



Health and Sport Committee Official Report 17 March 2010

Col 2929

Scottish Parliament

Health and Sport Committee

*Wednesday 17 March 2010**[The Convener opened the meeting at 10:03]*

Subordinate Legislation

National Health Service (General Dental Services) (Scotland) Amendment Regulations 2010 (SSI 2010/33)

The Convener (Christine Grahame): Good morning and welcome to the ninth meeting this year of the Health and Sport Committee. I remind everyone, including people in the public gallery, to switch off all mobile phones and other electronic equipment. Apologies have been received from Dr Richard Simpson and I am pleased to welcome Frank McAveety, who is substituting for him.

Item 1 is an oral evidence session on the National Health Service (General Dental Services) (Scotland) Amendment Regulations 2010 (SSI 2010/33), which amends the existing National Health Service (General Dental Services) (Scotland) Regulations 1996, so as to remove provisions that allow a continuing care arrangement or capitation arrangement to lapse. Members have a copy of the regulations with their papers for the meeting. The Subordinate Legislation Committee did not have any comments to make on the instrument.

The Minister for Public Health and Sport, Shona Robison MSP, is present. She is accompanied by Margie Taylor, chief dental officer; Eric Gray, branch head, dental, ophthalmic and fraud policy branch; and Lynne Morrison, senior policy officer, dental, ophthalmic and fraud policy branch, of the Scottish Government primary and community care directorate.

A motion that the committee recommends that nothing further be done under the regulations has been lodged by Mary Scanlon MSP and will be debated following the evidence session. As members are aware, once that debate has begun, the minister's officials will not be able to participate. I invite the minister to outline the regulations briefly.

The Minister for Public Health and Sport (Shona Robison): I welcome the opportunity to address the committee on the issue of continuous dental registration. One of the commitments in "An Action Plan for Improving Oral Health and Modernising NHS Dental Services in Scotland", which the previous Administration published in 2005, was to make dental registration a continuing

Col 2930

and not a time-limited system. The regulations that we are discussing today represent the final step in achieving that commitment.

The key principle that underlies this aspect of the dental action plan and our policy approach is that there should be no automatic ending of registration after any given period of time. The continuous, lifelong relationship that that encourages is entirely consistent with arrangements elsewhere in primary care, such as general medical services and, in pharmaceutical services, the development of the chronic medication service.

The development of a longer-term, more stable relationship between a dentist and patient fits with the need to plan care on a long-term basis and to monitor oral health over time. The better known the patient's history, the more likely the patient is to be treated appropriately, whether that is related to the development of periodontal disease, the replacement of restorations or the monitoring of pathological changes to the mucosa. Encouraging that relationship for all, instead of only for those who, historically, have been regarded as regular attenders, should bring significant health benefits as part of an overall strategy to improve attendance.

However, we recognise that registration itself is not the whole story; it is just one of the markers that indicate how available patient access to practitioners is. For instance, we are interested in not only the percentage of children registered but what happens to those children when they go to the dentist. We have therefore introduced a new health improvement, efficiency, access and treatment—HEAT—target, which measures the numbers who are getting preventive treatment. Similarly, with adults, we are looking at participation as a further indicator of the care that adults are accessing.

We also recognise that patients have a responsibility to attend their dentist when required. To that end, we are working with health rights information Scotland on an update to our leaflet, "Registering with a dentist for NHS treatment", on what a patient should expect from his or her dentist and what a dentist should expect from his or her patient. I am pleased that the British Dental Association Scotland is working with us on that update.

In parallel, we are working on the development of an oral health assessment, which should address the BDA Scotland's concerns about the further development of a preventive approach to dentistry.

Through the childsmile programme, we are already developing a comprehensive approach to preventive dentistry for children. We have

Col 2931

delivered early the HEAT target that 80 per cent of three to five-year-old children should be registered with a dentist by 2010-11.

The strategy set out in the dental action plan, plus this Government's work since taking office, has resulted in positive improvements in oral health, an increased dental workforce and better access for patients, but, of course, there is more to be done. By completing the dental action plan commitment to introducing continuous dental registration we will make a significant contribution to further deliver patient care with a consequent improvement in oral health. I will therefore oppose the motion that Mary Scanlon lodged.

Helen Eadie (Dunfermline East) (Lab): In future, will the Government publish the number of people—children and adults—registered with a dentist, divided into high and low capitation fees?

Shona Robison: We could do that. Is there any reason why we could not?

Margie Taylor (Scottish Government Primary and Community Care Directorate): What we could do is divide the numbers into areas of deprivation by postcode, using the Scottish index of multiple deprivation. We should be able to get that information and give it to you.

Shona Robison: We will certainly see what can be done.

Helen Eadie: That would be helpful. As you know, one of the problems that the committee and the Parliament face is getting the appropriate data. Sometimes the data are not held centrally. It will be important to monitor that information in future years, so I would appreciate it if we could get it.

How much does the Government expect to save by this move? Am I right in saying that the capitation fee is lower as time goes by—after three years?

Shona Robison: The capitation fee for keeping patients on the books will reduce to 20 per cent of the full fee. That equates to about 2p per patient per day. We believe that that is a worthwhile investment to keep the relationship between the dentist and the patient. It is difficult to work out whether it will save money, because if a patient becomes a regular patient, which is what we want to happen, the fee would go back up to 100 per cent. We will have to monitor that over time and ascertain the impact either way. We certainly encourage people to become regular attenders, which brings a reinstatement of 100 per cent of the fee.

Helen Eadie: Are the regulations intended to remove responsibility for the oral health of the population to dentists, so as to encourage them to recall patients?

Col 2932

Shona Robison: I am not sure that I follow the question.

Helen Eadie: At the moment the Government has a responsibility to encourage the population to maintain good dental health. Is it your intention to remove that responsibility from central Government to dentists so as to encourage them to recall patients?

Shona Robison: We view it as a shared responsibility to improve oral health. The patient information leaflets that we are working on with the BDA send out a clear message that patients, too, have a responsibility to attend.

The difference is that there will be no automatic deregistration. At the moment, a person who has not attended after a certain period is automatically deregistered. In future, although the dentist will retain the right to deregister patients, as do general medical practitioners if they give a certain amount of notice, that will no longer happen automatically. That is important, because those patients who are least likely to attend on a regular basis tend to come from the most deprived communities. We therefore need to do work beyond the patient leaflet and we will encourage health boards to do some specific work in the most deprived communities to get the message across that the best way to maintain good oral health is through regular attendance at the dentist's.

Helen Eadie: You are right about deprivation. A practice in my constituency that covered a number of areas decided six or seven years ago to deregister patients. There were no other dentists in those areas for some of my constituents to go to. A massive number of people in the Dunfermline East constituency were affected and I have been monitoring the matter closely. I was pleased that the then minister gave Fife £4.5 million to help us improve the situation, and seven or eight new dental surgeries were established as a consequence, with 30 salaried dentists from Poland. I shall continue to watch the situation very carefully.

Shona Robison: I have a list with me of investments in Fife, which I can pass to Helen Eadie if she would find that helpful. It covers what has already been invested, certainly under our Government, as well as some planned investments under the primary medical capital fund. Dentistry has received the vast bulk of that, and there are planned future investments in Fife.

Helen Eadie: I would welcome that. I agree that we need to work harder and harder in this area. We cannot let up on the issue, which is critical for our nation's health.

The Convener: It would be handy to have had that as a parliamentary question and a written answer, but there we are.

Col 2933

Rhoda Grant (Highlands and Islands) (Lab): I have a supplementary question following one of your answers to Helen Eadie, minister. I might have picked you up wrongly, but my understanding of what you said is that people who attend their dentists regularly for check-ups and so on will attract 100 per cent of the fee that is allocated to them, whereas people who remain on the dental lists but who do not attend regularly will attract 20 per cent of the fee.

Shona Robison: That is correct. After three years the dentist will be notified of people who will be moving to the 20 per cent capitation fee. Those are people who, currently, would be deregistered. We have agreed with the dental profession that the 20 per cent fee will be paid, basically for the dentist to keep those patients on their books so that they can get treatment when they return. Effort is required on the part of all of us to encourage those patients to return.

Rhoda Grant: Does that not almost create a reverse incentive for dentists? Every dentist who treats their patients regularly will operate at capacity. If they are being paid for having lapsed patients, is there not in effect an incentive for them not to noise up the lapsed patients too much, because they get a fee for them without any impact on their work. That allows them to go ahead at full capacity, pulling in those patients who attract the larger fee while maintaining a large base of folk who attract at least some fee for nothing?

10:15

Shona Robison: No, because as soon as such a patient turns up for treatment, the dentist can get 100 per cent of the capitation fee instead of 20 per cent. Therefore, dentists have a financial incentive to get those patients to come back for regular treatment.

Rhoda Grant: I understand the need for a per patient fee, but if a dentist was able to provide regular check-ups and so on to, say, 400 patients—I do not know what sort of number of patients dentists deal with—but could get a small fee for another 400 irregular attenders, who could never be made full attenders because of a lack of capacity in the practice, the dentist would almost have an interest in having that additional list to attract some extra money. Do you understand what I am driving at?

Shona Robison: Dentists manage capacity within their surgeries all the time. They will know that the patients for whom they receive 20 per cent of the capitation fee will not all turn up at the dental surgery at the same time on a Monday morning to demand treatment after having received none for three years. It does not work like

Col 2934

that. The dentists would try to build in requirements to ensure that those patients come back in dribs and drabs.

Eric Gray (Scottish Government Primary and Community Care Directorate): Under the Scottish dental access initiative, we give grants to dentists to set up or to extend practices. Typically, one of the conditions is that each dentist would need to get 1,500 extra patients, which we think is a manageable number.

We have arranged to give dentists prior notification of when people are due to lapse and be moved to 20 per cent of the capitation fee. The dentist will then be able to decide whether to make an effort to get the patient to return, in which case the fee would go back up to 100 per cent. In a way, that will help dentists to manage their practice lists.

Rhoda Grant: I do not think that you understand what I am driving at. My worry is that dentists will be almost encouraged to have many lapsed patients on their books, for whom they will get a small fee. If a dental practice does not have the capacity to increase the number of patients who might be regarded as full payers, will the practice not have an incentive just to keep those patients on the books so that they can collect that small fee?

Shona Robison: The practice would get 100 per cent of the capitation fee if those patients came back.

Margie Taylor: There will be an incentive to increase capacity, given that there is provision to give dentists grants to expand. From a purely business point of view, dentists will now have a reservoir of patients whom they could bring in if capacity was increased, so they might decide not only to see those patients for whom they receive the full capitation payment but to create more capacity to accommodate those for whom they receive the 20 per cent payment.

Shona Robison: We have agreed with the BDA's Scottish dental practice committee to joint monitoring of the arrangements from 1 April, so we will be able to pick up on any problems such as the issue that Rhoda Grant has raised. At the moment, dentists will know what capacity they have within their premises. As I said, the patients for whom dentists receive 20 per cent of the capitation fee will not all arrive requiring emergency treatment at the same time. Like the previous Administration, we feel that it is important that the relationship between the dentist and the patient can be built up over time. At the moment, that relationship ceases because of an arbitrary timeframe, so the dentist has no opportunity to develop the relationship to persuade those people to attend on a regular basis. We believe that that

Col 2935

approach is wrong-headed. It is also out of step with the way in which other primary care services are delivered.

Rhoda Grant: That has not really answered my question, but I think that I will take up the matter in writing.

The Convener: I think that the question has been answered, but I accept that Rhoda Grant may take a different view.

Helen Eadie: Until now, if a patient on the list lapsed, the dentist's capitation fee for that patient automatically stopped. Under the new set-up, we will move to a situation in which the dentist will still get 80 per cent of the fee. Is that what we are saying?

Shona Robison: No, the dentist will get 20 per cent of the capitation fee.

Helen Eadie: But the dentist will get the other 80 per cent if the patient then comes back. Therefore,

dentists will be paid 20 per cent of the capitation fee irrespective of whether the patient comes back.

Shona Robison: We will pay them 2p per patient per day to keep those patients on their books so that there are relationships between dentists and patients. It is the same in primary care. A person might not go to their general practitioner for five years, but they are still able to see them because they are a patient at that practice. Unfortunately, there has been a different relationship in dentistry, but we believe that, once they are registered, people should have a similar ability—they should have a right to see their dentist, although they might not have been within the timeframe that was set. We believe that 20 per cent of the capitation fee is worth paying in order to maintain the relationship between the patient and the dentist.

Helen Eadie: Have the sums been done? What is the estimated cost for the dentists in my constituency, for example, or throughout Fife or Scotland? Have there been cost breakdowns? Can you provide information on that in writing to us after the meeting?

Shona Robison: Sure.

The Convener: We have fully aired the matter, and I want to move on.

Agenda item 2 is a debate on motion S3M-5939 to annul the regulations. I invite Mary Scanlon to speak to and move the motion.

Mary Scanlon (Highlands and Islands) (Con): Thank you, convener.

The regulations, which will introduce continuous registration for all dental patients, were brought to my attention by high street dentists; if they had not

Col 2936

done so, I think that I would simply have nodded them through. I then sought advice from the British Dental Association Scotland.

The Government's Executive note that accompanies the regulations states under the heading "Consultation":

"The British Dental Association Scotland and the Scottish Dental Practice Committee have been consulted on this issue."

What was conveniently missed from that statement is that almost 90 per cent of dentists who responded to the survey are fundamentally opposed to the regulations. It would have been not only honest, but helpful if the minister had notified the Health and Sport Committee and the Subordinate Legislation Committee of the response to the consultation.

For the sake of clarity, let me refer to some comments from dental professionals. The BDA was publicly critical of the decision, and reiterated concerns that it had previously expressed that continuous registration encourages patients to neglect their oral health, sends the wrong signal about the value of preventive care,

"devalues the relationship between clinician and patient",

and could lead to an increase in undetected cases of oral cancer.

The BDA's Scottish dental practice committee, which is the body elected to represent high street

dentists throughout Scotland, has consistently warned of the issues that continuous registration raises. It has stated that continuous registration

"does not encourage a pattern of regular attendance".

It also objects on the basis of capacity issues, patient expectations and perceptions, the possible detriment to existing registered patients, and the disruption to practices that will be caused by non-regular attending patients who require emergency care. It has pointed out that the change is a politically expedient way of artificially improving the statistics for the number of people in Scotland who are able to access NHS dentistry.

The National Institute for Health and Clinical Excellence recommends a maximum interval for dental check-ups of 12 months for children and 24 months for adults. Given that longer intervals between dental check-ups increase the likelihood of a patient requiring more complex treatment, I think it erroneous to compare the NICE recommendations to a patient's attendance at a general medical practice. There are no recommendations stating that an adult must visit a GP every 24 months.

That is what the BDA says. I will share with the committee a Highland dentist's views, which were

Col 2937

published in the professional magazine, *Dentistry Scotland*. He says:

"The Minister for Public Health will continue to stand up in the Scottish Parliament and report on the record breaking dental registrations figures—she has ensured she will be spared the embarrassment of having to report on the thousands of lapsed registrations that would have occurred each month"—

he quotes a figure of 26,000 for one month alone—

"due to patients failing to attend their dentist at least once in ... 3 years.

Simply saying that patients will not be de-registered does not mean an improvement to access in NHS dental service—neither does it improve dental health or encourage a higher standard of oral hygiene."

This dentist goes on to state:

"From a public health perspective this is a retrograde step—with life threatening conditions such as oral cancer on the rise, early detection is essential. If the patient can't be bothered to respond to 'recall' letters when requested, nor attend even once within the existing 3 year period—why should we be obliged to care for them at all let alone provide them with all the benefits of registration for 19 pence a month?"

In that respect, though, I note that the minister said that the figure is 60p a month.

"Life time registration has nothing to do with building a long term continuing relationship with our patients—and everything to do with political manipulation of the registration figures for propaganda purposes."

I repeat that those are not my words, but those of a dentist.

Finally, the dentist states:

"A number of my colleagues also stressed the necessity to review their emergency cover arrangements as they felt that patients would not distinguish between emergency, urgent and routine treatment—others stated that they would move out of the NHS or reduce the NHS element"

of dental services.

Continuous registration is more likely to close the list to new patients and therefore likely to increase waiting lists in areas where they exist. That, in turn, means less, not more capacity, because the dentists constantly have to keep space open for those who might at any time turn up for emergency treatment.

Finally, we come to the cost of these regulations, which has been set at £2.4 million. That money could be used effectively to increase access to between 20 and 40 new dentists, depending on whether they are salaried or are in general dental practice.

The Convener: Mary, are you still quoting or are you speaking your own words?

Mary Scanlon: The comments on the cost of the regulations are my words, not those of the

Col 2938

Highland dentist. In fact, when I talked about continuous registration being more likely to close the list, those were my words as well.

I will repeat what I have just said because the point is important. The £2.4 million cost of the regulations could be used to increase access to between 20 and 40 new dentists, depending on whether they are salaried or GDP; reduce waiting lists in areas where they exist; and take tens of thousands of people off dental waiting lists.

Each health board in Scotland has an emergency dental service. I know that, because I used such a service while I was on a waiting list for an NHS dentist in Highland. People who have not visited a dentist for more than three years have the same access to emergency dental care as all other patients in Scotland, no matter whether they are registered and attend regularly, are on continuous registration or are on a waiting list.

The fact is that the regulations improve neither access to dental care nor, as the BDA has pointed out, oral hygiene. As a result, I move,

That the Health and Sport Committee recommends that nothing further be done under the National Health Service (General Dental Services) (Scotland) Amendment Regulations 2010 (SSI 2010/33).

The Convener: I should have reminded members that we have a maximum of 90 minutes for the debate. Of course, we might not use all that time.

Ian McKee (Lothians) (SNP): This is a classic producer versus consumer issue and, not for the first time, I have listened to Mary Scanlon concentrate 100 per cent on the people who provide the service, rather than on those who use it. I want to take an entirely different angle to the matter.

For many years, I worked as a GP in an area of multiple deprivation where dental health was absolutely appalling. The people in the area had—and, indeed, still have—to overcome many income, housing, education and other problems and very often dental care was put further down the list of priorities than perhaps you or I might think it should have been.

10:30

In a middle-class area, of course people will go to their dentists, keep their dental appointments and keep their registrations up to date, but that is not necessarily the case in areas such as that in which I worked. Time and again, I and our health visitors and nurses persuaded someone to go for dental care only to find that their registration had lapsed and they were unable to make an appointment with their dentist—the list was closed

Col 2939

and they could not be seen. Yes, people can get emergency dental care if they can work the system, but in many parts of Scotland it is very difficult to access emergency dental care. Someone can ring their dentist and get no reply at all. In Edinburgh, the Western general hospital provides an emergency service, but only at certain times and people have to get there. In any case, what we are talking about is not emergencies, but the prevention of emergencies.

If people who have registered are kept on their dentists' lists, whether or not it is three years since they have seen the dentist, then when health visitors, GPs and others are able to persuade them to go for dental treatment, it will be available. If they are deregistered, it will not be available. Therefore, I disagree with Mary Scanlon's proposition.

Helen Eadie: In my constituency, we had huge deregistration that happened in a matter of a month or two after the registration period had lapsed. No leniency or flexibility of any sort was shown, and that created huge anger. My office is knee deep in files full of my constituents' anger at the way in which we have not looked after the nation's dental health. I do not think that any politician around the table will ever do enough to improve the nation's dental health. Poor dental health does not just impact on a person's teeth; I am told by my dentist that it can impact on heart disease and a range of other aspects of a person's bodily health.

For me, we are taking a step in the right direction today. I hear what Mary Scanlon is saying and what the concerns are. I am concerned to hear that 80 or 90 per cent of the dental profession does not agree with the regulations. Nevertheless, many of my constituents have been driven to blazing anger at the fact that no Government will ever do enough on the issue of dental health. As parliamentarians, we have a huge responsibility to fight constantly for improved dental health. Although £2.4 million is a lot of money, it is not enough—we need to spend more. We have salaried dentists in Fife and we have new dental clinics, thanks to Lewis Macdonald when he was a minister. He listened to the campaign in Fife and it was great to get £4.5 million, but it is simply not enough. Therefore, I will vote for the motion, not because it is enough, but because we need to do more.

The Convener: There is some support from Helen Eadie, minister, which is good. Will you respond, please.

Shona Robison: I will start with the issue of consultation, which is important. We first began discussions on the issue with the BDA and the SDPC on 19 November 2008, so we have been discussing the matter for a long time. Following

Col 2940

those discussions, we wrote to them on 3 March 2009, proposing continuous registration. The SDPC voted on the proposal for continuous registration and accepted it, albeit by a narrow majority. We felt that that was the agreement of the profession, so we then got on with drafting the regulations. It was only after that that the survey to which Mary Scanlon referred was carried out, in which 90 per cent of respondents were opposed to the regulations. I point out that only 48 per cent of those who were surveyed responded at all, so we must be slightly cautious about that figure. When I speak to dentists, the first thing that I am asked about is decontamination and related issues rather than

continuous registration.

When the proposal was first mooted, back in 2005, the BDA and the SDPC agreed with the dental action plan, in which continuous registration was explicit, and they raised no objection whatever. It is fair to say that the profession did not express major concerns about continuous registration either back in 2005, under the previous Administration, or when this Government began negotiations in 2008. It did so only on the back of the survey.

At the end of the day, Governments must make decisions about policy. The regulations meet the commitment that was given in the dental action plan of 2005. Helen Eadie described better than I can the impact of deregistration on individual patients. Patients require their oral health to be looked after, regardless of whether they have attended within the artificial timeframe that was set under the previous policy. It is right and proper that we ask general dental practitioners to play their part in doing that. We have emergency centres, but we should also expect GDCPs to play their part in looking after the oral health of such patients, many of whom are among the most deprived.

Mary Scanlon says that the use of registration figures is politically expedient. In my opening remarks, I said that we will publish participation rates that ISD will formulate; those figures will show access to dentists. The registration figures will show those registered, whereas the participation figures will show the level of attendance at dentists, so people will be able to see the level of activity.

I agree with Helen Eadie that we need to expand access to dentistry. There has been a 10.7 per cent increase in the number of dentists. Dental surgeries and new dental centres have opened the length and breadth of Scotland. There is still work to be done, but access is improving.

The cost of £2.4 million must be set in context. In 2008-09, we spent £355 million on dentistry, so there is significant investment in the area. The element that we are discussing, which equates to

Col 2941

2p per patient per day, is a price worth paying to keep the link between the patient and their practitioner.

I hope that I have addressed most of Mary Scanlon's points.

Helen Eadie: For the record, I make clear that I meant to say that I would vote for the regulations and against the motion to annul.

The Convener: I was going to say that anyway, Mary. I am sorry, Helen—I am getting you muddled up with Mary this morning. I am just as muddled as you are.

Mary Scanlon: First, I must correct Ian McKee on a point that he made. If he reads my remarks in the *Official Report*, he will find that at least 50 per cent of what I said was concerned with oral health and patient registration—it was not 100 per cent about the producer. Dentists, like doctors, are more than capable of speaking out on behalf of their patients and of talking about oral health, hygiene and public health in Scotland. As parliamentarians, we should respect that. Ian McKee is concerned to ensure that patients are seen more quickly; he gave an example from Wester Hailes. If the £2.4 million were used to employ up to 40 new dentists, there would undoubtedly be an increase in access.

My second point is directed to Helen Eadie. There seems to be an assumption that continuous registration guarantees better oral health, but it does not do that one bit. As dentists and the BDA say, it guarantees that people will see dentistry as an emergency service and not take the best preventive care, as we would hope.

The minister referred to the consultation. I was careful to say that 90 per cent of dentists who responded to the survey were fundamentally opposed to the regulations; the minister and I are in agreement on that point.

With regard to the impact on patients, the point is that a general dental practitioner or a salaried dentist will not be able to deregister patients in future. I appreciate what Helen Eadie has said about that. However, a dentist might have 2,000 patients on their list, and another 1,000 who have not attended for more than three years but who can come back at any time during their lifetime for emergency and potentially complex treatment. The dentists therefore have to keep capacity on their lists for all that emergency care that will result from continuous registration. They have told me that they will have to close their lists, because those people could turn up at any time.

The £2.4 million may be a drop in the ocean in comparison to the overall cost of dentistry in Scotland but, in these difficult financial times, that

Col 2942

money could increase access by funding the employment of between 20 to 40 dentists.

The Convener: The minister wants to come back in; I will then let Mary Scanlon back in if she wishes.

Shona Robison: On a point of clarification, dentists will be able to deregister patients, but they will have to give three months' notice. Dentists will retain the right to do that, as doctors are able to, but the difference is that it will not happen automatically as it currently does. The relationship of a dentist with their patients will be similar to that of a doctor.

The Convener: For further clarification, I presume that the conditions under which dentists would deregister patients would not include simply non-attendance.

Shona Robison: No—a doctor or a dentist can deregister patients for a variety of reasons, as long as they give three months' notice.

The Convener: But if there is a breakdown in the professional relationship—

Shona Robison: There are a variety of reasons why someone might be deregistered.

The Convener: Just for clarification, there is not a loophole by which a dentist could deregister a patient with three months' notice just for non-attendance.

Shona Robison: No.

Mary Scanlon: That is a critical point that the dentists have raised: patients cannot be deregistered due to non-attendance. That point is at the heart of the SSI.

Shona Robison: They can deregister patients for any reason. There is no bar on dentists deregistering someone, whether it is because that person has a bad debt, or for another reason; it does not matter. There is no explicit list of reasons that states that a dentist can deregister someone for this or that reason.

A dentist will retain the right to deregister someone for whatever reason they so wish. The difference is that it will not happen automatically after a fixed period of time; the dentist would have to actively make that decision themselves.

The Convener: I have got more muddled as the discussion has gone on. You are telling me that dentists can still deregister people for non-attendance but that there is now a requirement for three months' notice, so deregistration is not automatic.

Shona Robison: Yes.

The Convener: Is that clear to everyone around the table?

Col 2943

Members *indicated agreement.*

The Convener: I think that Mary Scanlon is content now that that has been clarified.

Mary Scanlon: We could bat that back and forward for a full morning, but we have a busy schedule and have probably had enough.

The Convener: Do you wish to press the motion?

Mary Scanlon: Yes.

The Convener: The question is, that motion S3M-5939, in the name of Mary Scanlon, on the National Health Service (General Dental Services) (Scotland) Amendment Regulations 2010, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Scanlon, Mary (Highlands and Islands) (Con)

Against

Eadie, Helen (Dunfermline East) (Lab)
Finnie, Ross (West of Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Matheson, Michael (Falkirk West) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McKee, Ian (Lothians) (SNP)

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

Motion disagreed to.

Pharmacy Order 2010 (Commencement No 1) Order of Council 2010 (SI 2010/299)

The Convener: Item 3 is consideration of two negative statutory instruments. Members have copies of both instruments with their papers. The Subordinate Legislation Committee had no comments to make on either of them.

The first instrument is an order that brings into force amendments to schedule 6 to the Health Act 2006, which will enable the Appointments Commission to exercise the Privy Council's functions to appoint members of the General Pharmaceutical Council. Do members have any comments on the order?

Members: No.

The Convener: Are members content not to make any recommendation on the order?

Members *indicated agreement.*

General Pharmaceutical Council (Constitution) Order 2010 (SI 2010/300)

The Convener: The second negative statutory instrument is an order that makes provision with

Col 2944

regard to the constitution of the General Pharmaceutical Council, such that it will consist of seven registrant members who are pharmacists or pharmacy technicians and seven lay members. It also makes provision on other issues such as the limits on the period for which members may serve on the council.

Do members have any comments on the order?

Members: No.

The Convener: Are members content not to make any recommendation on the order?

Members *indicated agreement.*

10:45

Meeting suspended.

Col 2945

10:46

On resuming—

Alcohol etc (Scotland) Bill: Stage 1

The Convener: Item 4 is oral evidence on the Alcohol etc (Scotland) Bill. I welcome back John Beard, chief executive of Whyte & Mackay Ltd. Mr Beard gave evidence to the committee last week, but he has been invited back to clarify the evidence that he gave on the estimated number of job losses at the company if a minimum sale price for alcohol were introduced in Scotland. The decision to invite him back was taken in light of Whyte & Mackay's press release last week stating that such estimates were based on a UK-wide minimum price as opposed to a Scotland-only minimum price.

I point out that Mr Beard was invited to attend today's meeting and that he has come voluntarily. To clarify any misleading that I may have done this morning on BBC Radio Scotland, I have been told

that it is possible to compel witnesses to attend committee meetings. Section 23 of the Scotland Act 1998 gives the Scottish Parliament and its committees the power to require any person—subject to certain reservations, which are in the rules—

"to attend its proceedings for the purpose of giving evidence, or ... to produce documents in his custody or under his control, concerning any subject for which any member of the Scottish Executive has general responsibility."

My excuse for being in error earlier this morning is that, although the power—which is known as the nuclear option for witnesses—exists, it has never been exercised in the 11 years of the Scottish Parliament. Simply having it has enabled us to get round the problem.

Helen Eadie: Just for the record, I would like to say that the convener has exercised a power, but she has not done so in my name. I have no objection at all to witnesses being called to appear before the committee. Had I been consulted on the matter, I might have been very happy to subscribe to the view that the convener came to. I am happy to welcome back Mr Beard and to hear what he has to say by way of clarification, but it is a fundamental courtesy for the convener to consult all committee members on any action that she proposes to take. In addition, it would be good if, when she arrives at a view publicly on "Good Morning Scotland", she speaks for the committee. She was certainly not speaking for me earlier this morning.

The Convener: I say to Ms Eadie that it was within my power to exercise discretion in the way that I did. I was not compelled to consult her on

Col 2946

the matter. However, I did consult the deputy convener before taking the step of inviting Mr Beard back, so that it would not be thought that the decision was politically motivated. It was not. The invitation had to be issued fairly urgently because the Cabinet Secretary for Health and Wellbeing will appear before us next week, so this week's meeting was the only opportunity we had to hear from Mr Beard.

I do not want to have a spat about the issue, but I took the view that I was speaking for the committee collectively, in that any witness that comes before the committee has a duty to be straightforward with us in giving evidence. I took the view that the committee collectively had understood that the number of job losses that had been presented would arise as a consequence of minimum pricing legislation applying in Scotland alone. I cannot see how the committee could have taken any other view. It is on that basis that the evidence was not challenged. It was open to the witness to make it plain to us, at the time, that the job loss estimates were based on the implementation of minimum pricing across the UK.

I also—correctly, in my view—took exception to the BBC being told that there had been a mistake in the evidence before the committee was told, and to that being done on the airwaves. That is my position. I am content that Helen Eadie has expressed her view. I will not take any more debate on the point. I exercised my discretion as convener, following consultation with the deputy convener.

I want to move on to the evidence taking.

Helen Eadie: Convener, you cannot just close down discussion like that. Another member has her hand up.

The Convener: I may—

Helen Eadie: It is wrong of you to do that.

The Convener: I may close this if I wish, and I am closing it. Mr Beard has—

Helen Eadie: That is being dictatorial and Stalinist. We do not have that in this Parliament.

The Convener: Mr Beard has to return to the Economy, Energy and Tourism Committee after appearing here and we have already delayed him by some 20 minutes. That is why I am moving on.

Michael Matheson (Falkirk West) (SNP): Mr Beard, in your evidence last week, you were quite clear about the 300 job losses that could arise from the introduction of minimum pricing as a result of the Alcohol etc (Scotland) Bill. In that evidence, why were you not clear with the committee that that figure was calculated on the basis of a minimum price of 50p applying

Col 2947

throughout the UK as opposed to only in Scotland?

John Beard (Whyte & Mackay Ltd): Let me take the opportunity to make a few points, as I am the only witness for this session. We have been sharing our perspective on minimum pricing and its potential impact not only in Scotland but throughout the UK with all political parties for more than six months. We have shared our belief that anything that is introduced in Scotland risks being extended across the UK, and there is precedent for that. It is interesting that the convener mentioned in her opening comments the consequences of legislation that is introduced in Scotland.

I would like to make something clear in the context of the letter of invitation, in which it is suggested that we issued a press release before the session last week. That is incorrect. No press release was issued from our company. What might have happened is that, because our written submission was public, quotes were lifted from it. Building on that point, I find it somewhat strange, in the context of my being criticised for a press release that I did not make last week, that the convener was on Radio Scotland this morning in advance of my evidence.

Coming back to your specific question—

Michael Matheson: That would be helpful.

John Beard: Okay. Well, I am here to help you. There is precedent—smoking is an example—for legislation that is passed in Scotland subsequently being extended throughout the UK. In my position as chief executive of Whyte & Mackay, it would have been naive, verging on commercially negligent, for me not to have taken into account the business repercussions of the extension of the measure throughout the UK. Given the opportunity, I would like to read out a couple of quotes, one of which is from the Scottish Government, in the context of other discussions that have been going on about minimum pricing in other parts of the UK.

On 14 January, the Deputy First Minister and Cabinet Secretary for Health and Wellbeing said:

"it appears that the Labour Secretary of State for Health in England may also support the policy of minimum pricing."—[*Official Report*, 14 January 2010; c 22793.]

However, I believe that the Labour Party subsequently made its position very clear. I have another quote, which is from you, Mr Matheson. Again on 14 January, you said that the Secretary of State for Health's comments

"are a welcome, sensible contribution to the debate".

Our original hypothesis that there is a genuine risk of minimum pricing extending beyond Christmas across the UK seems to be borne out not only by

Col 2948

those statements but by others that the Scottish Government has made in an official capacity.

Michael Matheson: Okay. My question to you, though, was about the evidence that you gave to the committee last week, and that was that 300 job losses would result from the introduction of minimum pricing under the Alcohol etc (Scotland) Bill. I have been through your evidence carefully, and at no point did you make any reference whatsoever to the fact that your figures were based on the possibility of minimum pricing being introduced throughout the UK, whether that was a result of Government policy at Westminster, which could decide to go ahead with it irrespective of what happens in Scotland, or whether it followed the actions of the Scottish Government. Why, in the course of that evidence, given the explanation that you have given here this afternoon, did you not take the opportunity to present that information to the committee last week?

John Beard: The evidence that I am giving you this morning is clear. I am telling you that, consistently, over six to nine months, we have consulted all political parties, identified the real issue for Scottish jobs arising from the eventual introduction of minimum pricing, which it is very clear that some parties—one party in particular at this table—actively support. Let me push back to you a hypothetical question: should Westminster introduce minimum pricing throughout the United Kingdom following its introduction in Scotland—I still believe that it would be illegal—would the Scottish Government defend Scottish jobs?

Michael Matheson: With all due respect, that is not the question that I asked you. You explained that the figure of 300 job losses was based on a 50p minimum price being applied throughout the UK. The evidence that we were taking last week was specifically on the Alcohol etc (Scotland) Bill. At no point in any of your evidence did you explain that the figure of 300 job losses was based on a UK application of that minimum price.

John Beard: Well—

Michael Matheson: I do not want to go through the stuff about your having been discussing the matter with parties for six months. At no point in the evidence that you gave on the record last week did you explain that that job loss figure was based on a UK policy. You can come along here and hypothesise for as long as you would like to, but last week you did not hypothesise about 300 jobs being lost on the basis of a UK policy. Why did you not explain that to the committee at the time, when you were scaring workers in places such as Grangemouth on the basis of a policy being implemented in Scotland?

John Beard: Let me comment on that. I believe that we have been entirely consistent. I openly

Col 2949

said that jobs were at risk if minimum pricing were to be introduced throughout the UK. I have candidly said that I felt that the questioning last week was, on occasions, weak. We got into a level of detail about the bottles of different types of spirits that one particular police force recovered—the absolute number of bottles by absolute drinks category. Subsequent to the committee meeting, I was asked a straight question about whether our evidence was related to the UK and I answered in the affirmative.

There are two variables: the number of jobs and the level of any minimum price that might be introduced in Scotland. Again, I think there was some feedback from the convener about our use of

50p. However, the regulatory impact assessment that the industry was asked to make on 21 July involved considering the impact of minimum pricing at 25p, 50p and 70p per unit, so I find it somewhat strange to suggest that we should not extrapolate the implications of a 50p figure.

Michael Matheson: Mr Beard, I am afraid that you have still not answered my question—I do not know whether the convener can assist here. In evidence to the committee last week, you were clear that, by your calculation, 300 jobs would be lost as a result of the introduction of minimum pricing. Why, at no point in your evidence, did you explain that those job losses had been calculated on the basis of a minimum price of 50p being applied throughout the UK? I would welcome it if you took the opportunity to say why you chose not to provide that information to the committee.

John Beard: If there is any misunderstanding in my evidence from last week, I would be the first to apologise but I do not apologise for the content of what I told you. I was asked a very straight question subsequent to the committee meeting, which I answered. I was not asked that question by you, who seem to be leading the questions today. If I had been, you would have got the consistent answer that all political parties have had for the past six to nine months.

The Convener: Before I let other members in, I want to clarify one point, Mr Beard. The letter that I sent you as convener on behalf of the committee said:

"Following your appearance at the Committee, Whyte and Mackay issued a press release".

I never said at any time said the press release was in advance of your appearing at the committee. I said that, following the meeting, you put out a press release clarifying your position. You did not have the courtesy to contact either me or the clerk to clarify your evidence. I learned about it through the press.

Col 2950

11:00

John Beard: Let me try to clarify, too. I did not issue a press release after the committee meeting last week. One of the accusations that was made of me following the meeting last week was that I had issued a press release before the committee met last week, which is also incorrect.

The Convener: I have never said that, and my letter does not say it.

John Beard: I am not saying that you said it. Other committee members indicated that I had put out a press release prior to the committee meeting last week, which is factually incorrect. I repeat the point that I made a few minutes ago that, although there was some push-back about a press release that I did not make, it seemed that, this morning, press releases were totally acceptable. There seems to be a dichotomy there.

The Convener: When you knew that the true position on job losses was going to be out in the public domain—whether as a result of your answering a question or whatever—did you consider contacting me or the clerk to clarify the position so that committee members could be informed before they heard about it through the media?

John Beard: The media interview to which you are referring took place within three to five minutes of my leaving the room and it involved other members of the witness panel being asked questions as they exited the meeting. Practically, it would have been impossible to have contacted you.

The Convener: If the issue was clarified within three to five minutes, it would have been even more possible, as a matter of courtesy, to pass a note to me as convener to advise the committee of the

situation. You could have come back there and then and put it on the record.

John Beard: As I said, if there was a misunderstanding, I apologise. Today is an opportunity to clarify my statement, which has been consistent over the past six to nine months.

Mary Scanlon: Good morning again, Mr Beard. I am sorry that you have had to return, but thank you for coming.

John Beard: It is a pleasure.

Mary Scanlon: We have another opportunity to ask questions about whether there will be 300 or 83 job losses. It is fair to say that companies in the whisky industry cannot predict where job losses will be in the next five years, as we have seen with Diageo. The minimum price will affect your product, which is also used as an own-brand product for the major UK supermarkets such as Tesco, Asda, Morrisons and Sainsbury's. The

Col 2951

measure will increase the price of your product by 37.5 per cent and will equate the price of own-brand products to that of some single malts.

Some of this might be commercially confidential, but let us say that about half of the increase goes to the retailers—say 19 per cent—and that the producer, Whyte & Mackay, also increases the price by 19 per cent so that you get the advantage of the minimum price. Would it not benefit your company to base your distribution in England, so that English retailers would not be affected by your potential increase of 19 per cent as a result of the minimum price? We are talking about 83 job losses in Scotland. However, you are in a competitive industry, so is it possible that, as the English market is 10 times the size of the Scottish one, rather than disadvantage English and other retailers, you might consider at some point moving the distribution and selling of your whisky—although not the distilling—to England, so that people elsewhere in the United Kingdom and the world would not be affected by a minimum price in Scotland? You might therefore have underestimated the future job losses in Scotland.

John Beard: That scenario is interesting; we have not modelled it. We are a proud Scottish company and 90 per cent of our employees are based in Scotland. Such a development would be terribly disappointing, should it be a necessity.

Mary Scanlon: I agree.

John Beard: I am happy to talk through the figure of 83 jobs that is in my written evidence, which the committee has received. That breaks down into immediate job losses at our bottling facility and is linked to logistics, sales and administration, and distilling. I am sure that members respect my wish not to break the numbers down further, in consideration of our employees.

Last year, considerable media coverage was given to a restructuring of our business that led to the loss of 71 jobs. I gave that figure to the Economy, Energy and Tourism Committee this morning, to which I will return after this session. That committee pressed me on the specific number that would relate to minimum pricing, and I told it that it was only correct for me to give the Health and Sport Committee that number before giving it to the Economy, Energy and Tourism Committee.

The figure of 83 is higher than the number that resulted from the company's restructuring last year, which led to much political and media coverage and to significant concern throughout Scotland. That reinforces the enormity of what we are talking about. As a percentage of the 300 jobs, 83 is 28 per cent. Nine per cent of our UK

Col 2952

business is based in Scotland, so the ratio is inevitably higher.

Mary Scanlon: The issue is important. You are the producer. If what the consumer pays increases by 37.5 per cent, that increase will be shared somehow between the retailer and the producer. It is unfair to say that a producer would sit back and allow a retailer to have a 37.5 per cent increase in profits while the producer received nothing. Will you therefore consider having a separate price for retailers in Scotland from that for retailers in England?

John Beard: That is one potential scenario. Retailers operate UK-wide. Last week, we discussed the risk of consumers travelling south of the border to places such as Carlisle to purchase product. The committee has taken evidence from retailers. I have seen the figure of £120 million mentioned in the context of the money that could flow to retailers. I am not sure what experience members have of negotiating with retailers, but I think that it would be optimistic to assume that manufacturers would see a share of that money.

In response to a question from Mr Matheson last week, I said that if the price of own-label whisky moved to £14, such products would no longer have a rationale for being on the shelves. The issue is not sharing the profit; the phrase that I used was, "double zero is zero."

Mary Scanlon: That is right. If the price of own-brand whisky increased by 37.5 per cent, it would be priced similarly to many malts. A choice between Tesco's own brand and a single malt is a no-brainer. There is no doubt that demand would reduce, so jobs would reduce—whether by 83 or more. Is it fair to say that your projections of the reduction in demand and the substitution effect of the minimum price suggest that, in the long term, the loss of 83 jobs could be an underestimate?

John Beard: Possibly. You ask me again to forecast. We have made calculations and I have shared the numbers with the committee.

I return to the point that there is every indication that the minimum pricing proposal is illegal under European law. Numerous pieces of evidence illustrate the threat of cross-border trading and internet sales. I am confident that the committee will take Whyte & Mackay's evidence fully into account and that the company will be allowed to focus on growing its UK and international business, which will in turn create more Scottish jobs.

Mary Scanlon: Is it illegal for you to sell the same product at one price to retailers in Scotland and at a lower price in England?

John Beard: I have not tested that.

Col 2953

Mary Scanlon: The person behind you in the public gallery is indicating that it is illegal.

The Convener: With respect, we will wait until the person behind Mr Beard—he does not have a dagger in his hand, by the way—gives evidence to the committee later. The legality issue will be fully explored with the next panel of witnesses.

Ian McKee: Thank you for coming back to the committee, Mr Beard. I must confess to a certain degree of naivety in this business, perhaps because I entered politics only three years ago. At last week's meeting, the retailers told us that they would not get any of the £120 million and that they were just against minimum pricing on a matter of principle. I took that at face value, but perhaps I

should look at that again.

John Beard: May I come in on that? One of the ambiguities in the bill is that it is not clear where that profit would flow. That has created consternation among on-trade publicans in Scotland, who have their own point of view on minimum pricing. However, the important point is that they need to be aware of the risk that minimum pricing will strengthen the very trade channel that creates some of the problems that the on-trade faces today.

Ian McKee: I will certainly look into that. Another example of my naivety is that I thought that when a witness gave evidence on a Scottish bill that evidence would relate to that bill, so I was quite surprised to find that your figures on job losses were for the UK. For the record, can you confirm that you are not talking about the effect on jobs if other countries throughout the world followed the example of minimum pricing, and that your 200 to 300 job losses was estimated just on a UK basis?

John Beard: Yes, that is correct. Again, though, in quotations from the Scottish ministers there seems to be a certain amount of gleefulness when other countries consider introducing minimum pricing.

Ian McKee: But you have not accommodated that hypothesis in your figures of 200 to 300 job losses.

John Beard: No, and part of the reason for that, as I explained last week, is that we are a UK-centric business. Again, though, a Scottish National Party member of the Justice Committee, Nigel Don, said:

"Labour's Welsh Social Affairs Minister is the latest in a long line of people and organisations backing the SNP's efforts to introduce minimum pricing for alcohol."

All the evidence that I see shows a concerted attempt to extend minimum pricing in Scotland across the UK. I would go as far as saying that it would not be an unintended consequence if

Col 2954

minimum pricing was extended beyond Scotland. In fact, it would be a delayed consequence that some members of this committee would be keen to see.

On that basis, my view is entirely reasonable, to the extent that it would have been naive and commercially negligent on my part not to calculate and share with the committee the significant implication of minimum pricing in Scotland for a company such as Whyte & Mackay. I will reiterate my other point. If minimum pricing is introduced, what level of support would we get from Scottish politicians for the loss of further jobs in Scotland—or would that be deflected to Westminster?

Ian McKee: That is an interesting debating point, but it does not really answer my question. I am trying to establish that you were referring only to the UK when you spoke of 200 to 300 job losses and that you felt that that was such a likely consequence that you did not even need to mention that the figure was for the UK rather than just for Scotland.

John Beard: There are different elements in the question. I have been very clear this morning and I welcome the opportunity to clarify that point. I believe that I have been clear with all political parties over the past six to nine months. The figure of 300 that I quote is a UK-wide figure, although some people around this table hypothesise that the figure may be greater. The figure explicitly related to Scotland for the introduction of minimum pricing at 50p—very clearly, that is the figure that I have taken—is 83 jobs across the company.

11:15

Ian McKee: In the rest of your evidence, you made comments such as "for Calais, read Carlisle" and suggested that, with the introduction of a minimum price, people could go to Carlisle to purchase alcohol or purchase it via the internet. However, if your figure of 200 to 300 job losses is based on the entire United Kingdom having minimum pricing, why would people go to Carlisle to buy alcohol? The alcohol would be the same price in Carlisle as it is in Scotland.

John Beard: There would be a period of disconnect between Scotland and England and Wales. I think that in evidence that you received last week retailers told you that some of their stores in Northern Ireland are some of their highest performing stores. I think that the sixth highest performing Walmart store for alcohol is on the border of Northern Ireland with southern Ireland, to the extent that the Irish Government last year reduced excise duty to overcome the loss of business. Something like 2.5 per cent of the Irish Republic market for alcohol is, I understand,

Col 2955

taken by Asda and Sainsbury's, which do not even have any stores in southern Ireland.

Ian McKee: My problem is that in one part of your evidence you talked about it being so obvious that England would follow Scotland that it did not even need to be mentioned when you gave a figure of 200 to 300 job losses, yet in the rest of your evidence you talked about what you now describe as a period in between, when everyone would flock to Carlisle and so on. Later on in your evidence, you said:

"It is dangerous to be selective and to use UK data on one occasion and Scottish data on other occasions".—[*Official Report, Health and Sport Committee, 10 March 2010; c 2860.*]

Is that not what you are doing?

John Beard: I do not have the full transcript in front of me, but last week I was keen to get across the point that there is a real risk of cross-border trading. From speaking to Government officials over the past few months, I believe that that has been significantly underestimated. I was given feedback by a Government official who looked at the situation in the context of taking a family car to Carlisle. There is enough international evidence—I cited the example of Sweden last week—to say that the issue is far more about organised crime and that there are lots of parallels with what has happened to tobacco.

Ian McKee: But all that will happen only if England does not follow Scotland's example, yet your hypothesis for losing 200 or 300 jobs was based on England almost certainly following Scotland's example.

John Beard: That is out of my hands, but I do not see the same pace of movement towards legislation at Westminster as at Holyrood.

Ian McKee: So the 200 to 300 job losses do not exist, in that if a minimum price is not introduced in England, there will not be the 200 to 300 job losses that you spoke about.

John Beard: I think that you are trying to turn my words. I have now said on several occasions that there is every indication from quotations from the Scottish ministers that success would, to some extent, be the extension of minimum pricing beyond the boundaries of Scotland across the UK. I have heard politicians of all parties reference tobacco and what happened following the introduction of the smoking ban in Scotland and how quite quickly—we would need to check the timeframes—that moved from Scotland across the rest of the UK.

Ian McKee: I will ask a final question, if I may, convener. I worked out that with a minimum price of

40p, supermarkets' own-brand whisky would still be cheaper than the others. Although it would

Col 2956

be more expensive than it is now, it would still be cheaper than the malts and so on that we have been talking about. What would be your estimate of job losses at Whyte & Mackay—if any—if the minimum price was 40p?

John Beard: If a minimum price of 40p was introduced, it would have a negligible effect in the short term on companies that have focused primarily on whisky. Vodka would be more impacted. One of the requests last week was that we come back with figures for duty plus VAT, which we have supplied to the committee. The figures illustrate that currently more than 70 per cent of the price of a bottle of whisky is related to excise and VAT. The effect of the introduction of a minimum price of 40p would be negligible for whisky. I believe that the Sheffield report indicated that it would have a 2.6 per cent impact on consumption at a UK level. If that is the figure that the Government is now proposing, I suggest that it should be in the bill.

Ian McKee: Yes indeed, but there would be no job losses in Whyte & Mackay with a 40p minimum price.

John Beard: I think that that is correct, although, should a minimum price be introduced at a lower level—my perspective continues to be that that would be illegal under European law—I would want clarity on the process for any subsequent increase in the minimum price, the scrutiny that there would be and whether 40p could quickly become 50p, 60p or 70p. That is a question for you, but I think that the proposal is unclear and risks a fast escalation of price, at a rate potentially well ahead of the retail prices index, that would take us to 50p very quickly. I am the first to admit that that is a subjective view.

Ian McKee: Who knows what the future will bring? However, you agree that, at the moment, if a 40p minimum price was introduced there would be no job losses in Whyte & Mackay.

John Beard: Correct.

Ross Finnie (West of Scotland) (LD): I think that we have rehearsed the argument from last week, Mr Beard, and I agree that you were consistent—but we will not go there.

You have been very helpful, but I want to clarify one point. Last week, I asked you about the Scotch Whisky Association's idea of a minimum price based on duty plus VAT. You have helpfully supplied figures on that. I want to ask one further question to ensure that, as I said last week, we are comparing apples with apples and pears with pears, and not any combination of the two.

I am sorry that you do not have a copy of the *Official Report* in front of you, but I will be as helpful as I can—

Col 2957

The Convener: You can just give the reference.

Ross Finnie: Mr Beard, you referred last week to a current guideline price of £10.18. Can we be clear about this? Is that £10.18 for your product: a 70cl bottle of Scotch at 40 per cent alcohol by volume, not 37.5 per cent?

John Beard: I will be absolutely clear. The price of £10.18 was given at the time of the submission, and you may find that prices have moved marginally in the marketplace, but I will give absolute

clarity: it is £10.18 for a 70cl bottle of Scotch whisky at 40 per cent ABV.

Ross Finnie: If I was completing the column in your evidence on the price for that product, it would therefore be correct for me to assume that the total of £6.34 of duty plus £1.11 of VAT, which makes £7.45, would compare with the price of £10.18 from the date on which you submitted it and with the totals of £11.20 based on a minimum price of 40p and of £14 based on a minimum price of 50p. In my single column, I would not be misleading you or anybody else if I said that the price of a bottle would be £14 with a 50p minimum price, it would be £11.20 with a 40p minimum price, the current price is about £10.18 and a minimum price based on duty plus VAT would be £7.45. Is that correct?

John Beard: Yes. As you picked up on last week, Mr Finnie, the calculation for vodka is marginally different. From memory, I think that you quoted a price of £8 for whisky, but the underlying price is closer to £10. There is some movement between whisky and vodka, but you are correct in what you say.

Ross Finnie: I did not actually do that. I said off the top of my head that the price was £11.30, when in fact it is £11.20. My point, however, is that, although the total of duty plus VAT is an interesting, open and transparent method of suggesting a price below which discounting might not take place, £7.45 is nevertheless materially lower than any of the minimum prices.

The record is now clear that we have that column of prices. We also have the question of vodka, which I am not disputing. I wanted to use just the whisky comparison, because if we have a reference point for Scotch whisky we can make the distinction.

John Beard: Hence my submission in the past week.

Ross Finnie: That is very helpful, thank you.

Mr Frank McAveety (Glasgow Shettleston) (Lab): I am a temporary member of the committee and I have thoroughly enjoyed the discussions so far. However, I have a couple of important questions.

Col 2958

First, Mr Beard, have you ever been asked to carry out an impact assessment on the effect of a minimum unit price of 40p? Secondly, although you say that such a price would have a much lesser if not fairly marginal impact on jobs, you are worried that there might be an escalator effect in future decisions from the momentum that can gather around health measures. Will you say more about that? Finally, from your knowledge of the industry, is there any sense that as well as having little impact on jobs in Scotland—or, if the measure were to be extended, in the rest of the UK—a 40p minimum unit price might also have little or no impact on health?

John Beard: I will take those questions in sequence. First, Whyte & Mackay has never been asked to carry out any impact assessment. As I said earlier, trade bodies in the industry have been asked to assess the impact of a minimum unit price of 25p, 50p and 75p, but 40p is the figure that is being floated. The brief talks about 5p increments, but I find it strange that no one has been asked to model that scenario.

You are correct to say that although the introduction of a 40p minimum unit price would in the first instance have a very marginal impact on Scotch whisky companies, there is significant concern about how the escalator effect might impact on the industry over time and whether any increase would receive the same amount of scrutiny that has been given to the whole concept of minimum pricing.

Finally, on the question whether a 40p minimum unit price will have any impact, you will have seen

the evidence from the Sheffield study. My recollection is that such a price will lead to a 2.6 per cent reduction in alcohol consumption. In response to the question whether that figure is for Scotland or the whole of the UK, which Dr McKee asked last week, further analysis is being carried out on the specific impact on Scotland.

Does that answer your questions?

Mr McAveety: Yes.

Helen Eadie: Welcome back to the committee, Mr Beard. Can you expand on your submission by telling us about your meetings with officials and how they helped in making your thinking go along a particular route? Were any issues that we have been discussing not covered?

John Beard: We took the opportunity afforded by last year's restructuring, the output of which I have been briefing the Economy, Energy and Tourism Committee on this morning, to access a number of politicians of all political parties to put across in a pretty forthright way our views on the impact on jobs of introducing minimum pricing in Scotland. Until then, that element of the debate had probably not been covered as much as it

Col 2959

might have been, but, given our dependence on the UK and weighting towards Scotland, particularly in the context of the number of jobs that our business has in Scotland, it was absolutely correct for Whyte & Mackay to describe the impact of any introduction of minimum pricing.

I spoke to all four political parties and, as you might imagine, they each had different reactions. Certain parties found the information that we shared to be new to them and, indeed, it helped to form their thinking. However, I sensed that one particular party was not open to new ideas and I struggled to get more detail about why a particular minimum unit price would not be set out in the bill and to get a better understanding of why the bill had been considered legal and why the impact on jobs, which at the time was a high-profile issue in Scotland for us and another drinks company, had not really been taken into account.

Does that answer your question?

Helen Eadie: Yes, but am I right in thinking that it was Whyte & Mackay that took the initiative to meet the different political parties or were you invited to meetings by Government officials as part of a consultation exercise or to discuss the formulation of the policy?

11:30

John Beard: We took the initiative to meet each party.

The Convener: And—

Helen Eadie: I have not finished, convener. Mr Beard, you know what the impact of this measure will be on those who are directly employed by Whyte & Mackay. Has any consideration been given to its ripple effect on the economy and on subcontractors and others? Has any estimate been made of the number of other jobs that could be lost as a consequence?

John Beard: That is a good point. We have not done that kind of extrapolation. Arguably, we could do so, but the figures that I have mentioned, in particular the 83 jobs that I highlighted, are factual and based on our own data. I thought that it would be incorrect to extrapolate from that and come up with a figure for the ripple effect.

Helen Eadie: If, as you say, you could do that, will you do it? If you submit it to the clerks, it will be distributed to committee members. That information will be helpful, because we have to think about not only direct employment but every job in Scotland.

John Beard: Are you talking about the specific Scottish impact or the UK impact?

Helen Eadie: The Scottish impact, please.

Col 2960

The Convener: We would like the information in a Scottish context. Powerful though the Scottish Government is, it cannot rule over England.

Mr McAveety: Lucky England.

The Convener: Perhaps.

Helen Eadie: I am also very concerned about the impact of the internet, which has been discussed on a number of occasions. I have been increasingly impressed, you might say, by the ease with which, at a click, consumers can shop anywhere in the world and have it delivered to their doorstep. Last night, I was gobsmacked to discover that a 25kg parcel could be delivered to my door for about £14, which is incredibly cheap. If England did not follow the example of this bill, people in a community could import over the border stuff that they had bought on the internet and share the cost of delivery between them. I do not know how many bottles there are in a 25kg parcel, but you can see how cheap that might be.

Similarly, I know from a European Union report that the cost of alcohol in the EU has gone down, but consumption in mainland EU has also gone down. Given that the cost of alcohol has come down incredibly, I am concerned that it could be imported by white van men and women on the Rosyth to Zeebrugge ferry.

John Beard: I—

The Convener: I do not want you to answer that, Mr Beard. We have been quite elastic with the questioning—and quite rightly so—but, at the risk of being accused of being dictatorial, I remind Helen Eadie that she was clarifying the issue of job losses, which we have now examined thoroughly. I do not want to go down the route of the internet, Zeebrugge and so on, because we have already taken evidence on that and we also have Mr Beard's written evidence. Mr Beard has been well delayed already and I intend to bring this session to an end.

Thank you for coming, Mr Beard. One might say that you have been bearding the lion in his den, if I might make a pun. I suspend for five minutes to let the next witnesses, who have been very patient, take their places.

11:33

Meeting suspended.

11:40

On resuming—

The Convener: We will resume so that we can make progress. Before we move on to our next panel, I inform members that an additional meeting of the committee will take place at 2 pm on Tuesday 23 March so that we can take evidence via videolink from witnesses who are

Col 2961

based in Canada. That, too, will be a public meeting.

We will now take oral evidence from a panel of witnesses representing the police, the legal community, the licensing authorities and the Office of Fair Trading. I welcome, from the Association of Chief Police Officers in Scotland, Assistant Chief Constable Andrew Barker and Chief Constable Patrick Shearer of Dumfries and Galloway Constabulary; Derek McGowan, licensing standards officer at the City of Edinburgh Council; Mairi Millar, clerk to Glasgow City Council's licensing board; Michael McHugh, chair of West Dunbartonshire licensing forum; Chris Jenkins, head of competition advocacy at the Office of Fair Trading; and, from the Law Society of Scotland, John Loudon, convener of the licensing law subcommittee, and Jim McLean, convener of the competition law subcommittee. I think that Mr McLean was the gentleman who was nodding in the public gallery earlier—he was named in dispatches then and is regretting it now.

I am sure that members of the panel have previously watched committee proceedings. You can just indicate to me when you want to answer members' questions. I will put you on my list and let you know when I am coming to you. Do not feel obliged to say something just for the sake of it—not that any of the gentlemen and ladies present would do that. Thank you for your helpful written submissions.

Ross Finnie: I, too, thank all the witnesses for their submissions, particularly the Law Society of Scotland. I want to drill down to the very important and much-discussed issue of the legality of minimum pricing. I have two preliminary points, and then one on a more substantive issue.

Just by way of introduction—this is an initial question before I raise my other three points—the middle of page 2 of the Law Society's helpful paper notes that the opinions of the European Court of Justice on certain cases "are yet to be" finalised. However, those opinions have since been finalised. Do they make any material change to the Law Society's views?

Jim McLean (Law Society of Scotland): No, I do not think that they do. The judgments clarify and emphasise that the complaint in the tobacco case was not about free movement—it was not raised under the free movement article—but was about non-compliance with the tobacco directive. The judgments also say something that was not really said in earlier cases, which is that the health and public order issue can be used in free movement situations—or not, as the case may be—but it is probably not necessarily material to the tobacco directive issue.

Col 2962

Ross Finnie: It is helpful just to get that on the record in relation to the Law Society's submission. I will move on to my three points, which I think are helpful, although one is still slightly contentious. I want to be clear about what you say about competition law at the foot of page 1 of your submission. There are issues that require debate, but is it your clear view that, in terms of the construction of section 1, Scottish ministers would take the decision on the minimum price and that it would not be a matter of debate among suppliers or, ultimately, retailers, which means that the issue is taken out of competition law and into devolved competence?

Jim McLean: We are not talking about an agreement among parties that charge a price; we are talking about legislation that imposes a price, so there is no question of a concerted practice or an agreement among undertakings.

11:45

Ross Finnie: That would breach competition law.

Jim McLean: It would indeed.

Ross Finnie: Okay. I move to my second question, which you referred to in your answer to my first question. Last week, when we heard evidence from the Scotch Whisky Association, I asked:

"Is the Scotch Whisky Association clear, then, that no distinction at all should be drawn between the tobacco directive and any directive on alcohol?"

That was in relation to three cases in the European Court of Justice. Mr Gavin Hewitt responded with confidence:

"There is no alcohol directive, whereas there is a tobacco directive."—[*Official Report, Health and Sport Committee*, 10 March 2010; c 2852.]

Unfortunately—and foolishly, because I had discussed the matter beforehand—I did not bring with me Council directive 92/83/EEC, which is on alcohol and the existence of which was denied.

I do not want to get into a silly dispute with Mr Gavin Hewitt or the Scotch Whisky Association. I simply want to establish whether it is fair to say that the judgments in those cases have clarified that the principal basis of the complaints that were brought against France, Austria and Ireland was article 9(1) of the tobacco directive, which expressly provides that, in relation to tobacco, a manufacturer or others

"shall be free to determine the maximum retail selling price for each of their products for each Member State for which the products in question are to be released for consumption."

Jim McLean: That is correct.

Col 2963

Ross Finnie: Therefore, there is a real distinction to be drawn, because the alcohol directive to which I referred, and which I should have brought with me last week, makes no such equivalent provision.

Jim McLean: Yes, that is a significant difference.

Ross Finnie: Therefore, because alcohol duty is based on the volume of alcohol rather than its price, the cases can be distinguished from the discussion on the bill. The cases might have a bearing, because of some of the obiter remarks that are related to them, but they can be distinguished.

Jim McLean: Yes, they can be distinguished, but they have a bearing because of the remarks that are trailed in them and in earlier cases on tobacco.

Ross Finnie: Therefore, the Law Society is directing us that, if those two issues are perhaps not set aside, but are much clearer, we get into the territory of quantitative restrictions under other elements of EU law, particularly article 34 of the EU treaty, and whether the health exemption in article 36 applies.

Jim McLean: Yes.

Ross Finnie: I move to my third question, which is the matter of substance. Your paper helpfully sets out four possible scenarios and four questions that might arise about what minimum pricing does and whether it comes within the mischief of quantitative restrictions. Then, like an Addison and Steele essay from a different century, on the one hand, you pose four questions that might support the bill, but on the other hand you have four points that might not.

The Convener: Some of us know what you mean.

Ross Finnie: To try to get clarity, I want to press Mr McLean on those points. They are good questions, but we need to press you on them. My third point is about deterring consumption of alcohol by increasing price and clearly relates to the remarks in the ECJ judgments about other means. Indeed, paragraph 25 of the ECJ judgment in the case against France refers to the possibility of using other means, in particular excise duty. The judgment states:

"By contrast, a system of minimum prices is capable of producing damaging effects".

What test or other evidence would the Scottish Government need to produce to persuade the Commission that the system of minimum pricing that is proposed in the bill does not fall within the mischief of the provisions that prohibit quantitative restrictions?

Col 2964

Jim McLean: As was mentioned earlier this morning, a judgment in the 1970s on a case that was about gin in the Netherlands stated that minimum pricing interferes with the free flow of goods. That is the starting point. Therefore, we need to look at how the policy can be justified. In that previous case, the court said flatly that minimum pricing was not justified, so the case against minimum pricing is that, if we want to do something about the price of alcohol, we should simply increase duty and—I think that this was included in the original framework—ban loss leading. Such measures would be easy as a matter of Community law, but I appreciate that there are other reasons why they would not be feasible. We need to start with the question why the Government does not just increase duty. We need to find an answer, which will not be easy.

However, I do not think that anyone has previously had a crack at answering the question whether minimum pricing is possible in the way that has been done for this Parliament's processes, for which a study was undertaken by the University of Sheffield and a great deal of thought put into the matter. There has been much consideration of the proposal—including through the very process in which we are engaged today—which has been refined and further debated. It is a question not of being right but of having come to a decision on the basis of having really thought through the available evidence.

Of course, the court might override the Government and decide that these complicated arrangements present too much of a problem to interstate trade and that it will just not allow them. That could happen. However, if the court was persuaded—I will focus on the question here—that just increasing prices was excessively simplistic, that the Government had managed to find a way of targeting a particular pattern of consumption that was a particular problem and that there was reason to believe that the policy might achieve the Government's objectives, the court might conclude that that was a very powerful argument. I am not saying that the argument would prevail; I am saying that it could be very powerful.

Ross Finnie: To arrive at that situation, would the Scottish Government need to demonstrate that the effect of the minimum pricing policy would be material, which is always a difficult word in legal terms? Deriving from the wider body of evidence—the University of Sheffield study is not the only evidence—a case might be constructed to demonstrate that the exemption in article 36 ought to

prevail over the general prohibition on quantitative restrictions in article 34 because the policy could be shown to have a material effect.

Col 2965

Jim McLean: Yes, I think that the policy would need to be shown to have a material effect that could not be achieved simply by putting up prices.

Ross Finnie: In the context of the next point, the Law Society's submission suggests that it would be preferable that minimum pricing

"be fixed by reference to volume",

which perhaps relates to the requirement not to interfere with the harmonisation that is provided for in the other directive. It seems clear from the ECJ judgment that relief cannot be granted on the grounds that a policy protects health if it interferes with harmonisation. Why should it make any difference that the bill refers to millilitres of alcohol, whereas HM Revenue and Customs refers to litres of alcohol? Presumably, the practice of HM Revenue and Customs is wholly consonant with the provisions of the directive on the harmonisation of the structures of excise duties. The Law Society seems to think that referring to units of alcohol is a stumbling block, yet the unit is a volume, albeit one that is measured in millilitres. I refer to the top of page 4 of the submission. You give a counter-argument at the bottom of the page. I am interested in which argument you would follow.

Jim McLean: Perhaps what we were trying to get at in the submission is not clearly expressed. It might be suggested that the unit of alcohol is not a known, pan-European concept, which is why we have to show that it is objectively based.

Ross Finnie: But referring to 10 ml of ethyl alcohol is not, in principle, terribly different from HM Revenue and Customs referring to litres or hectolitres of pure alcohol.

Jim McLean: I agree. The point in question might well be made simply because of the unfamiliarity of the measure outside the United Kingdom, but there is a response to it.

Ross Finnie: Is it the Law Society's opinion that that is the substantive issue with respect to the legality of the bill?

Jim McLean: The substantive issue is whether what has been proposed is a proportionate and appropriate response to an identified problem. Could the aims have been achieved more simply in some other way? Does it make a difference that people who export to the UK might have to find out what a unit is when they are thinking about how they might do things? Is that too much of an obstacle? That is a difficult question that I do not know the answer to.

Ross Finnie: Notwithstanding the fact that any complaint by the European Union would be made against the United Kingdom as the member state, is it a reasonable defence for the Scottish

Col 2966

Government to aver that it is unable to increase excise?

Jim McLean: No. That is an internal UK matter that is of no interest to Brussels or Luxembourg.

Ross Finnie: So the fact that that cannot be done does not count.

Jim McLean: No. It cuts no ice.

Ross Finnie: So we would need to move to the other argument about the proportionality and reasonableness of the proposal and the material effect that it would have, and pray in aid the health provisions.

Jim McLean: That is right.

Ross Finnie: That is helpful. Thank you.

The Convener: Ian McKee has a supplementary question.

Ian McKee: I found that discussion interesting, although it got a bit Addisonian at times. We have heard considerable evidence that people at the lower end of the income scale are perhaps three or even four times as much at risk of developing alcohol-related diseases. They are also the group of people who tend to purchase the cheapest alcohol. What is the Law Society's opinion on whether the use of minimum unit pricing as a public health measure could be a defence against a complaint about interference with trade? The people who are most at risk would be specifically targeted, whereas putting up duty would affect prices across the scale, and some of the duty increases could be absorbed by sellers.

Jim McLean: That is the case that would be put forward, although I do not know whether it would be accepted. People would say precisely that—they would say that minimum unit pricing is targeted and that simply putting up duty is not a good answer.

Ian McKee: But that would be a reasonable case to put.

Jim McLean: It would be. It is not difficult to put up a reasonable case for or against minimum unit pricing. That is the case for it.

Helen Eadie: I want to continue the questioning of the Law Society before I ask about the submission from the City of Edinburgh Council. In the evidence that we have gathered, we have found it interesting to note what has sometimes been omitted from papers such as the Sheffield study rather than what is in them. I found the same with the Law Society's submission. The other week, Gavin Hewitt spoke about the decision in the case in the Netherlands, which you spoke about. You did not mention that in your submission. Why? I give you the chance to correct

Col 2967

me in case I missed a reference to it somewhere and am wrong.

12:00

Jim McLean: The paper is not meant to be an exhaustive analysis of pros and cons; it is meant to set out the position helpfully and briefly. The omission was not deliberate.

Helen Eadie: Given that it is the one decision that relates to alcohol—all the others relate to tobacco—I simply say that I am surprised that the Law Society omitted it. Given that you did not mention the decision in your paper, could you dig it out for the committee and supply us with your analysis of it? That would be very useful.

The Convener: Before Mr McLean answers that, I have a question: would it be relevant for us to have that information?

Helen Eadie: It is the only decision on the minimum pricing of alcohol that the EU has taken, so it is very relevant.

The Convener: I was not asking whether you thought that it was relevant; I was asking Mr McLean.

Jim McLean: You can have it if that would be helpful.

Helen Eadie: We will be able to judge for ourselves, convener.

Mary Scanlon: It will save Mr McLean from coming back next week.

Helen Eadie: Yes, it will save him from being called back next week by the convener.

Jim McLean: I would rather that that did not happen.

Helen Eadie: I compliment the City of Edinburgh Council on its submission, because it is one of the most practical papers that has been submitted to the committee. There is a danger that we concentrate far too much on minimum pricing. I draw attention to the paragraph at the bottom of page 2. There is a lot about enforcement in that paragraph. It says:

"Our Licensing Standards Officers have advised that they believe that the Act as it currently stands restricts such offers in off sales premises."

The council is concerned about enforcement. Can the witness from the City of Edinburgh Council tell us what is not being done that could be done?

Derek McGowan (City of Edinburgh Council): The term "measure" is used in the mandatory conditions on off-sales and off-sales restrictions in schedule 3 to the Licensing (Scotland) Act 2005. The off-trade has argued that that term is not consistent with a bottle of wine or a can of lager,

Col 2968

for example. Our opinion is that the UK weights and measures legislation interchanges the terms "quantity" and "measure" for on-sales premises through intoxicating liquor regulations and, if that interchangeability exists for on-sales, it should also exist for off-sales. We are concerned with a quantity of alcohol, whether it is a bottle of wine or 25ml of whisky or vodka sold from behind a bar.

We have been discussing the issue with the off-trade and continue to do so. The discussions have highlighted a general issue with the mandatory conditions, particularly those on irresponsible promotions, which are quite difficult to come to terms with—everyone has their own opinion about what they mean. I have given you our opinion, but authorities that have that opinion in relation to the off-sales trade are probably in the minority.

The economic argument is that promotions such as three bottles of wine for £10 can save the consumer, who may be more hard pressed in a recession, a lot of money, but our point is that they encourage people to buy more alcohol than they intended to buy. Offering multibuy alcohol promotions that can save the consumer £10, £15 or, in some cases, £20 is very irresponsible, and such promotions should be classified as such. That is why we pursue the matter in that way.

Helen Eadie: That was very helpful.

You strongly recommend the retention of the application of paragraph 8(2)(e) of schedule 3 to the 2005 act to off-sales. With reference to section 3 of the bill, you say:

"The amendment proposed in this section of the Bill helps to reinforce and clarify the existing position in one respect. However, the disapplying of ... Schedule 3 (8)(2)(e) from off sales may lead to weaker controls."

Will you expand on that point?

Derek McGowan: The point that we make is that paragraph (e) refers specifically—and I will read this, so that I get it right—to an offer that

"encourages, or seeks to encourage, a person to buy or consume a larger measure of alcohol than the person had otherwise intended to buy or consume".

We think that that can be a strong deterrent, and we would not like it to be removed. At the moment, we see both on-sales and off-sales traders trying to find ways to get round the categories of irresponsible promotions. Our concern is that, if we start removing categories, it will create more confusion and might lead to weaker control over the off-sales trade.

The Convener: For the sake of the *Official Report*, I ask committee members to tell us which page and which paragraph they are referring to when they quote committee papers.

Col 2969

Helen Eadie: That last one was on page 2.

I have a final question for Edinburgh and then—if I may ask it, convener—one question for the police. In the second paragraph of the first page of your evidence, you state:

"We ... feel that the formula provided for the calculation of the minimum price is not expressed clearly enough".

Will you expand on that point, too?

Derek McGowan: We proposed a clarification to the formula that reads:

"S is the strength of the alcohol expressed as ABV/100".

Neither the bill nor any of the explanatory information says who will calculate the minimum price. Will it be left to the retailer or to the manufacturer who delivers the product? We had a couple of attempts to work out exactly what the formula means, and we felt that, if we were having a problem, that might be replicated. We simply want clarification, given its absence in any information provided thus far, on who will be responsible for calculating the minimum price.

Helen Eadie: Finally, I ask the police to comment on difficulties in policing and enforcing the existing laws. I would be grateful to have a police perspective on the issues. We have seen in the City of Edinburgh Council paper that there is a law to restrict special offers. Where do the police fit into the situation and what is their view on the difficulties that they are presented with?

Derek McGowan: I will answer if I may. Perhaps I should have explained the role of the licensing standards officer—it might be useful if I do so quickly now. The LSO's job is to provide guidance on the legislation and mediation services when there is a dispute and to supervise the compliance of licence holders with the legislation. It is the role of the licensing standards officer, foremost, to ensure that the irresponsible promotion provisions in the legislation are complied with and that irresponsible promotions do not happen. I apologise for stepping in, but it might be that your question is more

relevant to me.

Helen Eadie: Why is the law not enforced better?

Derek McGowan: It is difficult. I know that that sounds vague, but the 2005 act has been settling in and we have found that, as soon as we think that we are on top of one style of promotion, the goalposts change—I have already explained the issue with off-sales, and the same applies to on-sales retailers.

Let me give an example. If people buy a meal, they get a free glass of wine or pint of lager with it. That might be seen as a reward of alcohol for visiting those premises, so we are now seeing the

Col 2970

offer turned on its head, with people being given a free meal when they buy a drink. That takes the offer completely out of the realm of being an irresponsible promotion, but in effect the customer is getting the same thing.

In the six months since the legislation was implemented, the goalposts have shifted continuously, and it can be hard to keep up. We have issued guidance across Edinburgh to the on-trade about what we think are acceptable and unacceptable practices, but the caveat is always that that is our considered opinion and it is up to the licensing board to decide whether it agrees with us that what we consider irresponsible is in fact irresponsible.

Helen Eadie: I guess that that is because the legislation is so new.

Mairi Millar (Glasgow City Council): I support what Derek McGowan says. The city of Glasgow licensing board takes a different view from the city of Edinburgh licensing board on the application of the provision on measures for off-sales.

The Convener: Glasgow having a different view from Edinburgh—there is something new.

Mairi Millar: Yes, I know—it is unbelievable.

That supports the fact that there are many interpretation issues with the mandatory conditions, with the result that boards are taking different views. There is a fundamental difficulty with the way in which the provisions are expressed, which is allowing loopholes to be created in how licence holders carry out promotions on their premises. Although we have taken a different view from the City of Edinburgh Council on the application of the provisions, we support its view that there are problems with how they are worded.

Helen Eadie: Is there a danger that the same loopholes could develop if minimum pricing were introduced?

Mairi Millar: My concern with minimum pricing is the difficulty in applying the formula, which, as Derek McGowan mentioned, is complex. There is an issue about whether it would be readily understood by multinational supermarkets and single operators of both off-sales and on-sales premises. In addition, it is intended that the minimum pricing provisions will apply to holders of occasional licences, which can include voluntary organisations. I am concerned about whether members of those organisations would readily understand them. For minimum pricing to work, there must be compliance. That leads on to enforcement issues.

Mary Scanlon: I will come to the police witnesses shortly, but first I have a question for Mr Jenkins and Mr McLean. We have heard quite a

Col 2971

bit about whether minimum pricing is competent under EU law. We know—it was confirmed last week—that the competence of the measure would be challenged with the EU if it were introduced. However, I want to move on to competition law, which I know little about, as it is a reserved matter. In my questioning of Mr Beard from Whyte & Mackay, I noted that a minimum price in Scotland could mean—unless the producers were to hand over all their profits to the retailers—whisky being sold at different prices in Scotland and England. Would that be a breach of competition law?

Secondly, I seek clarity on what the OFT's submission says about how minimum pricing relates to competition law.

The Convener: Where is that?

Mary Scanlon: It is in paragraph 9 on page 2 of the OFT submission.

My third question is about the proposed ban on promotions and how that relates to competition law or any other law. Is a promotions ban or any of the other measures in sections 3 and 4 of the bill anti-competitive? Would the existence of different prices in England and Scotland, the effect of minimum pricing on information sharing on commercially sensitive matters such as price setting, the promotions ban or any other measure that is proposed in the bill be considered a breach of competition law or any other relevant law?

The Convener: Mr Jenkins, would you like to go first for a change?

Chris Jenkins (Office of Fair Trading): Okay. I will briefly set out the OFT's remit in this debate. The OFT is the UK's main competition and consumer authority. Our mission is to make markets work well for consumers. As part of that, we enforce competition and consumer law across the UK as a whole.

We also have a number of other, wider duties and responsibilities, one of which is a statutory duty, under the Enterprise Act 2002, to advise Government on policy measures that might affect competition or markets. That is the primary reason for our being involved in discussions with the Scottish Government on alcohol pricing. We fully recognise the importance of tackling alcohol misuse—in no way do we seek to underplay the seriousness of the Scottish Government's efforts to tackle the issue.

First, I will deal with the competition law aspects of your questions. It is extremely important to distinguish between competition law in the UK and the EU, and wider internal market rules.

Col 2972

12:15

The OFT is responsible for competition law, and I broadly agree with the earlier comments that the measures proposed in the bill do not automatically breach competition law. However, there are some risks, which we were alluding to in our written submission. I will clarify that. The possibly relevant part of competition law is chapter 1 of the Competition Act 1998, and the equivalent legislation in Europe is article 101 of the Treaty on the Functioning of the European Union. Those rules basically prevent firms from making agreements that prevent, restrict or distort competition.

There is no agreement between firms, and it is the Scottish Government that is imposing a minimum price on the market, so that does not form an agreement. The risk to which we allude is that the way

in which the minimum price could be set might, in itself, risk creating a collusive agreement. To take an extreme case, if retailers were simply asked to determine a minimum price, that would pose serious competition law concerns. We are also aware of the wider internal market issues, but those are not the responsibility of the OFT and I do not want to go into them at this point. However, the Scottish Government is clearly considering that matter carefully.

On the promotions ban and the question whether any of the proposed measures could be anti-competitive, it is important to make the distinction between anti-competitive effects and the law. I have just outlined that in the case of minimum pricing. There are not automatic competition law blocks on the Scottish Government pursuing the measures relating to bans on promotions and discounting; the risk lies in how those measures are implemented.

That is not to say that we do not think that the measures have an anti-competitive effect in the market—as we tried to set out in our paper. I am happy to go into the issues in more detail if that would be helpful.

The Convener: I am a bit muddled about what an anti-competitive effect is, versus breaching competition law.

Chris Jenkins: Essentially, competition law applies to firms in the market, and it allows for Government to impose certain restrictions on the market. Government carries out a wide range of functions. Subsidies are permitted under competition law, and there is also tax. Such things can potentially distort competition in markets.

Our main concern about minimum pricing, whether or not it is illegal, is that the effect of it in the market is equivalent to allowing retailers to fix a minimum price. One of the big implications of the Scottish Government's impact assessment is that

Col 2973

we would expect there to be a transfer of economic profit from consumers to retailers and manufacturers. The figures that I saw in the Government's paper involved an £87 million per year retailer benefit if there was a 40p minimum price. Consumers would lose out by a similar amount.

We are in no way trying to undermine the detailed analysis that has been undertaken for the Scottish Government's work on the issue, but you might think that creating additional profits for retailers that sell alcohol gives them a perverse incentive to try to sell more alcohol. Clearly, there are things that the Scottish Government could do to combat that—for instance, trying to tackle advertising and promotions. In any case, minimum pricing agreements are being set out that allow retailers and manufacturers to earn more money from selling relatively cheap alcohol. In an extreme case, that might undermine the demand reduction that the bill is trying to achieve.

We are concerned about the potential unintended consequences of reducing competition. Competing on price is a fundamental part of any market. I appreciate that the aim of the measure is to control the price of a particular product, but there is a risk of unintended consequences that will weaken competition in the retail sector more widely. Ultimately, that is not good for Scotland or for competitiveness and consumer prices across a range of goods.

The Convener: I am sorry if the heat in the room is making anyone uncomfortable. This is a very technological building—someone has hands on a button somewhere that will open the window on my left. It is extraordinary, but only the window on my right can be opened manually. Instructions have been given to get the other window opened, but I am beginning to believe that the man in the moon is in charge of it. I warn you that we may have to wait for ever. You may take off your jackets if you wish, as it is getting quite stuffy in here.

Jim McLean: My first point relates to bundled packages of drink. If drinks are sold literally in a package—as two items in the same wrapping—that raises an issue separate from minimum pricing, especially for off-sales but even for on-sales. Prohibiting packages from being sold at a discount is not about minimum pricing—it is about promotion and lawful ways of competing. Some sections of the bill may go a little too far in that area, both from a European point of view and in respect of competence. No one has made that point, but there may be a competence issue in that regard.

One underlying concern relates to the situation of a large Scotch whisky producer that sells own-label whisky to a supermarket that operates

Col 2974

throughout the United Kingdom. If there were minimum pricing in Scotland but not in England, what would be the situation? There are two ways of considering the issue. The first is to look at whether there is any dominance or price discrimination in the market. However, it is more likely that the whisky company would put some restriction on where the supermarket could resell; it might say that it did not want the product to be sold in Scotland, or vice versa. That would raise a serious competition law issue. Something of the kind happened on a European scale when there were price controls in Belgium but not in Germany; as a result, BMWs went across the border. Similar issues could arise in the single British market in the United Kingdom.

Ian McKee: I want to ensure that I have understood you. If there were minimum pricing, low-price whisky that was manufactured for sale in supermarkets could be sold in Scotland, but at a higher price. If the manufacturer said that the product could not be sold in Scotland, it would be breaking competition law. If there is a minimum unit price, surely that will mean only that a Tesco whisky is more expensive in Scotland than it is in England.

Jim McLean: I had in mind cases in which there was a significant price differential for a product on one side of the border as compared with the other, in whatever way that might arise. An agreement between the manufacturer and the supermarket that the product should be sold on only one side of the border would raise a serious competition law issue.

Ian McKee: Surely the manufacturer, rather than the legislation, would be in trouble.

Jim McLean: Not the legislation. We are talking about competition law as opposed to the bill. The question is whether there is an agreement or a concerted practice between two undertakings. That is an example of someone perhaps being considered to have been provoked by the legislation.

Ian McKee: I understand that. On the same point, if I can ask Mr Jenkins—

The Convener: Can we just clarify that, please? You are saying that the manufacturer, not the Government, would be breaching competition law.

Jim McLean: Not the Government, no. The manufacturer and the retailer.

The Convener: That is fine.

Ian McKee: Mr Jenkins, from what you said earlier, I gather that it would be of interest to you and your area of law only if the Government asked the retailers what the minimum price should be. If the Government set the minimum price and the retailers had no say in it, except perhaps through

Col 2975

lobbying early on, there would be no problem from your side as far as the legality is concerned—is that correct?

Chris Jenkins: As far as the legality in terms of UK competition law is concerned, that is right.

Ian McKee: Yes. I appreciate that you are talking only about your area of the law. I just wanted to clarify that.

Mary Scanlon: A question that I asked earlier has not quite been answered. I will stick to Whyte & Mackay, as we have had so much evidence from that company this morning. It is looking at a 37.5 per cent difference in price as a result of the proposed minimum price, which is a significant difference. Some of that 37.5 per cent increase in profits will likely go to the retailer; some of it will likely go to the producer. I put the following question to Mr Beard of Whyte & Mackay. If a different price were set—whether for the Whyte & Mackay whisky that is sold as an own brand by Tesco or whoever, or for Whyte & Mackay branded whisky—on the assumption that some of the increase in revenue would go to the producer, would it be breaking competition law for the same product to be sold at a different price in England?

Jim McLean: You mean if it were sold by Whyte & Mackay to the retailer, not by the retailer?

Mary Scanlon: If Whyte & Mackay sold the same blended whisky to a grocer in Carlyle for 37.5 per cent less than it sold it to a grocer in Gretna, would that be breaking competition law? I am talking about the same bottle of whisky, the same brand—the same everything.

Jim McLean: If a very large producer were to do that—

The Convener: Spoken like a lawyer.

Mary Scanlon: I am talking about Whyte & Mackay. It has had good publicity today. Everyone in Scotland will be thinking, "I must get a wee dram o' that Whyte & Mackay stuff."

Jim McLean: If it were to sell what one might call a like grade and quantity—if there were no question of difference and there were equal volumes—

Mary Scanlon: The same product.

Jim McLean: I would not expect such a producer to discriminate between the Scottish and English purchaser. However, if the producer were considered not to be dominant because there was so much competition in the market—which is a possibility—it might try to enforce that difference through an agreement with the retailer, and that agreement would be illegal.

Col 2976

The Convener: The agreement could be between the retailer and the producer, not involving the Government.

Jim McLean: Absolutely.

Mary Scanlon: Your answer is based on the assumption that the retailer would retain all the profit from the 37.5 per cent increase in the price resulting from minimum pricing.

Jim McLean: They could not be expected to agree a margin. That would be resale price maintenance, which is not possible. The manufacturer must decide at what price it wants to sell to

the retailer and the retailer must decide at what price he wants to sell to the public. The manufacturer cannot tell the retailer at what price he may sell to the public—absolutely not.

Chris Jenkins: Price discrimination, which is what we are talking about, is not automatically illegal under competition law. As Jim McLean just set out, it very much depends on the facts of the case. Typically, it would be a competition law issue only if a dominant player—a firm with large market power—were involved. It is important to understand that price discrimination by a small producer is not, in itself, a problem under competition law. If the product were being sold to a large retailer, I am not sure how easy it would be to differentiate price between England and Scotland; however, that is a practical issue rather than a competition law issue.

12:30

Mary Scanlon: It would certainly lead to an increase in cross-border activity.

My next question is for the police. How does the social responsibility levy reward well-managed pubs? The Glasgow City Council licensing board submission states:

"it is often difficult or impossible for the Police to establish whether there is any causal link between the incidence of antisocial behaviour in a locality and the management and operation of individual licensed premises."

On behalf of Glasgow, I thought that its submission was just as good as Edinburgh's.

Mairi Millar: Thanks.

Mary Scanlon: How can the police identify—say in the Grassmarket—which pubs should be prosecuted? That will generally fall to the police who are at the scene of drunken behaviour. In the centre of Edinburgh or Glasgow or wherever, how can you identify from the people at the scene which pubs should be prosecuted? Do you think that what is proposed is fair?

Col 2977

Chief Constable Pat Shearer (Association of Chief Police Officers in Scotland): The short answer is that it is challenging. Much more work must be done to explore the issue properly, particularly given that movement between premises, including nightclubs, seems to be such a feature. It is worth teasing all that out and putting some effort into having discussions and consultation to see how best what is proposed could be applied. Undoubtedly, late hours and a high number of premises have a significant impact on our operations, but it will be difficult to work out who should be responsible, unless a more broad-brush approach is taken. It is worth taking the journey to try to tease that out.

Mary Scanlon: The problem is that we have no time. The Cabinet Secretary for Health and Wellbeing will be at committee next week.

Last week, we heard from representatives of the licensed trade, who said that many people drink a considerable amount before leaving their own home. They might not look intoxicated and they might go on to a pub and have only one more drink. Would it be fair and reasonable to make the pub responsible in that situation? It is about the implementation. We have no more time to tease all this out. I would like a clear view from you on the social responsibility levy.

The Convener: It is possible to take further evidence at stage 2 of a bill if there are still issues outstanding. That can be done and amendments might be lodged. I just make it plain that it does not have to be the end of evidence sessions.

Assistant Chief Constable Andrew Barker (Association of Chief Police Officers in Scotland): I agree with the points that Mary Scanlon made. I said the last time that I gave evidence on this matter that pre-loading is a continuing issue for us. As Mr Shearer rightly said, it would be very difficult to attribute an incident to the fact that an individual took drink in a specific area and to ascertain whether the management of the premises in that area allowed the individual to act in the way that they did. We certainly seek to support the concept of social responsibility, but it is very difficult to tease that out. More work is required to get the views of the police, communities and the trade to establish how best to proceed. Mary Scanlon makes valid points. We could take things further and ask whether it is purely liquor-licensed premises that cause problems or whether late catering premises also cause difficulties by attracting people to stay in a particular location. The short answer is that significantly more work must be done, but, as Mr Shearer said, it is worth going down that route.

Mary Scanlon: I turn to an issue that was raised last week—Helen Eadie also raised it today. There are existing laws, such as the Civic

Col 2978

Government (Scotland) Act 1982. I got information recently that showed that the number of prosecutions for serving to people who are already intoxicated was barely into double figures. Do you agree that existing provisions are in place and that they could be better enforced? Given that your men and women on the beat are likely to know which pubs have irresponsible landlords, should you not work more closely with licensing boards to recommend that such landlords should lose their licences, rather than everyone being blamed and a tax being imposed on responsible landlords as well as irresponsible ones?

Assistant Chief Constable Barker: The same argument holds. The legislation that covers the serving of alcohol to a drunk individual is the Licensing (Scotland) Act 1976. The guidance on that statute includes two interpretations of the meaning of "drunk". It comes down to the evidential difficulty—which you highlighted—in knowing whether the individual was drunk at the time when they were served. How do we interpret "drunk" and how do we prove that it was a certain premises that sold the person alcohol?

I defend our case on the basis that we have taken significant steps to target specific premises that have caused problems. That is shown by the statistics in relation to the work that has been done under the 2005 act and previously under the 1976 act to target premises and take them to boards for a review of their licences—or for revocation, under the 1976 act. Again, it comes down to the difficulty of knowing which premises it was that sold the person the particular drink that tipped them from being—I cannot think of the right phrase—tipsy to being drunk. Where is that balance struck? That is not an easy question. I know that I am not giving a definitive answer but a vague one.

Chief Constable Shearer: In putting resources into the area, our effort in the first instance is about trying to prevent things. For example, we get involved in working with youngsters and we go out and issue fixed-penalty notices. In that respect, trying to keep people out of the criminal element is extremely important. However, I repeat that it is a challenging area.

Mary Scanlon: Can I ask the licensing boards—

The Convener: Hang on a minute, Mary. Mr McGowan and Mr Loudon want to respond to your questions.

Mary Scanlon: That is what I was hoping.

Derek McGowan: I want to comment on pre-loading, which is when people buy alcohol in off-sales and drink a lot before they go out. The on-trade in Edinburgh tells us anecdotally that that is a major problem. It links back to our stance on the irresponsible promotions from off-sales that we

Col 2979

discussed earlier—buy a crate of beer and get one free, or £10 for a bottle of wine but three for £10, which is equivalent to buying one and getting two free. Those are examples of the promotions that we have seen. Please do not quote me, but I think that about two thirds—

The Convener: You are quoting yourself.

Derek McGowan: I do not want to mislead the committee, but I think that about two thirds of the alcohol that is sold in Scotland is sold in off-sales.

Mary Scanlon: The figure is 68 per cent.

Derek McGowan: Yes. That is obviously a substantial percentage. Added to the cheap prices that the supermarkets offer, that links in to the social responsibility issue. The question that we have asked is how we can identify the premises that are at fault.

John Loudon (Law Society of Scotland): I think that I had better say something, convener.

The Convener: Do not feel obliged to do that, but we would be delighted to hear your views.

John Loudon: The Law Society of Scotland has identified that it would be difficult to apply a social responsibility fee fairly across the board and to determine to which premises it should be applied. More important, we sometimes forget that the Licensing (Scotland) Act 2005 only came into effect on 1 September 2005 and it gives licensing boards, licensing standards officers and the police a wide range of powers, which are only gradually coming to be recognised and accepted. On occasion, I have described them as a nuclear bomb.

It is important to understand that many parts of the act and the regulations are not being implemented and are not fully understood by the public or the trade. If they were used in the way that was intended, the need for a social responsibility levy should not arise. If there was a problem with a particular pub, restaurant or nightclub, it should be identified by the licensing standards officer or the police and brought to the licensing board, which has a huge range of powers. It can suspend the licence, it can revoke the licence—it can do all sorts of things. An issue should not get to the stage at which a social responsibility fee requires to be paid. It should be dealt with before that. Most boards have not grasped the wealth of tools that exist for them to use. We should encourage them to use those tools before we tinker with things. If that did not work, you could reconsider the matter.

I do not know whether the committee will cover some other issues in the submissions, such as blanket variations of licences without the ability to appeal, which cannot be right. Society must consider what is important for the solicitor and for

Col 2980

the public. Allowing such a change without giving somebody the ability to comment on it is not right.

The Convener: The committee would be alert to such a breach of the right to a fair hearing under the European convention on human rights. I am sure that the Government knows that, from listening to the committee—do not quote me on that, to pick up what Mr McGowan said.

Can we move on? Does Mary Scanlon have a question?

Mary Scanlon: I thought that Mairi Millar and other witnesses wanted to speak.

The Convener: No. We must not speak for people.

Michael Matheson: Mr Jenkins, I will pick up on your earlier evidence and on the Office of Fair Trading submission. Paragraphs 6 and 7 of the submission raise concerns about the impact that minimum pricing could have on the marketplace and its effect on consumers. You referred to that in an earlier answer.

It strikes me that the alcohol market is already fairly distorted, particularly by large supermarkets' pricing practices. We have heard that 68 per cent of the alcohol that is consumed in Scotland is accessed via an off-licence or the off-trade. I understand that the supermarkets have something like a 60 per cent market share in the off-trade. Concern has been raised with the Competition Commission about the supermarkets' practice of using alcohol as a loss leader to entice customers into their shops.

If the market is distorted, it is therefore fair to say that that distortion reduces competition by putting small alcohol retailers out of business and specialist retailers under even greater pressure. On that basis, I question whether minimum pricing would have a negative impact on consumers in general, apart from increasing the price of cheap alcohol. The market is so distorted by supermarkets that competition is reduced for the public at the moment.

Chris Jenkins: I hear what you say. It is important to separate the different types of distortions. As a general principle, it is important to take each intervention on its merits, given the market as it exists. We based what we said about the impact of minimum pricing on the Scottish Government's impact assessment, which suggests a cost to consumers and benefits to retailers and manufacturers.

As for the wider issue of competition in retailing, the Competition Commission examined the UK market in detail when it investigated the groceries market two or three years ago. The remedies from that investigation are still being implemented, particularly in relation to the relationship between

Col 2981

suppliers and retailers and the intention to curb planning practices that were thought to raise barriers to competition in some local markets. A package of measures is in place to address any concerns that existed about competition in the groceries sector in the UK as a whole.

Supermarkets use below-cost selling as a sales technique for a range of products. The Competition Commission considered in detail the impact of that on consumers and competition. From that perspective, such practices benefit consumers in most cases—on average, they reduce the prices that are paid. The situation might differ in individual cases, but that is the general rule.

12:45

Michael Matheson: You suggest in your evidence that

"Taxation, if well designed"

is actually

"less distortive of competition".

I take it that your preferred approach would involve a form of taxation on alcohol, rather than minimum pricing. You will be aware that the committee has received evidence to suggest that some of the big supermarkets have a tendency to absorb, or to pass on to the producers, any tax increases on alcohol. Does that suggest to you that taxation is not necessarily one of the best methods to use in tackling the problem of very cheap alcohol?

Chris Jenkins: We would prefer a tax rather than minimum pricing. If it is decided that an intervention in price is the best way of curbing demand for alcohol, the tax and duty method has a number of advantages. First, it does not lead to a transfer of revenue to retailers and manufacturers, so there would be no perverse incentives to encourage them to sell more alcohol. Secondly, the revenues that are raised through a tax or duty could—at least in principle—be channelled into addressing public policy around alcohol misuse.

On the specific point about passing the tax through, I will answer your question straight. It is true that setting a minimum price would give greater certainty about the ultimate price that the consumer would pay. If a tax was set, there would have to be assumptions made about what the degree of pass-through was likely to be. However, it is wrong to jump to the conclusion that a tax would have no impact on end-user price, which would be unlikely. The issue is how best to predict the impact and then to gear that to the price effect that you are trying to produce in the market.

Michael Matheson: My concern is that there is evidence that some supermarkets—the big

Col 2982

players—do not pass on those tax increases. In trying to deal with people purchasing low-cost, high-strength alcohol, if suppliers and retailers are not passing on increases in taxation, we do not get anywhere.

Chris Jenkins: I have not seen the evidence to which you refer. I return to my basic point, which is that although the level of tax pass-through is inherently uncertain before the tax is put in place, one cannot jump to the conclusion that there will be no price impact in the market. It is a question of policy design, rather than a case against a policy of taxation.

Michael Matheson: My next question is to the police. Concerns have been expressed that there would be a rapid increase in the numbers of white-van men darting around the country bringing cheap booze from down south in England if a minimum price was introduced in Scotland. From a policing point of view, given that you support the introduction of minimum pricing, have you considered that possibility? If that type of behaviour begins to develop, could you readily deal with it effectively?

Chief Constable Shearer: That concern is probably particularly relevant to me, not just as ACPOS president, but as chief constable in Dumfries and Galloway, as most of the alcohol would come through that area.

A lot depends on the differentials, but if you set that issue against the whole volume that can be pushed out of the market through supermarkets and off-sales, or in the on-trade, it is relatively insignificant. It could become attractive for some people to get involved in peddling alcohol, but we and HM Revenue and Customs would start to focus on that. It has never been a major issue, but we would have to assess whether it was becoming one.

In terms of the overall proportionate gain or benefit from minimum pricing, such behaviour would be a cost worth bearing that we would just have to focus on. There is no evidence, however, that there would be any real or significant impact on the market in that respect. Andrew Barker might have a view on that.

Assistant Chief Constable Barker: Similar questions have been asked in relation to the current position with imported alcohol and so on. We scoped the issue with all eight Scottish forces in the very recent past, and there is no indication that such supplies are an issue. I do not know whether opportunities for that would develop. In considering the nature of alcohol consumption as a whole and what we support as an overall package to try to reduce alcohol consumption and its effects on our service provision and on our communities, my view is that it would be a small

Col 2983

price to pay if we had to monitor and deal with issues as they arose.

Michael Matheson: Thank you—that is helpful.

Michael McHugh (West Dunbartonshire Licensing Forum): I just want to come back to the OFT finally admitting that below-cost selling goes on in supermarkets and to Mary Scanlon's reference to a 37.5 per cent increase in price. Such an increase would not be distributed among the supermarkets and retailers. If minimum pricing comes in, what we will see is that the UK Government will receive VAT and corporation tax from them. That is an important point for the committee to consider. Currently, the supermarkets get VAT back from the Government when they sell below cost in order to support them in their below-cost selling, and there is no corporation tax at all, because no profits are made. That kind of selling distorts the marketplace, because the on-trade must buy the product at a dearer level than the level than supermarkets sell it. The Licensing (Scotland) Act 2005 has a provision that means that the on-trade cannot buy from supermarkets, so we could not go to supermarkets and source the cheap drink.

The Convener: Do you want to comment on that, Mr Jenkins?

Chris Jenkins: Yes. I have a point of clarification on below-cost selling. The OFT and the competition authorities have always been aware that below-cost selling goes on; the question is whether it is a competition problem.

The Convener: Do you want to respond, Mr McHugh? I feel it is a case of "in the red corner".

Michael McHugh: In the red corner, I would say that, especially now that we are hitting the recession the on-trade is seeing customers heading to the supermarkets because we cannot compete on price. The differential between the supermarket and the on-trade is so vast that it is a no-brainer that the supermarkets are distorting the marketplace, because we can no longer compete—we are not even close. As I said, the on-trade is buying at a dearer price than the off-trade is selling, and that is before we add the VAT on to the cost.

The Convener: As you are here representing West Dunbartonshire licensing forum—I suspect that that is a lot of people—will you clarify whether you are, when you say "we", speaking as a publican.

Michael McHugh: I am sorry—that was a slip of the tongue. We have discussed the issues at our meetings, which include members of the community and so on. The trade is only 25 per cent of the committee, and they became aware of the differentials and how alcohol was being sold.

Col 2984

The Convener: Just so I kept you in the clear there.

Rhoda Grant: Again, just on that point, who is "we"? You tried to clarify—

The Convener: Twenty-five per cent of the—

Michael McHugh: I do apologise.

Rhoda Grant: What is the membership made up of?

Michael McHugh: There are 20 members of the committee, and 25 per cent of them are members of the trade—on-sales and off-sales. The rest are made up of the police, local communities and drug and health bodies.

Rhoda Grant: Are your views the views of the whole committee?

Michael McHugh: It is in our submission: we feel that what I said is going on.

Rhoda Grant: Okay. I will move on to my substantive question, which is on the social responsibility levy. It is my understanding that the levy does not fall foul of devolved taxation laws. I am keen to find out why that is the case. The Parliament does not have tax-raising powers, apart from on income tax, so how can the Parliament implement a social responsibility levy? How does that fall within our devolved responsibilities?

John Loudon: I do not know a lot about this, but I am pretty sure that the wording used in the bill reflects the wording in the Scotland Act 1998, and the levy is not a tax as such.

The Convener: Is it operating more as a fine?

John Loudon: No. Let me just think about it for a minute.

The Convener: Do you want to write to us about it?

John Loudon: We can do that. Basically, it is all to do with the fact that it is a levy. The words have been taken from the Scotland Act 1998 and blended into this bill in order to reflect what can be done rather than what cannot be done.

Rhoda Grant: I would be keen to see something in writing on that.

My second question was this: How can the same avenue be used for minimum pricing? Minimum pricing is obviously the thing that is creating legal issues with the European Union and so on. Given that a social responsibility levy can be applied to the on-trade, could such a levy be applied to the off-trade, instead of having minimum pricing?

Col 2985

Obviously, if you cannot answer question 1 at the moment, you will not be able to answer question 2.

John Loudon: I certainly cannot answer it.

Jim McLean: I do not know that I understand the question. I think that the social responsibility levy is a kind of hypothecated-tax sort of thing. I could not say whether it is within competence, but it involves quite a different arrangement from imposing a price that a retailer must charge a customer.

Rhoda Grant: So, you will not be able to use the same instruments in the Scotland Act 1998 to impose that—

The Convener: When you answer, Mr McLean, could you lean towards your microphone? I could not hear what you were saying before.

Jim McLean: Placing a levy, a charge or whatever on the industry raises quite different issues from telling the industry what it must charge consumers.

Ian McKee: No one is telling the industry what it must charge.

Jim McLean: I am sorry. I meant the minimum price that it may charge.

The Convener: No one has asked about the age of purchase or the proposals on the localised limit that could be used to prevent people under 21 from buying alcohol in certain places. Does anyone have views on that? Is it workable? It is dealt with in section 8 of the bill. Before the bill was published, the limit was going to be Scotland-wide, but the Government has now moved to proposing that the decision on the limit be localised, so that it becomes a matter for licensing boards and the police. Is the proposal fit for purpose?

Chief Constable Shearer: In some respects, it is just another tool from among a range of tools. If there was a significant issue in an area in which it was difficult to differentiate between people of certain ages, the local licensing board and the police could use the provision. However, I would not say that it was a significant tool.

The Convener: Do you think that there would be displacement if the limit were introduced in a certain area but not in others? The area could be defined quite narrowly.

Chief Constable Shearer: That would be an issue for the licensing board to consider, and measures could be introduced to deal with that sort of problem. However, it might be easier to use it as a tool in a rural area or a small town than in a large urban area. It is just another tool that could be used more locally.

Col 2986

The Convener: So, you are supportive of the proposal.

Chief Constable Shearer: Yes.

The Convener: Does anyone from the licensing side want to comment?

Mairi Millar: It might be difficult to carry out the detrimental impact assessment in order to get the necessary evidence to show that there is a link between antisocial behaviour involving persons under the age of 21 and the consumption by them of alcohol from off-sales.

More importantly, as John Loudon said, the powers that the licensing board already has under the test-purchase legislation—including the powers to take action at a review hearing—might provide more assistance in targeting the problem relating to underage sales than the carrying out of a detrimental impact assessment. Certainly, the Glasgow licensing board has already taken robust action as a result of failed test purchases.

13:00

The Convener: Are you saying that it is another tool or that it is surplus to requirements?

Mairi Millar: It is another tool, but there are difficulties in how boards will put together the detrimental

impact assessments without being challenged on whether they have enough evidence to support putting a condition on specific premises within a locality to increase the minimum purchase age without saying that those premises themselves have sold to underage persons.

The Convener: I appreciate that.

John Loudon: Whether it is a Law Society view or a personal view, I can say that when I speak to board members and ask them how they would ever do this—some committee members may have been on licensing boards—they say, "Actually, it will be very difficult to do it." I am not sure that it is a tool that is necessary at this time. I come back to the point, which I made at the beginning, about the Licensing (Scotland) Act 2005. As it only really came into force a few months ago, it has not bedded down. That is, to a large extent, because the public are not aware, in the way that they were for the law on tobacco, of the significant changes that have taken place. We got no little leaflets through the door saying, "These are the new licensing rules" on an A4 sheet, which I have suggested to people. The public do not understand the new rules and the trade probably does not understand the new rules quite as it should. The act needs to be understood so that it can bed down and work. If it is implemented in the way that was envisaged, it should work.

Col 2987

The Convener: Should section 8 come into force at a later date, when the licensing legislation has bedded down? Should it be taken out of the bill?

John Loudon: I suspect that, in a practical sense, section 8 will cause more problems and produce less benefit than is intended.

The Convener: Thank you. That is very clear.

Helen Eadie: There are obviously one or two products—I will not mention any brand names—that will not be affected by the legislation but which contain significant alcohol. One of them contains caffeinated alcohol. I notice that Strathclyde Police said last January that approaching 6,000 crime reports had included a mention of that branded alcohol. By all accounts, 40 per cent of offenders in Polmont young offenders institution in 2007 indicated that they had used caffeinated alcohol. Would Strathclyde Police, ACPOS and Andrew Barker like to comment on the problems that are caused by caffeinated alcohol? I understand that in the United States the US Food and Drink Administration announced in November that it is considering a ban, and Denmark and Norway have imposed a restriction of 150mg of caffeine per litre for alcoholic drinks. I guess that all of us round the table and in the room are united in purpose in that we want to tackle Scotland's drink problems. There is no question about that. To what extent do you regard caffeinated alcohol as also being an issue?

Assistant Chief Constable Barker: Strathclyde Police conducted a very specific study in relation to the product to which you refer. The study that you mention on young offenders in Polmont suggested that 40 per cent or thereabouts were drinking daily to a problem extent. There has been a great deal of publicity in relation to that one product, but I suggest that, as you rightly imply, there are issues with alcohol throughout the country.

Perhaps more work needs to be done, but I am not scientifically-minded enough to be able to comment on the effect of caffeine. Work needs to be done on caffeine, but we cannot get away from the fact that there is an alcohol issue across the board in all parts of the country. The popularity of the particular brand to which I think you refer is not universal throughout Scotland, but we still encounter issues with alcohol-related problems throughout the country. In short, work probably needs to be done regarding caffeine, which would require more expertise than I could attribute to myself, but we should not lose sight of the fact that, if that particular product is not used or abused in a particular area, that does not mean that there are not issues in that area relating to alcohol.

Col 2988

Helen Eadie: You support the view that caffeine is certainly an issue that we must address in respect of alcohol-related problems.

Assistant Chief Constable Barker: That has been identified by Strathclyde Police as being a particular issue in its area. Work needs to be done to examine how much of an exacerbating factor it is.

Helen Eadie: Is that a public report to which we can have access?

Chief Constable Shearer: I am not sure. I would have to explore that. Caffeine-related products appear to cause a significant problem among a particular part of the population; however, in the much wider context of alcohol issues, it is a small area. In the effort that is going into our whole approach to alcohol, it is more important that we see the big picture and explore how best to deal with that particular aspect at a later date.

Helen Eadie: There is also the McKinlay report, which was co-authored by Alasdair Forsyth. If you could allow the committee clerks access to both those reports, that would be helpful.

Chief Constable Shearer: We will explore that.

The Convener: No, I think that the clerks can explore that.

Helen Eadie: If the reports are available, it would be helpful to get them.

The Convener: If they are publicly available, you can certainly look at them. Ross Finnie has a question. Then, to be frank, I would like to draw this evidence session to an end.

Ross Finnie: It is a very quick question. Rhoda Grant raised an interesting point about the competence of section 10, entitled "Licence holders: social responsibility levy". Mr Loudon appears to be addressing that issue—I am not sure whether he volunteered or whether it just drifted into his lap. The word "levy" might have been lifted from previous legislation, but it is not clear who will impose it and who will set the charge. When the member's bill to establish a levy on plastic bags for retailers was considered, it was important that that power was conferred on local authorities in order that it was not a national tax. The power to fix the rate had to be at the discretion of the local authority and the levy had to be imposed on each individual retailer in order to avoid its being a national tax. Some of the wording in section 10 might imply that that is going to be the case, but it is not crystal clear. The clarification that Rhoda Grant asked for would assist us in determining the competency of section 10 either in its intent or as drafted.

Col 2989

John Loudon: That is interesting. The end of section 10 talks about "local authority" meaning "a council". It was my belief that the councils, not the licensing boards or the Government, would impose the social responsibility levy.

Ross Finnie: We are asking whether the wording of the section leaves the matter open to interpretation. It is not made explicit. We are both inferring that, because the end of section 10 refers to local authorities, that is the case. However, the phrase

"Scottish Ministers may ... by statutory instrument make provision for"

is not an express statement that they will provide for a local authority to impose a levy. Nor does the wording state expressly on whom the levy will be imposed.

John Loudon: I agree, although the "purpose" is mentioned in subsection (3).

Ross Finnie: That is correct. The issue that Rhoda Grant raised was about the bill's competence in general. I am merely adding specific issues on which it would be helpful to have your view as to whether it is not competent or, if it is, whether it requires to be amended. Questions have been raised about other sections.

John Loudon: As you say, it is not clear on whom the levy would be imposed. I have attended discussions between the trade and Government officials in which we have tried to come up with some sort of formula to deal with the situation should it come to pass. One group is looking at the issue from one point of view and the other is looking at it from another, and I doubt that there will ever be agreement on it, as it is such a wide topic. For instance, surely the person who walks out of a pub and breaks a window is responsible for that—not the publican, who may have thrown that person out because he thought that they had had too much to drink somewhere else. There are a range of issues—

Ross Finnie: No, there are not. With all due respect, you are now arguing policy. Section 10 states:

"for the imposition on relevant licence-holders".

It is quite explicit.

John Loudon: Sorry. You are right, although we do not know who the relevant licence holder would be.

Ross Finnie: The relevant licence holder would be, first of all, someone who had a licence. That would exclude a member of the general public who decided to throw a brick through a window—unless they were a licence holder, which would greatly interest ACPOS and might lead to a report on his not being a fit and proper person to hold a

Col 2990

licence. However, that is an entirely separate argument, which I will not have.

Let us assume that the charge will fall on a relevant licence holder. Who will impose the charge? Will that be done at local authority level? Will the charge be set separately by each local authority? Will it be gathered at each separate premises? If so, in order for that to happen, is it required to come within the mischief of a levy as opposed to a tax?

John Loudon: The short answer is that I do not know.

Ross Finnie: If you are going to comment in writing, we would be grateful if you would extend the range of your comments to cover those issues, which are germane to what Rhoda Grant asked about.

The Convener: On that point, I thank you all for your attendance and your patience today. As you will notice, the man in the moon definitely does not exist, as he has not opened the window yet and we have been waiting for two and a half hours.

13:11

Meeting continued in private until 13:25.

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