people changed or the groups changed as the week wore on? It

would be too confusing for customers and for the people who were trying to organise it.

Mike Rumbles: The logic of that argument is that smoking should be banned in the establishment. I do not understand your response. You say that you would be quite happy with a full ban but not a halfway house; surely the bill seeks to make your life less restricted than it would be with a full ban.

Stephen Leckie: I am not sure that we are ready yet to propose a full ban. A consultation process needs to take place.

Mike Rumbles: So, have I got this right: you would not be in favour of a total ban on smoking in public places?

Stephen Leckie: Not at this stage.

Mike Rumbles: So you do not favour a total ban.

Stephen Leckie: It depends what happens with the consultation.

Mike Rumbles: May I pursue this with you? Your position does not strike me as being logical.

Stephen Leckie: If you start with the premise that we are trying to prevent people from being exposed to the effects of passive smoking in public areas where food is supplied—and I was interested to hear the arguments on that today—why not apply the ban to areas where food is not supplied? The consultation process will consider that. Meantime, we continue to believe that the voluntary approach is right just now.

Mike Rumbles: Right, so you do not want any legislation on this issue.

Stephen Leckie: Absolutely.

Mike Rumbles: That is fine. I just want to know what your position is, because it seemed to be different. Your position is that you do not want any legislation in this area at all.

Stephen Leckie: Not yet. There is not enough evidence to tell us that a total ban is conclusive and the right thing to do.

Mr McNeil: We have heard a lot about Ireland, in the debate generally and here today. It has been confirmed that compliance rates are particularly high. Anecdotal evidence from friends I recently visited in Dublin and outside Dublin is that their experience has been favourable, in that people have complied. Do you believe that that compliance has come about only over time—as David Davidson said, over a 14-year timeline? Do you believe that in Ireland they have been able to resolve and satisfy themselves of the arguments, and that only by doing that have they got such compliance rates?

I can give you another scenario. It would not be suggested that if England consulted, took

evidence and legislated that that would automatically be a model for Scotland. Why would we automatically apply the model from Ireland? In order to win the debate, is it not important for us to consult, rigorously examine the evidence and come to a conclusion that is satisfactory to the wider population? Also, would it not be helpful if the industry participated fully in that argument and examined a voluntary charter plus? We have heard today that much more can be done. Why is it not being done?

Arun Randev: In my opinion the bill does not go far enough. There needs to be more consultation. The bill emphasises the food element, but people who work in bars where no food is served are exposed to the same elements to which workers in the food industry are exposed. We need to be consulted more on a number of areas, because we work daily in the field.

I have 100 per cent no smoking in the restaurant and I have a smoking bar area. I am moving down the voluntary road and I exhibit what my policies are in my window. However, nobody has come along to ask me how it is working. It is about letting it work and giving people the choice. We always state in our advertising that ours is a non-smoking restaurant, in the way that people advertise their facilities for disabled people.

Mr McNeil: Can I have a response to my question?

Stephen Leckie: I am confused as to whether it was a long statement or a question.

Mr McNeil: It was a bit of a statement, I am afraid.

Is it not an integral part of the process to debate and win the argument in Scotland, rather than to overstate examples of the experiences in New York or Ireland? Do we not need to travel the same journey as those places had to travel?

Stephen Leckie: Scotland has voted for its Parliament, so it makes sense for Scotland to think about Scotland.

Helen Eadie: My question is for Stephen Leckie, but if anyone else wants to comment, that is okay. How does your trade association share information with places such as the Republic of Ireland?

16:15

Stephen Leckie: The chief executive and deputy chief executive of the British Hospitality Association—of which I am the part-time, not full-time, chairman in Scotland—communicate verbally, by letter and in whatever way with the guys in Dublin. They also attend regional meetings around Britain, which happen four times a year.

Helen Eadie: Are you aware that politicians in the Republic of Ireland have said that switchboards there were jammed with international calls from people who wanted to visit southern Ireland as a consequence of the legislation?

Stephen Leckie: I was not aware of that and I am intrigued to hear it. I think that you refer to a total ban, whereas I understood that this afternoon's debate was about the Maxwell bill. Perhaps the debate has moved on a bit. If it was decided that the bill was not appropriate and that a total ban would be implemented, and if that was all that was left, the BHA's view would be that that was the case.

Mike Rumbles: Commendably, Arun Randev has a no-smoking restaurant, which has signs that say that the restaurant does not allow smoking, so that people know what they are doing. That obviously works well and you have had good feedback from your customers. I will ask whether you understand the differences that are involved. A non-smoker does not inflict anything on anybody else, whereas a smoker inflicts smoke on people who do not want to have smoke inflicted on them. I do not understand why your submission says:

"Your proposals would be impossible for me to comply with"

as you would have to build a wall, because the bill would not necessarily mean that you had to build anything. However, if smoke travels from the bar area to the restaurant area, why not make the bar smoke free, too? It would cost you nothing to have a completely smoke-free environment.

Arun Randev: Every time that the main entrance door opens, smoke from outside travels into the premises. How would that be stopped?

Mike Rumbles: We are talking about an enclosed area.

Arun Randev: How hard would it be to control the smoke that enters from the street? People who work in the offices above my premises stand about outside my premises, where they drop litter and prevent customers from entering my premises. Twenty or 30 of those people congregate at a corner to smoke. What is to say that that smoke will not end up travelling into my bar, too?

The Convener: I will ask a brief question so that we can move along. What are the witnesses' views on using the criminal law to reduce passive smoking? I take it that corporate liability or individual liability in the case of a sole proprietor or partner will apply.

Stephen Leckie: The BHA sets out its view on that in our submission, which says:

"The structure of some of our members businesses involves premises being leased from them or managed on their behalf. As currently drafted this section appears to

suggest that they will be proceeded against even in circumstances where they are not in day to day control of their business."

The Convener: A company might not know about breaches of the law, but absolute liability will apply.

Stephen Leckie: Yes.

The Convener: Is that not the position in other legislation?

Stephen Leckie: Possibly. I will need some time to think about that properly.

The Convener: Do you wish to say anything else about criminal penalties? I know that I am rushing somewhat, but I want to give Stewart Maxwell a chance to ask questions.

Andy Matson: We have come to the committee to give our view on possible employment implications. If criminal penalties are to be imposed for breaching provisions, I suspect that when the licence for an establishment needed to be renewed, the police would comment to the licensing board. After that, it would probably be in the licensing board's remit to deny renewal of a licence, which could have knock-on effects on employment in an establishment.

The Convener: We have opened up that seam in our consideration of the Breastfeeding (Scotland) Bill, which proposes similar penalties and might lead to situations in which people come before the licensing boards.

If you want to add anything about criminal penalties, please write to the committee. I realise that I have skirted over the issue rather quickly, but I am trying to keep to the timetable. I will allow Stewart Maxwell five minutes to question the witnesses. I am sorry, Stewart; I must try to keep to the timetable, but you will have a chance to give evidence.

Mr Maxwell: I will start by asking Andy Matson about protecting jobs. Are you aware that Unison Scotland submitted evidence to the committee?

Andy Matson: No.

Mr Maxwell: The submission says:

"UNISON Scotland supports the general principles of this Bill".

The submission goes on to say that the bill would provide workers with "a healthier workplace" and continues:

"UNISON Scotland believes that all employees should enjoy a healthy and safe working environment."

Does Amicus agree that all workers deserve a healthy and safe working environment?

Andy Matson: In our written evidence we make the point that the health and safety of the work force is paramount.

I view the bill from a perspective that is different from that of Unison. We represent people who are employed in the sales forces of the major tobacco companies and people such as vending machine engineers who are employed in commissioning and maintaining the cigarette vending machines that are found in pubs, clubs and hotels. It is difficult to say how many are employed in the drinks retail industry. According to our information, the three major tobacco companies—Imperial Tobacco, Gallaher and British American Tobacco, which took over Rothmans—employ in the region of 114 salespersons in Scotland and the vending machine companies employ around 75 to 85 personnel. It does not logically follow that all those people service the areas that would be covered by the bill, but the bill could have an impact on some workers. As I said, other regulations are coming down the track, too.

Mr Maxwell: I am sure that you agree that the bill would not prevent people from smoking, so tobacco sales are neither here nor there. The bill would prevent people from using the product in certain premises.

Andy Matson: It might do in some places.

Mr Maxwell: I am sure that you also agree that it is reasonable to put workers' health and public health before a possible risk to some jobs and employment prospects. People who worked in the asbestos industry lost their jobs when we discovered what asbestos did, for example.

Andy Matson: Asbestos is a very bad example. When industrial diseases such as pneumoconiosis were clearly identified, suitable and adequate measures were put in place to minimise the problem in particular areas.

In our submission we say that other solutions to the problem can be found. After all, there is a wealth of engineering ingenuity out there in Scotland and elsewhere that is capable of developing processes that would deal with tobacco smoke in pubs, clubs, restaurants and workplaces, as it has been capable of dealing with other situations.

Mr Maxwell: Do you agree that no system of ventilation provides adequate protection against environmental tobacco smoke? The UK Government, the Scottish Executive and the European Commission agree on that.

Andy Matson: I do not know—I am not a chemist. However, the Government has put in place systems to ensure that its troops are protected from chemical warfare. I assume that that technology could be applied.

Mr Maxwell: I am sure that you are not suggesting that we all wear chemical suits.

Andy Matson: No, but I am suggesting that somewhere in the Government—both national and local—there is the technology to provide adequate filtration systems that would deal with the problems that you outline in the policy memorandum to the bill.

Mr Maxwell: There is no research evidence to suggest that.

I have a question for Stephen Leckie. You talked about having either a full ban or none at all—in other words, a voluntary charter. Do you accept that much of the legislation that we implement in the Scottish Parliament and that is implemented around the world is progressive? For example, around the world, smoking was banned in restaurants and other places and then the authorities moved on to further bans. In the United Kingdom, we enforced the use of seat belts in the front of cars and moved on to enforcing their use in all car seats and then on buses. On drink driving, we set the level of alcohol in the blood at a certain amount and then reduced it. Do you agree that progressive legislation is a perfectly acceptable way to introduce laws so that the public accept and get used to them before moving on?

Stephen Leckie: Yes I do, but your bill leaves too many anomalies open for debate and interpretation, which, in our view, leaves us too exposed and makes it too difficult for us to follow the bill for the reasons that I have already outlined.

Mr Maxwell: I do not accept what you say and I am not sure that I understand what anomalies you are talking about.

I have a question for Mr Randev. Do you believe—I am sure that you do—that owners should have the right to choose whether to allow smoking on their own premises?

Arun Randev: That is decided through consultation with our customers and employees and then it is more or less left to the public to decide. We leave it to choice.

Mr Maxwell: In effect, you decide whether or not to allow smoking in your own premises.

Arun Randev: We work by consultation with our employees and customers.

Mr Maxwell: After consultation, do you decide what the policy will be in your own premises?

Arun Randev: We suffer or fall by our own decisions.

Mr Maxwell: Do you, by extension, believe that you should be allowed to decide the policy on other laws? For instance, on under-age drinking, should bar owners be allowed to decide at what age people are allowed to drink in their bars?

Arun Randev: Yes, we should, because we are active in the industry and face such questions daily. We are sensible and know our business well enough to know the problems that we face. I made a personal submission to the Nicholson committee based on my 25 years of experience. That experience in the trade is why I am here today, and it is enough to enable me to make such decisions.

Mr Maxwell: So your view is that bar owners should be allowed, in a laissez-faire way, to decide for themselves what laws they should implement or not on their own premises. Is that correct?

Arun Randev: It is not for me to decide; it is for the customer to do that. I first have to realise the economics of the matter.

Shona Robison: Andy Matson talked about his members who work in the tobacco industry. Do you not agree that all measures to reduce smoking levels could have an impact on their jobs, whether health warnings on fag packets, a ban on tobacco advertising or smoking cessation classes? All those measures potentially have an impact on your members' jobs, but you are surely not going to oppose them.

Andy Matson: You are right. A raft of measures and issues could impact on employment prospects in the tobacco industry. I remember Dr Michael Kelly leading the smoke-free Glasgow campaign—I think that most of us here are old enough to remember that. I think that, at that time, Imperial Tobacco still had a facility in Glasgow, but nobody could say what alternative employment, with the same sort of employment package, they would put in place for the workers in the Imperial Tobacco factory if it was closed as a direct result of a ban on smoking. The answer to that question is still awaited.

Obviously, a whole raft of things can impact on employment in the industry, some more directly than others. Technology has had an impact on the levels of employment of our members in the tobacco production industry. It is naive to think that production capabilities and methods of production stand still, whether in the tobacco industry, the engineering industry or any other industry. The one thing that is constant is change and we are always moving on. Each time production methods become more sophisticated, somebody somewhere usually loses a job, whether a member of ours or of another trade union.

The Convener: I want to bring the item to an end. That point—economic impact and whether there should be compensation—is where we came in, so we have come round full circle. I thank the three witnesses for their evidence.

I suspend the meeting for 10 minutes. We will start again at 20 to five.

16:29

Meeting suspended.

16:41

On resuming—

Breastfeeding etc (Scotland) Bill: Stage 1

The Convener: I welcome Shona Barrie, who is head of the victims, witnesses and vulnerable accused team in the policy office of the Crown Office. She will make a short opening statement.

Shona Barrie (Crown Office): I want to provide some context to clarify an issue that arose at the committee's previous meeting when the Minister for Health and Community Care was present. There was some confusion about whether the Crown Office made a submission. As I understand it, we received no formal invitation to do so. Obviously, as an Executive department, we were invited by the minister to offer our views, so the memorandum that the minister submitted incorporated the views of the Crown Office.

The Convener: There were crossed wires. We are required to ask for a response specifically from the Crown Office.

Shona Barrie: It would seem so.

The Convener: Thank you.

I refer members to Mike Dailly's letter dated 8 June—it is not yet in the public domain—which gives some definitions. Mike Dailly is the principal solicitor assisting Elaine Smith with her bill.

Helen Eadie will ask the first question.

Helen Eadie: I beg your pardon. My mind was elsewhere.

The Convener: We have no time to halt. You need to be on the ball because 10 minutes is all that you will get.

Helen Eadie: The Scottish Executive's written submission states that the Crown Office and Procurator Fiscal Service and the Association of Chief Police Officers in Scotland raised issues about the enforcement of the bill's provisions. In particular, the submission notes problems with definitions of "public place" and "prevent". What is the Crown Office's position on the standard of the definitions that Mike Dailly has supplied?

Shona Barrie: I, too, have only just now seen Mike Dailly's helpful supplementary paper. The paper addresses the definition of "public place" by using a definition that is already recognised in knife legislation. That is all good and well.

The enforcement issues concern the scope of the phrase "public place". Clarity is needed, given that any person in any public place at any time

would come within the scope of the proposed offence provisions.

The issues around the definition of “prevent” and “stop” are more complicated and require further debate and clarity. It is clear from the evidence that ACPOS offered that, if preventing someone from breastfeeding involved a physical intervention, an assault would in effect be committed. There are also issues about what would constitute preventing someone from breastfeeding. If such prevention is not restricted to physical intervention, what acts would be involved? Would any reaction on the part of the carer be required? Would the act of feeding be required to have been prevented or stopped or to have come to an end? Those aspects of the definition need to be clarified.

Helen Eadie: I hesitated before asking my question because I was hurriedly trying to read Mike Dailly’s letter, too. In fact, it goes on to clarify some of those points. We have heard it from the Crown Office but we have also heard it from Mike Dailly.

The Convener: Obviously, Elaine Smith will have an opportunity to respond on the matter later.

Janis Hughes: What concerns does the Crown Office have in relation to the identification of the accused in the bill? What problems might arise in relation to enforcing the bill?

Shona Barrie: I think that the problems are likely to be less acute in commercial premises, particularly in relation to a member of staff who has done whatever act is required to constitute stopping or preventing someone from breastfeeding. However, someone in a public park, on a bus or in some other public place is unlikely to hang around and wait for the police once they have said whatever they want to say to the carer of the child. The offence might have been committed and offence might have been caused, but there will be no enforcement procedure to follow.

16:45

The Convener: Could you expand on your view about the current provisions for harassment, breach of the peace and assault? Would they be sufficient or would there need to be a statutory offence?

Shona Barrie: There would be circumstances in which it could be said that a breach of the peace had been committed. To an extent, I concur with the view of ACPOS that whether something is a breach of the peace has to be decided separately in each case. The test for breach of the peace, which relates to whether alarm and distress have been caused, is well known. On assault, cases in

which there was physical intervention would tend to stand out.

I agree with what Mike Dailly said about harassment. The provisions for non-harassment orders and the relevant case law are quite clear that there must be at least two cases of breach of the peace or harassment before the prosecutor can make any motion for a non-harassment order to be granted.

The Convener: There would have to be a serial preventer of breastfeeding at large.

Shona Barrie: Yes. The provision might be some sort of inhibitor for those who run commercial premises, but the test has a high threshold.

Mike Rumbles: I have a question about the word “prevent”. If someone physically prevents someone from breastfeeding, the situation is quite clear—the common law relating to assault would deal with that. However, what if a proprietor said to someone, “Hey, you can’t do that in here.” In doing so, they would be putting pressure on the person and I would imagine that the word “prevent” would apply in that circumstance. That is a situation in which the bill would cover something that other legislation does not.

Shona Barrie: Yes. There is a lacuna. The common-law offence of assault requires a different *actus reus* from the scenario that you have depicted. I am not clear about what the situation would be if the proprietor said, “We have a private facility for breastfeeding, would you please move through there?” I do not know whether that would constitute “preventing or stopping” or would fall within the present offence provision. If the policy intent is to prevent such a situation, that issue needs to be examined further.

Mr Davidson: What is the position of the Crown Office with regard to the corroboration of witnesses’ evidence? Does the bill make suitable provision for which witnesses’ evidence is required to be corroborated and exactly how that should be carried out? Presumably, the Crown Office will have to issue a definition in that regard, if the bill is passed.

Shona Barrie: Once the offence had been committed, there would have to be two sources of evidence pointing to the fact that there had been an intervention and that the accused was the perpetrator. Those are standards at common law and it is perfectly natural and absolutely standard for offence provisions not to reiterate those requirements. I am comfortable with that. Procurators fiscal are certainly well versed in those requirements. If the offence provision reaches the statute books, the Crown Office might well seek to provide guidance about prosecution policy to prosecutors. However, we are all quite

comfortable with the requirements for corroboration.

Mr Davidson: In other words, the requirement is standard in common law.

Shona Robison: You said that you were not sure about the situation in which a proprietor made the person who was breastfeeding aware that they had a private facility. Surely that would depend on several things. For example, if the person said that they were happy to feed where they were and the proprietor then said, "I am telling you that you have to move," at that point—

Shona Barrie: The provisions would kick in.

Shona Robison: Yes. So I suppose that a bit of common sense would have to be applied in that situation. As Mike Dailly's letter says,

"any conduct would need to be sufficiently serious and wilful in determination in order to evidence sufficient intent."

Therefore, making someone aware that there is a private facility would not be regarded as an offence, but pressing the issue once the person feeding had made it clear that they were happy where they were and almost instructing them to move would surely come into the category of sufficient intent. Is that reasonable?

Shona Barrie: I think so.

The Convener: We will stop right there, then.

Shona Robison: Okay—"reasonable" is good.

We heard from the Minister for Health and Community Care that he is sympathetic to the aims of the bill. However, he cited the Crown Office's concerns as the main barrier to Executive support for the bill. The issue is all in your hands.

Shona Barrie: Nobody made that clear to me.

Shona Robison: As a representative of the Crown Office, do you have a view about whether the bill could be amended at stage 2 to address the Crown Office's concerns so that the Executive can support the bill?

Shona Barrie: On the part of the Crown Office, I would align myself with the aims of the bill and say that they would be supported. The Crown Office is an Executive department and, if we foresee any difficulties with enforceability, we have the responsibility to raise them. I do not know that it is within my gift to give you all the answers that you are looking for.

The Convener: I thought that you were going to be indiscreet for a moment. We were all waiting for it.

Shona Robison: I do not want to press you, but do you think that it is practically possible to amend the bill at stage 2 to address the Crown Office's concerns?

Shona Barrie: Those would be matters for the office of the solicitor to the Scottish Executive and the drafters, who have more expertise than I do. I can speak only from the prosecution point of view, if you like, about the obstacles that we could identify and that we would like to be overcome to assist us in implementing a piece of legislation.

The Convener: Have you found the letter from Mike Dailly helpful? Has it clarified issues for the Crown Office?

Shona Barrie: It is useful in that it sets out the underpinning principles of law.

The Convener: Has it satisfied the concerns about enforcement raised in paragraph 8 of the Scottish Executive's memorandum to the committee? Have you seen that?

Shona Barrie: Yes. There are probably several aspects that need clarity.

The Convener: The definition of "prevent" would be one, for example.

Shona Barrie: Yes, there needs to be clarity on the definition of "prevent or stop".

I am just looking through my papers to return to the offence provisions.

The Convener: I am trying to clear up the outstanding issues. The definition of "prevent" is one, although we have cited Mike Dailly's letter.

Shona Barrie: We seek clarity that the offence provision requires an objective assessment of the accused's actions, rather than a reaction in the carer. The same set of circumstances could provoke different reactions in different people. It is likely that the offence provision would quickly become the subject of an appeal court comment. We need to disentangle the element of subjective reaction.

The Convener: That is extremely useful. One person might react well or quietly to an invitation to go to a private place to feed a child, whereas someone else might react badly. That is an interesting point for us to consider.

Mr Davidson: As I am a slow reader, I have just got to the second page of Mike Dailly's letter, which contains comments about harassment. Is the Crown Office happy about the interpretation of harassment? For the sake of argument, let us assume that a couple of customers in a shop start tutting. Is part of the issue the reaction of the person with the child? Is the bill clear on harassment? Is harassment definable and not just a matter of the opinion of the person who alleges that they have been harassed?

The Convener: For clarification, is it correct that harassment is a statutory, rather than a common-law, offence?

Shona Barrie: It is a difficult notion. English law has a statutory offence of harassment; in Scotland, if there are multiple charges of breach of the peace, a non-harassment order can be attached. However, for the purposes of court recording, the crime is recorded as, "Breach of the peace (harassment)." One important distinction between practice in Scotland and practice down south is that there is no statutory offence of harassment in Scotland.

Mr Davidson: What is your view, as a Crown Office representative, of the apparent ambiguity in the bill?

Shona Barrie: It would create a difficult evidence area.

Mr Davidson: The matter depends very much on individual interpretation.

Shona Barrie: Yes. One carer might feel inhibited by pressure from members of the public who are tutting, throwing disparaging glances or making comments, whereas that might not inhibit another carer. The matter will turn on individual facts and circumstances, therefore it is about the subjective reaction of the carer.

Mr Davidson: Should there be a duty on the person who complains about harassment to prove conclusively to the police and, if necessary, the procurator fiscal that something has happened?

Shona Barrie: Our public prosecution system is such that it would not be for the person who made the complaint to prove anything; it would be for the police to gather evidence. The underpinning concern that ACPOS and the Crown Office fed into the exercise was that there could be difficulties with gathering evidence. People do not remain in shop premises and may have departed, which means that there could be difficulty with identifying the accused and finding witnesses to support the carer's account.

Mike Rumbles: I asked the Minister for Health and Community Care how many people he thought would be prosecuted for the offence in the bill. After a while, he came to the conclusion that nobody would be prosecuted. Is that the Crown Office's view?

Shona Barrie: Our view is that we would expect to receive very few reports.

Mike Rumbles: How many is very few?

Shona Barrie: That would be entering the realm of speculation. I do not know, but I suppose that to a large extent the matter would be down to the publicity that was associated with the legislation.

Mike Rumbles: I asked the question because of the worries that have been expressed about the interpretation of "prevent", whether cases would go to the appeal court and all that stuff. If no

prosecutions are going to take place, however, surely those points of law are academic?

17:00

Shona Barrie: As the police have said, they have an obligation to investigate cases. If there is sufficient evidence, their obligation is to report that to procurators fiscal across the country. Unfortunately, we have no means of gauging what the uptake might be.

Another matter that is in the balance is the public interest test. If we are to assume that sufficient evidence is found, does the public interest lie in a prosecution being made? Of course, a range of alternatives to prosecution is available to procurators fiscal.

Mike Rumbles: You said that the Crown Office would pursue a case only if there was a range of evidence. If there is such an accumulation of evidence, what is the concern about "prevent"? You seem to be saying that the bill, as it is drafted, is not specific enough.

Shona Barrie: It is simply that we have a responsibility to ensure that, if law is to be put on the statute book, it is as good as it can be.

Mike Rumbles: Absolutely.

Helen Eadie: Last week we heard evidence from—if my memory serves me right—Dr Pat Hoddinott. Reference was made to the international scene and I recollect that Australia was mentioned as one of the countries in which the right to breastfeed in public has been established; I cannot remember the other country that was mentioned. Has any research been undertaken on the number of prosecutions that have taken place in those countries? If not, will the Crown Office and Procurator Fiscal Service make some inquiries to see how many prosecutions have taken place?

Shona Barrie: Research has certainly not been done on the part of the Crown Office and Procurator Fiscal Service. However, it might be something that the sponsoring department or the Health Department could look into.

The Convener: We can ask the Executive about that.

Elaine Smith is here to give evidence. I am not sure whether you can ask questions and give evidence, so it might be better if you simply gave evidence. However, I am in the hands of the committee on the matter and, on looking round, it seems to me that members are quite relaxed about your doing both. Off you go.

Elaine Smith (Coatbridge and Chryston) (Lab): Thank you, convener. I waited until I had heard the questions that the committee wanted to

ask. I have a small question for Shona Barrie. Given that we are talking about the number of prosecutions—whether there would be any or whether there would be few—do you think that the bill will have a deterrent effect?

Shona Barrie: I am probably about to step a little outwith my bailiwick. Once more, if we assume that appropriate publicity would be given to the issue, the bill could have an impact on the attitudes and actions of those who operate commercial premises. I really do not know.

Elaine Smith: Thank you.

The Convener: I thank Elaine Smith and Mike Dailly for coming to the meeting at short notice. We will have a brief session in which members can ask questions of Elaine Smith and Mike Dailly in the light of what has been said by the Crown Office and to tidy up on any points that arise from the letter that the committee received.

Helen Eadie: In light of the various points that have been made, particularly in relation to the definition of “prevent”, are there issues that you want to highlight and on which you might come back to us?

Elaine Smith: I am glad that the Crown Office was able to give evidence today and that you have asked us to give evidence again. It is important to ensure that a bill covers everything and that it is drafted properly. The bill uses the term “deliberately to prevent”. Mike Dailly will go into more detail on the definition.

Mike Dailly (Govan Law Centre): The Crown Office evidence that was given today has been helpful. One key problem—the definition of “prevent or stop”—seems to remain. I understand that the courts interpret the word “deliberately” on an objective basis, as they would interpret the words “wilful” or “reckless”.

Shona Barrie’s concern—rightly—was to ensure that the courts would apply an objective test in those cases. My understanding is that the way in which the bill is drafted would deliver that. However, if the Crown Office wants certainty on that issue, it would not be particularly difficult to put that beyond doubt at stage 2. In drafting the bill, I chose the word “deliberately” because my understanding is that that is an objective concept. The difficulty is not insurmountable.

The Convener: As I understand it, the point that was being made was that whether an offer to direct a feeding mother, a person or a carer to another area was seen as offensive or inoffensive would depend on evidence of the manner in which the offer was made.

Mike Dailly: Yes.

Shona Robison: What amendment would you suggest at stage 2 to address that concern?

Mike Dailly: My primary position is that it is my understanding, as a solicitor, that “deliberately” would be interpreted on an objective basis. If the Crown Office wanted that put beyond doubt, it would not be difficult to produce an amendment that would spell out that “deliberately” in section 1(1) would be looked at objectively.

Mike Rumbles: As the convener said, who could object to an inoffensive offer of facilities elsewhere? However, one person’s inoffensive offer can be interpreted by somebody else—the recipient—as an offensive offer. Is that not the key to the issue? I am not sure that you provide the answer by saying that the test is objective. How do you form that test?

Mike Dailly: The test has to be objective because there has to be uniformity. As we discussed at the meeting last week, it is necessary to ensure that there is a sufficient degree of intent. Someone must be trying to stop the person from breastfeeding. It is not that they are curious and are staring at the person, or that they are making a noise; they must be going beyond that and doing something that, I guess, would be getting on for being quite abusive.

The Crown Office said that it was concerned about what would happen if someone was told to go to private facilities, which was a brilliant example. As Shona Robison said, it is fair enough to tell a person who is feeding a child that private facilities are available, but if someone insisted that that person had to use a different place, section 1 would engage.

We focused on the issue in debate with the Parliament’s legislation team. In section 1(2), we have the get-out that the child has to be “lawfully permitted” to be in the place before section 1 engages. We use the phrase

“otherwise than for the purpose of being fed milk.”

to ensure that somebody cannot say, “Okay, you can have a kid under two in here, but our policy excludes breastfeeding.” If a child under two is allowed to be in a particular area, breastfeeding or bottle feeding is allowed in that area; someone cannot pick or choose where breastfeeding is permitted. I think that that is clear. Shona Robison picked up on that issue. I do not think that that is a problem; the key issue is the definition of “prevent”.

The Convener: I found that helpful.

Thank you both for coming back to the committee. We will consider our draft report shortly.

Meeting closed at 17:08.

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