

HEALTH COMMITTEE

Tuesday 29 June 2004
(*Afternoon*)

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2004.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The
Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now
trading as The Stationery Office Ltd, which is responsible for printing and publishing
Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 29 June 2004

	Col.
SUBORDINATE LEGISLATION	1091
Food Labelling Amendment (Scotland) Regulations 2004 (SSI 2004/269)	1091
National Health Service (Borrowing and Loans from Endowments) (Scotland) (No 2) Regulations 2004 (SSI 2004/284)	1091
National Health Service (Transfer of Property between Health Boards) (Scotland) (No 2) Regulations 2004 (SSI 2004/285)	1091
Mental Health Tribunal for Scotland (Appointment of Legal Members) Regulations 2004 (SSI 2004/286)	1091
National Health Service (Vocational Training for General Dental Practice) (Scotland) Regulations 2004 (SSI 2004/292)	1091
Regulation of Care (Scotland) Act 2001 (Transitional Provisions) Amendment Order 2004 (SSI 2004/293)	1091
PETITIONS	1093
Autistic Spectrum Disorder (PE452)	1095
Psychiatric Services (PE538)	1095
Autism (Treatment) (PE577)	1095
Aphasia (PE475)	1097
Digital Hearing Aids (PE502)	1098
Mental Welfare (Complaints Procedure) (PE537)	1098
Eating Disorders (Treatment) (PE609)	1100
Hospital Closures (Public Consultation) (PE643)	1100
Health Service Configuration (Consultation) (PE707)	1100
PROHIBITION OF SMOKING IN REGULATED AREAS (SCOTLAND) BILL: STAGE 1	1102

HEALTH COMMITTEE

18th 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)
Tom McCabe (Deputy Minister for Health and Community
Care)

THE FOLLOWING GAVE EVIDENCE:

Dr Mac Armstrong (Chief Medical Officer)
David Cullum (Scottish Parliament Non-Executive Bills
Unit)
Amber Galbraith (Crown Office and Procurator Fiscal
Service)
Dr Nancy Miller (New York City Department of Health and
Mental Hygiene)
Catherine Scott (Scottish Parliament Directorate of Legal
Services)

CLERK TO THE COMMITTEE

Jennifer Smart

SENIOR ASSISTANT CLERK

Tracey White

ASSISTANT CLERK

Roz Wheeler

LOCATION

Committee Room 1

Scottish Parliament

Health Committee

Tuesday 29 June 2004

(Afternoon)

[THE CONVENER *opened the meeting in private at 14:05*]

14:33

Meeting continued in public.

Subordinate Legislation

Food Labelling Amendment (Scotland) Regulations 2004 (SSI 2004/269)

National Health Service (Borrowing and Loans from Endowments) (Scotland) (No 2) Regulations 2004 (SSI 2004/284)

National Health Service (Transfer of Property between Health Boards) (Scotland) (No 2) Regulations 2004 (SSI 2004/285)

Mental Health Tribunal for Scotland (Appointment of Legal Members) Regulations 2004 (SSI 2004/286)

National Health Service (Vocational Training for General Dental Practice) (Scotland) Regulations 2004 (SSI 2004/292)

Regulation of Care (Scotland) Act 2001 (Transitional Provisions) Amendment Order 2004 (SSI 2004/293)

The Convener (Christine Grahame): Item 2 is subordinate legislation. I ask members to look at paper HC/S2/04/18/4 and the six instruments that are subject to the negative procedure that are listed on the agenda. The Subordinate Legislation Committee made no comments on SSI 2004/284, SSI 2004/286 or SSI 2004/293.

The Subordinate Legislation Committee's comments on SSI 2004/269 have been circulated. Members now have papers on SSI 2004/285 and SSI 2004/292. No comments have been received from members, and no motions to annul have been lodged in respect of any of the instruments.

Members may wish to comment about the two late reports from the Subordinate Legislation Committee. Does anyone wish to comment on SSI 2004/285 or SSI 2004/292?

Dr Jean Turner (Strathkelvin and Bearsden) (Ind): I would like more time to digest the instrument. The transfer of property between health boards is an important issue that involves trust funds. It is hard to absorb the subject.

The Convener: I am sorry. Which instrument do you mean?

Dr Turner: I refer to the instrument on transfer of property in the national health service.

The Convener: That is SSI 2004/292.

Dr Turner: No. It is SSI 2004/285.

The Convener: I do not know whether the comment from the Subordinate Legislation Committee is in the public domain yet. It states:

"The Committee ... draws the attention of the lead Committee and the Parliament to this instrument on the grounds that there are doubts as to whether it is *intra vires*."

That is quite a serious criticism. Is the committee content to continue consideration of SSI 2004/285?

Members indicated agreement.

The Convener: What about SSI 2004/292? Do members wish to make no recommendation on it or any of the other SSIs except SSI 2004/285?

Members indicated agreement.

Petitions

14:36

The Convener: Item 3 on the agenda is public petitions. I am in the committee's hands, but it might be useful for us to discuss how we deal with public petitions at an away day, or half day, at some point during the recess. We had decided that we would deal with petitions quarterly, but we may want to revisit that decision in the light of other matters and the committee's burden of work.

I refer members to committee paper HC/S2/04/18/5, which details all the petitions on which the committee awaits further information to aid our future consideration and which I ask members to note. I thank the clerks for a full report on what has happened to all the petitions to date. Is the committee content simply to note the paper and, where appropriate, to write pushing letters to the Executive or whoever?

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): What paper are we talking about?

The Convener: We are talking about paper HC/S2/04/18/5, which is a detailed narrative on several petitions and is a public document. In respect of six of the petitions, we are waiting for commissions, the Executive or whoever to report. Are members content to leave it to me and the clerks to write reminders and to chase matters up?

Members indicated agreement.

Mr Duncan McNeil (Greenock and Inverclyde) (Lab): Among the options that are open to us is that we pursue further inquiries. However, rather than go through all the petitions, make decisions on them and end up having maybe four days or four half days of inquiry on each, can we park them, group them together, look at them again and assess how much time we want to allocate to them and so establish our priorities? We could then decide whether we want to have an inquiry or to take evidence. The last time we dealt with petitions, we went through them all and—nice people that we are—agreed to pursue all the issues. That meant more work for the clerks or implied work for the committee. I suggest that we give all the petitions an equal chance in respect of our taking further evidence on them.

The Convener: I have read all the petitions, which raise serious issues, and I hope that the committee can pick up and develop some of them. At our away day, we will perhaps need to discuss how we deal with our inquiry work load and the burdens that the Executive puts on us, which we must deal with at the same time as we try to do justice to petitioners. I do not want to pre-empt

discussions, but we should perhaps establish sub-groups to deal with certain petitions and report back to the committee.

Some of the petitions are splendidly researched and highlight extraordinary difficulties in the system that deserve attention. As Mike Rumbles said previously, we cannot just put them through the system; we have to work out how we can deal with them, especially as so many petitions come to the committee. I am content for us to come to another view and to say that we will defer consideration of the petitions pending discussions at our away day. Are members content with that? I am not pre-empting any decisions on the petitions that are before us, but that is an option. There are some pertinent points in the petitions and I feel that they are going round in circles, which is not fair.

Mr McNeil: The point is that we cannot deal with all the petitions in the time that we have been allotted.

The Convener: That is right.

Mr McNeil: In that case, how should we deal with them? It may be that, after we look through them, we will find that three of them deserve further investigation or inquiry—perhaps a half-day evidence-taking session or whatever. We need to devise a system under which we can park some of the petitions so that we can take a harder look at the remaining ones and decide on our priorities, including deciding on which petitions we want to take further evidence.

The Convener: That was my point about the away day. Consideration of the petitions cannot be done in any real depth in committee. We could today take a view on which petitions we feel merit further consideration. We could then defer the item until our away day, when we could discuss the petitions and how we will deal with them.

Perhaps we could appoint a couple of reporters to look into the subject and update the committee. I am conscious of the burden that would be placed on the committee if we were to sit twice a week, especially on members who sit on other committees. We need to decide how to deal with petitions so that they are not just shuffled around. I suggest that we deal with today's petitions and decide which we want to consider in more detail. We can, at our away day, discuss how we should deal with petitions in terms of the committee's work programme.

Mr David Davidson (North East Scotland) (Con): I want to return to the convener's point about reporters. I think that I suggested once before that we should set up—on a cross-party basis—a standing sub-committee to vet petitions, so to speak. I am thinking of a sub-committee of two or possibly three members who could consider

the petitions that come to us to decide whether they are worthy of the committee's consideration. It would then be up to the committee to decide whether a petition went further. Some petitions are repetitive. We are hearing evidence that some are being reworded and resubmitted—people have the time and spirit to get on and do that.

The Convener: I agree fully. Every member is aware that we have not worked out how to manage the issue and that we need to be able to prioritise petitions. However, we have petitions before us today and the petitioners know that their petitions are due to be considered. I am in the committee's hands—we have 20 minutes in which to discuss petitions. We need to decide whether to pluck out certain petitions and deal with them today. We also need to decide whether to defer others so that, at our away day, we can consider how to prioritise and deal with the batch of petitions that require further investigation.

Shona Robison (Dundee East) (SNP): We should do that. We should go through the petitions today and decide which to examine in more detail at the away day. I suggest that we leave it at that.

Mike Rumbles: The petitions are on the agenda; it is important that we go through them today.

The Convener: I agree. It would be inappropriate for us not to do so.

Autistic Spectrum Disorder (PE452)

Psychiatric Services (PE538)

Autism (Treatment) (PE577)

The Convener: Petitions PE452, PE538 and PE577 concern autistic spectrum disorder. Members have paper HC/S2/04/18/6 in front of them. I invite comments on the petitions.

Mike Rumbles: The paper says that the Executive does not support proposals to set up an autism-specific facility and that its preference is for a managed clinical network that would provide better multi-agency care and support. The petitions make reference not only to services but to research. That is the issue on which we focused the last time we discussed the petitions briefly.

A couple of professors came to talk to me yesterday in my constituency on the subject of the petitions. They want to set up a research centre in Aberdeen that would act as a UK centre. The professors could not be at the committee today, but they asked me to pass on their suggested approach to our consideration of the petitions—which I am aware were not submitted by constituents of mine. Instead of our looking at the research that is done on a UK-wide basis, the

professors suggest that we focus on the research that is available in Scotland. It is important that that initiative is supported.

The petitioners call for a Scotland-wide approach to autistic spectrum disorder, for a Scottish treatment facility and for Scotland-wide research; however, the Executive's view is that it wants to decentralise services. There is a middle ground between the two approaches: we could do a little more work on that without closing the matter down.

14:45

The Convener: You focused on research, but I have concerns about the way in which adults who have ASD are managed in the system. That management seems to be very ad hoc and in some ways casual, in that patients are referred to mental health services without consideration being given to the nature of their particular disorders.

I make no special plea. Do members want to defer consideration of the petitions and to include them in the group of petitions that we will consider taking a step further? We are perfectly entitled to consider all the petitions and then to take a measured view—I am open to doing that. We can discuss the various petitions one at a time and then collectively, and we can then decide how many petitions we can consider, which we will prioritise and for which we will appoint reporters. That would not mean that nothing would happen in relation to the petitions that were not chosen, but it would give us a starting point. Are members happy to take that approach?

Members indicated agreement.

Mr Davidson: The two gentlemen who went to see Mike Rumbles yesterday are probably the gentlemen who have visited some of us in Parliament during the past few months. My impression is that the door is partially open to possible benefit from research. It might be useful to consider that.

Mr McNeil: We can accept the clerk's recommendation and we can ask the two fine gentlemen who found their way to Mike Rumbles and David Davidson to make further representations to the committee.

The Convener: Do you mean oral representation?

Mr McNeil: No. The paper from the clerks suggests that we await a response from the petitioner to the Executive's funding announcement. Have we received a response?

The Convener: We have a response from one of the petitioners, but we await comments from the petitioner who lodged PE452 and PE538. We

could accept option 1 in the clerk's paper, which is to await

"the comments of the petitioner for PE452 and PE538 on the Executive's funding announcement".

We would then have the package and we could take the petitions—and any others that we decide to take—to our away day and decide how to deal with them. That decision could provide a model for our approach to other petitions.

Mr McNeil: We have to decide whether to take the petitions to the away day.

The Convener: No. I propose that we take the petitions to the away day to discuss how we will deal with them. It would obviously be inappropriate to do everything in private, but we could discuss the ramifications for the committee's time, rather than the value of the petitions, at the away day—

Mr McNeil: That would be a starting point, but we would have to—

The Convener: After the away day, we could bring back all the petitions that we had discussed and we could deal with them in an open forum, at which members would be free to make comments. I am just trying to manage our time.

We will write for comments. During the summer recess we will receive further comments from the petitioner who has not yet responded, which will form part of the material that we discuss.

Mr McNeil: The petitioner has a responsibility to contact us, does he not?

The Convener: Yes, absolutely. I am sure that he is paying attention to what we are saying.

Aphasia (PE475)

The Convener: Petition PE475 was lodged on behalf of Speakability. I refer members to paper HC/S2/04/18/7. I am having problems with this petition, too: I am having problems with all the petitions that we are considering.

Helen Eadie (Dunfermline East) (Lab): I heard the petitioners give evidence at the Public Petitions Committee about services for people who suffer strokes and for other people who have aphasia. We should add the petition to the group of petitions that we will consider for prioritisation when we establish our time commitments.

Dr Turner: I agree with Helen Eadie.

The Convener: I am concerned that the Executive has no plans to record aphasia specifically. I would have thought that such records would provide important data.

Mr McNeil: One of the options for consideration from the clerk is the recommendation that we take up the petition as an inquiry.

The Convener: Another one.

Mr McNeil: We could consider doing that. We must be consistent.

The Convener: We will consider the petition at the away day.

Mr McNeil: The clerk recommends that we have an inquiry.

The Convener: We make the decisions.

Mr McNeil: There is no point in the clerks working on a matter for weeks and months and making recommendations to us about it if we are just going to throw it away.

The Convener: I was not suggesting—

Mr McNeil: I am trying to assist us in our difficult task.

The Convener: The petition raises issues about simple data recording and I am not content with the Executive's response on the matter.

Digital Hearing Aids (PE502)

The Convener: The next petition is PE502, which was submitted on behalf of the Royal National Institute for Deaf People Scotland. Previously, we took a decision in good faith but, on looking back on the correspondence, it appears that the Executive's answer complied with the requests that were made. What are members' views on that and on the recommendations that have been made?

Mike Rumbles: I am not sure that any further action is required, as the petitioner's requests seem to have been replied to.

The Convener: Are members content to close petition PE502?

Members indicated agreement.

Mental Welfare (Complaints Procedure) (PE537)

The Convener: Petition PE537 is on the performance of the Mental Welfare Commission and the health ombudsman in handling complaints. Paper HC/S2/04/18/9 makes an interesting recommendation about the Scottish public services ombudsman. It suggests that the committee could

"invite the Ombudsman to provide the Committee with further information on the work of the Office of the Ombudsman".

The public services ombudsman has been in post for only a short time. If members are content with the recommendation in the paper, there could be an informal briefing to the committee. I am in the hands of the committee, but there could be a pre-

meeting briefing one Tuesday, subject to members' time.

Helen Eadie: There is a national ombudsman organisation—perhaps we could write to it for its views on the petition. I went through a pile of papers at the weekend and was interested to learn that such an organisation existed. It has a track record and knows what procedures should be in place. It would be good to ask it for its views on the petition and to have a briefing after the recess.

The Convener: Are you talking about the Scottish Public Services Ombudsman?

Helen Eadie: No. I am talking about the national organisation in London, which comprises representatives of the legal profession from throughout the United Kingdom.

The Convener: As public services are a devolved matter in Scotland, I would first like to hear what the Scottish public services ombudsperson has to say.

Helen Eadie: I am not saying that we should consider the national organisation's views in isolation, but that we should consider them with other views because it will have set out criteria.

Mr Davidson: Professor Alice Brown's position is now much more stable in that the various offices have now come together under her office. However, in responses to me on a number of issues, she has flagged up that some procedures that were in place in the past have been reviewed. I do not think that many of us know what the changes are.

The Convener: Subject to members' diaries, can we arrange an informal briefing with the Scottish public services ombudsman? That would be useful for us as MSPs in any event, let alone for us as members of the committee.

Mr McNeil: There should be a briefing as per the recommendation, and not just on the petition.

The Convener: The paper suggests that we could, if we proceed in that way, take no further action on the matter and close the petition. Do members agree to that approach?

Members indicated agreement.

Helen Eadie: I would still be happier if we wrote to the organisation that I mentioned. I can supply its address and details. It will have set out criteria relating to what we should expect. To write to it would do no harm.

The Convener: Can we invite the Scottish Public Services Ombudsman to the committee first? That would be courteous. We could invite somebody else after that, if members wanted to do so.

Helen Eadie: I was not asking for a representative of the organisation that I mentioned to come. I simply wanted written information.

The Convener: I have no difficulty with that proposal, but I would like to have a briefing. Are members content to close the petition on that basis?

Members indicated agreement.

Eating Disorders (Treatment) (PE609)

The Convener: The next petition is PE609, which calls on the Scottish Parliament to ask the Scottish Executive to address, develop and fund specialised treatment of eating disorders in Scotland. I have concerns about this petition, too.

Mike Rumbles: Mrs Smith is a constituent of mine. She came to see me on Saturday, as she cannot be at the meeting, and asked me to say that although she appreciates that we must prioritise, she thinks that the issue is a life-and-death issue, whereas some petitions do not involve life-and-death issues. I said that I would make her comments known to committee members at today's meeting. Mrs Smith is also a constituent of David Davidson, of course.

The Convener: I thought that the letter from the consultant psychiatrist, Dr Harry Millar, was very telling.

Mr Davidson: Members know my interest in the matter. If a consultant is prepared to go on record with such information, we are almost obliged to hear evidence from him.

The Convener: I do not know what members think, but I think that the response is detailed and considered—I hope that I am not being patronising in saying that—and that the issue is one of those issues that we glide over a little. Are members content to continue our consideration of the petition and to come back to it?

Members indicated agreement.

Hospital Closures (Public Consultation) (PE643)

Health Service Configuration (Consultation) (PE707)

The Convener: Petitions PE643 and PE707 are dealt with in paper HC/S2/04/18/11. Petition PE643 is about public consultation on proposals to close hospitals that have obtained public funding through fundraising. Petition PE707, which is from Professor Young, is about the use of guidelines and the selection of expert advice on hospital closures or "shrinkages", if we may call them that.

Janis Hughes (Glasgow Rutherglen) (Lab):

When first we considered the petitions, we agreed to take evidence from the Minister for Health and Community Care as part of the evidence that he was going to give on the national framework for service change. The suggestion in the paper is fair enough because consultation on the matter is on-going within the NHS. I do not think that there would be any problem with our writing to the minister to request more information on opportunities for the public to participate in such consultation. I know that the minister is still deliberating on consultant-led maternity services in Glasgow, so any pre-emption of his decision would be wrong.

Mr Davidson: Although Dorothy-Grace Elder's petition—petition PE643—is specific to a certain group of hospitals, I do not know of any hospital that has not had public funding in another way. The petition is really about consultation in general. I wonder whether that will be part of what we do in our inquiry.

The Convener: Are members content with the second recommendation and with the suggestion that we absorb our consideration of the petition into our inquiry? That we would mean that we would close our consideration of the petition.

Members indicated agreement.

Mr McNeil: We could make it clear that we recognise the difference between consultation when a service is being closed down and on-going consultation of patients that is mentioned in the National Health Service Reform (Scotland) Act 2004.

Shona Robison: I want to clarify that we will write to the petitioners to make it clear to them that their evidence will be used as part of the inquiry.

The Convener: Absolutely.

I suggest a brief suspension until 8 minutes past 3. That will give members a couple of minutes to get back into their seats for the New York videoconference link at 3.10.

14:57

Meeting suspended.

15:09

On resuming—

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

The Convener: Agenda item 4 is the taking of further evidence on the Prohibition of Smoking in Regulated Areas (Scotland) Bill. We begin with evidence by videolink, for which I welcome Dr Nancy Miller, who is assistant commissioner of the New York City Department of Health and Mental Hygiene's bureau of tobacco control. Good morning from the Scottish Parliament.

Dr Nancy Miller (New York City Department of Health and Mental Hygiene): Good morning to you, too.

The Convener: I hope that it is a nice day.

Dr Miller: It is lovely here.

The Convener: It is fine in Scotland as well.

New York city's written submission to the committee suggests that the New York City Smoke-Free Air Act of 2002 was passed to curb the public health threat from second-hand smoke. How do you answer the criticism that has been advanced by the pro-tobacco lobby and by some in the medical press that the risk from second-hand smoke has been exaggerated?

Dr Miller: We strongly disagree with that criticism. The United States Environmental Protection Agency, the surgeon general of the United States and numerous international and US reports have unequivocally determined second-hand smoke to be a class A carcinogen and a major risk factor for lung cancer, heart disease, asthma and numerous other conditions. In New York, we estimate that second-hand smoke is the third leading preventable cause of death and that 1,000 deaths are attributable to it in New York city each year.

The Convener: Thank you. I welcome to the committee Stewart Maxwell, whose member's bill we are discussing.

Dr Turner: Before legislation was introduced in New York, what alternatives were considered, and why were they discounted in favour of a ban?

Dr Miller: That is a good question. In 1995, we introduced a smoke-free air law in New York city. That law regulated smoking in large restaurants that could accommodate more than 35 patrons and established separate smoking areas in office buildings and other places throughout the city; it did not regulate smoking in bars.

The volume of information about the effects of second-hand smoke has grown over time. We found through a community-based survey that many New Yorkers worked in jobs in which they had no protection from second-hand smoke—especially in the hospitality industry—and that many of those people were minority or low-income workers. We felt that we had an obligation to protect their health, because they were in jobs in which they were exposed without protection to very high levels of second-hand smoke for eight hours a day or more.

We felt that the 1995 law was not protecting those individuals, and it became apparent that we had to strengthen that law. That is why we worked hard to craft the 2002 law, which makes virtually all establishments in New York city smoke free. The law applies to all restaurants, bars, stores and office buildings. It covers any place that has workers, to provide them with what is needed to protect their health.

Dr Turner: What is the general public attitude to the ban? What work was undertaken to encourage the public to support the ban?

Dr Miller: From the beginning, public support has grown. Right now, more than 70 per cent of New Yorkers are in favour of the law. We have worked hard over time to increase public support. When the law was introduced, we ensured that lots of educational information and sessions were provided throughout the city, so that city council members, communities, bar and restaurant workers and others around the city knew what the law proposed, what protection we felt workers needed from second-hand smoke, what the health effects were and why the law was needed.

During consideration of the law, our city council held a series of public hearings at which opponents and proponents of the law spoke vigorously pro and con in relation to their concerns about the law and its health benefits. As a result of the work that we did in communities and through the public hearings, the city council voted in favour of the New York City Smoke-Free Air Act of 2002 by a very wide majority.

The law became effective on 30 March last year, and since then, public opinion has continued to grow in favour of it, even among smokers, such that it is probably at least 70 per cent in favour. The compliance rates also show that support: we have nearly 30,000 restaurants and bars in the city, and our compliance rates are extraordinarily high at 97 per cent; there are extremely few violations. We worked hard to educate the owners of hospitality businesses and others by, for example, sending them letters and providing them with materials—we put lots of materials on our website—such as signs and draft policies so that they were well aware of what the law was about,

the reason for it and what they needed to do to comply with it.

15:15

Mr Davidson: In your preparations for the ban, did you consider any form of voluntary agreement from the bar trade? Did the trade offer anything along those lines? Did you consider the idea that smoke-free bars could be created voluntarily?

Dr Miller: There were many smoke-free bars in the city already. Some bars had determined to be smoke-free on their own, but we had the responsibility to consider the health of New Yorkers and the health effects of second-hand smoke. We felt that we needed to provide a level playing field of protection for all workers, all areas of the economy and all establishments, as well as providing business with a level playing field. We cannot have some establishments voluntarily comply with fire codes or other occupational laws that regulate businesses or protect workers, so we felt that we had to make the law on smoking apply uniformly throughout the city so that all workers would be protected.

Mr Davidson: Did the bar owners and their federations ask for the level playing field of a total ban or nothing? Was that their approach?

Dr Miller: That is pretty much the case. They were concerned about having a level playing field, which is why the New York City Smoke-Free Air Act of 2002 was written in the way that it was. If we make the case that second-hand smoke is unhealthy and that all workers need to be protected from it, we cannot simultaneously say that certain workers do not need to be protected for whatever reason. We felt that that was the case from a health standpoint, and the trade associations were concerned from an economic standpoint that there be one law that would affect everyone uniformly throughout the city. That is why our law is so effective. It provides protection, everyone has the same regulations and compliance is easy because everyone is following the same law. That is also well accepted by the public.

Janis Hughes: In New York, you are way ahead of us. You said that, in 1965—or was it 1985—there was a piece of legislation—

Dr Miller: It was 1995.

Janis Hughes: That legislation introduced a prohibition on smoking in larger restaurants and other areas. You are aware that the bill that we are considering proposes to prohibit smoking only in places where food is served. In your experience, is it easier to go for a partial ban first, followed by a wider ban, or would it be easier to go for a blanket ban in the first place?

Dr Miller: A total ban provides the best health protection to employees and the public. It makes it easier for all establishments to comply with the law, because they are all doing the same thing. We would suggest a total ban, but you would need to consider how best to achieve that through your political process.

Shona Robison: In 1995, when the partial ban was introduced, why did you not want to go for a total ban?

Dr Miller: I was not in New York city at the time, so I am not sure about all the conversations. What we did in New York city was comparable with what had been done in smoke-free air laws throughout the United States. We were tightening up regulations and trying to provide more protection. The focus at that time was more on the public at large than on employees, particularly in hospitality. Our knowledge of the effects of second-hand smoke has grown since then, and we have come to understand that hospitality workers, in particular bartenders, have virtually no protection. They work eight to 10 hours a day in environments in which, after a few hours, they have breathed in as much second-hand smoke as if they had actively smoked half a pack of cigarettes. We were very concerned about that.

We conducted a community-based survey and found that a large number—about 15 per cent—of workers in New York city had no protection under the existing law. Knowing the health effects and the danger of second-hand smoke, we felt that we had to take stronger action to provide protection, particularly to workers. The New York City Smoke-Free Air Act of 2002 is really a worker protection law, which is designed to ensure that, just to hold a job, individuals do not have to work in an environment in which they are exposed to cancer-causing substances.

Shona Robison: Thank you—that is helpful evidence. You said that the bill had the support of a wide majority on the city council. What was that majority? Did a number of people change their view during the process of the evidence and the public hearings?

Dr Miller: The bill was introduced in August 2002, and the city council started working on it in October 2002. Between October and 30 December 2002, when the bill was signed by the mayor, our agency conducted many educational sessions. The New York city coalition for a smoke-free city worked hard to educate the public, city council members, and the hospitality and other trade associations, about the need for the law. The effect of that was that, when the law was voted on, it was passed by a majority of 42 votes for and seven against. It was approved overwhelmingly. We had extensive public hearings so that the public could understand that the bill was not really

an anti-smoking bill but a pro-worker, health protection bill.

Helen Eadie: Do you have any empirical evidence that the smoking ban has led to higher rates of smoking cessation?

Dr Miller: We are considering that carefully, and we have been conducting extensive cessation programmes in the city. The literature shows that smoke-free legislation encourages smokers to quit.

Two days after our law was implemented last year, we commenced a project to provide free nicotine patches to 35,000 New Yorkers who were interested in quitting. On the first day, more than 235,000 people tried to call that programme. It was a little overwhelming. We have implemented numerous other projects since then. Within one year of the implementation of the strong smoke-free air law and other tobacco control efforts—raising the price, promoting cessation, having strong education and media programmes and so on—New York city, which had had a 22 per cent smoking rate for the past 10 years, was able to reduce the prevalence of smoking by 11 per cent, down to 19 per cent. We think that the concerted effort, which combined smoke-free air legislation, more expensive tobacco and cessation promotion, has resulted in that achievement.

Helen Eadie: This committee has received evidence to the effect that enforcement will be a resource-intensive issue. What has been New York's experience of enforcing the legislation?

Dr Miller: We already had a staff of inspectors who inspect every restaurant, bar, swimming pool and almost every other site that is covered by our smoke-free air law in the city. As part of their inspection process, those inspectors now check for compliance with the new law. To be compliant with the law, the establishment has to ensure that it has no-smoking signs, has no ashtrays and allows no smoking. Further, the employer must have a workplace policy for its staff. As I mentioned earlier, we have found a compliance level of about 97 per cent.

However, some establishments that are covered by the law are not within the remit of our inspectors. Further, because we have bars, restaurants and night clubs that are open until the wee hours of the morning, inspectors who work nine-to-five days would not be out there to see what was happening. We wanted to ensure that we got the message across that we were going to enforce the law actively, day or night, so the department hired about a dozen additional inspectors to help out, particularly during the night. That meant that those establishments that were open late understood that we were serious about enforcing the law.

The Convener: How many enforcers—if I may use that shorthand to refer to them—do you have? Do you think that they will be in place on a temporary basis and that, eventually, you will cut back on the numbers?

What are the penalties? I think that there is a civil penalty of \$200, with a maximum of \$400. How many fines have been levied? We have received evidence that smoke-free air legislation would be preventive and that we would not need to fine people—the procedure would come under criminal law in Scotland.

15:30

Dr Miller: Our health inspectors, who have done their job for a long time, inspect a host of establishments to enforce the health code. Many of them inspect food establishments. As part of their job, they also enforce the New York City Smoke-Free Air Act of 2002. There are around 25 inspectors across the city. We felt that we needed to add a small number of additional staff to that number—like I said, about a dozen—to help with night-time inspections. We felt early on that that was necessary to help establishments know what they needed to do to comply with the law and also to get the message out that we were serious about enforcing the law. There have been very few violations.

I keep mentioning that our enforcement rate is 97 per cent following the inspection of more than 20,000 establishments. There are always a few who will choose to go their own way, which is why we have a series of penalties. As was said, the first penalty is a fine of \$200 to \$400; the second is \$500 to \$1,000; and the third is a civil penalty of not less than \$1,000 but not more than \$2,000. After the third violation, an establishment can lose its licence.

The Convener: It is interesting that you are using licensing law and not the criminal law. You may not be able to answer the question, but why was the decision taken to use licensing law and civil fines rather than the criminal law?

Dr Miller: We felt that the law would, in essence, be self-enforcing. The public at large are widely in favour of it. We felt that simple civil penalties would be sufficient to help people to understand what the law was so that they would comply with it. I repeat that we have had to be concerned with very few violations, so the law is working.

Shona Robison: Your one-year review of the New York City Smoke-Free Air Act of 2002 in March 2004 found that both tax receipts and employment levels had grown. On the other hand, you will be aware of the report by Ridgewood Economic Associates, which was cited by the New

York Nightlife Association, which came to the opposite conclusion about the economic impact. Can you comment on the difference of opinion?

Dr Miller: I would be happy to. The report that was issued on the one-year anniversary of the smoke-free air law was issued by the New York City Department of Health and Mental Hygiene, the New York City Department of Finance, the New York City Department of Small Business Services and the New York City Economic Development Corporation. Those are four major city agencies, which all worked together to examine all the data that were available at city level and the appropriate state-wide data to examine whether the law had had an economic impact.

We looked at hirings, employment levels, tax receipts, corporate tax receipts, the numbers of restaurants opening and closing and the number of establishments that have liquor licences—all factors that provide hard evidence to show the effect of the law. The data were analysed seriously over a long period. We even went back to 1980 to look at trends over time and at seasonal adjustments, because we know that in some months trends can go up or down, even due to the weather.

Using published data, the four agencies found that, over time, tax receipts were up, employment was up, openings increased and the number of liquor licences went up. Every published economic indicator that one could put one's hand on was positive in relation to the law. Other studies have been published, but we have not been able to locate their sources or understand their methods. We certainly disagree with their conclusions. Those studies did not use established economic indicators.

Shona Robison: The Ridgewood Economic Associates report claims that the ban has led to 2,000 lost jobs, but the author of the report—Brian O'Connor—has said that the numbers were derived from projections and that actual employment data for 2004 were not yet available. Would you therefore conclude that the quality of the evidence in that report is—how can I say it—perhaps not the most reliable?

Dr Miller: I think that that would be a good way of putting it. It would be nice if we could project how we would like life to be, but we have to live with how life really is.

As I said, we used hard data from four major city agencies. Those agencies considered all the available data from all sources, and they reported on what actually occurred and not on what they projected should have occurred or what they wished would have occurred. When we consider what actually occurred, we see that all the results

were positive. The results for tax receipts, employment, openings, liquor licences and so on, were all positive. That is not only a New York phenomenon; if we consider data from California and numerous other states or cities, we see that it is a phenomenon across the United States. Studies from all over the country show that smoke-free air laws do not hurt business. In general, the result of such a law is either neutral or slightly positive. That is what we have found here in New York and we would expect that your bill would lead to similar results in Scotland.

Mike Rumbles: You said that your views are based on “hard data” from four main city agencies but how do you know that the impacts can be related to the smoking ban? In New York, you had a terrible terrorist attack in 2001. After that, business plummeted, but obviously it will rebound. How do you know that you are not seeing the effects of that rebound, rather the effects of the smoking ban?

Dr Miller: That is an excellent question. I work in health and we know a little bit about that, but we had to ask for help from people who were more familiar with economics and business. The four city agencies worked together to consider long-term trends. As I mentioned, we considered data from the mid-1980s up to the present. We considered good times and bad times. We considered the 1995 law and saw that its effects were positive, and we considered the impact of the 9/11 terrorist attack here in New York, after which everything plummeted. The economy of the city went down very low after the attack, and the city is only now recovering. However, in spite of those effects, when we consider the hospitality industry in particular, as opposed to the economy in general, we see that it is doing even better than everyone else, especially since the law was implemented.

We considered hard data and we considered some projections for the economy over the various seasons of the year over the long term. The results were very positive and were based on hard evidence, not projections.

Janis Hughes: Still on the economic impact of the legislation, how have the authorities sought to deal with those such as lobby groups who would like to scrap the legislation, or those who seek to enact the Destito-Meier bill?

Dr Miller: That bill failed resoundingly in committee last week by 16 votes to eight.

We are working against an industry whose intention is to make people addicted all over the world for large profits, resulting in 5 million deaths per year. It will work hard against anything that impinges on or threatens it. We know that the tobacco industry is working hard against state

laws and the city laws in New York city and worldwide. It is against anything that will hurt its business. Unfortunately, it is able to find sponsors and others who will promote those ideas.

Nevertheless, public opinion polls and health surveys tell us that the general public are overwhelmingly in favour of the law: they like it, they comply with it and they think that it is terrific. Tourism is up in New York city; people are coming there from all over the world and saying how wonderful it is to be able to go into a restaurant and come out without smelling like they have to run and take a shower and wash their clothes and hair. Workers also feel that they are protected.

However, this is not just about a feeling and about economics. We did this for health reasons, and we have examined health surveys since the legislation. We have worked with the state health department and have conducted observational surveys to ensure that the law is complied with. We conducted air sampling in restaurants and bars and compared the results with those from other sites. We did that before the law came in to show that the air inside a smoky bar was 50 times worse than the air at the entrance to the Holland tunnel. Thankfully, since the law has been enacted, the air quality in that smoky bar has improved tremendously.

We also have data that show that non-smoking hospitality workers, particularly those who work in bars, had very high blood cotinine levels before the law was introduced. Cotinine is a biomarker of exposure to nicotine. Since the law was implemented, those cotinine levels have dropped by 85 per cent. We are examining the effects on health of a law that was enacted to protect the health of workers. Air quality is improving and exposure to tobacco is decreasing substantially. We will continue to study the health effects to see whether other health markers can also be shown.

The Convener: As you are aware, this is not a Government bill but a member's bill. The member who is promoting the bill is at the committee today. Stewart Maxwell will ask you some questions.

Mr Stewart Maxwell (West of Scotland) (SNP): Good afternoon—or should I say “Good morning”. Thank you for your evidence so far; it has been very enlightening.

I have one question that does not appear to have been touched on yet. Many of the groups and individuals who oppose anti-smoking legislation say that we should bring in better ventilation to restaurants and bars. Why did New York city not take that route instead of going for a ban?

Dr Miller: Experience has shown that the ventilation idea comes from the tobacco industry. The idea is that when this nifty little device is put

into a smoky bar, it can protect everyone. That is not true. No company that has developed and which produces the devices can assure us that they can protect individuals from the harmful substances in second-hand smoke.

We are not talking about clouds of smoke, irritation or odour—although those affect people in a negative way and in some cases simple devices can cut back on some of that. We are talking about tiny particles that cannot be detected by existing filtration devices and which contain the cancer-causing substances that get deep into the lungs and cause havoc. Generally, the larger substances cause the odour, eye irritation and so on. Those are the alarm bells that indicate to people that they should get out of a smoky environment, because what is behind those are the very small particles that existing filtration devices cannot prevent. In a smoky bar where people are smoking all night it is impossible for a small filtration device to clear the air sufficiently to protect the workers—let alone the public. We think that such devices are essentially a fraud; they do not protect health and they give the impression that workers are protected when the reality is that they are not.

15:45

Mr Maxwell: It has been argued by those who oppose such laws that they remove choice from those who wish to smoke. Do you have anything to say about the idea of free choice when it comes to smoking and passive smoking?

Dr Miller: My duty is to encourage all New Yorkers to be healthy. Therefore, I encourage them not to start to smoke and, if they smoke, to quit—our office exists to help them with that. The legislation is not anti-choice; it is legislation to protect workers and the public at large. The law does not apply in a private home or in any private establishment. It applies where other people are being injured involuntarily, against their will, by a substance that causes cancer—among other diseases. That is what the legislation is about.

Smokers can choose to smoke, but I cannot choose to breathe. I must breathe for my continuance, as we all must do. There is an adage that you can swing your fist and, as long as it does not hit my nose, you can do whatever you want. Unfortunately, second-hand smoke gets not only into my nose but into my lungs and into other parts of my body. If I choose not to smoke, I also choose not to breathe in second-hand smoke. The law ensures that workers and those who are most affected by the harmful effects of second-hand smoke also have choice.

The Convener: Thank you very much, Dr Miller. Personally, I think that the only way that we could

have taken evidence was by visiting New York—I think that the whole committee would have endorsed that—but unfortunately, being mean-spirited Scots, we were not allowed to do that and we only got a video link.

Dr Miller: We just entertained a group of 17 people from Liverpool—you are welcome anytime.

The Convener: I hope that somebody who has their hands on the purse-strings is listening. We will endorse that idea and might put that on the agenda.

Thank you very much for your helpful and thorough evidence. Have a good day.

Dr Miller: Thank you. If there is anything further that I can assist with, I will be happy to do so.

The Convener: I am much obliged. Thank you.

We move on to the next panel. I do not want to impugn Mr McCabe's talents, but it is perhaps not quite so glamorous to come from the back row. I shall give the minister and his officials some time to take their seats.

If everybody is sitting comfortably—some of you may remember the phrase—then we shall begin. I welcome Tom McCabe, Deputy Minister for Health and Community Care; Dr Mac Armstrong, chief medical officer; and Amber Galbraith, principal procurator fiscal depute at the Crown Office. I know that they sat through the interesting evidence that we heard earlier. I am sure that they will be able to allocate among themselves responsibility for addressing members' questions.

The Executive's written submission says:

"Long term exposure to second-hand smoke increases a non-smoker's risk of lung cancer and heart disease by about 20-30%."

Where does that statistic come from? Is there any distinction between exposure to smoke in public places and exposure to smoke in a domestic setting?

The Deputy Minister for Health and Community Care (Mr Tom McCabe): If you do not mind, I will deal with that question at the end, but I would like to set the Executive's memorandum in context before I answer specific questions.

The Convener: If you make a statement, please keep it short. You have sprung that on me, you see. We have a no statements rule, but you have been so charming that you caught me off balance, and it is the end of term.

Mr McCabe: Thank you very much for the opportunity to provide oral evidence and to answer the committee's questions on Stewart Maxwell's Prohibition of Smoking in Regulated Areas (Scotland) Bill. My intention is to augment the

Executive's memorandum and to set the Executive's position in context.

The bill's policy intention is to restrict the number of public places where people can smoke and to reduce the health impacts of second-hand smoke, and the Executive commends those objectives. However, we have decided that a more robust and comprehensive approach is required both in making those objectives a reality and in garnering a level of public support that will ensure that they are sustainable.

Earlier this year, we launched our action plan on tobacco control, which contained a wide range of actions to reduce the prevalence of smoking in Scotland. At the same time, we launched a substantial public information campaign on the dangers of passive smoking, and we have made no secret of the fact that we wish to see substantial reductions in rates of smoking prevalence. With specific regard to passive smoking, earlier this month we launched a major consultation on smoking in public places. The Executive firmly believes that, if we are to achieve sustainable change, the driving force must be a well-informed Scottish population that expresses a wide view on the options for the future.

The nature and breadth of that consultation are important. I understand that Mr Maxwell's consultation received 39 responses from 43 organisations, and the Health Committee's own consultation has elicited around 350 responses. The consultation that the Executive launched on 7 June this year elicited 950 responses on the first day. So far, we have issued 210,000 freepost response forms and 6,500 consultation packs. The consultation runs until the end of September this year. As members are aware, people can respond in a variety of ways, including via freephone numbers and the internet.

The consultation is complemented by a number of regional seminars—14 in total—the first of which was held in Dundee today. It is further complemented by comprehensive research into international experience, by a separate and specific public opinion survey and through focus group work. We have also made it clear that all options, from a voluntary approach to a legislative approach, are within our consideration.

I hope that I have demonstrated our belief that to have the backing of the Scottish people for any action is absolutely critical. It is the Executive's firm belief that we shall revolutionise health outcomes in Scotland by helping people to make their own changes to lifestyle choices.

We have reserved our position on Mr Maxwell's bill because we think that it is premature to reach a decision before completing this very substantial piece of work. Indeed, we are picking up evidence

of confusion among the general public, some of whom—quite understandably—have little understanding of the distinction between Executive and members' bills.

I am happy to try to answer any questions, with assistance from my colleagues. I hope that my comments so far and our responses to your questions will help the committee to determine how to progress the bill.

The Convener: Will you now answer my question and tell me the source of the statistic that long-term exposure to second-hand smoke increases a non-smoker's chances of lung cancer by 20 to 30 per cent?

Mr McCabe: I will hand you over to the chief medical officer.

Dr Mac Armstrong (Chief Medical Officer): The statistic was quoted in the report that Action on Smoking and Health Scotland and NHS Health Scotland prepared at the Executive's request.

The Convener: Do you make any distinction between exposure to smoking in public places and exposure to smoking in a domestic setting?

Dr Armstrong: No.

The Convener: So there is no greater danger from or higher degree of safety in being exposed to smoke in one or the other setting.

Dr Armstrong: Absolutely not. As my colleague in New York pointed out, environmental tobacco smoke is a health hazard. There is no safe level of exposure. It is a highly carcinogenic substance that contains class A carcinogens. No matter where you come into contact with it, it is always dangerous.

The Convener: I might ask a few supplementary questions later.

Janis Hughes: Although the Executive acknowledges the negative health effects of environmental tobacco smoke, it argues in its written submission that the bill is premature. Given that the Executive regularly argues for immediate action in other areas of health improvement, do you not concede that the bill is quite timely?

Mr McCabe: No. Although we are involved in a programme to reduce the prevalence of smoking in Scotland, we are also involved in a wider programme to revolutionise people's health outcomes through their diet, their alcohol intake, their levels of physical activity and so on. Earlier this year, I launched constituency health profiles that demonstrated the stark differences in life expectancy and life journeys in different parts of Scotland. Although there are many reasons for those differences, the biggest single reason was smoking. As a result, we are interested in reducing

the prevalence of smoking, but want to do so in a sustainable way.

We believe that we will sustain that reduction by providing comprehensive information to the Scottish public that will improve their understanding of just how negatively smoking and passive smoking impact on society and our health outcomes. With such a sustainable approach, we will revolutionise the health outcomes of people in Scotland.

The message that we have received from the people in Scotland is that if we are to make this change meaningful, long term and sustainable, it should not be made by Government diktat. We have to convince people of the reasons for our approach to smoking and take them with us. That is why we have embarked on the comprehensive programme of actions that I outlined a few moments ago and why we think that it would be counterproductive to consider more narrow legislation at this time.

Janis Hughes: Previous voluntary bans have had minimal impact, and there is a general consensus that we need some form of legislation that makes it an offence one way or the other to smoke in public places. Does the bill not represent a step towards doing something about the situation?

16:00

Mr McCabe: It would. However, any measure that reduces people's exposure to second-hand smoke would be progress. My point is that we are interested in a wider goal and in taking a far more comprehensive approach in Scotland. Although public houses and restaurants are an important part of our social life, the public also gather in many other places and we believe that they should also be protected in those places.

We are convinced that the mood has changed in Scotland, that there is a strong notion for change—you are right to say that—and that people recognise more than ever before the dangers of smoking and passive smoking. We hope that the Executive has played a part in promoting that understanding. However, if the proposed changes are to be sustainable, we should test public opinion and, in so doing, give a firm commitment that we will listen to the opinions expressed. When I launched the consultation on behalf of the Executive on 7 June, I made it clear that if the Scottish public spoke to us in large enough numbers and in a loud enough voice, we would not shrink from taking appropriate action. I repeat that again today.

I said that we are picking up evidence of some confusion among the public who, understandably, little understand the distinction between a

member's bill and Executive legislation. We are picking up some concerns from the licensed trade about market distortion and its inability to put in place some of the aspects of the bill. My colleague from the Crown Office will speak in more detail about that.

When I spoke before, I chose deliberately to mention as one of my first points the fact that we concur with the policy intention of Mr Maxwell's bill. However, as the mood has changed in Scotland, we believe that taking a more comprehensive approach could secure a bigger gain.

Shona Robison: My first question concerns the timing of the consultation. Why did you decide to have the consultation now and not last year or in the years before that?

Mr McCabe: In simple terms, I was not Deputy Minister for Health and Community Care then.

Shona Robison: Then why did your department or predecessor not have the consultation then?

Mr McCabe: I feel more comfortable answering for myself and find it more difficult to do so for others. However, as members know, there has been a series of moves since 1995 to reduce smoking prevalence in Scotland, right from the white paper, which I think was in 1997, to the increase in smoking cessation services to the provision of nicotine patches on prescription. A range of measures has gradually moved the agenda on in Scotland. That has been very important. Any attempt to go from a stark position to a greatly different one would have failed. We can demonstrate that a range of actions has been taken over time and has contributed to our arrival at the current position in Scotland.

In our partnership agreement, we made a commitment to produce a tobacco control action plan, which we launched earlier this year. That was the first time that a plan for the control of tobacco had been designed specifically for the circumstances that we face here in Scotland. That in itself was substantial progress.

We firmly believe that an integral part of that plan is the on-going consultation. We embarked on a substantial public information campaign, which has been going on since January this year—I watched one of the adverts on television just last night. We have secured a number of advertising slots during the coverage of Euro 2004 and we will continue to use them. We have also had a number of slots during peak viewing events on television in previous months and we will continue to secure them through NHS Health Scotland.

We took a firm view that we had to engage with the people of Scotland in a way that we had never

done before if we were to raise the level of understanding and garner the appropriate level of support. That is what we are doing.

Shona Robison: Would it not be fair to say that the introduction of Stewart Maxwell's bill focused the Executive's minds on the matter and that it was largely what led to the announcement of the consultation?

Mr McCabe: That is not true. Evidence from the mid-1990s contradicts that view. I said earlier that it was hard for me to respond to events that happened before I became a health minister—I became a minister for health last year—but I have had a lifelong commitment to the drive to reduce smoking prevalence in Scotland. I have been aware for a long time of how negatively smoking impacts on our society. With the greatest respect to Mr Maxwell—I have already said that there is no difference between us on the policy intention—considerable work was going on in the Scottish Executive and before its time to move on the smoking agenda in Scotland.

Mike Rumbles: Even some of those who support Stewart Maxwell's bill have given evidence to suggest that the bill does not go far enough and is not sufficiently comprehensive, whereas the minister has just said that there is no policy divergence between the bill and the proposals on which the Executive is consulting. Obviously, the committee will produce its stage 1 report on the bill before that consultation is closed, but the stage 1 parliamentary debate will not take place until about the beginning of November. Rather than introduce an Executive bill, which would need to go through the whole process again from the start, could the Executive amend Stewart Maxwell's bill at stage 2 to take into account the results of the consultation? Hypothetically, and without pre-empting the committee's stage 1 report, would it be possible and practical for the Executive to do that?

Mr McCabe: I must be careful to precede my remarks by explaining that it is not my business to tell the committee how to deal with this bill or any other. Obviously, the decision is for the committee. However, with the greatest of respect, I suggest that the committee could decide to produce its stage 1 report on the bill after the Executive's consultation has concluded. For instance, the committee could decide to suspend consideration of the bill while it awaits the outcome of the consultation. If the committee was then unhappy with the Executive's proposals, it could restart consideration of Stewart Maxwell's bill. I stress that my remarks should not be interpreted as the Executive trying to tell the committee what to do, but I think that the scenario that was suggested in the question is perfectly feasible. My colleague from the Crown Office is likely to suggest that it

would be difficult to amend the bill appropriately at stage 2, but I will leave that to her to explain.

The Convener: When will the consultation conclude?

Mr McCabe: I think that it will conclude in the third week of September. We have committed ourselves to do our very best to announce our thoughts on the outcome before the end of this year, although such commitments always have caveats. In this case, we are trying hard to break the record by eliciting the most responses to any consultation ever in Scotland.

The Convener: Of course, the evidence that the committee has taken is also pertinent. We will discuss this later, but the deadline for our report is 2 November. That is just a point of information.

Mike Rumbles: Are we under instruction to complete our report by 2 November?

The Convener: Yes. As I understand it, that is the current timescale for the submission of our report. Let us leave the procedural matters to the side at the moment. That was just a point of information.

Mr McCabe: May I offer a point of clarification? Having had some involvement in the Parliamentary Bureau in a previous life, I know that it is open to the committee to explain the circumstances to the bureau and to ask for the timetable to be altered.

The Convener: Yes. As I said, 2 November is the current situation, but I am obliged to the minister for that clarification.

Helen Eadie: Minister, everything that you have said this afternoon points to the need to win public support for the arguments. Politicians must lead the country, but they must not run too far ahead of their constituents. In your opening statement, you referred to the policy memorandum to Stewart Maxwell's bill. My recollection is that Kenny Gibson received 39 responses from 43 organisations throughout Scotland to his bill, but Stewart Maxwell's policy memorandum is silent on how many responses he received. When Malcolm Chisholm made the announcement in the chamber two or three weeks ago, he said that the Executive had received some 700 responses on the first day following the launch—[*Interruption.*]

The Convener: Excuse me. Unfortunately, I must embarrass someone whose mobile phone is still switched on. Thank you for switching it off.

Helen Eadie: I wondered whether there was an update on the feedback to the Executive. Can the minister update us on the number of responses to the consultation?

Mr McCabe: My information was that there had been 39 responses to Mr Maxwell's consultation

from about 43 organisations. That was my understanding. Although the figures may relate to Mr Gibson's consultation, the point remains the same. The piece of work that the Executive is involved in has the full force of the Executive behind it and is eliciting extremely large numbers of responses. On the first day, there were 950 responses to the consultation. We continue to enjoy significant levels of response.

I must be honest and admit that I am somewhat wary of inducing what may be called Scottish apathy by mentioning figures that indicate that the proposal is a done deal and that enough people are responding. There are different forces at work. This morning in Dundee I attended the first of our regional seminars. It is fair to say that the licensed trade's representation was more than reasonable and that its members were fairly vocal. It is part of my job to ensure that the responses are balanced. We are enjoying a significant level of response to the consultation.

Mr McNeil: Previous evidence has suggested that whatever proposals are produced need to have the backing of the Scottish people. That position has been supported by the evidence that we have received today from New York and from you, minister. You also said that the mood had changed. What has changed since Dr Armstrong said publicly a couple of months ago that there was no public support for such a ban in Scotland?

Mr McCabe: With the greatest respect to our friends in the press, I think that we sometimes need to take rather lightly some of the comments that we read. A few weeks after the occasion to which you referred, Dr Armstrong made a very different range of comments.

The Convener: I would like to hear what Dr Armstrong has to say.

Mr McCabe: From time to time, we have all had experience of how easy it is to be misinterpreted when we engage with our friends in the press. Dr Armstrong might want to say a few words on that.

Dr Armstrong: I welcome the opportunity to do so. It is true that the way in which the questioning in the first interview was phrased led me to give a cautious response, because the interviewer was attempting to make me pre-empt the public consultation, which I regard as a very important part of the process. Subsequently, I have been offered the opportunity to state my personal opinion—I have not resiled from giving a clear statement of my personal and professional opinion on the matter, because I think that it is important that the public should have from me, as chief medical officer, a clear professional lead.

Mr McNeil: You would both agree that, as the minister suggested, we need the backing of the Scottish people. Today we have heard about

some great examples that highlight the weaknesses of the bill. It is not comprehensive. To obtain the health gains that we seek, we need to give support through measures such as free patches, counselling and education.

Dr Armstrong: That is true.

Mr McCabe: Absolutely. We cannot stress that too strongly. I firmly believe that a top-down approach simply will not work. Supplying the people of Scotland with the appropriate information and allowing them to come to a decision will mean that any changes that we make will be sustainable. That is the only way forward. I make no secret of the fact that those changes as regards smoking prevalence will be sustainable. When we better inform people about the lifestyle choices that have such a negative impact on our life journeys and our life outcomes, we will revolutionise our experiences across a range of issues.

Mr McNeil: You have discussed your involvement in Dundee. Do you have any plans to learn from the New York experience by setting up public hearings and information sessions throughout the country? If you do, is there a budget to fund that?

16:15

Mr McCabe: There is a difference in terminology. Our friends across the pond speak of public hearings; we have arranged 14 regional seminars, which are effectively the same thing. The seminars will have a panel of four, including the director of public health in the area, a representative from the Scottish Licensed Trade Association and a representative from ASH Scotland. A broad range of interest groups and members of the public will attend the seminars. There was a seminar this morning, at which I was on the panel. I intend to attend at least three of the remaining 13 seminars. The consultation, which is wide ranging, started on 7 June—we have already issued 210,000 response forms and 6,500 consultation packs. The seminars are complemented by a separate and specific public opinion survey and by specific focus group work. The overall consultation will be informed by research into international experience of restricting smoking in public places. The Executive considers that its approach is as comprehensive as it could be.

Shona Robison: Will Dr Armstrong tell us for the record his view on a smoking ban in public places? If the choice was between Stewart Maxwell's bill and no change, what would his position be?

Dr Armstrong: I have no difficulty with that. I am already on record as saying that I fully support

a ban on smoking in public places. I also say for the record that I do not believe that that should be the end of the affair. We are progressing on a journey towards a healthier, smoke-free Scotland. A ban on smoking in public places should be seen not as an end in itself, but simply as the logical next step on that journey.

A ban is important for four straightforward reasons. First, as committee members have already said, it is in line with public opinion. Attitudes are shifting: 70 per cent of the population does not smoke; more than two out of three smokers want to quit; and almost 90 per cent of a random sample of the Scottish public—smokers and non-smokers alike—appears to support a ban. Secondly, worldwide evidence shows that a ban helps to drive down the level of smoking among the public, as the committee has heard this afternoon. That is the goal on which we should be fixing our thoughts.

Thirdly, a ban protects not only non-smokers in otherwise hazardous environments from the effects of environmental tobacco smoke, but those who cannot choose. My principal concern in that regard is the unborn and children. Lastly, a ban sends a clear signal that smoking is not acceptable, for all the reasons that the committee has heard. The question is the degree to which tobacco and smoking-related harm is a social justice issue—the burden of the harm is borne by the poorest and most vulnerable in society, to whom we owe our protection.

Shona Robison: What about if the choice was between the bill and no change?

Dr Armstrong: That is like a controlled experiment in which I offer you a medieval treatment versus no treatment at all. In other words, if the choice is nothing or the bill, I would choose the bill, but we are not in a position to say whether the choice is between nothing and the bill. At the current rate of response, and from what I have heard so far this month, I believe that the consultation will show that the bill falls far short of what the Scottish population expects from its legislature.

The Convener: You are clearly saying that the public support a ban, so, against that background, why consult? There seems little doubt that the public want a ban in public places—I will check what you have said on the record—so why the lengthy consultation?

Dr Armstrong: The issue is about sampling. I was quoting the result of a single sample, which itself is pretty impressive—90 per cent in favour of anything is pretty impressive. However, the nature and strength of the Scottish parliamentary process is that we consult the Scottish people, because the Parliament is a single-chamber legislature. To me,

that is a demonstration of how the new Scotland works, so I do not have to apologise for allowing the Scottish parliamentary process to be exercised to its fullest extent in this matter even though my personal belief is that a ban goes with the trend of public opinion.

The Convener: I will make a personal comment. We do not consult for the sake of it; if a consultation is not necessary, we should not consult. However, if the Executive's consultation comes out with a rich sample of the public in favour of a ban in all public places, such as the sample that Dr Armstrong has demonstrated for us, when will a bill that the minister considers to be in an appropriate form—rather than the current one, which he says is imperfect—be before the committee?

Mr McCabe: Representatives of the media have said to me on many occasions, "Why not just ban smoking? You know that the evidence exists, so you should just go ahead and do it. You are wasting time." Let us take a snapshot of this morning's discussion in Dundee. At one end of the spectrum we were being accused of already having reached a conclusion and were told that the consultation was a sham, whereas at the other end of the spectrum people were saying that the evidence was clear, that we should act now and that there was no need for a consultation. We are always caught in that dilemma, but, if I hear voices from two ends of the spectrum, that gives me a reasonable indication that we are on the right track.

It is difficult to be precise about when a parliamentary slot would be available for a bill and it would be dangerous to identify such a slot lest it give weight to the view that we have already made up our minds and the consultation is a sham. I would not want to give weight to anyone who expresses such a view.

The Convener: I am not suggesting that. Let us say that the consultation runs its course and, at the end of December, you have a view—I accept your stated commitment to be anti-smoking. Broadly speaking, when would you envisage that a bill would be before the committee? Would the Health Committee be considering stage 1 of an Executive bill on banning smoking in public places next year or the year after that?

Mr McCabe: The best that I can say is that I envisage no unnecessary delay. Those matters are not entirely in my control, but I repeat that I envisage no unnecessary delay and I give a personal commitment that, as the Deputy Minister for Health and Community Care, I would advocate strongly that we act sooner rather than later.

The Convener: I have a feeling that that was a civil servant's answer. You said "sooner rather

than later", but can I read into that that we would see the bill next year?

Mr McCabe: No. It would be sooner rather than later.

Shona Robison: Still speaking hypothetically, I would argue that, if the consultation comes out in favour of a complete ban on smoking in public places, the quickest way of introducing such a ban would be to amend the bill that is before us. Will you give me some reasons why that would not be the best way forward?

Mr McCabe: I will follow your guidance on whether to answer that question, convener. You indicated that you wanted to deal with the issue later, but my colleague from the Crown Office and Procurator Fiscal Service is here and we can deal with the issue now, if you want.

The Convener: We were focusing on the question of expanding the ban to all public places, although I am happy to come to the issue of enforcement. The Executive will have the same enforcement problems whether Stewart Maxwell's bill is amended or it introduces its own bill.

Mr McCabe: The issue is not as straightforward as that. My colleague from the Crown Office and Procurator Fiscal Service might have a view on that.

The Convener: Shona, can we come back to your question when we deal with enforcement? You can also deal then with amending the bill to broaden its scope.

Shona Robison: Okay.

Helen Eadie: Minister, are you aware of any empirical evidence that has found that limited bans on smoking—in the workplace, for example—have led to higher rates of smoking cessation?

Mr McCabe: There is such evidence. I will refer the question to the chief medical officer, but there is evidence that, where there is a restriction on smoking in whatever location, it helps to drive down the prevalence of smoking and that the more comprehensive the restriction is, the more the incidence of smoking drops. The committee heard evidence from New York suggesting that rates of smoking have dropped substantially in a remarkably short period of time. There are also indications from Ireland, but I think that it is too early to draw any conclusions from them as yet. An important part of our work will be to conduct research into the international experience, by which I mean the impact that a restriction on smoking in public places has had on rates of smoking and on economic and other factors.

Janis Hughes: As you said, minister, we heard evidence earlier from New York about the economic impact of such legislation—indeed, the

reports from New York show conflicting views on the issue. You talked about the evidence that you heard this morning from the licensed trade about its obvious concerns. What will the effect be on the income and revenues of the establishments that are affected by the legislation? I am thinking in particular about the different views in the licensed trade about the impacts of a partial or blanket ban.

Mr McCabe: I fully understand why the licensed trade might have reservations about the proposed restriction. Clearly, any new situation is indeterminate to some degree. It is therefore natural that the people who have invested in licensed trade premises would be nervous. Sometimes I find it difficult to understand why people do not talk more about the 70 per cent of the Scottish population who do not smoke. If I was in business, I would want to appeal to and attract such a large market. At the very least, there is the strong possibility that the market that is to be gained is at least as big as, if not bigger than, the market that could be lost.

I recognise that it is difficult for people in the business to express that view, but we are beginning to see evidence from around the world of the economic benefits as well as the disbenefits. In any market, there will always be a difference of views. Again, I will have to qualify what I am saying—I am before the committee as the Deputy Minister for Health and Community Care and not as a minister for enterprise. That said, most people recognise that in any market there will be a range of gainers and losers. In this case, the exact balance remains to be seen, although some of our research will help to clarify things.

It is worth saying that, whatever the eventual balance of the calculation, we believe that we have firm and irrefutable evidence that second-hand smoke is responsible for around 1,000 deaths each year in Scotland. That fact also has to be factored into the balance sheet. It is legitimate to ask what kind of financial price we place on 1,000 deaths each year in Scotland.

Janis Hughes: I have heard anecdotal evidence from licensees that they would prefer a blanket ban, as that would put everyone on a level playing field, whereas, if there was a partial ban, they might have to make fairly extensive modifications to their premises. What is your view on that? Have you heard similar evidence?

Mr McCabe: I am sorry, are you talking about alterations to premises?

Janis Hughes: Yes. Some licensees who serve food in one part of their premises claim that a partial ban such as the bill proposes would mean that they would have to make fairly major modifications to their premises in order to comply

with the law. They say that a partial ban could put them at a disadvantage and that they would prefer a blanket ban, because that would put all licensees on a level playing field.

Mr McCabe: From the discussions that we have had with the Scottish Licensed Trade Association, we know that licensees would like consistency. Whatever we do, we should avoid market distortion. Licensees are greatly concerned that the power to make laws might pass to the local government level. Their great fear is that neighbouring authorities could take different approaches. That could result in movements of people, which, in turn, could lead to market distortion.

I have certainly heard concerns expressed about the costs of modifications to accommodate the bill. That is part of the confusion between consideration of Stewart Maxwell's bill and the direction in which the Executive is travelling. If, for instance, a business had to incur substantial costs—I have heard the figure of £3,000 or more quoted—only to find that, hard on the heels of the bill, the Executive took more comprehensive action, the business would undoubtedly consider that that money was not well spent. We want to do everything that we can to avoid such a situation.

16:30

The Convener: We will move on to enforcement, which you refer to as one of the difficult features of the bill that cannot be amended. I also ask you to address broadening the bill's scope.

The Crown Office and Procurator Fiscal Service's submission says of section 7:

"To criminalise negligent conduct is a significant extension to criminal liability in Scotland and certainly merits very careful consideration."

That section deals with bodies corporate, partnerships and voluntary unincorporated associations. I ask the Crown Office representative why that would be a significant extension. Does no other legislation have a similar provision?

Amber Galbraith (Crown Office and Procurator Fiscal Service): Not that I am aware of. To a degree, criminal liability in Scotland is obviously of a necessarily high level. To be labelled as criminal conduct, conduct must be severe and very culpable. For that reason, negligent conduct can be criminal only if it is very severe, such as gross or wicked negligence. Under the bill, mere negligence on the part of an employee would be labelled as criminal conduct. That would take the level of negligence down a step and would not attach a criminal or serious element.

The Convener: I say with respect that that does not seem to be what section 7 says. We understand the situation of a negligent employee acting on their own, but section 7(1) refers to

"an offence under section 4 or 5"—

the offence of permitting smoking in a regulated area or of failing to display signs—

"which has been committed by a body corporate other than a local authority"

and

"is proved to have been committed with ... consent or connivance".

That is more than simply neutral—a body corporate must have consented or connived. The section also covers an offence that

"is attributable to, any neglect on the part of—

(a) a director ... or

(b) any person who was purporting to act in any such capacity".

That would mean that senior management—directors who knew that the law was being broken and who consented to or connived in that—became criminally liable. It is not simply a case of some naughty employee doing something of which directors were unaware—the directors would be part of that. To take it further, the employee might be unaware of the law because the owner, proprietor or body corporate operated in that fashion.

Amber Galbraith: I am sorry; I did not mean to confuse the issue by referring to an employee. It would not matter what the nature of the accused person was; what would be important would be the mens rea that was involved.

The Convener: Is there not mens rea in consent or connivance?

Amber Galbraith: Indeed, but in general what the bill is talking about is art-and-part liability. If people were so involved in the offence, they could be prosecuted in any event.

The Convener: The provision seems to be perfectly sound. If I were a proprietor or a company director and I wilfully, with consent or connivance, broke the law by failing to display signs or by allowing smoking to take place, I should be prosecuted.

Amber Galbraith: Perhaps that is a separate issue. The body corporate is found guilty of such an offence, but it is referable to neglect on the part of a manager. The bill would criminalise neglectful conduct.

The Convener: Yes, but the conduct would be knowingly undertaken. It would not be undertaken in a neutral state or in absence. The important

words are “consent” and “connivance”. I understand that section 7 would prevent individuals from hiding behind the corporate veil. It would put them on the same footing as that of members of a partnership or a voluntary association. In other words, the important thing, as you point out, is mens rea—doing it knowingly. That is the important issue in establishing criminal liability. I did not understand the points that you raised in objection to that.

Amber Galbraith: Perhaps we have a difference of view. My reading of the section is that where an offence is attributable to neglect on the part of a director, the director—as well as the company—could be found liable. The issue is not about a director or a particular individual separately committing the offence, which could happen anyway. There is arguably no need for a separate provision.

The Convener: We will tease that out. I disagree entirely. I can see the import of the section, which is not to protect company directors, members of partnerships or the chair of a voluntary organisation from being held personally responsible for wilfully ignoring the law.

I do not understand what the Crown Office and Procurator Fiscal Service submission says about section 8. It states:

“Subsection 2 provides that while the Crown may not be found criminally liable, any ‘public body or office-holder having responsibility for enforcing that provision’ may apply to the Court of Session for a declaration of unlawfulness. There will be no consequent element of sanction or compulsion. It is unclear who should be applying to the Court of Session. While this would depend on the definition of ‘enforcing’ it would appear that this refers to the police and COPFS.”

The explanatory notes on section 8, which I meant to quote first, state:

“Many public spaces where food is supplied and consumed will be operated and controlled by the Crown ... Section 8(1) applies the provisions of the Bill, including any orders or regulations made under it, to places operated by the Crown.”

I am not quite sure why Edinburgh Castle is operated by the Crown. Is the Palace of Holyroodhouse operated by the Crown? What if the Queen broke the rules and allowed smoking in a public area where food was served?

The explanatory notes continue:

“under subsection (2) the Crown itself cannot be held criminally liable for committing an offence under the provisions of this Bill. A public body or office holder who has responsibility for enforcing any of the provisions in the Bill”—

which I take to mean an environmental health officer, for example—

“can make an application to the Court of Session, to declare that any specific breach of the provisions of the Bill by the Crown is unlawful.”

Is not that unfair? Why should the Crown be different from anyone else?

Amber Galbraith: I agree, but that was not the point of the submission. The arrangement reflects similar provisions in health and safety legislation. There is a difficulty with Crown immunity. In particular legislation it is perhaps right that the policy should be that the Crown is not exempted from its application. Where the Crown cannot be held criminally liable, the provisions provide a mechanism for some kind of sanction. Put simply, the enforcement mechanism for the sanction was not clear. In England and Wales, the Health and Safety Executive petitions the court for a Crown notice.

The Convener: When Stewart Maxwell answers his questions, I will get him to say whom he expected to make applications for a declaration of unlawfulness. The problem is only about who will make the application; there is no other problem with that procedure.

Amber Galbraith: No.

The Convener: My lawyer’s horns are beginning to come out.

Minister, aside from the amendments on enforcement that you may have to deal with, what difficulties arise from the point that Shona Robison made? Let us say that the response to your consultation is, “Absolutely. We’re with the chief medical officer on this. We should bring in a ban in public places.” Why could the bill not be amended? Let us say that we sort out the penalties. Why cannot the other bits be amended?

Mr McCabe: In theory, it is possible to amend any bill. However, as the Executive’s consultation has not been concluded, and given the time that it will take for the Executive to consider the responses and to make an announcement, we are not convinced that amending the bill is the best way forward. As I have said, work on the bill is going on at the same time as a high-profile piece of work on behalf of the Executive. That is causing confusion and is allowing people—especially people in the licensed trade—to say that elements of the bill could result in considerable expenditure that might be negated shortly afterwards if the Executive decides to take a different course of action. In theory, any bill could be amended. However, I have to put a caveat on that comment: I am not a lawyer and we would have to take considerable advice from our legal advisers.

The Convener: That is not an absolute no, then.

Mr McCabe: I have been asked some hypothetical questions and I have given committee members a theoretical example.

Shona Robison: Is it not the case that if you put three lawyers in a room they will disagree with one

another? Legal advice could argue for both sides of the argument, but where there is a political will, there is always a way. If the weight of evidence that we hear in relation to this bill is in favour of a complete ban, and if the evidence that the Executive hears through its comprehensive consultation is in favour of a complete ban, then is there not a better solution than the Executive trying to find room in its legislative program? If that happened, I fear that there would be a big delay. Would it not be better to pick up on where we are with this bill, fix it where you feel it needs to be fixed, and get the bill on to the statute book?

Mr McCabe: I would make a distinction between different legal advice and sound legal advice. I hope that the Executive will move on the basis of sound legal advice.

Shona Robison seems to assume that there could be considerable delay. I had not intended to give that idea to the committee this afternoon, and I do not think that I did. I am here to give evidence as the Deputy Minister for Health and Community Care. I do not have specific responsibility for the progress of the legislative programme. If I gave a specific time commitment now, those who have a different view of the need to take action on smoking in public places would be able to take that time commitment as evidence that we had already reached a conclusion in advance of the consultation. I want to avoid that. However, I do not see why there would be any considerable delay if, as a result of the consultation, the Executive announced a specific course of action.

We are not in this for the sake of going through the motions. As I have said time and again, we are convinced of the impact that smoking and passive smoking have on our communities in Scotland. We are absolutely convinced that we need to take people with us. If people speak in large enough numbers and in a loud enough voice, we will not shrink from taking action. I do not think that there is anything to indicate that, in taking that action, we would introduce any unnecessary delay.

Dr Turner: I remind everybody here that the medical profession has known since the 1960s how detrimental smoking is to health and its costs in human life and misery. Throughout my 35 years in medicine, we have known those things. The evidence that we are gathering now is the icing on the cake of public opinion. The evidence that we have heard has convinced me that the public are way ahead of us and are desperate for help.

If the Executive were to act now, I do not think that it would be regarded as having cut short consultation. I think that it would be admired. For 35 years, the medical profession has been desperate for a government to take a lead. However, financial considerations and the cigarette companies seem to have had the upper hand.

You should not be afraid. If your consultation is over by the end of September, you would be applauded if you made a decision then.

Mr McCabe: That is a point of view—

Dr Turner: It is the view of many doctors who have written, believe it or not.

Mr McCabe: The medical profession has been convinced for many years of the negative impact of smoking. The difficulty is that the general public in Scotland have continued to adhere to the habit and smoking continues to take 13,000 lives in Scotland every year and to result in 33,000 admissions to hospitals.

Dr Turner: What does that tell you?

16:45

Mr McCabe: It tells us that there is a serious problem. The Executive is determined to take action on it, which is why we are engaged in a comprehensive piece of work and why we have a tobacco control action plan, which is the first such plan designed to tackle the problem in Scotland. We have issued 210,000 response forms and 6,500 consultation packs and we are holding 14 regional seminars as well as focus groups and public opinion forums. We firmly believe that there is a change in the public mood. Measures will be sustainable if people express their view and believe that they have made a contribution to the formulation of public policy. One thing that I hear time and again in politics—I have heard it for a considerable number of years—is that there is a disconnection between the legislators and the people whom we try to represent. We have an opportunity to get the biggest ever response to a consultation and to allow people to be convinced that the views that they expressed genuinely helped to form public policy.

The difference between us is perhaps a matter of five months at the most. The consultation ends at the end of September and we hope to make an announcement before the end of the year. There are big gains to be made by adopting the Executive's approach, which is why I advocate that that approach is the right one. I genuinely believe that confusion has been caused, which disappoints me, given our commitment to and determination on the issue.

I agree with Jean Turner about the determination in the medical community and the length of time that the knowledge has existed. However, even though that knowledge has been available, smoking has continued seriously to damage health and people's life journeys in Scotland. For the first time, the people of Scotland will have an opportunity to say clearly that they have had enough and then to ask us what we will

do to ensure that that does not happen in the future.

The Convener: Perhaps we are exasperated because we are into the fifth year of the Parliament—it would have been good if we had done the work in the first year. I realise that your heart is in the right place, minister, but urgency is sometimes not the hallmark of the Parliament. That is my personal view.

Mr McCabe: We are all experienced politicians. Despite some of the trials and tribulations, we are all in the job for the right reasons. We know that we cannot cure the ills of the world overnight and that we cannot do everything at once. We are five years into a Parliament for which we waited 300 years and we are on the verge of making significant breakthroughs to tackle the single biggest cause of preventable death in Scotland. That is significant progress.

Mr McNeil: The other view needs to be presented for the record that if we legislate in haste, we repent at leisure. It is better to get any measures right, certainly given the evidence that we heard today from New York about how to get people to comply and how we deliver on the legislation. While we have the comfort of hours and hours of evidence from campaigning organisations, we have not heard from people from bowling clubs, bingo halls and social clubs, who will provide severe opposition to any proposed legislation. The 1.2 million people who smoke in Scotland have to be won round to the idea. My regret about all the hours that we have spent on the bill is that we have not focused on those 1.2 million people. The minister should take time and should not rush the matter because it is more important to get it right.

The Convener: The witnesses whom we called reflected the balance of evidence that we received. We put out a call for evidence and we can do no more than that.

Mr McNeil: The people I was talking about do not respond to that sort of call.

Mr McCabe: I agree with Mr McNeil's sentiments. At our meeting this morning in Dundee, it was related to me that community halls in Dundee are under community management—they are owned by the council but leased to and managed by community management groups. Smoking in the halls is generally restricted, although it is allowed on specific occasions for functions such as funerals, weddings and others. The council decided to consult those management groups about restricting smoking completely. The council was aware that the majority of the members of the management groups were smokers and it was stunned that all but one group came back and agreed with a restriction on smoking in those halls.

Yes, we need to engage with a variety of groups in Scotland, but as the chief medical officer has rightly said, all our evidence suggests that the vast majority of people who smoke are anxious to kick the habit. Whatever we can do to assist them will be warmly welcomed, whether it be restricting smoking in public or expanding smoking cessation services.

The Convener: I will bring in Stewart Maxwell very briefly. You two seem to be having a meeting on your own now and I am conscious of the time.

Mr Maxwell: I pick up on the point about the Executive's intentions versus the bill, but I am struggling with your logic. I am not sure that I understand what the conflict is between all the robust action that you are taking, minister—I have commended you for taking that action and I do so again—and the passage of this bill when it is amended as the committee and other members might see fit. It seems to me that the two timetables could merge quite easily. The advantage would be that we would get the bill that we want, there would not be a five-month delay, and this very busy committee of the Parliament—one of the busiest, if not the busiest—will not have to go through the process twice by having to consider an Executive bill sometime next year or perhaps the year after. What is the conflict?

Mr McCabe: Again, I have to say that it is not for me to tell the committee how to do its business. I do not think that the committee would have to repeat the process if, for example, it suspended consideration of this bill.

As I have said umpteen times, we will conclude the consultation at the end of September. I give a commitment to do my very best to be in a position to make an Executive announcement before the end of the year. The caveat is always that the response to the consultation might be so huge that the analysis takes longer than we anticipate. The outcome of that consultation might well see far more robust proposals for a way forward.

If that is not that case or if, for example, the consultation has a disappointing response, or if the committee and Mr Maxwell are disappointed by the Executive's proposals, there is nothing to stop consideration of the bill restarting after we have made our intentions clear.

We do not differ in our policy intention. I do not want this to turn into a mutual admiration society, but I have also made it quite clear that we have no difference with the work that you have done, Mr Maxwell, and we commend you for advancing the agenda and bringing it to the notice of the general public in Scotland. The fact that you introduced a member's bill has contributed to the level of awareness in Scotland and I am happy to acknowledge that.

However, if we are legislating responsibly, and we are taking the opportunity of adhering to the founding principles of the Parliament, it makes sense to await the outcome of one of the biggest questionnaires that has ever been placed before the people of Scotland, to assess those responses and then to decide on the appropriate way forward.

This is a fundamental issue for Scotland. I have said before and I will say again that it is about more than smoking in public places and more than driving down the rates of smoking that are prevalent in Scotland. It is about engaging with the people of Scotland and asking them to think differently about their lifestyle choices in smoking, in diet and physical activity, and in how they interface with alcohol.

For all those reasons, it is important that we do this properly and comprehensively, and that we avoid anything that allows confusion and that allows people who take a different view and want to maintain the status quo to make the charge that our minds are already made up and we are only going through the motions.

That is the conflict. At this time, we are in danger of introducing a degree of confusion, and I stress that it is just a degree of confusion; I do not want to overstress the point. Irrespective of where we stand in the debate, if someone steps back and assesses the work that is going on—although I am not going to go through all the aspects of the consultation again—they will conclude that we will arrive at a very firm indicator of the direction of travel of the Scottish people. That is extremely important to me, particularly in this debate.

Mr Maxwell: I have a question for the Crown Office. I was left a little confused by your response on Crown liability. Perhaps you could tell me who is responsible, under section 67 of the Water Industry (Scotland) Act 2002 and section 66 of the Transport (Scotland) Act 2001, for the very same actions, in relation to the Crown?

Amber Galbraith: I am sorry; I do not have the answer to that. However, I assume from the question that it is the Crown Office.

Mr Maxwell: It is the Crown Office. The provision in the bill that we are discussing is exactly the same as in those acts. Why do you have a problem with a power being in the Smoking in Regulated Areas (Scotland) Bill that is already in those acts? You have that power already.

Amber Galbraith: Is the wording exactly the same in those acts?

Mr Maxwell: It is exactly the same. I think that that answers my question.

The Convener: We can perhaps consider that. I thank our panel for their help.

Bearing in mind the committee's endurance levels and the fact that we have thoroughly aired many issues, I think that our question-and-answer session with our next panel might be shorter than the other ones. Heaven forbid that I should suggest that it is also almost the end of term.

In our next panel, we have Stewart Maxwell MSP, David Cullum, of the Scottish Parliament's non-Executive bills unit, and Catherine Scott, of the Scottish Parliament's directorate of legal services. I was about to ask them to take the stand, but they are not in a witness box. I ask them to take their seats.

Dr Turner: I will ask what I hope will be a quick question. I would like to know, having heard all the evidence so far, whether the bill can be changed to make the provisions compulsory and to even out the inequalities that have been mentioned. Can it be changed in order to create a blanket ban?

Can you explain the connection that has been made in the bill between food and a ban on smoking? Why has the ban not been extended to all licensed premises, including those serving only alcohol? Perhaps it is naive to ask this question, but could the bill be changed to include all licensed premises? As a doctor, I have waited all my life for something like this bill, which would help people and cut costs to the health service. Would it be possible to change the bill reasonably quickly if we had a mind to do so? The evidence is overwhelming—

The Convener: I was hoping for short questions, Jean.

Dr Turner: Sorry.

Mr Maxwell: The short answer to your question is yes. It is possible to change the bill in the way that you describe. There is no doubt that a full ban on smoking in public places can be achieved through the bill. That was agreed with the parliamentary authorities when scope issues were discussed when the bill was introduced. The scope of the bill is clear and unequivocal: it is to prevent people from smoking in regulated areas, hence both the short and the long title. There is no problem in extending the definition of regulated areas to cover all enclosed public places. The only thing that the bill cannot do is ban smoking everywhere, which is not the intention.

Catherine Scott (Scottish Parliament Directorate of Legal Services): I agree absolutely with Stewart Maxwell—there is no problem with amending the bill in the way that he has suggested.

The Convener: My comments will also be short because I could tell that people thought it was like watching paint dry when I asked about the section on enforcement.

17:00

Mr Maxwell: I will answer a question quickly if I may. I was asked about the link between smoking and food, rather than alcohol. The bill is a progressive measure. We must reflect on the fact that, when the bill was originally proposed a year ago, the situation was different to where we are now; the argument has moved on quickly since then.

The reason why the bill connects smoking with food is that that mirrors approaches taken in other jurisdictions. You heard the representative in New York say that they had a ban on smoking in restaurants before they had a full ban elsewhere. It was also clear at that time that there was public support for introducing a ban in restaurants and other places where food is served. I agree with the minister about taking the public with us to make legislation effective.

I have outlined the original reasons why we plumped for going as far as we did with the bill. However, as I said a moment ago, we left scope in the bill for any possible amendment to go much further—or indeed to go for a full ban. Having sat through all the evidence sessions with other committee members over the past four weeks and having read all the written submissions as well as the enormous amount of scientific evidence, other surveys, reports and evidence from around the world, I am of the opinion that the bill does not go far enough. I now think that we need a full ban on smoking in public places. I am glad that we left scope in the bill for introducing an amendment that would remove section 1 and replace it with a new section 1 that would allow us to have a full ban. I would certainly support such an amendment at this point.

The Convener: Both the Crown Office and I were partly confused about section 7. Section 7(1) refers to

“the consent or connivance of, or is attributable to, any neglect on the part of—

(a) a director, manager or secretary, member or other similar officer of the body corporate”.

I ask the legal team whether they should remove the phrase

“any neglect on the part of”.

Does that phrase add confusion? I want to know why it is there. If a manager consents or connives to break the law, it seems that you want to make them criminally liable. I do not quite understand the need for that phrase.

Mr Maxwell: The intention was clear and your questions to the Crown Office followed exactly the intention of the bill, which was to prevent corporations or businesses from hiding behind the corporate veil, as you put it. Perhaps Catherine Scott will respond.

Catherine Scott: That type of provision is common in statute law. It is common in regard to regulatory offences that might be committed by businesses. We see examples in the Trade Descriptions Act 1968 and the Food Safety Act 1990 and there are some examples in acts of the Scottish Parliament. The provision was modelled on a similar provision in the Building (Scotland) Act 2003.

The Convener: I seem to remember asking the representative of the Crown about that and was told that the provision was not statutory—was that not correct? The representative of the Crown said that it was not, but you tell me that it is.

Catherine Scott: I think I know where the Crown might be coming from on the matter. It is unusual for a common-law crime in Scotland to be committed through negligence, but the same considerations do not apply where it is a statutory offence. That type of provision for bodies corporate is common.

The Convener: That is fine—you have cleared up that the situation is not unusual and that the provision seems to be enforceable.

Dr Turner: We heard from witnesses that it would be impractical to require that there should be connecting spaces and non-smoking areas next to regulated areas. Even where there is a buffer zone, the practicalities would be quite difficult because such a zone would not prevent the smoke getting to the people on the other side; it would drift regardless of the barrier. Such an area would have to be at quite a distance. What do you think of that?

Mr Maxwell: I should make a couple of points in response to that question. First, as I said earlier, the evidence is clear that a full ban is the obvious answer to the problem.

Dr Turner: That would cover both aspects.

Mr Maxwell: Scientific evidence clearly shows that smoke drift occurs even when there is a single barrier or door. If we had connected spaces, the places that connect to a smoke-free enclosed place—even through a door—must also be smoke-free to avoid the problem of smoke drift from immediately adjacent spaces. As a result, we would have a double barrier, because the enclosed place and the connected space—or what you call the buffer zone—would be smoke free. I do not want to go back to last week's evidence about having toilets with two doors and a connecting space, but it is the same kind of zone. That said, I think that a full ban is the right approach.

Dr Turner: That would exclude the need both for connecting spaces and for the five-day rule, which could also raise difficulties.

Mr Maxwell: As the unamended bill sets out a partial ban on smoking in public places, the five-day rule was supposed to address scientific research on the length of time that carcinogens, gases and other chemicals remain in the atmosphere or re-emerge into the atmosphere from furnishings. As we all know, people who have been in a smoky atmosphere can smell the smoke on their clothes the following day or even several days later.

Dr Turner: I understand the reasoning behind it.

Mr Maxwell: The five-day rule simply creates enough time for people to remove smoke from the atmosphere and furnishings in a room. Within this unamended bill's framework, such a measure is valid to ensure that carcinogens from smoke are not present for customers and the people who work in a particular place. However, you are right; a full ban would remove the necessity for such a rule.

The Convener: The Crown Office has said that phrases such as "regulated area", "enclosed space", "connecting space" and so on are badly defined in the bill and its written submission cites certain examples. What is your response to those criticisms and to the comment that, as it stands, the proposed legislation will result in many failed prosecutions?

Mr Maxwell: I must be honest and say that I have some difficulty with the whole of the Crown Office's evidence. I will certainly answer its criticisms, if you wish; however, instead of going through all of them here, it might be better if I wrote to the committee with a point-by-point explanation of where I disagree with the Crown evidence. Is that acceptable?

The Convener: Is the committee content with that?

Members *indicated agreement.*

The Convener: That would be very useful. After all, this area is a bit too technical to go into at this time of the day. However, it must be addressed.

Mr Maxwell: I also disagree with the Crown's evidence given during the meeting on the points that have been raised and the questions that have been asked. It has either accidentally or deliberately misinterpreted what is in the bill.

The Convener: I do not think that we should say that the Crown's evidence was deliberately misleading.

Mr Maxwell: Well, there has been accidental misinterpretation.

The Convener: Perhaps we should say that there might have been some differences in legal views.

Janis Hughes: On enforcement, is the bill not likely to place undue demands on enforcement agencies, such as the police? I think that the financial memorandum underestimates the impact on local government of, for example, the complexities of enforcing the five-day rule.

Mr Maxwell: Perhaps I should respond to that question by referring to enforcement in its broadest sense instead of to the five-day rule. After all, I have conceded that, given the evidence that the committee has received, a full ban—or what you have called a level playing field—is probably a much more sensible option. However, no matter whether we are talking about this bill as it stands, an amended bill or an Executive bill, the enforcement issue will remain. It is not exclusive to this bill.

That said, after considering evidence from Ireland, Norway, New York, California and elsewhere, I feel that enforcement has not been an issue. For example, Dr Nancy Miller mentioned that, after one year, the compliance rate was 97 per cent. Such an exceptionally high figure suggests that enforcement has not been a problem. If I recall correctly, I think that she said that an additional 12 enforcement officers or whatever they were called—they sounded like environmental health officers to me—had been needed. That does not seem that many for New York. I do not know how many premises there are in New York city, but Dr Miller said that more than 20,000 premises have been inspected so far, so there does not seem to be much of a problem.

The Office of Tobacco Control in Ireland has said clearly that there does not appear to be a problem with the enforcement of the ban in Ireland and the committee heard similar evidence last week and in other weeks. I have difficulty in understanding why enforcement might be an issue, given that wherever a ban has been introduced it has been enforced by the public themselves and there has been no need for draconian enforcement measures.

It would be incumbent on owners and proprietors to enforce the ban, so we would not need smoke police, as the pro-tobacco lobby suggests. Owners and managers would have a legal as well as a moral incentive to enforce the law. The ban would be enforced not only by the public, but by the owners of the establishments that were involved.

Shona Robison: You heard that there are opposing views on the impact of a smoking ban on jobs and businesses. What is your view on that? The Finance Committee's report on the financial memorandum to the bill rightly recommended that the Health Committee consider the bill's effect on businesses. The report said:

"the Committee has concerns that greater costs may fall to on-premises licensed outlets".

What is your view on the Finance Committee's interpretation of the evidence on the economic impact of a ban?

Mr Maxwell: The best word to describe my reaction to the Finance Committee's report is "disappointed", because the report does not truly reflect all the evidence that was taken. To a great extent, the report's conclusion hangs on paragraph 22, which states that the Scottish Licensed Trade Association mentioned a report from New York that said that the ban there had led to a loss of trade. The New York report is not referenced in the Finance Committee's report and Finance Committee members obviously did not see it.

Dr Nancy Miller debunked the evidence from the New York report, which was based on assumptions, guesses, projections and the wishes of those who oppose the ban—I am not surprised that it arrived at the figures that it stated. Moreover, the report's author has admitted that he based the report on projections rather than on real figures and he has accepted that it is not the case that there have been 2,000 job losses, as the report suggests. He has admitted that that figure was based on a projection of a hoped-for increase in jobs that did not happen. Frankly, Dr Miller answered the question clearly. That single report does not reflect the situation in New York. The New York City Department of Health and Mental Hygiene and other departments—I think that Nancy Miller mentioned four separate departments—have produced evidence that jobs are up, tax takes are up and the number of licenses is up. We should accept the evidence from the facts that those departments have supplied, rather than the projections of people who oppose the ban.

The Finance Committee rather underplayed some of the other effects of the bill. Productivity loss and figures on absenteeism were not considered in the report, although the figures suggest that non-smoking employees take between 2.5 and 6.5 fewer days' absence per year than smoking employees—so there would be productivity gains to be made for businesses. There would also be massive gains for the health service, which estimates that smoking-related illness and death cost the service about £200 million per year. Such costs should have been mentioned in the Finance Committee's report. The Executive is keen on talking about balance and offsetting costs; I have often seen bills that suggest that costs would be neutral because savings could be offset against the costs that would be incurred.

The Finance Committee's report did not mention ventilation costs, either. However, if the ventilation

route is chosen, the evidence even from the SLTA is that the cost to premises of installing a system would be between £5,000 and £20,000—perhaps even more for large premises. There are a lot of savings to be made through the bill, but the Finance Committee's report hangs on a comment from the SLTA about the report that Dr Miller debunked. All the surveys that have been carried out around the world into the economic effect of smoking bans on businesses report that the effect is either neutral or positive.

The Convener: The Health Committee has been sitting for three and a quarter hours with scant ventilation. Before we expire, I thank witnesses for their evidence and—before I expire—I advise that the first draft of our stage 1 report should be available on 21 September and the final draft should be ready on 28 September. I thank the clerks for their work this year, and members who have managed today's endurance test and I wish them and everyone else a happy recess. I hope that you come back bright, brisk and ready for another year.

Meeting closed at 17:15.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Thursday 8 July 2004

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75

Special issue price: £5

Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0870 606 5566 Fax 0870 606 5588

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF1 2BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation
Helpline may be able to assist with additional information
on publications of or about the Scottish Parliament,
their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

RNID TYPETALK calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers