FINANCE COMMITTEE

AGENDA

5th Meeting, 2005 (Session 2)

Tuesday 8 February 2005

The Committee will meet at 10.00 am in Committee Room 2 to consider the following agenda items:

1. Smoking, Health and Social Care (Scotland) Bill: The Committee will take evidence on the Financial Memorandum from—

   Panel 1
   Paul Waterson, Chief Executive and Stuart Ross, Immediate Past Chairman, Scottish Licensed Trade Association;
   Hilary Robertson, Director and Susan Aitken, Policy Officer, Scottish NHS Confederation; and
   Councillor Eric Jackson, Social Work and Health Improvement Spokesperson, COSLA, Alan McKeown, Team Leader, Health and Social Care Team, COSLA and Gordon Greenhill, Society of Chief Officers of Environmental Health.

   Panel 2
   Hilary Robertson, Director and Susan Aitken, Policy Officer, Scottish NHS Confederation

2. Subordinate legislation: The Committee will take evidence as part of its consideration of the draft Budget (Scotland) Act 2004 Amendment Order 2005 from—

   Tom McCabe MSP, Minister for Finance and Public Sector Reform and
   Richard Dennis, Team Leader, Finance Co-ordination, Scottish Executive; Iain Leitch, Director Resources and Governance and Derek Croll, Head of Financial Resources, Scottish Parliament

3. Subordinate legislation: Tom McCabe, MSP, Minister for Finance and Public Sector Reform to move (S2M-2358) - That the Finance Committee recommends that the draft Budget (Scotland) Act 2004 Amendment Order 2005 be approved.
4. **Water Services etc (Scotland) Bill:** The Committee will take evidence on the Supplementary Financial Memorandum from—

Clare Morley, Water Service etc (Scotland) Bill Team Leader, Andrew Scott, Head of Water Division and David Wallace, Air, Climate and Engineering Division, Scottish Executive

Susan Duffy
Clerk to the Committee

The papers for this meeting are:

**Agenda Item 1**

**Smoking Health and Social Care (Scotland) Bill** and accompanying documents

Written submissions  
PRIVATE PAPER

**Agenda Items 2 & 3**

Draft Budget (Scotland) Act 2004 Amendment Order 2005 (hard copy only)

Correspondence from the Presiding Officer  
F1/S2/05/05/2

Paper from the Clerk  
F1/S2/05/05/3

PRIVATE PAPER

**Agenda Item 4**

Correspondence from the Minister for Environment and Rural Development (x2)  
F1/S2/05/05/4

Supplementary Financial Memorandum and revised Explanatory Notes to the **Water Services etc (Scotland) Bill**  
F1/S2/05/05/5

PRIVATE PAPER
Finance Committee

5th Meeting 2005 – Tuesday 8 February 2005

Smoking, Health and Social Care (Scotland) Bill - Financial Memorandum
Written Submissions

1. The Smoking, Health and Social Care Scotland) Bill was introduced in the Scottish Parliament on 16 December 2004. In order to aid the Committee’s consideration of the Financial Memorandum, the Committee will take evidence from the Scottish Licensed Trade Association, COSLA and the Scottish NHS Confederation and then Scottish Executive officials will give evidence to the Committee at its meeting on 1 March 2005.

2. In addition, written submissions have been received from the following organisations.

   - British Dental Association
   - Care Commission
   - COSLA
   - Optometry Scotland
   - Scottish NHS Confederation
   - Scottish Social Services Council
   - Scottish Health Endowment Research Trust
   - Scottish Licensed Trade Association (two research papers which were submitted by the Scottish Licensed Trade Association have been circulated separately.)

3. **The Committee is invited to consider these submissions.**

Susan Duffy
Clerk to the Committee
SUBMISSION FROM BRITISH DENTAL ASSOCIATION

QUESTIONNAIRE

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Response: The British Dental Association (BDA) is responding to Part 2 of the Bill. In this regard, we took part in and provided a comprehensive response to “Modernising NHS Dental Services in Scotland” in April of 2004. We also responded to “Towards Better Oral Health in Children” in December 2002.

The BDA still awaits formal responses from the Scottish Executive on both of these consultations.

The BDA noted the current level of expenditure on General Dental Services, outlined in “Modernising NHS Dental Services”. We also noted the level of funding that had been made available for dental practice improvements in the 3 years up to 2003.

In our response to that consultation, the BDA highlighted serious shortfalls in funding in both primary and secondary care dental services. In particular, we believe that the cost of funding the NHS General Dental Services at the current level of provision of service should be in the region of £520m, ie a threefold increase. Our estimation is based upon expenditure figures published by NHS Highland’s “Oral Health Strategy” in 2002, which shows the levels of expenditure across primary care dental services in the area. These figures highlighted a significant under-investment in the independent contractor services (the GDS), compared with the costs of providing a salaried general dental service.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Response: We do not believe our comments on the financial assumptions have been reflected in the Bill. For this reason, it is almost impossible for the BDA to comment in more detail. The Bill will enable legislation to take forward “Modernising NHS Dental Services in Scotland” before the Scottish Executive has announced its detailed policy intentions to address the shortcomings of the current system.

3. Did you have sufficient time to contribute to the consultation exercise?

Response: The original deadline of 5th March 2004 proved very difficult to meet and we welcomed the extension of the consultation to 2nd April 2004. We would suggest that consultations of this nature should extend over a minimum period of 4 months.
Costs

4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial memorandum? If not, please provide details.

Response: Not applicable

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Response: Not applicable

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Response: Not applicable

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Response: With regard to the policy intentions outlined in Part 2 of the Bill, the BDA has serious reservations on two grounds: (a) funding and (b) workforce. For the purposes of this submission to the Finance Committee, our comments and evidence here relate solely to the funding aspects, but includes reference to the funding implications with regard to workforce.

In the BDA’s response to “Modernising NHS Dental Services” we set out our recommendations for a way forward for improving oral health, and a shift towards a preventive based service.

The funding of general dental practices is mostly from item of service fees. This system generates the “treadmill” effect, which the Scottish Executive mentions in the Bill.

The BDA believes that if NHS dental services are to be truly modernised, then financial provision needs to be made to facilitate a preventive approach to dental care. This allows general dental practitioners to spend more time with patients discussing their oral health, their general health and agreeing individual management regimes. This increased time commitment must be recognised and appropriately remunerated. The current range of GDS allowances have been welcomed, however, the eligibility criteria of these are almost totally based on levels of GDS earnings, which is “output” based, rather than “outcomes” based; thus compounding the “treadmill” effect.
As long as the current system does not recognise this time and focuses mainly on funding reparaive and restorative work, modern dental services will not be delivered. Examples of where additional support might come from would be direct support for premises and infrastructure that would include things such as equipment and materials, as well as direct reimbursement for some staff costs.

The impact of the current NHS system requires dentist to work at a pace that is increasingly difficult to sustain in order to provide adequate dental care. The result is that many dentists have had to withdraw from the NHS and seek support for running their practice through the provision of dental services on a private basis. In doing so, it also enables them to allocate greater time to their patients, which they are unable to do by working under the current NHS system.

The Scottish Executive has confirmed that since 1999, 93 practices in Scotland have ceased to provide general dental service, ie NHS treatment. In many cases, this has been as a result of dentists choosing to retire early. According to the findings of the “Toothousand Project”, a survey of General and Community Dental Practitioners carried out by the Scottish Council for Postgraduate Medical and Dental Education, two thirds of GDPs planned to retire early. Half of this group planned to reduce their clinical hours in the years before retirement. The “piecework” nature of the GDS was cited as one of the main reasons; furthermore, a third of GDPs identified stress as a reason for early retirement.

Many dentists (practice owners) have found it difficult, if not impossible, to sell their practices as “going concerns”. The current criteria of the Scottish Dental Access Initiative does not allow for funding to be allocated towards the purchase of established practices. The BDA believes that if the criteria were expanded in this way, it would help address the problems associated with practice closures, not least continuation of care for patients.

Free Dental Examinations

The funding of this initiative is of major concern to the BDA. In its response to “Modernising NHS Dental Services in Scotland”, the BDA favours the development of a fully funded, comprehensive oral health assessment as part of basic oral healthcare provision. The existing dental examination 1(a) in the Statement of Dental Remuneration is insufficient to identify the needs of patients and to identify and discuss and agree with them the care regimes that they should receive as part of a modern dental service.

Dental workforce shortages in Scotland will also affect the ability to deliver this initiative. Evidence to support this statement is contained in NHS Education for Scotland 4th Workforce Planning Report “Workforce Planning for Dentistry in Scotland” published in June 2004. The Report states that in 2003

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1 Answer to Parliamentary Question S2W-12427; answer presented by Rhona Brankin on 6 December 2004
“Potential gaps in service provision may be identified by comparing the supply and utilisation model projections and the principal results suggest a current shortfall of 215 GDPs.”

The Scottish Executive has based its costs for the implementation of this initiative on the current system and “on an increase of up to 25% on the numbers of people who currently pay for dental check-ups.” The BDA finds it difficult to see how this increase in numbers of patients will be realised, more especially with current evidence showing the numbers of patients being de-registered in some areas. Evidence of a downward trend in adult and child registrations is contained in the Scottish Dental Practice Board’s annual report of 2003/2004, figures that the Scottish Executive recently presented to Parliament.

In addressing workforce shortages, the Scottish Executive must also recognise and take action on the funding of under-graduate and post-graduate education and training.

In 2000, a recommendation was made by the Scottish Advisory Committee on the Dental Workforce (SACDW) to standardise the output of the two dental schools in Scotland by setting an output target of 120 dental graduates (70 from Glasgow and 50 from Dundee), over the 5 year period 2000-2005. (Reference: “Workforce Planning for Dentistry in Scotland – A Strategic Review”).

The Scottish Executive Health Department has set a revised output target of 134, which is reflected by an intake target in 2004/2005 of 151.

The BDA believes that without significant investment in the two dental schools in Scotland, then this increase in intake will be difficult to support. The BDA understands that some of the education and training of dental students is likely to take place in a primary care setting (outreach). However, once again, this will require major investment in facilities and staff training and recruitment.

The BDA acknowledges that the proposed increase in Professionals Complementary to Dentistry (PCDs) may help to free up dentists’ time (although it has not been made clear as to how these numbers are to be increased). This is more likely to be the case if PCDs have enhanced roles within the dental team - a trend that will be facilitated under the planned new regulatory regime for PCDs. However, we note that the Section 60 Order (under the Health Act 1999) that is required to amend the Dentists Act 1984 so as to enact this change has been delayed by six months and the GDC now expects the PCD reforms will not be implemented until 2006.

Moreover, an article published in the British Dental Journal (Vol.198 No 2 Jan 2005 page 105)\(^2\), showed that the majority of registered dental hygienists in

\(^2\) “Educational needs and employment status of Scottish dental hygienists” by M K Ross (Senior Lecturer, Edinburgh Postgraduate Dental Institute), R J Ibbetson (Professor of Primary Dental Care and Director, Edinburgh Postgraduate Dental Institute) and J S Rennie (Postgraduate Dental Dean, NHS Education for Scotland).
Scotland do not work in wholly NHS practices, but in either wholly private practice or in mixed NHS/private private (39% and 41% respectively).

**GDS**

The Bill is measuring and costing the current system. The BDA is unable to comment on this aspect of the Financial Memorandum, as we do not yet know the Scottish Executive’s plans for "Modernising".

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Yes, there will be future costs associated with the Bill. The modernisation of NHS dental services in Scotland cannot take place without significant increase in the level of funding. The BDA has already provided an estimation of the investment required (as outlined above).
SUBMISSION FROM CARE COMMISSION

QUESTIONNAIRE

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Financial Memorandum for the Smoking, Health and Social Care (Scotland) Bill. In addition to the questions below, please add any other comments you may have which would assist the Committee’s scrutiny.

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?
   
   Did not take part.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
   
   Not applicable

3. Did you have sufficient time to contribute to the consultation exercise?
   
   Not applicable

Costs

4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.
   
   The financial implications as stated do provide an accurate reflection of the cost implications to the Care Commission.

   Services which are excepted by regulations and that are not required to register with the Care commission will not incur regulatory costs in the form of Care Commission fees that are set to recover the full cost of regulation.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?
   
   There are no material financial costs to the Care Commission associated with the Bill.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not applicable

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

No future costs that would impact on the Care Commission can be identified.
SUBMISSION FROM COSLA

Purpose
The purpose of this paper is to provide the Scottish Parliament’s Finance Committee with an outline estimate of the costs associated with the introduction, implementation and continuing enforcement of a ban on smoking in wholly enclosed public spaces as proposed by the Smoking, Health and Social Care (Scotland) Bill. The Committee is asked to note that these are preliminary costs that COSLA will refine with its member councils. The costs will, in addition, be discussed with the Scottish Executive.

Principles
1. COSLA supports the principle of the ban on smoking in enclosed public spaces and regards it as a major step in advancing the health improvement agenda which is one of our member councils’ priorities.

2. Support for the principles and goals of the Bill is dependent on the Scottish Executive providing full funding to allow for the successful implementation of the Act. This is standard COSLA policy and was reiterated as part of our spending review submission in 2004.

The Financial Memorandum
3. As usual, as required by the Parliamentary process, the Financial Memorandum was published with the Bill itself but in the absence of the detailed Regulations that will accompany the new legislation. This has caused practical problems in costing the implementation of the smoking ban and means that, at best, COSLA’s current estimate can only be an estimate. Costing new legislation is an important part of the legislative process, for all parties involved, but it is particularly important to ensure the integrity of any new legislation and its efficacy. Against this background COSLA’s member councils have provided the best estimates possible. The Committee is asked to recognise this and also the fact, that, at this stage, the interpretation of costs will vary between authorities. Any inconsistencies in approach will be addressed as estimates are refined.

4. Work with COSLA member councils has produced an initial first year estimate for the implementation of the ban of smoking in public places. Based on figures available, we believe that the total cost in 2005/6 and 2006/7 is in the region of £6 million.

5. With regard to the other elements of the Bill, the financial memorandum states that no major financial implications have been identified for local government at this stage. However, the cost neutral description of the section relating to Joint Ventures should be treated with some caution. It is felt that, in the long term, this could have implications for local authorities and COSLA would wish to reserve its position on this element of the Bill.

6. The commentary in Executive’s Financial Memorandum on the banning of smoking in public places reflects the uncertainty which all parties feel
surrounds the financial elements of the Bill. It rightly states that the implementation costs for local authorities have yet to be determined and will be linked to the detail of the Regulations which have yet to be drafted. It also recognises that additional costs in the early years are likely, an open acknowledgement that is welcome. It is therefore against this background that this evidence has been prepared and the Committee will recognise that the figures used are estimates only. However, experience does indicate that where councils have given detailed estimates, the outturn costs are unlikely to vary significantly.

7. The evidence has been prepared within a short timescale to meet the Committee’s deadline and there has been little opportunity for cross checking, either at Council or COSLA level. When the Regulations are available, it is intended to repeat this exercise against the more detailed background the Regulations will provide and COSLA will be happy to make the information from this available to the Committee.

8. As indicated in the introduction to this paper, COSLA will also be working with the Scottish Executive on these financial estimates.

9. One specific point emanating from the Financial Memorandum that COSLA would like to raise relates to the generally held view that enforcement costs will diminish over time. This is accepted, but there are concerns that it may take longer than anticipated for opposition to the ban to fade. To ensure the success of the ban therefore ongoing commitment is needed from all parties involved. The ban is not a ‘quick fix’ but the beginning of what will be a sustained campaign against the damaging effects of smoking on health. The investment of sufficient resources both initially and on an ongoing basis will be essential.

10. What will not be available with the Regulations and in the next year or so with actual experience of implementation is firm evidence of the financial benefits of the legislation. Some of these benefits to health will be long term and COSLA would prefer to leave it to statisticians to attempt to quantify the cost benefits to employers, the NHS and individuals, of living and working in a smoke free environment. What is clear, however, is that there will be real benefits which must be borne in mind when considering the cost of implementing the legislation.

Individual Issues
11. COSLA would wish to comment on and highlight a number of individual issues with financial implications. These are:

Staff
12. There is already an acknowledged shortage of Environmental Health Officers – a situation likely to be exacerbated given the age profile of the profession. This is an issue the Scottish Executive has already agreed to discuss. It is a fact, however, that the enforcement needs of the smoking ban will create further demands and difficulties on council staff with considerable efforts being required for recruitment. It is recognised that fully qualified
EHOs will not necessarily be required for all elements of the resulting workload and enforcement officers will be employed too – typically authorised/technical officers. This will very much be a matter for individual authorities to determine and current staffing arrangements will be a factor.

13. The possibility of combining smoking legislation duties with existing EHO officer work and with enforcement officers to be responsible for liquor license standards work will be considered by individual authorities, but decisions here will be on an individual authority basis. (For example, in one authority it is not envisaged that the Liquor Licence Standard Officer will be involved in the enforcement of the smoking ban in licensed premises. This post is considered to be a liaison and advisory link between the Licensing Board and licensees and accordingly will at most report breaches of licensing conditions to the Board. It is considered that a direct involvement in enforcement would compromise this link.) Discussions are also taking place between COSLA and the HSE regarding respective responsibilities, possible cross over etc but these discussions are at a preliminary stage.

14. There are concerns that the Executive will only fund enforcement for an initial period and that funding will then decrease with revenue consequences for councils.

15. ‘Lone working’ will not be an option given the need for corroboration and the nature of the premises to be visited allied to the police position that they are not able to commit resources to assist in the enforcement of a ban.

16. Much of the work will be of an ‘out of hour’ nature – overtime payments will be the norm.

17. For rural councils, (and notably islands authorities) given the geography of their areas, there will be particular organisational issues to be addressed and extra expenses incurred.

18. The introduction of the new legislation, if the planned timetable is achieved, will more or less co-incide with the introduction of the new EU Food Hygiene Regulations (from 1 January 2006) which will also place significant additional burdens on environmental staff.

Lead in time
19. Assuming the implementation date for the legislation will be 1 April 2006, work will be required prior to that and expenditure incurred in the current financial year. Ideally staff should be in post some months before the legislation goes live. Publicity and consultations with businesses should ideally be allowed a generous timeframe.

Street Cleaning
20. An increase in street cleaning – particularly in city centres – has been identified by elected members as a likely outcome of the ban. At the moment cigarette litter is a particular issue at the entrance to shopping centres and
large office complexes and it is a problem that is expected to increase once the legislation is enacted.

21. There are differing views, however, as to the additional burden this will impose on councils and as with many of the issues relating to enforcement of the ban, advance quantification of their impact is not an exact science. Where streets are not swept in the evenings this might need to be reviewed. If cleaning is required in other than city centre areas, any noise caused by the sweepers will be a consideration. Cigarette related litter is difficult to deal with by mechanical sweeping and is labour intensive. What is clear is the view that responsibility for the immediate environs of premises such as pubs, clubs and restaurants should lie with proprietors allied to a licensing condition that licensees provide cigarette disposal facilities and/or local cleaning at licensed premises. Capital costs for the provision of additional litter bins are anticipated by many councils and to this must be added the cost of their installation and servicing.

Training
22. Training will be required not only for all staff involved, but also for elected members. A central training resource (perhaps a bespoke, module-based course) that can be delivered remotely has been suggested.

23. Training should include: enforcement; how to deal with confrontational situations/aggression/assertiveness; court room training; statement taking, record keeping; use of computers and relevant programmes

Publicity materials
24. These will be required on both a national and local basis and, as usual, in minority languages etc. Clarification is awaited as to how the £2M expenditure identified by the Scottish Executive for ‘communication ahead of implementation’ will be used. It is hoped that a proportion at least will be allocated to the central production of materials that can in turn be individually badged by councils.

Income generated from fines
25. It is not anticipated that income generated from fines will be high, but that income should be retained by councils for use, for example, to:- offset the cost of implementing the legislation, for smoking cessation services or for sports grants in keeping with the public health theme.

Start up Costs
26. These will include: advertising and employment of new staff; the development of enforcement strategies; preparation for training for enforcement and front-line staff, elected members and senior management; briefing of administrative and managerial staff and training of existing and new enforcement staff; promotion/publication of the new law and councils’ approach to enforcement, associated management of Freedom of Information and the provision of information to the public and businesses (recognised that the Scottish Executive could provide some materials centrally for badging by
individual councils); use of existing EHO staff to provide advice on the ban in the run up to implementation.

27. Inspections will require to be at a higher level initially, but it is anticipated that the need for these will decline to a lower, constant rate over time.

Exemptions
28. Depending on any exemptions agreed later through Regulations, there could be financial implications for councils’ social work and housing services, eg to upgrade premises, the introduction of transitional arrangements as part of a move towards smoke-free status as well as a need for continuing support to protect workforce and client health in them. Private agencies used by councils as care providers could pass on costs to councils as service users.

Practical Experience
29. Councils’ experience of implementing similar legislation – eg dog fouling – is varied. In one council, 20-25% of fines are unpaid. The cost of pursuing these through Sheriff Officers is not cost effective.

Conclusion
30. The financial comment and estimates contained in this paper have been based on the information available to date, in some cases projected scenarios and best estimates. COSLA would welcome the opportunity to return to the Committee with more detailed financial information once its member councils have had the opportunity to consider the full implications of the new legislation in light of the detailed regulations.

February 2005

<table>
<thead>
<tr>
<th>Council</th>
<th>Estimated Costs (2006/07) + prep costs</th>
<th>Comments*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aberdeen City</td>
<td>114,000</td>
<td>Probably 75k in future years; 5000 premises; 2 FT officers; 24k start up</td>
</tr>
<tr>
<td>Aberdeenshire</td>
<td>109,100</td>
<td>1 senior officer; 2 authorised officers; admin asst + 10k essential training</td>
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<tr>
<td>Angus</td>
<td>108,000</td>
<td>Includes start up costs in 05/06; for 05/06 - Senior EHO/EHO on out of hours conditions (33k); links with other enforcement teams – 5k; publicity + comms materials – 2k; for 06/07 – 08/09 – Senior EHO – 45k; 2 PT EOs – 20k; publicity, comms – 5k. 22.7k pa estimate after 06/07</td>
</tr>
<tr>
<td>Argyll &amp; Bute</td>
<td>145,000</td>
<td>Includes ICT set up costs of 10K + 4K for publicity materials, assuming central provision of some materials</td>
</tr>
<tr>
<td>Clackmannanshire</td>
<td>52,000</td>
<td>25k staffing (AP3); 15k street cleaning; training 2k publicity etc 10k; admin – 15k</td>
</tr>
<tr>
<td>Comhairle nan Eilean Siar</td>
<td>55,000</td>
<td>Initial recruitment training + indirect costs + possible legal &amp; admin costs</td>
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<tr>
<td>Dumfries &amp; Galloway</td>
<td>159,800</td>
<td>5-6000 premises (includes food premises + other where H &amp; S enforced) 4FT officers (1 co-ordinator + 3 tech officers); for first 18-24 months reducing to 2 (co-ordinator + 1 tech officer) in next 18-24 months. + admin backup</td>
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<tr>
<td>Dundee City</td>
<td>95,500</td>
<td>includes 1 EHO (37,000); 1 Enforcement Officer – 25,000; Staff, training, overtime, travel, IT, local publicity + 5k initial set up</td>
</tr>
<tr>
<td>East Ayrshire</td>
<td>135,000</td>
<td>2 EHOs; Includes oncost; 10k for training + other operational costs + 10K street cleaning, litter bin provision</td>
</tr>
<tr>
<td>East Dunbartonshire</td>
<td>143,500</td>
<td>2 EHOs - 72k. accommodation – 13k; elected member training 1k – 2.5k; publicity; 5k additional street cleaning 50k</td>
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<tr>
<td>Council</td>
<td>Population</td>
<td>Costs Description</td>
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<tr>
<td>Edinburgh City</td>
<td>403,000</td>
<td>17,000 premises currently inspected – a further 3,000 expected to fall within the smoking legislation; 173k for staff (1 EHO; 1 EO; 2 Env Wardens; 2 EOs (night team); 230k - other costs (16k recurring overheads; 1k elected member training; 30k staff communication and signing; 10k publicity.</td>
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<tr>
<td>Fife</td>
<td>420,000</td>
<td>2 FT EHOs per area, reducing to 1 FTO per area as legislation beds in – 180kv for years 1 and 2, 90k thereafter; includes costs for mechanical sweepers (80k) + additional manpower; + additional litter bins</td>
</tr>
<tr>
<td>Glasgow</td>
<td>896,000</td>
<td>192k of this for first year only; 404k for initial 3 years. Covers additional EHOs – 1 team leaders + 5 enforcement assts + admin support – 250k for 3 years; legal support; technical &amp; admin support; monitoring; publicity &amp; info materials; additional street cleaning – 144k pa.</td>
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<tr>
<td>Highland</td>
<td>184,000</td>
<td>Staff only costs – 4 additional staff; 4,500 premises, but 1500 estimated to require active regulation. Other costs to be added later - admin, re signage.</td>
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<tr>
<td>Inverclyde</td>
<td>140,000</td>
<td>Includes 40k in 05/06 for preparatory work</td>
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<tr>
<td>Moray</td>
<td>126,500</td>
<td>Covers 4 officers (poss qualified technical officers) – 117k; training for new and existing staff and also Licensing Board members – 4k ; implementation in council premises – 1k; printing of fixed penalty notices + establishment of systems – 3.5k. NOT included, but expected to be substantial – additional street cleaning costs and also publicity materials which it is felt should be produced by the Executive.</td>
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<tr>
<td>North Ayrshire</td>
<td>40,000</td>
<td>1 EHO only costed + training</td>
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<tr>
<td>North Lanarkshire</td>
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<td>Using Irish experience as model; 8,600 premises – risk assessment required in some form to determine priority for visits; specialist unit will be required, managed by an EHO and initially staffed by at least 6 technical officers on short term contracts; flexible working patterns and out of hours working.</td>
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<tr>
<td>Orkney</td>
<td>128,000</td>
<td>Based on 2 officers at 30k, including out of hours working, training, mileage and publicity. Pre-implementation costs included cover training, consultations with businesses, training for elected members. NOT included is cost of employing EHOs in lead in period pre-April 06.</td>
</tr>
<tr>
<td>Perth &amp; Kinross</td>
<td>312,500</td>
<td>5-6 staff at AP3-4; training; staff time + management costs; equipment – mobile phones, laptop PCs, printer etc; hire equipment (2 vans + running costs); publicity; admin (clerical support; job adverts; accommodation etc). Excludes training, street cleaning costs and miscellaneous additional costs</td>
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<tr>
<td>Scottish Borders</td>
<td>196,000</td>
<td>Includes 1 senior warden + 4 wardens + vehicles, training transport, recruitment – 155k; 1 AP111 officer – 35k; training 3/.5k; signage 1.5k publicity 1k</td>
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<tr>
<td>Shetland</td>
<td>75,100</td>
<td>2 EHOs at higher salary point (36,869) assumed; training £600; mileage costs</td>
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<tr>
<td>South Ayrshire</td>
<td>302,200</td>
<td>Covers additional staff + overtime, additional litter warden, training + publicity – 81k; additional street cleaning – 56k; provision of bins and their servicing – 182k</td>
</tr>
<tr>
<td>South Lanarkshire</td>
<td>470,000</td>
<td>Includes 170,000 for lead in work; costs for years 2 + 3 reducing to 230k; anticipated 6965 premises</td>
</tr>
<tr>
<td>Stirling</td>
<td>132,500</td>
<td>Senior EHO SCP 39-42); 3 EHOs SCP 31-38 Admin support (SCP 13-15); training; office accommodation</td>
</tr>
<tr>
<td>West Dunbartonshire</td>
<td>190,000</td>
<td>76k for start up + 114k in 05/06 covering recruitment, training of 2 EHO + 2 student EHOs, publicity + other misc costs; 113k and 114k in following 2 years; further 20% reduction anticipated in 09/10.</td>
</tr>
<tr>
<td>West Lothian</td>
<td>75,000</td>
<td>Includes staff (AP4), training, promotional work; 5000 premises</td>
</tr>
</tbody>
</table>

- comments are summaries only extrapolated from detailed submissions. Where councils have provided low and high estimates of staff costs, these have been averaged.

**Notes:**

'Start up' costs typically include: development of enforcement strategy; training of front-line staff, elected members and senior management; briefing admin and managerial staff; promotion/publication costs- eg staff time, postage, officer time for preparing and presenting seminars, press releases, briefings etc; advance advice provision by EHO staff; recruitment costs; accommodation and equipment costs

Enforcement costs typically include: initial high volume of inspections, decreasing over time; out of hours working; provision of advice; responding to complaints; monitoring; technical and admin support.
SUBMISSION FROM OPTOMETRY SCOTLAND

Smoking, Health and Social Care (Scotland) Bill: Financial Memorandum

I am writing as Chairman of Optometry Scotland, the organization that represents the profession which will be charged with the implementation of the Partnership Commitment on “free eye checks”, as provided for in the Smoking, Health and Social Care (Scotland) Bill. We wish to take this early opportunity of advising the Committee that, in our view, the funding estimates contained in the Bill are likely to fall well short of that required to fulfil the Commitment.

We appreciate that the figures in the Bill were produced from the currently available GOS data and that the SEHD have informed the Health Committee that information on any additional costs for Dental and Optometry services will be made available as soon as practicable.

At the request of the Scottish Executive, The Review of Eyecare Services in Scotland is currently considering fundamental changes in the nature of care and responsibility optometrists will have for Eyecare in the community. The Centre for Change and Innovation is designing pathways for Eyecare that will make use of the services of Optometrists at a level far in advance of that for which the current very limited General Ophthalmic Services contract was designed almost 60 years ago. The introduction of Community Health Partnerships and integrated inter-disciplinary working arrangements will reinforce this updated provision of Optometric Eyecare.

Using Optometry, in the way under discussion with the SEHD, will reduce acute referrals to the hospital sector by approximately 40%. There will also be considerable direct patient, carer and social benefits that it is our intention to quantify within the interim Review of Eyecare Services Report.

OS believes that this Bill offers the opportunity to provide Scotland with a primary Eyecare service of which it can be truly proud and which will contribute significantly to a real health gain for the country. This must, however, be accompanied by realistic funding and we will continue to work with SEHD to develop the detail of that.

We would therefore commend the Smoking, Health and Social Care (Scotland) Bill to the Finance Committee and encourage its support bearing the caveats above in mind.

Yours sincerely,

Hal Rollason
Chairman
1. The Scottish NHS Confederation is the independent representative body for NHS Scotland boards and special health boards. We are grateful to the members of the Finance Committee for giving us the opportunity to present evidence on this important bill.

2. We have confined our comments to the sections of the bill where we believe that there are potential significant financial implications for NHS organisations. We have not commented on the implications for NHS National Services Scotland as, although they are one of our member organisations, they are giving their own evidence to the committee.

3. A key point that the committee should bear in mind when considering all new cost commitments for NHS boards is that, despite significant increases to their allocations in recent years, boards have only very limited financial scope available to develop new services or take on new commitments. This is because funding increases have been accompanied by new cost pressures which account for the greater part of boards' annual allocation uplifts. Chief amongst these is the UK-wide pay modernisation agenda (the new GMS and consultant contracts and Agenda for Change), along with increases in prescribing costs and a revaluation of the NHS estate. Further pressures to come in the future will include the implementation of Modernising Medical Careers, the review of training for doctors. NHS boards increasingly find that their annual allocation uplifts are largely accounted for by the time they reach them, and that they have very little left over to redesign and develop services. Audit Scotland reported that of the additional £2.7 billion allocation uplift (£1.8 billion in real terms) for the whole of NHS Scotland 02/03, £1.4 billion was already accounted for, not including Agenda for Change. This picture was confirmed by the most recent Auditor General's overview of NHS Scotland financial performance, which concluded: "Despite significant increases in funding …the NHS in Scotland is facing unprecedented challenges over the coming years…the fixed costs associated with staffing and property will make it difficult for NHS boards to free up money for redesigning services." 

4. Prohibition of smoking:
The Confederation fully supports the proposals to prohibit smoking in public places and is confident that, in the long-term, it will result in a considerable reduction of the estimated £200m per annum that smoking-related ill-health currently costs NHS Scotland. It is extremely difficult to predict when these savings will be released and at what level they will be achieved, as the wide range of the Executive’s own estimate (£5.7m – £15.7m) in the Financial Memorandum indicates.

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3 Overview of the NHS 2002/03, Audit Scotland August 2004
4 Overview of the financial performance of the NHS in Scotland 2003/04, Audit Scotland December 2004
5. In order that the full health benefits of the prohibition of smoking in public places are realised, the policy should be supported by further investment in NHS smoking cessation services. The Executive has already confirmed, in A Breath of Fresh Air – Improving Scotland’s Health: The Challenge, that funding for smoking cessation will rise to £5m across Scotland for 2005/06. This figure is welcome but may need to be supplemented, not only in order to respond to increased demand as a result of prohibition of smoking coming into force, but also in order to allow NHS boards to actively promote their full range of smoking cessation services without fear of staff being overloaded, waiting times building up or prescription costs increasing significantly in the short-term. Several studies (such as Buck and Godfrey 1994\(^5\) and Parrott and Godfrey 2004\(^6\)) have found smoking cessation services to be one of the most cost-effective forms of health intervention. It is difficult to say in advance of prohibition being implemented how much extra investment may be required, but the Executive should be prepared to respond if necessary to the evidence presented by NHS boards.

6. **Free eye and dental checks**
   The Confederation has always welcomed the proposal to introduce free eye and dental checks as an important contribution of preventive health care, but we have had some concerns about the impact that the costs of providing free checks would have on existing NHS services. We are pleased therefore that the Executive has committed to provide funding to National Services Scotland to cover the costs of free checks, but stress that this must be additional funding and not drawn from existing NHS allocations.

7. **Provision of General Dental Services**
   Section 13 of the bill provides for NHS boards to provide assistance and support, including financial assistance to general dental practitioners. This could be a useful method of encouraging dentists to contribute more of their time to treating to NHS patients or to move into areas which are currently lacking in dental provision. We believe however that it could also lead to an expectation on the part of practitioners that financial assistance will be provided, and that this burden will fall particularly on boards where there are particular shortages of NHS dentists and/or where issues with the quality and availability of premises have been identified, such as in remote and rural and urban deprived communities. The Executive should, in the interests of ensuring an adequate level of dentistry provision across Scotland, consider providing additional resources for those boards which are likely to find themselves in the position of having to make higher levels of financial assistance available.

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8. The estimation in the financial memorandum of a £500,000 increase in administrative costs across NHS Scotland resulting from the new GDS provisions seems reasonable and, if the actual costs turn out to be in this region, they should be found fairly easily from existing allocations. However, it is difficult to predict exactly what administrative costs will be in advance of the new provisions coming into force, and once again it is likely that a larger burden will fall on those NHS boards that currently face particular problems with dental service delivery.

9. **Pharmaceutical care services**
   The Confederation fully supports the Executive’s intentions, set out in *Modernising Community Pharmacy*, to further integrate community pharmacy into the NHS, to increase the clinical care offered by community pharmacies and to improve access to community pharmacy services across Scotland, as part of the overall strategy to deliver services closer to patients. An important element of this strategy is the new responsibility for NHS boards to secure the provision of adequate pharmaceutical services in their areas, and we support the plan to disburse the existing national ‘global sum’ to NHS boards so that they have more control over the use of that money in response to local needs.

10. We do not believe, however, that the current global sum of £97m for the whole of Scotland will be sufficient to allow boards make the investment that will be required to adequately rectify under-provision of pharmaceutical services over and above the maintenance of existing services. Until boards develop their individual Pharmaceutical Care Services (PCS) Plans, we cannot say exactly what the extent of under-provision is and what it will cost to address, however we do know that there are significant service gaps in many remote and rural and deprived urban areas. Expanding provision to fill these gaps and to ensure that there is equitable access to PCS across Scotland will have significant cost implications. The Financial Memorandum does give some indication of the specific costs that may be involved (£30,000 to £80,000 for fitting small to medium-sized premises), and it can be seen even from this broad estimation how costs could quickly accrue for boards which have significant service gaps to fill. These costs will be extremely difficult for boards to meet from their annual allocations at the present time, for the reasons that we outline in paragraph 3. The Confederation believes that the Executive should give serious consideration to finding additional resources for boards to fulfil their PCS Plans once they have been drawn up. The expansion of community pharmacy will be an important factor in the successful implementation the Executive’s health policy agenda and it should be funded properly.

11. Once again, the estimate of £500,000 across NHS Scotland for additional administrative costs associated with the new PCS provisions
does not seem unreasonable, but the true figure will not be quantified until implementation begins to take place.

12. **Joint Ventures**

The development of a Joint Ventures model would provide NHS boards with another vehicle, if they choose to use it, to invest in and expand community premises and services. Since there is so little flexibility within annual financial allocations for service development, the creation of new options for NHS boards in this respect is welcome. The new arrangements for securing and exploiting intellectual property developed within the NHS are also welcome, and are a source of potential income. Both of these are complex issues and we look forward to seeing the outcomes of the work of the Joint Premises Project Board for further detail on implementation.

13. Finally, we would reiterate that NHS boards currently have very limited capacity within their existing financial allocations for service expansion. One idea that has come from Confederation members is that the Executive should provide boards with financial memorandum-type costings for new health policies, before they reach legislative stage, where this is relevant. We would suggest that this would be extremely useful, not only to aid financial planning at the centre and at board level, but also to assist the Parliament’s committees in their scrutiny of health policy.
SUBMISSION FROM SCOTTISH SOCIAL SERVICES COUNCIL

Smoking, Health and Social Care (Scotland) Bill – Financial Memorandum

Thank you for the opportunity to comment upon the Bill. The Council was aware of the Bill and supports the amendments relating to its functions. (These can be found in the Explanatory Notes, page 19, paragraphs 131-135; page 38, paragraph 259 and in the Policy Memorandum, page 24, paragraph 140). The Council brought to the attention of the Scottish Executive the issues it wished to see addressed relating to its functions. We do not anticipate any additional costs arising out of the sections relevant to the Council’s function and responsibilities.

Yours sincerely

Carole Wilkinson
Chief Executive
SUBMISSION FROM SCOTTISH HEALTH ENDOWMENT RESEARCH TRUST

SHERT was involved in discussions with the Chief Scientist Office about the proposed wording for the section of the Bill dealing with the repeal of SHERT’s public body status and was also asked for comments on the financial assumptions which are now included in the Financial Memorandum.

The Financial Memorandum accurately reflects the financial implications for SHERT connected with the repeal of public body status in the way proposed in terms of Section 32 of the Bill.

SHERT can meet the one-off financial cost associated with the Bill.

We would also comment that, in the long term, we do anticipate that the change of status will lead to cost savings for SHERT. These are impossible to quantify and have therefore correctly been reflected in the Financial Memorandum as being “at the most ……… neutral”. Perhaps the likelihood of cost savings could be emphasised to the Finance Committee.

Any comments or queries should be directed to Simon Mackintosh or Alexander Garden at Turcan Connell, SHERT’s Secretaries.

Turcan Connell
Secretaries to SHERT
10th January 2005
SUBMISSION FROM THE SCOTTISH LICENSED TRADE ASSOCIATION

On behalf of the SLTA I am writing to formally respond to your invitation to give a written submission to the Finance Committee on the Financial Memorandum of the Smoking, Health and Social Care (Scotland) Bill. As previously advised both Paul Waterson, Chief Executive, and I will be representing the SLTA at the oral hearing on Tuesday 8 February.

The SLTA represents 1,800 licensees in Scotland who are mainly independent self-employed publicans operating bars and small hotels throughout the length and breadth of the country.

There is a common misconception, perhaps derived from uninformed press reports, that the SLTA has opposed the Government’s plans to increase restrictions on smoking in public places. On the contrary, we have been working with the Scottish Executive for five years as partners in the Voluntary Charter and we proactively approached the Deputy Health Minister in May 2004, asking him to legislate for the introduction of significant restrictions on tobacco smoking in licensed premises with incremental restrictions being introduced on an annual basis.

We would like to present six principal points for your consideration and for further debate at the oral hearing:

(a) The Financial Impact Study carried out by the Scottish Executive (through Aberdeen University’s International Review) has been incomplete, irrelevant and rushed.

(b) Independent research, commissioned by the licensed trade, suggests that the financial impact will be far greater than stated in the Financial Memorandum.

(c) We feel it is extremely important that Scotland’s policy on tobacco restrictions should be aligned to the policies adopted in the rest of the UK. There should be exemptions for licensed premises which do not serve hot food.

(d) The knock on effects of the health and economic impact of a sudden, outright ban have, so far, not been fully considered by the Scottish Executive.

(e) The gradual or phased approach may well achieve improved health results, in comparison to the outright ban approach.

(f) The licensed trade wishes to continue to work with the Government to achieve the common aim of a healthier Scotland.

Can I now elaborate on these six points.

(a) **Lack of Relevant Research**
The licensed trade has commissioned the Moffat Centre for Travel and Tourism Business Development, Glasgow Caledonian University, to undertake a project to source, review and evaluate existing research which has been undertaken in analogous destinations and countries which have legislated for either an outright or a phased ban on smoking in workplaces. This included the aforementioned International Review undertaken by the University of Aberdeen.

Their report is herewith attached at appendix 1.

The Moffat Centre conclusions include:

- The weakness of the International Review is its lack of relevant evidence to:
  
  (a) support the argument that an outright ban in all workplaces will reduce the number of smokers when increases in smoking may be displaced elsewhere eg in the home

  and (b) make a claim that a no smoking policy will not harm the hospitality business, particularly bars.

  (page 50 refers)

- The authors of the International Review add weight to the above argument by freely admitting that “the estimates for Scotland of the impact on the hospitality sector of a smoking ban are not considered to be as robust as the estimates for the health effects”. This was likely to be the case as the authors are from a health background.

  (page 50 refers)

- We would expect pubs and bars to feel the negative effects of a total ban much more keenly than in the restaurant and hotel sectors. (page 54 refers)

- Nearly all the governments in the countries and states reviewed for this work, with the exception of Ireland, have given significant notice of their intention to introduce a total ban on smoking in hospitality establishments. This is only fair given the apparent difference in perception of the public towards smoking in different categories of hospitality premises. The Scottish Executive could take a lead from the experiences of other nations’ legislature. (page 54 refers)

- It has been acknowledged as a weakness in the Executive’s commissioned research that the studies reviewed do not include analysis of a total ban situation. This is compounded by the lack of transferability of the cases used in their argument. (page 54 refers)
A government-backed investigation into the effects of the ban in Ireland could be undertaken, using a cross sectoral group that encompasses health experts, industry practitioners and government policy makers. This would surely provide a consensus on the effects of and timescale for introducing a total ban, if that was the conclusion of the group. (page 55 refers)

(b) Likely Financial Impact

The licensed trade in Scotland has been alarmed by the lack of any in depth study of the potential financial impact of the smoking ban. As one of the key partners in the “Against an Outright Ban” Group we commissioned the Centre for Economics and Business Research (London) to independently review the economic impact on both the licensed trade and the beer industry in Scotland. The CEBR report is attached as appendix 2. Its findings include:

♦ The value of annual turnover in the licensed trade will decline by £105m (page 5).

♦ Annual profits in licensed premises may decline by £86m (page 5).

♦ Employment in the licensed trade can be expected to decline by 2,300 jobs initially (page 5).

♦ About 142 average sized licensed premises may close as a result of decreased trade (page 5).

♦ The Chancellor of the Exchequer may lose out on a total of £59m in annual tax revenues from Scotland (page 5).

(c) Alignment with the Rest of the UK

The SLTA feels strongly that Scotland should align its general smoking policy with that of the rest of the UK. Tourism is a major contributor to the economic welfare of Scotland and we feel that there is a strong possibility of tourists preferring English destinations rather than Scottish ones as a result of the different tobacco policies. Eighty percent of visitors to Scotland are English based. There is support for this theory from American boundary States (see page 40 of Moffat Centre research) where border-hopping has become an issue.

We would like to make it clear that we do not agree with the exemptions proposed in England for registered clubs. Whatever smoking restrictions are introduced (in any country) it is not fair or reasonable to give preference to clubs (which don’t pay tax on their profits) over business premises (which do pay several different taxes on their income). If clubs are subject to different laws from licensed premises, health problems are not solved – they are merely shifted.
(d) **Knock on Effects**

Little recognition seems to have been afforded to the ramifications of a downturn in the Scottish leisure industry and the consequences of lower employment. The fear of unemployment affects the mental and physical welfare of all those who work in any industry which is subjected to such sudden cultural change as this.

Moreover, there has been no Scottish Executive research into the potential consequence of smokers ceasing to visit licensed premises and switching their disposable spend into take home drinking. Approximately six-sevenths of health problems encountered from ETS are derived from domestic situations and it is quite possible that the outright ban approach will result in greater health problems as a consequence. Obviously, this is a crucial point and we strongly contend that the Scottish Executive should conduct independent research into the likelihood of this before any legislation is approved.

(e) **The Benefits of the Gradual Approach**

The Scottish Executive’s own research, and many other opinion surveys show that the Scottish public favour tobacco restrictions but they also favour a gradual approach to the banning of smoking in licensed premises. It is our contention that the public will support a phased approach to an eventual ban but could well be hugely resistant and rebellious to the outright ban proposition. If the outright ban proposal simply fosters the “couch potato syndrome” the desired effect of moving towards a smoke free Scotland will not be achieved. The legislation will not solve a health problem – it will simply shift the health problem from ETS experienced in public places to ETS experienced in domestic environments.

(f) **Working Together in the Future**

We would stress that the Scottish Licensed Trade Association wishes to continue to work with the Government to improve Scotland’s health and we understand fully the benefits of a reduction in tobacco consumption. What we are seeking at this stage is a reappraisal of the best means to achieve the desired outcome. It will be to the benefit of all parties if the Scottish Parliament adopts a phased approach to a smoking ban or the structure proposed by Dr John Reid for England (apart from the matter referred to earlier – there should be the same smoking rules for pubs and clubs).

These are our main points. However, we would further comment on the Financial Memorandum as follows:

1. No attempt seems to have been made to examine the loss of excise duty, VAT, etc to the Exchequer should smoking of tobacco reduce following the implementation of the ban. The most recent figures
(2001/2002) calculate excise duty on tobacco to be £9.5bn. Scotland has about 9% of total UK population so it is fair to assume that the tobacco take from Scotland is circa £855m. Section 202 of the Financial Memorandum pontificates that 4% of smokers might quit following the introduction of a workplace ban. If that proves to be the case the tobacco take will decrease by over £34m. Against that, NHS savings due to 4% lower treatment costs would be £8m. Thus, the net cost would be in the region of £26m.

2. The Financial Memorandum makes reference to National Health Service Scotland savings should there be a reduction in the number of smokers over time and therefore a reduction in the treatment of smoking related diseases. However, the Memorandum fails to endeavour to capture the cost of expensive geriatric healthcare and attention if longevity is achieved through the smoking ban.

3. Further, no attempt has been made to calculate the cost to the country of providing pensions for smokers who live longer as a result of the smoking ban. This is a major issue for everyone at present – pensions are not being funded adequately as it is.

We would also make the following observations on the Financial Memorandum:

(a) If the smoking ban is to be enforced effectively by the authorities we estimate that each of Scotland’s 32 licensing boards will require around six additional environmental health officers to cover the geographic territory and the long working day within the licensed trade (including sports and social clubs) which stretches to almost 24 hours. We believe that the cost of this policing could amount to as much as £6 million per annum.

(b) We are baffled by the “international research” which is suggesting that there will be an identified saving from smoking breaks which would no longer be permitted under the terms of the proposed legislation. This is patently a nonsense. If smoking breaks are permitted by employers at the moment then it is clear that the staff involved will require to leave the premises rather than stay within the premises, once the ban is imposed. So there would be no cost implication whatsoever. However, it is our experience that very few employers permit smoking breaks in Scottish industry at present. In most companies if staff want to smoke they must do so in their own time, not in the time of their employers. So it is a “cost neutral” issue.

Conclusions

The licensed trade has always been, and will always remain, supportive of the ultimate objective of a smoke free Scotland. However, we strongly believe that the Scottish Executive has not afforded the time and consideration necessary to identify the best move for public health. As
we have stated, there is a significant body of evidence to suggest that an alternative strategy, with the same aim, may further increase the health benefits achievable from restricting the use of tobacco in licensed premises.

Surely what is effectively the most radical move in public health policy this government has seen deserves a greater attention to detail?

We urge the Finance Committee to request more time to conduct research into the financial and health benefits of alternative approaches. In addition, we would urge the government to consider new and innovative ways to tackle smoking. This debate seems to have been dominated by a ban / no-ban approach. At no point in the process would it seem that anyone has really sat down and looked for the best solution.

Should the Executive decide to give the decision just a bit more thought we would of course be delighted to help in anyway possible.

We look forward to further debating these issues with you at the oral evidence on 8 February.

Yours sincerely

Stuart Ross
Chairman of the Year 2004
The Scottish Licensed Trade Association
Dear Des

SPCB SPRING BUDGET REVISION FOR 2004-05

Although the Spring Budget Revision is not due to be formally considered by the Finance Committee until early February, the Executive has today laid the relevant Scottish Statutory Instrument before Parliament and you will note that it includes a non-cash adjustment of £79m to the SPCB’s resource budget for 2004-05. This is in respect of the accounting entries required to incorporate an independent valuation of the Holyrood land and buildings in the SPCB’s 2004-05 resource accounts.

I am therefore taking this opportunity to inform you and your Committee of the background to this adjustment. In particular, I would like to reassure you that this resource accounting adjustment has no impact on the actual cash expenditure of the SPCB and that the estimated final completion cost of the Holyrood Building remains unchanged at £430.4m.

The Executive has advised us that this budget revision will have no impact on its published spending plans.

The non-cash adjustment arises from the requirement under resource accounting and FRS 15 (the financial reporting standard covering tangible fixed assets) to obtain an independent valuation of the Holyrood building for the SPCB’s 2004-05 resource accounts, following the building being brought into use earlier in this financial year. Prior to the building completion in August 2004, the assets under construction were valued at cost in line with resource accounting requirements.

Our independent valuer, Chesterton, has now valued the land and buildings at Holyrood on a replacement cost basis at £333m. After allowing £17m for the cost of fixtures and fittings and other elements not covered by the valuation exercise, this is £80.4m less than the total estimated final completion cost of £430.4m for the Holyrood Building as advised to the Finance Committee. The valuation is lower than the estimated final completion cost because of the valuation basis, which makes an assumption that costs attributable to prolongation and delay would not be incurred again if we were to rebuild Holyrood from scratch.
Members of the Finance Committee will remember that I have regularly reported the costs of such prolongation and delay. For example I refer you to my letters of June 2003 and February 2004, which identified significant increases to the estimated final cost largely as a consequence of prolongation and disruption.

The lower valuation will reduce the SPCB’s resource budget requirement for cost of capital and depreciation charges in future years. Part of this reduction (£1.4m) will occur in 2004-05, leaving a net resource adjustment required for the SPCB of £79m.

Although the final completion cost of the building is not yet determined, we are required to seek budgetary cover at this time to ensure that the SPCB’s 2004-05 resource accounts are consistent with the appropriate Budget Act authorisation.

We have also taken the opportunity of the Spring Budget Revision to increase the amount of allowable income set out in Schedule 4 of the Budget Act that can be earned by the SPCB without breaching the annual budgetary limits from £250k to £670k. This is to cover the increased income arising from guided tours and shop sales since the move to Holyrood. At this stage we have conservatively assumed that the increase in income will be offset by higher costs and have therefore not adjusted the net revenue budget.

The SPCB’s officials will be pleased to attend the Finance Committee at its meeting on 8 February to answer any questions on the above adjustments contained in the Spring Budget Revision.

Yours sincerely.

George Reid
Finance Committee

5th Meeting 2005 – Tuesday 8 February 2005

Procedure for Considering Subordinate Legislation

Introduction
1. The Finance Committee may consider subordinate legislation which seeks to amend Budget Acts (referred to as ‘budget revisions’). These budget revisions request parliamentary authorisation for a number of in-year changes to the allocations as set out in the Budget. For these items, the Minister or Deputy Minister responsible for the instrument gives evidence to the Committee, normally accompanied by officials from the Scottish Executive’s Finance and Central Services Department. Members may find this briefing note on the procedure for the consideration of subordinate legislation helpful.

Background
2. When passing legislation, the Parliament accepts the principles of a bill but often leaves much of the detail to be filled in by subordinate (or secondary) legislation via Scottish Statutory Instruments (SSIs) at a later date. The nature and extent of the powers which are delegated to Ministers are set out in the parent Act.

3. After a SSI has been laid before the Parliament, the Parliament has 40 days to report on it. The SSI is referred to the Subordinate Legislation Committee first, for consideration of its technical and legal aspects, and then to a nominated lead committee (this is the committee within whose remit the subject matter falls) to consider the policy issues.

4. SSIs are usually considered under either affirmative or negative procedures. The draft order before the Committee is an affirmative instrument and thus requires the approval of the Parliament by motion before it can come into force. Negative instruments, on the other hand, automatically become law unless a member proposes a motion for annulment.

Procedure
5. It is the role of the lead committee to scrutinise the draft order and decide whether to recommend its approval to the Parliament. The Minister or Deputy Minister responsible for the instrument will speak to and move the motion calling on the Committee to recommend that the order be approved. The motion recommending approval of this motion is listed below. The Committee may then question the Minister and the debate on whether to recommend approval of the instrument must last no longer than 90 minutes (Rule 10.6.3). At the conclusion of the debate, the question will be put to committee members that they recommend to the Parliament that the SSI be approved.

6. The Committee will then report its decision to the Parliament. If it recommends the approval of the instrument, the Parliamentary Bureau shall, by motion, propose that the instrument be approved by the Parliament.

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1 For further information on the procedure for examining subordinate legislation, Members are advised to consult Chapter 10 of Standing Orders.
**Motion**
S2M-2358 Tom McCabe: The Draft Budget (Scotland) Act 2004 Amendment Order 2005—That the Finance Committee recommends that the draft Budget (Scotland) Act 2004 Amendment Order 2005 be approved.
Supported by: Tavish Scott.

The Subordination Legislation Committee considered the instrument at its meeting on 1 February 2005 and had nothing to report.

Susan Duffy
Clerk to the Committee
Water Industry

When I gave evidence to your Committee on 28th September, I promised to answer some outstanding queries for which I did not have the information immediately to hand.

You asked about the Parliamentary process for starting Q&SIII projects. Ministers will decide on Q&S III following the current consultation. Once the investment level priorities have been set and the Water Industry Commissioner has advised on / or determined charges, then it will be clear what levels of borrowing are required by Scottish Water. Parliament will need to approve these borrowing levels as part of the annual budget process.

Mr Purvis asked whether we would publish reports from SW on the capital programme. Progress with the capital programme is published in the annual report and interim (half yearly) accounts of Scottish Water, the annual report of Scottish Water Solutions, and in the Investment and Asset Management report by the Water Industry Commissioner. The Executive also receives regular updates from Scottish Water on progress with investment and programme expenditure, but these would not be generally published. In addition to this, I also regularly meet with the Non Executive Directors of Scottish Water (most recently on 28th September 2004) to review Scottish Water’s progress in delivering its capital programme.
Mr McNulty asked how many staff would be affected by the retail proposals in the Bill. The number of staff that will be affected by the creation of a separate retail subsidiary cannot be clearly determined until the scope of the potential retail business has been defined further (e.g. whether all or only some call centre functions in relation to non-domestic customers be included in retail). Work is ongoing, commissioned by the WIC, to clarify this. However, I can reassure you that, as set out in Part 2, Section 13 (3), any staff transferred to the employment of the retail subsidiary, will be transferred with the same rights of employment.

Yours ever,

ROSS FINNIE
Water Services etc. (Scotland) Bill

I am happy to provide additional information on financial issues which arose during your Committee’s Stage 1 consideration of the Water Services etc. (Scotland) Bill. I have also supplied a revised Financial Memorandum to the Parliament to take account of the financial implications of the amendments to the Bill at Stage 2.

We have been giving further consideration to the difference between the costs estimated in the Financial Memorandum and those suggested in research carried out for Scottish Water to implement the licensing regime set out in the Bill.

The market envisaged in the Bill and planned by the Water Industry Commissioner is well-defined and relatively simple. There is no scope for the market to increase in number of products: it is limited to retail of water services and sewerage services (including surface drainage and trade effluent), nor in number of customers, given the statutory prohibitions on common carriage and on retail competition for domestic customers.

Consistent with this, the Executive’s general approach to market mechanisms has been based on a desire for a simple and cost effective solution, and the Water Industry Commissioner has based his modelling on this approach. We have now received more information on the model used by IBM Consulting in their work for Scottish Water, which drew instead on their experience in other deregulated utility markets, and assumed a greater number of activities and degree of complexity in market design, infrastructure and processes than we believe is required. This consideration does not allow us to reach a single set of definitive costs but we have gained a clear understanding of the differences between the estimates reached by the Water Industry Commissioner and by IBM and concluded that the differences were not due to underestimation by the Water Industry Commissioner but reflect the simple model of retail competition proposed in the Bill and cost effective solutions that are appropriate to that market.

In resolving the differences in the projected costs, of particular significance was the £10.8-18.4 million costs estimated by IBM/Scottish Water of establishing a competitive regime and market mechanisms. This included £2.5-3.5 million on market design and developing industry codes and agreements which is work which the Water Industry Commissioner has already commenced and expects to be concluded using the £2.5m identified in the Financial Memorandum for general administrative functions of the Water Industry Commission. And IBM/Scottish Water had allowed £5.2-10.0 million for automated central market systems, based on requirements including profiling of customers and complex
volume allocations. The Water Industry Commissioner proposes that an IT based system which is not completely automated could be used, a considerable saving permitted by the small size of the market (150,000 customers) and that profiling and volume allocation will not be required in a simple market with fixed wholesale water costs. These decisions remove very significant costs and reduce the difference in the two estimates considerably, to around the Commissioner’s original estimate that a switch engine would cost around £2.5m. A simpler system without many of the complex operations assumed in the IBM model would have a consequent reduction on the projected ongoing operational costs, another area where estimates varied widely.

In conclusion, a complex market of a scale to justify automated systems, and taking into account lessons from other industries where markets have grown from their original parameters would lead to greater cost estimates. But we have taken clear statutory provision to ensure that the market has well defined limits and can be operated in as simple a way as possible, where further costs are only incurred when these can be justified by the benefits they bring. Unless unforeseen reasons were to require a much more complex and automated system, the costs set out by the Water Industry Commissioner in the Financial Memorandum appear to be appropriate forecasts in advance of consultation on the final market shape and knowledge of if or how competition will develop.

One further piece of work on these costs has been completed since Stage 1: a scoping study by Shepherd & Wedderburn, legal consultants, on the legal work required by the Water Industry Commission to establish the licensing regime. This was published on 4 November 2004 and is available at www.watercommissioner.co.uk. It scopes the legal costs, estimated in the Financial Memorandum as £1.5 million, at £1.6 to £2.0 million. Some of this increase will be absorbed by reduced expenditure by the Commission on general administrative work, now reduced from £2.5 million to £2.3 million.

I am copying this letter to the Convener of the Finance Committee, and would be happy to provide any further information that either of your Committees require.

ROSS FINNIE
These documents relate to the Water Services etc. (Scotland) Bill (SP Bill 23) as amended at Stage 2, and which was introduced in the Scottish Parliament on 11 June 2004

WATER SERVICES ETC. (SCOTLAND) BILL
as amended at Stage 2

EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these are Revised and Supplementary Explanatory Notes to accompany the Water Services etc. (Scotland) Bill, as amended at Stage 2, and which was introduced in the Scottish Parliament on 11 June 2004:
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The main provisions of the Bill are as follows:

- Part 1 – replaces the Water Industry Commissioner (the Commissioner) with a body corporate, the Water Industry Commission (the Commission), with a view to improving the transparency, accountability and consistency of regulation in the water industry. It also amends the functions of the Water Customer Consultation Panels and the Convener of those Panels to strengthen customer representation in the water industry.

- Part 2 – makes a series of provisions regarding water and sewerage services:
  - prohibits common carriage (where Scottish Water would use its water mains to carry water treated by a competitor and its sewers to carry wastewater from a competitor’s customers to that competitor’s treatment works) in the water or sewerage systems, and prohibits retail competition for households (sections 4 and 5);
  - establishes a licensing regime for retail competition for non-household premises only, managed by the Water Industry Commission (sections 6 to 11);
  - enables Ministers to require Scottish Water to establish an undertaking for the purposes of applying for a licence under the Bill (sections 12, 12A and 13);
  - provides for arrangements between Scottish Water and a licensed water or sewerage services provider to supply water or sewerage services, or, as the case may be, to discontinue a water supply or trade effluent services, and the procedure to be followed in the latter cases (sections 14 to 17A);
  - provides new arrangements for determining Scottish Water’s charges, under which the Water Industry Commission will determine charge limits based on objectives set by Ministers, and Scottish Water will propose charges schemes within these limits (sections 18 and 19);
  - enables Ministers to issue Codes of Practice on sewerage nuisance and introduces monitoring and enforcement provisions to ensure compliance with such Codes (sections 19B and 19C); and
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23), as amended at Stage 2, and which was introduced in the Scottish Parliament on 11 June 2004.

- sets out definitions of “eligible premises” for the purposes of retail competition, and of “public water supply system” and “public sewerage system” (sections 20 to 22).

- Part 3 – makes provision for coal mine water pollution, providing a statutory basis for the remediation programme carried out by the Coal Authority to tackle and prevent pollution (section 23).

- Part 4 – makes miscellaneous and general provision, including in relation to the offences created under the Bill and the procedure for exercising the order and regulation making powers provided under the Bill (sections 24 to 30).

COMMENTARY ON SECTIONS

PART 1: WATER INDUSTRY COMMISSION AND CUSTOMER PANELS

Section 1: Water Industry Commission for Scotland

5. Section 1 establishes a corporate body, the Water Industry Commission for Scotland, to take on the functions of the Water Industry Commissioner.

6. Subsection (1) of section 1 replaces section 1 of the Water Industry (Scotland) Act 2002 (“the 2002 Act”) with a new section 1 establishing the Water Industry Commission for Scotland. Subsection (2) of the new section 1 of the 2002 Act gives the Commission the general function of promoting the interests of persons whose premises are connected or might reasonably become connected to the public water supply and/or sewerage system (as defined in sections 21 and 22 of the Bill respectively). This ensures that the Commission will promote the interests of both Scottish Water’s direct customers, and the customers of licensed providers of retail services. It is a duty to promote the interest of customers as a whole which might be relevant, for example, where the interests of different categories of customers conflicted.

7. Subsection (3) of the new section 1 of the 2002 Act gives Scottish Ministers power to direct the Commission with regard to the financial management or administration of the Commission, having first consulted it. This ensures that the Commission is accountable to Ministers for these matters, while at the same time functioning independently with regard to its technical functions of calculating Scottish Water’s required revenue, and charge determination and the other substantive functions conferred on it by or under the Bill. Subsection (4) introduces Schedule A1 which makes detailed provision as to the appointment of the Commission and as to the Commission's staff, status and accounts and its procedures for carrying out its functions. This Schedule is inserted into the 2002 Act by Schedule 1 to the Bill.

8. Subsection (2) of section 1 replaces section 4(2) of the 2002 Act (power of the Commissioner to require information), with the effect that the Commission may not require Scottish Water to disclose anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session. This enables Scottish Water to treat as confidential legally privileged information. Subsection (2) also adds a new subsection (3) to section 4 of the 2002 Act, which requires Scottish Water to inform the Commission in writing if it considers that it is entitled to withhold information which the Commission has requested. This removes Ministers from having a role in resolving conflicts between the
Commission and Scottish Water as to whether the information requested by the Commission is reasonable.

9. Subsection (3) of section 1 adds a new subsection (4) to section 5 of the 2002 Act (annual reports by, and information from, the Commissioner), requiring Scottish Ministers to lay before Parliament a copy of the Commission’s annual report, detailing the Commission’s functions during that financial year.

Section 2: Dissolution of office of Commissioner

10. Section 2 provides for Scottish Ministers to specify an appointed day to dissolve the office of the Water Industry Commissioner for Scotland, given that it is replaced by the Water Industry Commission for Scotland, as described above.

Section 3A: Customer Panels


12. Subsection (1) replaces sections 2(3) to (5) of the 2002 Act, which made provision in relation to the functions of a Customer Panel, including its duty to publish reports, and in relation to the duty of the Water Industry Commissioner to have regard to representations, recommendations or reports made by a Customer Panel, with new subsections (3) to (5D).

13. New subsection 2(3) of the 2002 Act provides that the general function of the Customer Panels is to represent the views and interests of those whose premises are connected to the public water supply and sewerage systems, or might reasonably become connected to those systems.

14. New subsection 2(4) to the 2002 Act places a duty on Customer Panels to publish reports on matters relevant to the interests of the persons they represent, and gives them the power to make recommendations to the Water Industry Commission, the Scottish Ministers, the Drinking Water Quality Regulator, the Scottish Environment Protection Agency and Scottish Water:

(a) Recommendations to the Water Industry Commission can be made as to the promotion of the interests of those represented by the Customer Panels, whether generally or specifically;

(b) Recommendations to the Scottish Ministers, the Drinking Water Quality Regulator or the Scottish Environment Protection Agency can be made on any matters considered relevant to those interests, in connection with such functions of those bodies as are exercisable in relation to Scottish Water’s exercise of core functions (as defined in section 70(2) of the 2002 Act to mean its statutory functions as the public water supplier and provider of sewerage); and

(c) Recommendations to Scottish Water can be made on any matter considered relevant to those interests in relation to Scottish Water’s exercise of core functions.
15. New subsection (5) provides that Scottish Water must have regard to any representations or recommendations made to it by a Customer Panel. New subsection (5A) makes equivalent provision as regards other persons to whom a Customer Panel makes representations or recommendations.

16. New subsection (5B) requires the Customer Panel to publish a summary of any representations and recommendations made by it, as referred to in subsections (4) to (5A). This may be complied with through including such a summary in a report.

17. New subsection (5C) provides that any person who receives recommendations under new subsection (4) must respond to the recommendations within 6 months, and publish a summary of their responses.

18. New subsection (5D) enables Customer Panels to jointly exercise their functions in publishing reports and making recommendations or representations.

19. Section 3A(2) of the Bill repeals section 3(1) to (5) of the 2002 Act (the Water Industry Commissioner’s complaints investigation function) in consequence of the amendments made in section 3A(3) (paragraph 21 below).

20. Section 3A(3) inserts a new section 6A into the 2002 Act to confer on the Convener of the Customer Panels (“the Convener”) duties to investigate complaints about Scottish Water’s exercise of its core functions.

21. New section 6A(1) of the 2002 Act places a duty on the Convener to investigate complaints in respect of Scottish Water’s exercise of its core functions from any person whose premises are connected to, or have been, or might reasonably become, connected to the public water or sewerage systems (as defined in sections 21 and 22 of the Bill). Section 6A(2) provides that if such a complaint is received by a Customer Panel or the Water Industry Commission, they must refer it to the Convener. Section 6A(3) provides that the Convener need not investigate a complaint which has not already been pursued with Scottish Water, or which the Convener considers vexatious or frivolous. Section 6A(4) enables the Convener to make representations about complaints to Scottish Water. Sections 6A(5) and (6) require the Convener to report to the Water Industry Commission or a Customer Panel about the outcome of any investigations made about a complaint, or give reasons for any decision not to investigate a complaint. Section 6A(7) requires Scottish Water to respond to reasonable requests for information from the Convener in connection with the Convener’s complaints investigation function. If Scottish Water and the Convener disagree on whether a request for information is reasonable, section 6A(8) provides that the disagreement may be referred to Scottish Ministers to decide the matter, and the latter’s decision is final.

22. New section 6B to the 2002 Act requires the Convener to submit to the Scottish Ministers and to publish an annual report, on the exercise of functions by both the Customer Panels and the Convener (under section 6A), as soon as practicable after the end of each financial year. The Convener is also required to provide the Scottish Ministers with any information they require as regards the exercise of those functions. The Scottish Ministers are required to lay a copy of the annual report before Parliament.
23. New section 6C of the 2002 Act requires the Water Industry Commission and the Convener of the Customer Panels to make arrangements for co-operation and the exchange information between the Commission and the Panels and between the Commission and the Convener; and for the consistent treatment of matters which affect both the Commission and the Panels, or both the Commission and the Convener. These arrangements are to be set out in a memorandum, which they are to send to the Scottish Ministers. The memorandum is to be kept under review, and any revised memorandum must also be sent to Ministers.

PART 2: PROVISION OF WATER AND SEWERAGE SERVICES

Offences

Section 4: Public water supply system: offences

24. Section 4 prohibits any person from introducing water into the public water supply system (as defined by section 21 of the Bill) or using the public water supply system to carry water to the premises of another person. It also prohibits making arrangements for or in relation to the supply of water to the premises of another person, except as authorised by a licence. To achieve this, subsections (1) to (3) create offences, and these are subject to the exceptions in subsections (4) to (6).

25. Subsections (1) and (2) prohibit common carriage by making it an offence for anyone to introduce water into the public water supply system or to use that system for the purpose of supplying water to premises connected to the system.

26. Subsection (3) prohibits the making of any arrangements for or in relation to the supply of water through the public water supply system to the premises of customers connected to that system.

27. Subsection (4) exempts Scottish Water or someone acting on its behalf or under its authority from the offences introduced in the preceding subsections, allowing them to introduce water to the public water supply system, use the system for the purpose of supplying water and make arrangements in connection with supplying water.

28. Subsection (5), by way of an exemption from the offences at subsections (2) and (3), allows a person supplying water with the help of services provided by Scottish Water as described at section 30 of the 2002 Act, to use the public water supply system to supply water to premises connected to the system and to make arrangements to supply water to the premises of another person.

29. Subsection (6) provides that licensed providers of water or sewerage services are not caught by the prohibition at subsection (3). (Section 6 of the Bill establishes a system for licensing "water services providers" and "sewerage services providers").

30. Subsections (7) and (8) allow Ministers to specify in regulations other circumstances where the prohibitions in subsections (1), (2) and (3) will not apply. These give Ministers powers, which could be used if, for example, it emerged in practice that the prohibitions were catching activities which Ministers did not intend to prohibit. Ministers are required to consult
on any regulations that they propose to make under subsection (7), and section 27 provides for these regulations to be subject to affirmative procedure in the Parliament. Subsection (8A) qualifies the power to make regulations under subsection (7) by providing that it can only be exercised where the effect of any such regulations is not prejudicial to the exercise of Scottish Water’s core functions regarding the supply of water.

31. Subsections (9) and (10) set out the penalties for anyone committing an offence under this section, setting greater penalties for offences under subsection (1), which prohibits introducing water into the public water supply system: up to two years in prison, an unlimited fine, or both (subsection (9)). Subsection (10) specifies penalties for anyone guilty of the offences at subsections (2) and (3) of using the public water supply system to supply customers, or arranging for a supply to be made, of up to an unlimited fine. In both cases there is provision for treating offences in two ways, summary conviction (i.e. where convicted by a Sheriff sitting without a jury), where lesser maximum penalties apply, or conviction on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court). The statutory maximum fine referred to in subsection (10)(a) is currently £5,000. Subsection (11) provides that any agreement in breach of the prohibitions is unenforceable.

Section 5: Public sewerage system: offences

32. Section 5 makes provisions prohibiting common carriage and other activities for or in relation to the public sewerage system that parallel those at section 4 in relation to the public water supply system. Subsections (1) to (3) create offences, and these are subject to the exceptions in subsections (4) to (6).

33. Subsections (1) to (3) prohibit common carriage on the public sewerage system (as defined by section 22 of the Bill). They also prohibit the making of arrangements for or in relation to the provision of sewerage to, or the disposal of sewage from the premises of another person, except as authorised by a licence.

34. Subsections (4) to (6) set out the circumstances in which the prohibitions in subsections (1) to (3) do not apply. Subsections (7) and (8) provide for Ministers to make regulations specifying other circumstances in which the prohibitions will not apply. Section 27 provides for these regulations to be subject to affirmative procedure in the Parliament. Subsection (8A) qualifies the power to make regulations by providing that it can only be exercised where the effect of any such regulations is not prejudicial to the exercise of Scottish Water’s core functions regarding the provision of sewerage and disposal of sewage. Subsections (9) and (10) provide for the same range of penalties in respect of the prohibitions concerning the provision of sewerage services as are available at section 4(9) and (10) in respect of water supply services. Subsection (11) provides that any agreement in breach of the prohibitions is unenforceable.

Licensing of services provided to eligible premises

Section 6: Licence authorisation

35. Section 6 provides for the Commission to grant licences which authorise licence holders to provide services to the occupiers of eligible premises (as defined in section 20). The Commission's powers to grant licences are subject to the provisions at section 7, as regards the
Commission granting licences, and at paragraphs 1 and 2 of schedule 2 to the Bill, which makes detailed provision for applications for licences and licence conditions.

36. Subsections (1) and (2) and subsections (3) and (4) respectively empower the Commission to grant a “water services licence” and a "sewerage services licence". These licences will authorise their holders (the "water services providers" and "sewerage services providers") to arrange for the supply of water, or the provision of sewerage services, as the case may be, to the occupiers of eligible premises. Subsection (5) provides that where premises are unoccupied, references to occupiers in this section are to be read as referring to the owner of the premises. Eligible premises are defined in section 20 as premises other than domestic dwellings. These subsections also set out that providers can fix, demand and recover charges for the water or sewerage services they provide.

Section 7: Granting of licence

37. Section 7 specifies the grounds on which the Commission can grant a water services or sewerage services licence and the procedure to be followed.

38. Subsection (1) requires the Commission to be satisfied that an applicant has the ability to perform adequately the activities authorised by a licence, before granting the licence. Subsection (2) requires the Commission, in assessing an applicant’s ability to perform those activities, to have particular regard to an applicant's knowledge, experience, expertise, financial acumen and business viability, and to any other factors specified by the Scottish Ministers in an order. Section 27 provides for orders under subsection (2) to be subject to negative procedure in the Parliament. In the interests of transparency, subsection (3) empowers the Commission to issue guidance setting out the factors it will consider when assessing an applicant’s ability under subsection (2).

39. Subsection (4) requires a licence to be in writing. It provides for it to be in force as set out in the licence unless it has been revoked or suspended. Subsection (5) requires the Commission to notify the applicant and Scottish Water of a decision to refuse a licence application. And where the Commission has granted a licence application, subsection (6) provides for the Commission to send a copy of the licence to the applicant and Scottish Water.

Section 8: Compliance with licences

40. Section 8 places a duty on the Commission to monitor compliance with the terms and conditions of licences and to take any action necessary to ensure compliance. To carry out this duty, the section confers two powers on the Commission: subsection (2) enables the Commission to give directions to service providers which providers are obliged to comply with; and subsection (3) empowers the Commission to issue guidance in relation to compliance with the terms and conditions of a licence. In addition, subsection (4) requires Scottish Water to inform the Commission if it appears a licence condition is being or has been breached.

Section 9: Commission’s power to obtain information and charge fees

41. Section 9 gives the Commission further powers in respect of its monitoring and compliance functions at section 8 by requiring water and sewerage service providers to provide the Commission with information. It also empowers the Commission to charge service providers fees.
42. Subsection (1) places a duty on service providers to comply with requests for information by the Commission, provided the request is reasonable for the Commission to make in the exercise of its functions. Subsection (2) provides that service providers need not provide the Commission with information that they would not be required to disclose on grounds of confidentiality in proceedings in the Court of Session (such as legally privileged information).

43. Subsection (3) provides that it is an offence for a service provider to fail to provide information required by the Commission without a reasonable excuse. Subsection (4) specifies that the penalties for this offence, depending on the type of conviction, are a fine not exceeding the statutory maximum, currently set at £5,000, on summary conviction (i.e. where convicted by a Sheriff sitting without a jury), or an unlimited fine if convicted on indictment (i.e. where convicted by a jury in the Sheriff Court or the High Court).

44. Subsection (5) gives the Commission the general power to charge fees in relation to licences, for example, in relation to applications for a licence. It gives Ministers the power to set out in an order the detailed basis on which, and the matters in respect of which, the Commission is to charge fees, and section 27 provides for these regulations to be subject to negative procedure in the Parliament.

Section 10: Participation of licensed providers

45. Section 10 gives the Commission powers to take such steps as it considers necessary to ensure that the opening up of the market for licensed water and sewerage services under Part 2 of the Bill happens in an orderly manner, and with minimum disruption to Scottish Water and its customers.

46. Subsection (1) gives the Commission a duty to exercise its functions in such a way as to secure that water and sewerage services providers participate in the provision of services pursuant to a licence in an orderly manner and in a way that is not detrimental to the exercise of Scottish Water’s core functions. To enable it to do this, the Commission is given powers under subsection (2) to direct Scottish Water or a licensed water or sewerage services provider, including a potential licensed provider, to take such steps as are required to ensure their participation achieves the aims in subsection (1). Subsection (4) requires proposed directions to be consulted upon with the intended recipient(s). Subsection (5) requires that the recipient(s) of directions under subsection (2) must comply with these.

47. In particular, it is envisaged that the Commission may use its power under this section to require licensed providers to use a central mechanism (one which the Commission would have identified as optimum) to facilitate the exchange of information required when a customer switches to another licensed provider. Subsection (3) specifically provides for directions to relate to this matter.

Section 11: Licences and compliance: further provision

48. Section 11 introduces schedule 2 which makes more detailed provisions on licences and compliance.
Scottish Water: water and sewerage services undertaking

Section 12: Water and sewerage services undertaking

49. Section 12 enables the Scottish Ministers to require Scottish Water to separate its retail functions from its wholesale functions, by creating a separate business undertaking. In this way it will be possible for this retail arm to be treated in the same way as any other service provider, under the licensing regime and by Scottish Water.

50. Subsection (1) provides that Scottish Water must comply with a requirement made on it to secure the establishment of a business undertaking. Subsection (1A) provides that the Scottish Ministers may require Scottish Water to take such steps as Ministers specify for the purposes of, or in connection with, the establishment and development of, or Scottish Water’s interest in, the undertaking; and to take these steps, or any particular steps, by such date as Ministers specify. Subsection (1B) provides that it is for Scottish Water to determine, subject to Scottish Ministers’ approval, whether the undertaking will be a subsidiary, company, or partnership, or be established through such other arrangements as it considers appropriate.

51. Subsection (2) provides that the functions of the undertaking established under subsection (1) are to apply for a water services licence and a sewerage services licence, and thereafter to carry out the functions authorised by those licences. Subsection (3) requires the undertaking to apply to become a water services and sewerage services provider as soon as reasonably practicable after it is established.

52. Subsection (3A) confers an order-making power on the Scottish Ministers to prescribe that paragraphs 1 and 2 of Schedule 2 to the Bill, which make provision for licence applications and licence conditions, have effect subject to such modifications as are specified in the order, in relation to the first application for a licence made by the undertaking established under section 12. Section 27(3)(a) of the Bill provides that an order under this subsection is subject to negative procedure in the Parliament.

53. Subsection (4) allows the new undertaking to engage in any activity which it considers is not inconsistent with its activities as a water and sewerage services provider. The intention here is to ensure that the undertaking has the same freedom as any other licensed provider to offer its customers services in addition to those provided pursuant to its licence.

54. Subsection (5) requires Scottish Water to treat the new undertaking in the same way as it treats any other licensed water or sewerage services provider.

55. Subsection (6) confirms that references to Scottish Water in any enactment will henceforth be understood not to include the new undertaking established by this section, to ensure that responsibility for all Scottish Water’s statutory functions apply to Scottish Water as the public (wholesale) water supplier and sewerage provider in exercise of its core functions.

Section 12A: Financing, borrowing and guarantees

56. Section 12A makes provision in relation to the funding of the undertaking established under section 12, and confers order-making powers on the Scottish Ministers to prescribe circumstances in which grants may be made to the undertaking, sums may be lent to it, and
financial obligations may be guaranteed in respect of it. Section 27(3)(a) of the Bill provides that the order-making powers in subsections (1), (2) and (6) of section 12A are subject to negative procedure in the Parliament.

57. Subsections (1) and (2) make provision for the Scottish Ministers to make grants to the undertaking, and for the undertaking to borrow from the Scottish Ministers and not (subject to the exception in subsection (4)(b)) from any other person. In each case, the circumstances in which this may occur and the amounts of any grant or loan will be specified in an order, and will be subject to the consent of Scottish Water.

58. Subsection (3) provides that in any financial year, the net amount (as defined in subsection (4)) of sums borrowed from the Scottish Ministers by the undertaking must not exceed the amount specified for that year in a Budget Act.

59. Subsection (5) provides that any loans made by the Scottish Ministers under subsection (2)(a) to the undertaking are to be repaid at such times and by such methods, as Ministers may from time to time specify; and Ministers can also specify the times and rates at which interest on such loans is to be paid.

60. Subsection (6) provides for an order-making power for Scottish Ministers to specify the circumstances in which they may guarantee a financial obligation entered into by the undertaking under subsection (4)(b), such as an overdraft or similar temporary borrowing arrangement. Subsection (7) provides that, immediately after a guarantee is given under subsection (6), the Scottish Ministers must lay a statement of the guarantee before Parliament. Subsection (8) provides that where any sums are paid out in fulfilment of a guarantee, the undertaking must repay to Ministers such amounts (with interest), as Ministers may specify.

61. Subsection (9) provides that any grants or loans made, or guarantees given to the undertaking under section 12A are to be subject to such conditions as Ministers consider it appropriate to impose.

Section 13: Transfer of staff etc. to the undertaking

62. Section 13 provides for the transfer of staff, property and liabilities from Scottish Water to the new undertaking established under section 12 for the purposes that the undertaking is established to perform. It makes provision for the protection of the terms and conditions of employment of staff who are transferred to the undertaking.

63. Subsection (1) requires Scottish Water to comply with a requirement by the Scottish Ministers to transfer staff to the new undertaking for the purposes of it applying for water services and sewerage services licences and enabling the undertaking to carry out its activities as a licensed provider (these purposes are specified in subsection (7)).

64. Subsection (2) provides that the contract of employment of any staff transferred under subsection (1) will not be terminated by the transfer, but will continue as if originally made between the person and the undertaking.
65. Subsection (3) provides that when staff are transferred to the undertaking, the undertaking will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer will continue to have effect after the transfer.

66. Subsection (4) states that the transfer under these provisions does not affect any person’s right to terminate their contract of employment if their terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that that the identity of the person’s employer has changed does not in itself constitute such a change.

67. Subsection (5) requires Scottish Water to comply with a requirement by the Scottish Ministers to transfer such property (including rights) and liabilities to the undertaking as necessary for the purposes specified in subsection (7). Subsection (6) provides for the transfer of property and liabilities to have effect despite any provision which might otherwise prevent the transfer, and that the property and liabilities which are transferred are vested in the undertaking.

Scottish Water: services via licensed providers

Section 14: Scottish Water to provide services

68. The Bill provides for water and sewerage services providers to assume responsibility for providing services to customers in the following way. Firstly, the provider applies for a licence from the Commission. Secondly, and assuming that a licence is granted, the provider makes arrangements with the occupier of eligible premises to provide them with licensed services. Thirdly, the provider agrees specific terms and conditions by which Scottish Water will provide a wholesale supply of water or, as the case may be, sewerage services in respect of the premises provided with such services. Section 14 makes provision for this third step.

69. Subsection (1) enables a water services provider, once it has made arrangements with the occupier of eligible premises (as defined in section 20 of the Bill) for the supply of water to those premises, to request Scottish Water to supply water to the premises through the public water supply system (as defined in section 21 of the Bill). Subsection (2) places a duty on Scottish Water to comply with this request subject to agreeing terms and conditions with the provider, and subject to the carrying out of the request being consistent with the exercise of Scottish Water’s core functions (as defined in section 70(2) of the Water Industry (Scotland) Act 2002). This is to ensure that these new duties on Scottish Water are subject to its wider statutory responsibilities as the public supplier of water.

70. Subsection (3)(a) provides for Scottish Water’s duty to supply water under subsection (2) to cease if the arrangements between a provider and the occupier of eligible premises have come to an end. However, this is subject to section 15(1) of the Bill which provides that Scottish Water must continue to serve the premises for two months after the arrangement has come to an end, unless it has come to an end under the disconnection provisions in section 16(5). However, subsection (3)(b) provides that Scottish Water’s duty to supply water under subsection (2) may be superseded by a new duty, such as, for example, when another licensed provider assumes responsibility for the provision of water services to the premises.

71. Subsections (4) to (6) make equivalent provision to subsections (1) to (3) as respects Scottish Water’s duty to provide sewerage services to premises as agreed by the sewerage
services provider. However, unlike Scottish Water’s duties under subsections (1) to (3) in relation to the water supply, there is no general provision for sewerage services to be disconnected: a duty to provide sewerage services can only be superseded by a new duty, under subsection (5). Trade effluent services may, however, be discontinued by virtue of section 17A of the Bill (see paragraphs 86 to 90 below).

72. Where Scottish Water and a water or sewerage services provider cannot come to an agreement under subsections (2) or (5), on the terms and conditions whereby Scottish Water provides the water supply or sewerage services, subsection (7) provides for the Commission to determine the terms and conditions of the supply that Scottish Water is to make to the provider and for these to have effect as if they had been agreed between those parties.

Section 15: Continuation of water services

73. Section 15 makes provision in relation to Scottish Water’s duty to provide water services, when the arrangements between a licensed water services provider and the occupier of eligible premises have come to an end.

74. Subsection (1) provides that where the arrangements between the occupier of an eligible premises (as defined in section 20 of the Bill) and a water services provider have come to an end, such as, for example, on revocation of a licence, Scottish Water has a continuing duty to supply water to the premises for the period specified in subsection (2). The only exception to this is where the supply is discontinued at the request of a provider under section 16 of the Bill where alternative arrangements apply. This is to enable the customers of licensed providers to have a continued supply of water while they seek to secure services from an alternative licensed provider if their arrangement with their existing provider comes to an end for any other reason than those provided in the disconnection code under section 16. In most cases it is anticipated that a customer will be able to make arrangements with a new provider prior to the arrangements with their previous provider having come to an end.

75. Subsection (2) specifies the period for which Scottish Water must continue to supply water, after arrangements between the occupier of premises and a provider have come to an end, as two months or such longer period as Scottish Water agrees to.

76. Subsection (3) provides that the continuing duty to supply under subsection (1), that is to say, in the absence of an agreement between the occupier and a provider, ceases where a new arrangement has been made between a licensed provider and the occupier of eligible premises under section 14(2) of the Bill, or where the occupier of those premises notifies Scottish Water that a supply of water is no longer required.

77. Subsection (5) amends section 9 of the Water (Scotland) Act 1980, by inserting new subsections (2A) to (2C). Section 9(1) of the 1980 Act requires Scottish Water to supply water on reasonable terms and conditions where requested for non-domestic purposes. The new section 9(2A) qualifies the section 9(1) duty so that Scottish Water is not required to make such a supply where arrangements between a licensed provider and the occupier of eligible premises under section 14(2) of the Bill have come to an end, where it believes there is no reasonable prospect of recovering charges from a customer. The requirement to supply water for non-domestic purposes can only come to an end if the arrangements between a licensed provider and a customer have ended because of non-payment of charges (section 9(2A)(a) of the 1980 Act), or
the supply of water to a premises has been discontinued at the request of the provider (under section 16(5) of the Bill) because of non-payment of charges (section 9(2A)(b) of the 1980 Act). The intention of this provision is to ensure that, where a customer is unable to find a water service provider, for example, because of a track record of not paying bills, that Scottish Water should not be required to provide a supply of water to that customer. The new section 9(2B) of the 1980 Act provides that where Scottish Water refuses to provide such a supply, the occupier of the premises has a right to have this reviewed by the Water Industry Commission which, in terms of the new section 9(2C) of the 1980 Act, can either confirm the decision to refuse or direct Scottish Water to give a supply, and its decision is final.

Section 16: Discontinuation of water services

78. Section 16 enables water services providers to request (under subsection (1)) that Scottish Water discontinue the supply of water to a premises provided by Scottish Water under an agreement with the provider as established by section 14(2) of the Bill. This provision will allow a water services provider, subject to compliance with the provisions of the disconnection code provided for under section 17, to request the disconnection of a customer, for example, when the customer has not complied with their contract to the provider by not paying their charges.

79. Subsection (2) requires a provider to serve a notice on: the occupier of the premises, Scottish Water, and the Commission, at least 14 days before requesting disconnection intimating its intention to seek disconnection. Subsection (3) gives Ministers the power to specify by order the form the notice will take and its content, and under section 27 an order under this subsection is subject to negative procedure in the Parliament.

80. Subsection (4) gives the occupier of the premises concerned the right to make representations to the provider about the notice within 10 days of it being served, which the provider must have regard to.

81. Subsection (5) requires Scottish Water to discontinue a supply of water as requested if the conditions set out in subsection (6) are satisfied. Accordingly, the disconnection code, provided under section 17 of the Bill must have been complied with, and the disconnection requested must not adversely affect any supply of water to the premises for domestic purposes, or the supply of water, to any other premises for any purpose. Subsection (7) provides that a supply of water for domestic purposes is defined in accordance with section 7 of the Water (Scotland) Act 1980 (which includes a supply for drinking, washing, cooking, central heating and sanitary purposes).

82. Subsection (8) provides that the water services provider who requested the disconnection should pay any reasonable costs incurred by Scottish Water in carrying out the disconnection. Subsection (9) provides that in the case of any dispute as to reasonable costs in this regard the Commission will determine this and its decision is final.

Section 17: Disconnections code

83. This section makes provision for a disconnection code to be drawn up by the Commission.

84. Subsection (2) provides that a disconnection code may specify circumstances in which requests to Scottish Water to disconnect a premises under section 16 of the Bill may or may not
be made; and any other conditions which must be satisfied before the disconnection actually takes place (over and above those mentioned in section 16(6)(b) of the Bill). The intention behind the code is to ensure that disconnection is only carried out where the circumstances genuinely demand it, and where it will not adversely affect any customers other than the one in respect of whom the disconnection is to be carried out. The code may make different provision for different cases and can be amended or revoked (subsection (3)).

85. Subsection (4) ensures that the Commission, in devising the code, will consult: Scottish Water, all water and sewerage services providers, the Convener of the Water Customer Consultation Panels, (on behalf of the Panels), the Drinking Water Quality Regulator for Scotland (appointed by virtue of section 7 of the 2002 Act), and such others as it thinks appropriate. Subsection (5) provides that the Commission must publish the code and publicise arrangements for making a copy of it available to any person who wishes to obtain it.

Section 17A: Continuation and discontinuation of sewerage services

86. Section 17A makes provision in relation to Scottish Water’s duty to provide sewerage or dispose of sewage when the arrangements between a licensed sewerage services provider and occupier of eligible premises have come to an end. Specific provision is made in relation to “trade effluent services” (as defined in subsection (15)), to permit such services to be discontinued under particular circumstances.

87. Subsection (1) places a duty on Scottish Water to continue providing sewerage, or disposing of sewage from eligible premises (as defined in section 20 of the Bill), even if the arrangements between the occupier of the premises and the sewerage services provider have come to an end. However, in contrast to the duty in section 15 as regards the continuing provision of a water supply, no time limit is put on this duty. However, by virtue of subsection (2), the duty does not apply to trade effluent services.

88. Subsection (3) provides that where arrangements between a sewerage services provider and the customer have come to an end, such as, for example, on revocation or suspension of a sewerage provider’s licence, Scottish Water has a continuing duty to provide trade effluent services for the period specified in subsection (4) (namely, for 2 months or such shorter period as Scottish Water, with the Water Industry Commission’s consent, determines).

89. However, subsection (5) provides that Scottish Water’s duty under subsection (3) ceases where a new arrangement has been made between a sewerage services provider and the occupier of eligible premises under section 14(5) of the Bill, or if the occupier of the premises notifies Scottish Water that trade effluent services are no longer required.

90. Subsection (6) enables a sewerage services provider to request that Scottish Water discontinue any trade effluent services provided to premises under section 14(5) of the Bill. The procedures for this are set out in subsections (7) to (13). Under subsection (7), at least 14 days before making such a request, the provider must serve a notice of its intention to do so on: the occupier of the premises, Scottish Water, and the Commission. Subsection (8) gives Ministers the power to specify by order the form and content of such a notice, and under section 27(3)(a) of the Bill, such an order is subject to negative procedure in the Parliament.
91. Subsection (9) gives the occupier of the premises concerned the right to make representations to the provider about the notice within 10 days of it being served, which the provider must have regard to.

92. Under subsection (10), if the request proceeds, Scottish Water must discontinue the trade effluent services, provided that the conditions set out in subsection (11) are satisfied, namely, that other arrangements for the provision of sewerage or the disposal of sewage in respect of those or other premises is not adversely affected by the discontinuation, and there is no likely risk to public health as a result of the discontinuation.

93. Subsection (12) provides that the sewerage services provider who requested the discontinuation should pay any reasonable costs incurred by Scottish Water in carrying out the discontinuation (which, in the event of a dispute, must be determined by the Commission - see subsection (13)).

94. Subsection (14) provides that section 17A is expressly without prejudice to the existing statutory provisions governing the provision of trade effluent services, as set out in Part II of the Sewerage (Scotland) Act 1968. Part II of that Act makes provision generally for the granting or continuation of consents by Scottish Water in respect of discharges of trade effluent from premises, or for agreements in relation to such discharges. Those consents or agreements can be subject to appropriate conditions, which may include provision as regards their discontinuance in certain circumstances.

95. Subsection (15) defines trade effluent services for the purpose of section 17A, in accordance with section 59(1) of the 1968 Act, which provides that ““trade effluent” means any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade to industry carried on at trade premises, including trade waste waters or waters heated in the course of any trade to industry and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises”.

Scottish Water: charges and functions

Section 18: Scottish Water’s charges for water and sewerage services

96. Section 18 alters the basis for determining Scottish Water’s charges as provided in the Water Industry (Scotland) Act 2002 (“the 2002 Act”). Under the new provisions, Ministers will set objectives for charges, and the Commission will determine charge limits and approve charges schemes. This section substitutes a new section 29, and inserts new sections 29A to 29G into the 2002 Act; amends section 30 thereof; and repeals sections 31 to 34 thereof. It also amends section 35 of the 2002 Act and inserts a new section 35A into it.

Subsection (1): the new section 29 of the 2002 Act: Charges for goods and services

97. Subsection (1) inserts new sections 29 to 29G into the 2002 Act. The new section 29 provides for Scottish Water to charge for goods and services. In contrast to the broad general power in the existing section 29(1) of the 2002 Act, the new section 29(1) makes a distinction between the power to demand and recover charges for services which are part of Scottish Water’s core functions as defined in section 70(2) of the 2002 Act (new subsection 29(1)(a)),
and goods or services provided in pursuit of Scottish Water’s other functions (new subsection 29(1)(b)).

98. The new section 29(2) of the 2002 Act provides that Scottish Water is to demand and recover charges for services it provides as part of its core functions either according to a charges scheme made under the new section 29A of the 2002 Act or under an approved departure from a charges scheme under the new section 29E of the 2002 Act.

99. The new section 29(3) of the 2002 Act provides that fixing, demanding and recovering charges for non-core functions is exercisable by or in accordance with an agreement with the person to be charged.

100. The new section 29(4) of the 2002 Act makes exemptions from the general charging powers in sections 29(1) to (3) in respect of water supplied under the circumstances set out in:

- section 9A of the Water (Scotland) Act 1980, which ensures that no charge can be made for supplies of water for certain fire-fighting purposes; and
- section 47 of that Act, which continues any arrangements in force before 16th May 1949 under which no charge was made for supplies of water.

Subsection (1): the new section 29A of the 2002 Act: Charges schemes

101. The new section 29A to the 2002 Act, also inserted by subsection (1) of section 18 of the Bill, sets out the procedure for making, approving and publishing charges schemes. Subsection (1) of the new section 29A provides for Scottish Water to make a scheme, defined as a charges scheme, setting out what it proposes to charge for each of the services it provides as part of its core functions. Subsections (2) and (3) of the new section 29A provide that a charges scheme must comply with a charge determination made by the Water Industry Commission under the new section 29B to the 2002 Act, and in particular that no charge within the scheme may exceed the relevant maximum charge set out in the determination.

102. Subsection (4) of the new section 29A provides that a charges scheme can specify times and methods of payment for charges.

103. Subsection (5) of the new section 29A provides that where Scottish Water reasonably requests information from Scottish Ministers and the Commission for the purposes of making a charges scheme they must provide that information.

104. Subsection (6) of the new section 29A gives the Scottish Ministers the power to direct when Scottish Water should send the charges scheme they have drawn up to the Commission for its approval. This is connected to Ministers’ power to set the charge determination period under the new subsection 29B(2) of the 2002 Act. The charge determination period will be divided into one or more periods for a charges scheme to apply to and this provision will allow Ministers to set a date sufficiently in advance of the intended start of a new charges scheme period for the scheme to be approved by the Commission and published by Scottish Water.
105. Subsections (7) and (8) of the new section 29A provide that the Commission may approve a charges scheme as submitted by Scottish Water with or with modifications. Where the Commission modifies the charges scheme, it is to set out its reasons for doing so.

106. Subsection (9) of the new section 29A provides for Scottish Water to publish a summary of the charges scheme approved by the Commission. It must also make arrangements for anyone to inspect or obtain a copy of the full charges scheme, and publicise these arrangements.

Subsection (1): the new section 29B of the 2002 Act: Determination of maximum charges

107. The new section 29B of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, requires the Commission to determine maximum charges within which Scottish Water will make a charges schemes for approval under the new section 29A of the 2002 Act. It also provides for the period of a determination to be set by Ministers and for the Commission to consult on a draft determination.

108. Subsection (1) of the new section 29B provides that the Commission must determine maximum charge limits which will be the basis for a charges scheme made by Scottish Water under the new section 29A(1), and for Ministers to specify the date by which the determination must be sent to Scottish Water.

109. Subsection (2) of the new section 29B provides for Scottish Ministers to set the period that a charge determination by the Commission will apply for. This might cover the period of one or several charges schemes.

110. Subsection (3) of the new section 29B provides that a charge determination by the Commission can set different maximum charges for different cases or categories of case. This will allow the Commission to provide different charge limits for different types of customers of Scottish Water, including customers in particular circumstances and for different services. The Commission will do this to reflect the different services Scottish Water provides to its customers, and in accordance with Scottish Ministers’ statement under the new section 29D of the 2002 Act.

111. Subsection (4) of the new section 29B sets out the procedure for the Commission to consult on the basis of a draft determination. In advance of making a determination under this section, the Commission is required to send a draft determination to Scottish Ministers, Scottish Water and the Convener of the Water Customer Consultation Panels (representing the Panels as a whole) and to publish it with a view to receiving representations about it, which the Commission must have regard to.

112. Subsection (5) of the new section 29B provides that Scottish Ministers and Scottish Water are required to comply with reasonable requests for information made by the Commission in exercise of its determination function under this section.

Subsection (1): the new section 29C of the 2002 Act: Exercise of functions regarding charges

113. The new section 29C of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, sets out what should be taken into account by:
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23), as amended at Stage 2, and which was introduced in the Scottish Parliament on 11 June 2004

- Scottish Water, in making a charges scheme under section 29A or revising any charges fixed by the scheme under section 29F; and
- the Commission, in approving charges schemes under section 29A, determining maximum charges under section 29B, authorising departures from those schemes under section 29E and reviewing its determinations under section 29F.

114. Subsection (1) of the new section 29C provides that Scottish Water, in proposing a charges scheme under section 29A or any revision under section 29F, must comply with subsections (3) and (4) of this section. These provide that Scottish Water must comply with the statement of policy regarding charges as issued by Ministers under the new section 29D, and ensure that its income (whether from charges or other available resources) is not less than sufficient to match the expenditure required to enable the effective exercise of its core functions (the latter as defined in section 29G).

115. Subsection (2) of the new section 29C specifies how the Commission must exercise its functions under the new sections 29A, 29B, 29E and 29F. In relation to sections 29A, 29B and 29F, the Commission must, like Scottish Water, comply with sections 29C(3) and 29C(4) (as discussed in the previous paragraph). In approving departures from charges schemes under section 29E, the Commission should ensure that Scottish Water’s income is sufficient to match the expenditure required to enable the effective exercise of its core functions (again as defined in section 29G). The Commission must also have regard to any relevant Ministerial guidance issued to Scottish Water or directions given to it, either under the general direction-making power in section 56 of the 2002 Act, or in relation to payment and investment under section 44 of that Act. This will ensure that the Commission takes account of all relevant obligations or duties or instructions which have a bearing on how Scottish Water discharges its core functions (as defined in section 70(2) of the 2002 Act), in calculating the income or expenditure charge determinations or schemes should provide for.

116. Subsection (4) of the new section 29C provides a formula for balancing Scottish Water’s income and expenditure (from various resources) which charge determinations and revisions thereof (under section 29F) and charges schemes must take account of. This must be read in light of the duty on Scottish Water under section 41(1) of the 2002 Act to ensure that, taking one year with another, its income is not less than sufficient to meet its expenditure. It defines Scottish Water’s income as the sum of its income from its charges for services and the amount of financial resources reasonably available to it such as, for example, grants paid to it by Ministers under section 42(1) of the 2002 Act and borrowing authorised by Ministers under section 42(3) of that Act. In effect, it requires that Scottish Water’s income in respect of its core functions should not be less than sufficient to meet the expenditure, in both capital and operating costs, required to enable it to effectively perform those functions.

Subsection (1): the new section 29D of the 2002 Act: Statements regarding charges

117. The new section 29D of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides for Ministers to issue a statement of policy regarding charges, which must be taken into account by the Commission in its determination of maximum charges under the new section 29B and by Scottish Water and the Commission respectively in making and approving charges schemes under the new section 29A.
118. Subsection (1) provides that for each charge determination provided under section 29B(2), the Scottish Ministers must provide Scottish Water and the Commission with a statement of policy on charges for a given period (as determined under section 29B(2)). This statement is to be prepared with reference to economic as well as other relevant factors.

119. Subsection (2) provides that Ministers’ statement on charges policy should include provision regarding charge harmonisation, and defines that as provision that seeks to ensure that charges under a charges scheme are the same for similar services provided to people in similar categories.

120. Subsection (3) specifies other provisions that Scottish Ministers may include in their statement on charges policy, which must be consistent with the overriding principle of harmonisation as set out in subsection (2). This includes provision regarding: particular services that should be funded through a charge for combined services (subsection (3)(a)); the proportion of Scottish Water’s charge income which different categories of customer should contribute (subsection (3)(b)); fixing the level of charge for specific categories of customer, or by reference to a customer’s liability for council tax (subsection (3)(c)); and for it to cover such other matters as Ministers think fit (subsection (3)(d)). This will allow Ministers to require continuation of the current link for household customers between their council tax band and their water and sewerage charges. It also provides a mechanism for prescribing reduced charges for certain groups of customers, which will replace the current provision under section 40 of the 2002 Act for Ministers to make regulations reducing charges for customers meeting specific conditions, for example, those in receipt of council tax benefit.

121. Subsection (3A) provides that in preparing a statement under this section, Scottish Ministers must have regard to Scottish Water’s duty under section 51(1) of the 2002 Act, when exercising its functions, to act in the way best calculated to contribute to the achievement of sustainable development.

122. Subsection (4) states that Scottish Ministers must consult the Commission, the Convener of the Customer Consultation Panels (representing the Panels as a whole) and Scottish Water before issuing a policy statement on charges under this section.

Subsection (1): the new section 29E of the 2002 Act: Departure from certain charges

123. The new section 29E of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides for departures from a charges scheme to be made in respect of charges paid by a water services or sewerage services provider. The section also specifies the narrow circumstances in which these departures from the set charges scheme may be permitted.

124. Subsection (1) of the new section 29E allows Scottish Water to apply to the Commission for its consent to depart from a charges scheme in respect of charges to be paid by a water services or sewerage services provider.

125. Subsection (2) of the new section 29E provides that the Commission may consent to such a departure only where satisfied that a customer of the provider in respect of which Scottish Water has made the request has taken specific action which demonstrably reduces or increases
the costs incurred by Scottish Water in providing services to the provider. The subsection also
provides that the departure must be otherwise justified in the circumstances of the case.

126. Subsection (3) to new section 29E provides that where the Commission agrees to a
departure, it may do so subject to such reasonable conditions as it considers appropriate.

127. Subsection (4) to new section 29E stipulates that where the Commission does not agree to
a departure it must give its reasons for doing so.

128. Subsection (5) to new section 29E provides that the Commission must specify in writing
the procedure it will follow in deciding whether to agree to requests for departures made under
subsection (1). In addition it must specify matters which will be taken into account and criteria
which will be used in determining whether a departure from a charges scheme is justified; and, where
the Commission determines that a departure is justified, matters to be taken into account
and criteria to be used by Scottish Water in the setting of lower, or as the case may be, higher,
charges. Subsection (6) provides that the Commission may revise this provision.

129. Subsection (7) to new section 29E provides that, in making provision under
subsection (5) for the procedure to be followed in determining requests for departures, the
Commission must consult Scottish Ministers, Scottish Water and such other persons as it thinks
fit.

130. Subsection (8) provides that the Commission must send a copy of the provision made
under subsection (5) for the procedure to be followed in determining requests for departures, the
Commission must consult Scottish Ministers, Scottish Water and such other persons as it thinks
fit.

Subsection (1): the new section 29F of the 2002 Act: Review of determinations and charges

131. The new section 29F of the 2002 Act, which is also inserted by subsection (1) of
section 18 of the Bill, provides for the Commission’s determination of charges made under
section 29B to be reviewed and amended prior to the date set (under section 29B(2)) for the next
determination to be made. Subsection (1) of the new section 29F provides that a review of a
determination under section 29B(1)(a) is only to be sought where there has been or is likely to be
a material change to Scottish Water’s income from charges, grants, borrowing, or the other
resources reasonably available to it; or to the expenditure required by Scottish Water for the
effective exercise of its core functions (as defined in section 29G).

132. Subsection (2) of the new section 29F provides that, where subsection (1) applies,
Scottish Water may, or must if the Commission requests it to, send the Commission proposals
for revising the maximum amounts determined for charges under section 29B(1)(a).

133. Subsection (3) of the new section 29F provides that the Commission, on receipt of such a
proposal, must review the maximum amounts in force, and may revise them to such extent as it
thinks fit.
134. Subsection (4) of the new section 29F provides that in reviewing the amounts, the Commission must take into account all matters affecting the resources available to Scottish Water and the expenditure required to carry out its core functions.

135. Subsection (5) of the new section 29F provides that the Commission, before revising the amounts, must inform Scottish Ministers that review of these is under consideration; invite representations regarding the revision of the amounts; and have regard to any representations made to it.

136. Subsection (6) of the new section 29F provides that the Commission must give reasons for its decision as to whether or not to revise the amounts.

137. Subsection (7) of the new section 29F requires the Commission to send Scottish Water a written notice of any revised amounts set.

138. Subsection (8) of the new section 29F provides that Scottish Water may revise any charges fixed by the charges scheme in accordance with the revised amounts and that where it does so it must send written notice of the revised charges to the Commission for approval. Subsection (9) provides that the Commission may approve any revised charges with or without modifications. Subsection (10) provides that if the Commission approves any revised charges with modifications, it must give its reasons for doing so.

139. Subsection (11) provides that once revised charges have been approved by the Commission, Scottish Water must publish a summary of the revised charges and the date from which the revised charges have effect. Subsection (12) provides that the date for this purpose will be determined by the Commission.

Subsection (1): the new section 29G of the 2002 Act: Effective exercise of core functions

140. The new section 29G of the 2002 Act, which is also inserted by subsection (1) of section 18 of the Bill, provides that, for the purposes of sections 29C(4) and 29F(1), Scottish Water is to be taken to be exercising its core functions effectively if it makes such use of its resources that, year on year, it achieves its objectives, as set out in Ministerial directions under sections 56 and 56A at the lowest reasonable overall cost. Section 29C(4) provides that Scottish Water’s income should not be less than sufficient to allow it to carry out its core functions. A definition of the effective exercise of Scottish Water’s core functions is needed in relation to section 29F(1) because the expenditure required in relation to this is one factor where a material change may trigger a section 29F review of the Commission’s determination and charges.

Subsection (2): Scottish Water’s charges for water and sewerage services

141. Subsection (2) of section 18 makes amendments to section 30 of the 2002 Act which currently gives the Scottish Ministers the power by order to set maximum charges that may be recovered by a person other than Scottish Water for supplying water or providing sewerage services with the help of Scottish Water to others who are not the direct customers of Scottish Water. For example, the owner of a caravan site may be the direct customer of Scottish Water, and might in turn charge individual caravan owners for Scottish Water’s services subject to any relevant maxima. The amendments provide that in future the maximum charges for these services, or the method of calculating them, will be set out in Scottish Water’s charges scheme.
under the new section 29A of the 2002 Act (see above) and consequently will be subject to approval by the Commission.

**Subsection (3): Repeal of sections 31 to 34 of the 2002 Act**

142. Subsection (3) of section 18 repeals sections 31 to 34 of the 2002 Act, which make provision for the Water Industry Commissioner to provide advice on charges and for charges schemes to be proposed, approved and published. These arrangements are all superseded by new sections 29 to 29G of the 2002 Act, as inserted by subsection (1) of section 18.

**Subsections (4) and (5): Liability of occupiers etc. for charges**

143. Subsection (4) of section 18 amends section 35 of the 2002 Act which sets out the liability of the occupiers of premises to pay Scottish Water for water or sewerage services. The amendment disapplies the section in respect of services provided under section 14(2) of the Bill, i.e. services to persons eligible to be served by a water or sewerage services provider; unless their supply has been continued under section 15(1) or (4). This provides that only occupiers of eligible premises whose service is continued by Scottish Water under the supplier of last resort provisions in section 15 are liable to Scottish Water directly for their water charges. For all other occupiers of eligible premises whose services are arranged by a licensed provider, the latter will instead be liable to Scottish Water for charges under the new section 35A.

144. Subsection (5) of section 18 inserts a new section 35A into the 2002 Act. This new section provides that water and sewerage services provided by Scottish Water to eligible premises by a licensed provider, as provided in section 14 of the Bill, are to be considered as services provided solely by Scottish Water to the licensed provider for the purposes of charge schemes and determinations under the new sections 29 to 29G of the 2002 Act (as inserted by section 18(1) of the Bill) (see, in particular, section 35A(1) and (2) which make provision for water and sewerage services respectively). Section 35A(3), however, disapplies section 35A(1) and (2) where water or sewerage services continue to be provided directly to the occupiers of those premises under section 15 of the Bill. In that case, occupiers will be directly liable to Scottish Water for charges as set out in a charges scheme under the new section 29A of the 2002 Act.

**Section 19: Scottish Water’s functions: powers of the Scottish Ministers**

145. Section 19 inserts sections 56A and 56B into the 2002 Act. Section 56 of the 2002 Act gives the Scottish Ministers powers to direct Scottish Water as regards the exercise of their functions. Subsection (1) of the new section 56A enables any directions issued under section 56 to, in particular, set objectives regarding the standard of services to be provided by Scottish Water in the exercise of its functions; or the timescales within which Scottish Water is to achieve a particular standard of service in exercising its functions, or to commence or complete a particular piece of work. The directions will apply by reference to the period of a charge determination specified under the new section 29B(2) of the 2002 Act. Subsection (2) states that different objectives may be set for different cases or categories of case.

146. Subsection (3) of the new section 56A requires Scottish Ministers, in formulating objectives of a type referred to in subsection (1), to have regard to Scottish Water’s duty under section 51(1) of the 2002 Act, in exercising its functions, to act in the way best calculated to contribute to the achievement of sustainable development.
147. Subsection (4) of the new section 56A of the 2002 Act requires Scottish Ministers, before giving directions under section 56 of a type referred to in subsection (1), to consult the Convener of the Customer Consultation Panels on the objectives. The Convener, in being consulted under this section, represents the Panels as a whole.

148. The new section 56B gives Ministers powers, after consulting the Commission and Scottish Water, to make orders conferring additional functions on Scottish Water as regards the provision of water and sewerage services. Paragraph 7(7) of schedule 5 to the Bill amends section 68 of the 2002 Act to provide that regulations under new section 56B will be subject to affirmative procedure in the Parliament.

Section 3: Determinations relating to provision of services

149. Section 3 relates to regulations to be made under the Sewerage (Scotland) Act 1968 (“the 1968 Act”) and the Water (Scotland) Act 1980 (“the 1980 Act”) as amended by the Water Environment and Water Services (Scotland) Act 2003 (“the 2003 Act”). These allow the Scottish Ministers to make regulations dealing with the issue of reasonable cost, the cost which Scottish Water is required to bear in making a new connection to the public water supply or sewerage system. The regulations will define how the balance of costs between Scottish Water and developers will be calculated. In effect, these amendments mean that the Commission is to be responsible for deciding any disputes about reasonable costs rather than Ministers.

150. Subsection (1)(a) amends subsection (4) of section 1 of the 1968 Act to give the Commission, rather than Ministers, powers to determine disputes arising over the determination of reasonable cost of a sewerage connection as defined in regulations. Subsection (1)(b) inserts provisions into the 1968 Act to require the Commission to define its procedures for determining disputes, and to consult Scottish Water and others as it considers appropriate on these procedures.

151. Subsection (2) makes equivalent provision in relation to connection to the public water networks through amendments to the 1980 Act.

Section 19A: Qualification of duty to provide services

152. Section 19A qualifies Scottish Water’s duties to provide public sewers and a supply of wholesome water for domestic purposes, and to allow connections to the public water and sewerage network, where practicable at a reasonable cost, as set out respectively in section 1 of the Sewerage (Scotland) Act 1968 and section 6 of the Water (Scotland) Act 1980.

153. Subsection (1) inserts a new subsection (7) into section 1 of the 1968 Act to provide that the duties imposed by sections 1(1) and (2) of that Act shall not require Scottish Water to do anything which is prejudicial to its compliance with (a) any directions given to it under section 56 of the Water Industry (Scotland) Act 2002 so far as setting objectives of a type referred to in section 56A of that Act (inserted by section 19 of the Bill); or (b) a statement of policy issued under section 29D of the 2002 Act (inserted by section 18 of the Bill).

154. Subsection (2) of section 19A makes equivalent qualifications in respect of Scottish Water’s duties under sections 6(1), (2) and (4) of the 1980 Act.
Sewerage nuisance: Code of Practice

Section 19B: Sewerage nuisance: code of practice

155. Section 19B gives the Scottish Ministers powers to issue a code of practice on the assessment, control and minimisation of sewerage nuisance.

156. Subsection (1) of section 19B gives the Scottish Ministers the power to make an order containing a code of practice on the assessment, control or minimisation of sewerage nuisance. This is referred to as a “sewerage code”.

157. Subsection (2) defines “sewerage nuisance” as any smells or discharges, insects or any other thing emanating from any part of the public sewerage system so as to be prejudicial to health or a nuisance. “Public sewerage system” is defined in section 22(1) of the Act.

158. Subsection (3) provides that a sewerage code may include guidance on the best practicable means of assessing, controlling and minimising sewerage nuisance, and may set out the circumstances in which a person to whom a sewerage code applies could be regarded as complying or not complying with that code.

159. Subsection (4) contains provisions concerning the interpretation of “best practicable means” for the purposes of subsection (3)(a).

160. Subsection (5) provides that a sewerage code will apply to Scottish Water in respect of its core functions relating to the provision of sewerage and the disposal of sewage and to any other person acting on Scottish Water’s behalf or under its authority in respect of those functions.

161. Subsection (6) requires Scottish Water and any other person to whom the code applies, to comply with that code.

162. Subsection (7) requires the Scottish Ministers and local authorities to publicise a sewerage code.

163. Subsection (8) requires the Scottish Ministers, in advance of making an order containing a sewerage code, to consult Scottish Water, local authorities and any other appropriate persons, on the proposed sewerage code.

164. Subsection (9) exempts from the requirements of sections 19B and 19C, those parts of the public sewerage system which are regulated by a permit issued by the Scottish Environment Protection Agency (“SEPA”) under the Pollution Prevention and Control (Scotland) Regulations 2000, such as, for example, certain sewage treatment works. However, subsection (10) reserves the powers of Ministers under other legislation, to make a direction concerning the application of a sewerage code to any part of the public sewerage system. This would, for example, enable Ministers to give directions to SEPA to have regard to the requirements of any sewerage code when granting permits under the 2000 Regulations.
Section 19C: Monitoring and enforcement

165. Section 19C contains monitoring and enforcement provisions relating to sewerage codes.

166. Subsection (1) requires a local authority to monitor compliance with a sewerage code, and to investigate complaints of sewerage nuisance made by persons living in its area.

167. Subsection (2) requires a local authority to serve a notice (referred to as an “enforcement notice”) on Scottish Water or any other person to whom a sewerage code applies, where satisfied that there is or is likely to be material non-compliance with a sewerage code.

168. Subsection (3) provides that the enforcement notice may set out the works or steps required to comply with a sewerage code and must specify the date by which these requirements are to be fulfilled.

169. Subsection (4) provides that it is an offence without reasonable excuse to contravene an enforcement notice, and provides for a fine of up to £40,000 on summary conviction.

170. Subsections (5) and (6) enables a local authority itself, in the event of non-compliance with an enforcement notice, to undertake works to secure compliance with that notice, and to recover the costs of so doing from the person upon whom the notice was served.

171. Subsection (7) disapplies the statutory nuisance functions of a local authority under sections 79 to 81 of the Environmental Protection Act 1990, so that only the Bill’s provisions apply as regards sewerage nuisance (and not the monitoring and enforcement functions under those sections of the 1990 Act so far as relevant in relation to sewerage nuisance). This will ensure that the monitoring and enforcement procedures set out in section 19C apply to sewerage nuisance in future. However, the operation of section 82 of the 1990 Act is expressly preserved so that the abatement procedure under that section, by which individuals may bring summary proceedings regarding a statutory nuisance, continues to apply so far as relevant in relation to sewerage nuisance.

Definitions for Part

Section 20: Meaning of “eligible premises”

172. Section 20 defines “eligible premises” for the purposes of Part 2 of the Bill. This is required to define which customers licensed providers may make arrangements to supply water or sewerage services to. Where a customer meets this definition a licensed provider can supply services to them without contravening the general prohibitions in sections 4(3) and 5(3) of the Bill.

173. Subsection (1) defines eligible premises as those that are connected, or are to be connected, to the public water supply system or, as the case may be, the public sewerage system, and are not a dwelling.
174. Subsection (2) defines “dwelling” by reference to the definition given to it for council tax purposes under the Local Government Finance Act 1992 (i.e. premises in respect of which council tax is payable). The main purpose of this provision is to ensure that licensed providers cannot make arrangements to provide services to households. However, certain places which are dwellings under the 1992 Act, are not to be classed as a dwelling for the purposes of this Bill, namely “the residential part of part residential subjects within the meaning of that Part of that Act”. This means that premises which are technically residential but which form part of a building whose main purpose is to function as a business, e.g. a care home, are not caught by the definition of “dwelling”; they will therefore fall within the definition of “eligible premises” and be able to receive water and sewerage services from a licensed provider notwithstanding that, for council tax purposes, certain parts of those subjects may be classed as a dwelling.

175. Subsection (3) gives Ministers the power by order to amend the definition of a “dwelling” for the purposes of the Bill. This power could be used, for example, in the event of any changes made for council tax purposes to the definition of dwelling, to ensure that premises used primarily as dwellings are always excluded from the category of "eligible" premises. Section 27 provides for these regulations to be subject to negative procedure in the Parliament.

Section 21: Meaning of “public water supply system”

176. A water services licence will authorise a provider to arrange for a supply of water to be made to any eligible premises through the public water supply system. Section 21 defines what constitutes the public water supply system for the purposes of Part 2 of the Bill.

177. Subsection (1) defines the public water supply system as all mains, pipes, water treatments works and other similar infrastructure vested in Scottish Water (i.e. infrastructure for which Scottish Water is responsible), or used by Scottish Water (or a person acting on its behalf or under its authority, such as a PFI contractor) in connection with the exercise of Scottish Water’s core functions in respect of the public water supply. (Scottish Water’s core functions are defined at section 70(2) of the Water Industry (Scotland) Act 2002 and for all practical purposes the definition includes all activities involved in providing statutory public water and sewerage services.)

Section 22: Meaning of “public sewerage system”

178. In parallel to the water services licence, a sewerage services licence authorises a provider to arrange for a supply of sewerage to, or disposal of sewage from, an eligible customer through the public sewerage system. Section 22 provides a definition of the public sewerage system for the purposes of Part 2 of the Bill.

179. Subsection (1) defines the public sewerage system as all sewers, drains, sustainable urban drainage systems (SUDS), sewage treatment works or other similar infrastructure vested in Scottish Water or used by Scottish Water (or a person acting on its behalf or under its authority, such a PFI contractor) in connection with the exercise of Scottish Water’s core functions in respect of statutory public sewerage services.
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23), as amended at Stage 2, and which was introduced in the Scottish Parliament on 11 June 2004

PART 3: COAL MINE WATER POLLUTION

Section 23: Control of water from coal mines

180. Subsection (1) of section 23 of the Bill inserts new sections 4D to 4F and a new Schedule 1C into the Coal Industry Act 1994 (“the 1994 Act”). These new sections provide the terms and conditions of powers allowing the Coal Authority (“the Authority”) to act to prevent or mitigate pollution, and to gain access and, if need be, to compulsorily acquire land in order to deal with coal mine water pollution in Scotland. The new provision is set out as a power, rather than a duty in any particular case, in order to enable the Authority to decide what action, if any, would be appropriate, depending on the circumstances.

181. The new section 4D of the 1994 Act makes provision for the Authority to take action to prevent or mitigate pollution of the water environment caused by discharges of water from coal mines which are vested in the Authority. This provides a statutory basis for the Authority's remediation work beyond its existing powers and general duties in Part 1 of the 1994 Act.

182. The new section 4E of the 1994 Act defines the powers that are given to the Authority to enter premises (within the meaning of section 4E(8), which includes land) for the purpose of investigating or dealing with water discharging from coal mines. The new Schedule 1C to the 1994 Act (as set out in Schedule 4 to the Bill) sets out additional provisions on the administrative and operational procedures concerning these powers of entry. Before invoking these powers, the Authority would usually seek to reach agreement with the relevant owners of the land. These provisions therefore only concern situations where the Authority is unable to gain entry by agreement.

183. Subsections (1) and (2) of new section 4E sets out the reasons why the Authority would need to have access to premises (in exercise of its powers under subsection (3)). These are to carry out work to determine the extent, or the likelihood, of any pollution or danger, and to take any remedial action required under section 4D, where coal mine water has caused, or is causing, or is likely to cause either serious pollution of the environment or a danger to life or health. While actual ownership of the mine remains with the Authority, Part II of the 1994 Act provides for the leasing of coalmining operations; this new provision therefore makes provision to enable another person, such as a licensee or a specialist, to undertake the required investigative works on behalf of the Authority.

184. Subsections (3) and (4) of new section 4E set out the extent of the powers of entry and the purposes for which they might be used in order to allow a broad spectrum of investigative and remedial work, including the power to carry out experimental borings. As read with paragraph 1 of Schedule 1C, the powers enable the Authority to take others onto the premises, for example, engineering experts, and any necessary equipment, for use in tracing the source of leaks.

185. In an emergency (as defined in new section 4E(8) to cover cases where there is an immediate risk of serious pollution of the environment or immediate danger to life or health), the provisions of new section 4E(3) permit the Authority to enter premises at any time and, if need be, by force.
186. Subsections (5), (6) and (7) of new section 4E require the Authority either to give at least seven days’ notice before entering a premises (in cases other than an emergency), or to obtain a warrant granted under the terms of paragraph 2 of Schedule 1C (where the occupier of the premises does not consent to the entry). Whilst the immediacy of the threat to the water environment may not be such that it could be described as an “emergency”, there may still nevertheless be a need to exercise the powers of entry under the authority of a warrant to deal with potentially significant pollution of the water environment. For example, where the Authority had identified the need for a new monitoring point but could not gain the agreement of the landowner to install the monitoring equipment or subsequently to take measurements. In order to establish clearly the evidential basis which underpins the issue of a warrant, the new Schedule 1C sets out the required evidence which must be adduced in writing before a warrant may be issued. These include circumstances where the Authority requires access urgently and the occupier is absent. However, this would rarely be necessary, for example, where the Authority needed to work quickly and the occupier was uncontactable for an extended period.

187. The new section 4F of the 1994 Act enables the Authority to compulsorily acquire land in Scotland. This new provision is in addition to section 5(2) of the 1994 Act which enables the Authority to acquire land by agreement for the purposes of carrying out its general functions under that Act.

188. Subsections (1) and (2) of new section 4F enable the Authority, if authorised by the Scottish Ministers, to acquire land compulsorily for the purpose of preventing or mitigating the effects of a mine water discharge which has caused, is causing or is likely to cause serious pollution of the water environment or danger to life or health. The Authority is also able, where necessary, to acquire a right of servitude in or over land to ensure access to the land for the purpose of carrying out its works.

189. Subsection (3) of new section 4F applies the requirements of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 to compulsory acquisitions under new section 4F. Wherever the 1947 Act refers to 'a local authority', it will apply as if it were a reference to the Coal Authority. The provisions of the 1947 Act enable Scottish Ministers to confirm an Order with or without modifications in the absence of any outstanding objections, failing which a public local inquiry must be held. Additionally, following confirmation of an Order, the Authority is required to notify it in the prescribed form. These new powers will not affect the requirements, in section 5(7) of the 1994 Act, for the Authority to obtain the agreement of Treasury and the Secretary of State for Trade and Industry before acquiring any land.

190. Subsection (2) of section 23 of the Bill inserts a new subsection (6) into section 66 of the 1994 Act, so that the provisions apply to land held by non-ministerial office holders in the Scottish Administration as well as other government departments.

191. Subsection (3) of section 23 of the Bill amends the 1994 Act to provide that the provisions inserted by the Bill apply to Scotland only.
PART 4: MISCELLANEOUS AND GENERAL

Miscellaneous

Section 24: Offences by bodies corporate and partnerships

Section 24 provides that officers of companies and other corporations and members of partnerships can be held personally liable, in certain circumstances, for offences under the Bill that their companies or partnerships commit.

Section 25: Amendments to enactments

Section 25 introduces schedule 5, which makes consequential amendments to enactments as a result of this Bill.

Section 26: Ancillary provision

Section 26 enables Ministers to make orders for incidental, supplemental, consequential, transitional, transitory or saving provisions where they consider that these are necessary or expedient for the purposes of or in consequence of the Bill. The parliamentary procedure for making these orders is defined under section 27: where an order is used to amend primary legislation, affirmative procedure is prescribed; otherwise an order would be subject to negative procedure.

General

Section 27: Orders and regulations

Section 27(1) provides that the powers to make orders and regulations that the Bill confers on the Scottish Ministers are exercisable by statutory instrument. Subsection (2) provides that in exercising such powers, Ministers can make such incidental, consequential, transitional or saving provisions as considered necessary or expedient and can make different provision for different circumstances.

Subsections (3) and (4) set out the parliamentary procedure which the various statutory instruments that are capable of being made under the powers in the Bill are subject to.

Subsection (3) provides that some statutory instruments are subject to negative procedure or annulment. Subsection (4), however, specifies affirmative procedure for some statutory instruments, whereby Ministers cannot make and bring into force a statutory instrument until the instrument has been laid in draft before the Parliament and the Parliament has by resolution approved it. This procedure requires closer Parliamentary scrutiny and is applied to the few provisions in the Bill that enable primary legislation to be amended, or enable provisions in the Bill to be modified in a significant way.

Subsection (3) applies negative procedure to statutory instruments in respect of the following provisions:

- Section 2: an order to dissolve the Water Industry Commissioner for Scotland.
• Section 7(2): an order to specify any other factors beyond those at sections 7(2)(a) and 7(2)(b) that the Commission is to take into account in assessing the ability of an applicant for a licence to discharge the licence’s terms and conditions.

• Section 9(5): an order specifying the matters for which the Commission, under the powers conferred by section 9, may charge applicants for a licence.

• Section 12(3A): an order to modify paragraphs 1 and 2 of schedule 2, which govern procedures for the application for a water or sewerage services licence and the conditions of the licence, in relation to the first application for such a licence by the undertaking established by Scottish Water under section 12.

• Section 12A(1): an order to specify circumstances in which Scottish Ministers may make grants to the undertaking established under section 12.

• Section 12A(2): an order to specify circumstances in which the undertaking established under section 12 may borrow from Scottish Ministers and the circumstances in which it may not borrow money from any other person.

• Section 12A(6): an order to specify circumstances in which Scottish Ministers may guarantee the discharge of any financial obligation in connection with sums borrowed by the undertaking under section 12A(4)(b).

• Section 16(3): an order prescribing the form and content of the notice that a water services provider must issue under section 16(3), prior to requesting that Scottish Water discontinue the supply of water to premises.

• Section 17A(8): an order prescribing the form and content of a notice that a sewerage services provider must issue, prior to requesting that Scottish Water discontinue provision of trade effluent services to premises.

• Section 19B(1): an order containing a code of practice for the purposes of assessing, controlling and minimising sewerage nuisance.

• Section 20(3): an order to vary the meaning of “dwelling” for the purposes of the Bill’s definition of “eligible premises” at section 20.

• Section 26: an order to make further provision for the purposes of the Bill (where this does not amend primary legislation).

• Paragraph 1(1) of Schedule 2: an order prescribing the form and content of an application for a water services or sewerage services licence.

• Paragraph 1(4) of Schedule 2: an order prescribing the timescales and content of the notice that an applicant for a licence must publish.

• Paragraph 11(1) of Schedule 2: an order specifying the manner in which the Commission must maintain a register of water and sewerage services licences.

• Paragraph 11(2)(g) of Schedule 2: an order specifying any additional information, beyond that at sections 10(2)(a) to 10(2)(f), to be included in the Commission’s register of water and sewerage services licences.

199. Subsection (4) applies affirmative procedure to statutory instruments in respect of the following provisions:
Section 26: an order to make further provision for the purposes of the Bill (where this amends primary legislation).

Section 4(7): regulations which specify circumstances in which the prohibition on common carriage on the public water networks at section 4(1); on using the public water networks to supply services at section 4(2); or on providing services on the public water networks without a licence at section 4(3), do not apply.

Section 5(7): regulations which specify the circumstances in which the prohibition: on common carriage on the public sewerage networks at section 5(1); on using the public sewerage networks to supply services at section 5(2); or on providing services on the public sewerage networks without a licence at section 5(3), do not apply.

Section 28: Interpretation

200. Section 28(1) specifies the meaning to be placed upon the abbreviated references to legislation in the Bill. Subsection (2) provides that the definition of Scottish Water's core functions given at section 70(2) of the 2002 Act is to apply for the purpose of the Bill.

Section 29: Crown application

201. Section 29 provides that the provisions in the Bill bind the Crown.

Section 30: Short title and commencement

202. Section 30 (1) specifies the title by which the Bill should be cited once it has been enacted. Subsections (2) and (3) empower Ministers to bring different provisions in the Bill into force at different times following Royal Assent.

SCHEDULE 1: WATER INDUSTRY COMMISSION FOR SCOTLAND

203. Schedule 1 is introduced by section 1(4) of the Bill and inserts a new schedule A1 into the 2002 Act.

Schedule A1: Water Industry Commission for Scotland

Paragraph 1: Status

204. Paragraph 1 provides that the Commission is a body corporate. Sub-paragraph (2) provides that the Commission does not form part of the Crown.

Paragraph 2: Membership

205. Paragraph 2 provides that the Commission is to be made up of 3-5 ordinary members and a chief executive. This means that the majority of the membership of the Commission will be non-executive. Paragraph 5 provides that a person is to be appointed to chair the Commission from amongst the ordinary members.

Paragraph 3: Tenure and removal from office

206. Paragraph 3 provides for the appointment and vacation of office for Commission members. Members are to be appointed by the Scottish Ministers, who will also determine their
terms and conditions. Sub-paragraph (2) provides that Ministers may remove ordinary members from office; and that the Commission may remove the chief executive from office with the approval of Ministers. Removal from office under this paragraph of members or the chief executive may only happen under certain circumstances, specified as bankruptcy, incapacity by physical or mental illness, prolonged absence from Commission meetings without permission, or otherwise being unable, or unfit to discharge the functions of a member or unsuitable to continue as a member.

**Paragraph 4: Disqualification**

207. Paragraph 4 disqualifies members of the House of Lords, the House of Commons, the Scottish Parliament or the European Parliament from being appointed as members of the Commission.

**Paragraph 5: Chairing**

208. This paragraph requires the Scottish Ministers to appoint a person to chair the Commission from among its ordinary members. Sub-paragraph (3) provides that this person may resign by giving written notice to Ministers. Sub-paragraph (4) states that they cease to chair the Commission on ceasing to be a member of the Commission.

**Paragraph 6: Remuneration, allowances and pensions**

209. Sub-paragraph (1) provides for Scottish Ministers to determine the remuneration to be paid to ordinary members of the Commission, and sub-paragraph (2) provides further for them to determine allowances in respect of expenses to be paid to ordinary members and to the chief executive.

210. Sub-paragraph (3) provides that Scottish Ministers may, under special circumstances, direct the Commission to pay compensation to an ordinary member who has ceased to hold the office otherwise than on the expiry of the terms of their appointment. Sub-paragraph (4) provides that Scottish Ministers may direct the Commission to pay pensions, allowances or gratuities, or contributions to these, to ordinary members as Ministers consider appropriate.

**Paragraph 7: Chief executive**

211. Paragraph 7 requires the Commission to employ a chief executive and makes provision regarding their appointment and employment.

212. Sub-paragraph (2) provides that Scottish Ministers will appoint the first chief executive of the Commission and determine the appointee’s terms and conditions. Sub-paragraph (3) ensures that before they do this, Scottish Ministers will consult the chairman or prospective chairman of the Commission, if that person has been identified.

213. Sub-paragraph (4) provides that the Commission will appoint subsequent chief executives on such terms and conditions as they determine, subject to the approval of Ministers.

214. Sub-paragraph (5) requires that the chief executive has knowledge, skills or experience relevant to the functions of the Commission.
215. Sub-paragraph (6) enables the Commission, with the approval of Ministers, to vary the terms and conditions of the chief executive or to terminate such an appointment where satisfied that the chief executive is not adequately discharging the functions of that post.

Paragraph 8: Staff

216. Sub-paragraph (1) provides that all the staff of the Water Industry Commissioner for Scotland will transfer to the Commission once it is established.

217. Sub-paragraph (2) provides for the contract of employment of any staff transferred under sub-paragraph (1) not to be terminated by the transfer, but to continue as if originally made between the member of staff and the Commission.

218. Sub-paragraph (3) provides that when staff are transferred to the Commission, the Commission will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer continues to have effect after the transfer.

219. Sub-paragraph (4) states that the transfer under these provisions does not affect any person’s right to terminate their contract of employment if the terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that the identity of the person’s employer has changed is not in itself to constitute such a change.

220. Sub-paragraphs (5), (6) and (7) provide that the Commission may employ other staff, and determine their terms and conditions and the arrangements for pensions, allowances or gratuities. Ministers must approve all such recruitment and arrangements. Sub-paragraph (8) provides that reference to provision of pensions includes provision by way of compensation for loss of office or employment.

Paragraph 9: Transfer of property and liabilities

221. Paragraph 9(1) provides that all property (including rights) and liabilities of the Water Industry Commissioner will transfer to the Commission. Sub-paragraph (2) provides that sub-paragraph (1) will have effect despite any provision which might otherwise prevent the transfer of such property and liabilities.

Paragraph 10: Committees

222. Paragraph 10 provides for the Commission to establish committees for or in connection with any of its functions. These must be chaired by an ordinary member of the Commission (sub-paragraph (2)), and may include employees of the Commission who are not members of the Commission (sub-paragraph (3)), as well as the chief executive.

Paragraph 11: Delegation of powers

223. Paragraph 11 enables any function of the Commission to be delegated to any of its authorised committees; but that this authorisation does not prevent the Commission itself from doing anything it has authorised a committee to do.
Paragraph 12: Proceedings

224. Paragraph 12 states that the Commission may determine its own procedures, and that any vacancy among its members or defect in the appointment of a member does not affect the validity of its proceedings.

Paragraph 13: General powers

225. Paragraph 13(1) provides that the Commission may enter into contracts and acquire or dispose of property, if this is necessary or expedient in the exercise of its functions; but the Scottish Ministers’ consent is required where land is acquired or disposed of (sub-paragraph (2)).

Paragraph 14: Accounts

226. Paragraph 14 provides that the Commission will prepare accounts for each financial year, and send these to the Auditor General, in accordance with directions from Scottish Ministers. By virtue of this provision the Commission is also subject to provision under the Public Finance and Accountability (Scotland) Act 2000 giving the Auditor General powers to audit and examine any part of the Commission’s expenditure.

SCHEDULE 2: LICENCES AND COMPLIANCE: FURTHER PROVISION

227. Schedule 2 is introduced by section 11.

Paragraph 1: Application for licence

228. Paragraph 1 provides an order-making power for the Scottish Ministers to make provision in respect of applications for a water or sewerage services licence under the Bill. The paragraph sets out detailed provisions about the Commission's functions in considering applications from those seeking licences, and about the requirements to be placed on applicants.

229. Sub-paragraph (1) requires the form for applications to the Commission under this paragraph to be prescribed by Ministers. Sub-paragraph (2) requires applicants to provide the Commission with any other information reasonably required to enable consideration of the application unless that is legally privileged information (sub-paragraph (3)).

230. Sub-paragraph (4) requires applicants to publish a notice of their application and to explain in this notice the procedures by which anyone can make representations to the Commission about the application. The timing of this notice and the procedures on representation contained in it are to comply with requirements prescribed by Ministers in an order.

231. Sub-paragraph (5) requires the Commission to give notice to applicants of any proposed refusal of an application, explaining the reasons for it and specifying a time within which representations about it may be made. Sub-paragraph (6) provides that in making a final decision about whether to grant or refuse an application, the Commission is required to have regard to any representations made by the applicant and other interested parties.

232. Sub-paragraph (8) makes it an offence for an applicant to provide false or misleading information in an application for a licence. Sub-paragraph (9) specifies that the penalties for
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23), as amended at Stage 2, and which was introduced in the Scottish Parliament on 11 June 2004

anyone guilty of this offence are up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or where convicted by a jury, an unlimited fine.

233. Sub-paragraph (10) gives applicants who are refused a licence the right to appeal against that refusal to the Court of Session, on a question of law. Sub-paragraph (11) gives Scottish Water a right of appeal on a question of law, to the Court of Session against a licence being granted. Sub-paragraph (12) establishes that decisions by the Court of Session in these cases are final.

Paragraph 2: Conditions of licence

234. Paragraph 2 makes provisions about the conditions that are to attach to water services licences and sewerage services licences.

235. Sub-paragraph (1) provides for each licence to contain within it certain standard conditions, and any other "ordinary" conditions particular to individual licences, which the Commission judges to be necessary. Sub-paragraph (2) requires the Commission to specify what the standard conditions are to be within 9 months of the sub-paragraph coming into force. For example, this will allow the Commission to use part of the 9 month period to consult publicly on draft conditions.

236. Sub-paragraph (3) provides for the matters to be covered by the standard conditions. It is anticipated that these will include requirements that service providers avoid undue discrimination between customers, meet their financial obligations to Scottish Water at all times, and comply with standard procedures in transferring or surrendering licences. In the interests of allowing the Commission to operate flexibly and to take into account different circumstances, the sub-paragraph enables conditions to apply only to specified classes of licence and to come into effect or be suspended in particular circumstances.

237. Sub-paragraph (4) requires the Commission to consult Ministers on its proposals for standard conditions and to publish the conditions once determined. The intention is that the Commission should consult Ministers about these proposals having had regard to the outcome of a public consultation on the draft conditions.

238. Sub-paragraphs (5) to (11) provide for the Commission to review and modify the standard conditions and to modify other conditions of any licence if necessary as a consequence of modifying a standard condition. This is the mechanism for changing the standard conditions for all licences that contain them. The Commission is not required to obtain the agreement of each licence holder to whatever change is being made.

239. Sub-paragraph (5) places a duty on the Commission to review the standard conditions from time to time and gives it the power to modify them and also, in consequence of so doing, to make any other modifications to licence conditions which it considers necessary or expedient. The frequency with which this type of review is required will depend on experience gained of the system in operation. Sub-paragraph (6) requires that the Commission, before making any modification to a standard condition or a consequential amendment to a licence condition, should notify the licence holders affected by any proposed modification, Scottish Water and Ministers; and should publish this notification. Sub-paragraph (7) requires that the notice explains the
Commission's reasons for proposing modifications and specifies the timescale within which representations about them can be made to it. Sub-paragraph (8) requires the Commission to have regard to any representations made about the proposed modification. Sub-paragraph (9) requires the Commission to publish any modifications that are made to the standard conditions.

240. Sub-paragraph (10) empowers the Commission to grant a licence that does not contain the standard conditions in their normal form, again in the interests of flexibility to reflect the particular circumstances of the case. Sub-paragraph (11) requires, where the Commission is minded to grant a licence on this basis, that the Commission should follow the procedures for consulting on modifications to standard conditions set out at sub-paragraphs (6) to (8).

241. In the interests of flexibility, sub-paragraph (12) gives the Commission discretion to provide in an ordinary condition of a licence, for that condition to have effect or cease to have effect or be modified at such time, in such manner and in such circumstances as it considers appropriate.

242. Sub-paragraph (13) empowers the Commission to modify any conditions within a particular licence, if it considers that this is necessary in the circumstances of the case. Sub-paragraph (14) requires, where the Commission is minded to modify a condition on this basis, that it should follow procedures for consulting on modifications to standard conditions set out at sub-paragraphs (6) to (8).

243. Sub-paragraphs (15) and (16) empower a water or sewerage services provider to appeal to the Court of Session against the inclusion or modification respectively of a condition in a licence, on a question of law. Sub-paragraph (17) provides that the decision of the Court in the appeal is final.

**Paragraph 2A: Conditions: sustainable development**

244. Sub-paragraph (1) of paragraph 2A provides that Scottish Ministers may issue guidance to the Water Industry Commission on how licensed water and sewerage services providers might, in performing the activities authorised by their licences, reasonably contribute to the achievement of sustainable development. Sub-paragraph (2) requires the Commission to have regard to such guidance when setting licence conditions for providers under paragraph 2 of Schedule 2 to the Bill. Such conditions will, in line with all other licence conditions, be binding on providers.

**Paragraph 3: Transfer of licence**

245. Paragraph 3 establishes the basis on which a water or sewerage services provider can transfer a licence to another person.

246. Sub-paragraph (1) allows in principle for a licence to be transferred from a service provider, who holds a licence, to another person. A transfer can be in respect of all, or part of, the activities covered by a licence. Sub-paragraph (2) requires any transfer to comply with any conditions (whether standard or ordinary) relating to transfers and to be subject to the consent of the Commission.
247. Sub-paragraphs (3) and (4) empower the Commission to consent to a transfer, but only where satisfied that the person the licence is being transferred to is able to carry out adequately the activities in respect of which the transfer is being proposed. In deciding whether someone is able to conduct these activities adequately the Commission must take into account the factors that would normally be considered when granting the licence under section 7 of the Bill.

248. Sub-paragraph (4A) requires a transferee to submit an application to the Commission for consent to the transfer and provides for a similar application procedure for the transfer of a water or sewerage services licence to that which applies to licence applications under paragraph 1(1) to (6) of Schedule 2 to the Bill.

249. Sub-paragraph (4B) makes it an offence to knowingly or recklessly make a false statement in connection with a transfer application (similar to paragraph 1(8) of Schedule 2) whilst sub-paragraph (4C) prescribes the penalties for such an offence (similar to paragraph 1(9) of that Schedule).

250. Sub-paragraph (8) empowers the Commission to make its consent to a transfer subject to any conditions in respect of the licence or more generally as it considers appropriate. Sub-paragraph (9) requires the Commission to notify, as soon as is practicable after its decision about a transfer, those parties with an interest in that transfer and Scottish Water.

251. Sub-paragraph (10) permits prospective transferees to appeal to the Court of Session on a question of law against a decision by the Commissioner to withhold consent to a transfer.

252. Sub-paragraph (10A) permits Scottish Water to appeal to the Court of Session, on a question of law, against the granting of consent to transfer a water or sewerage services licence, in the same way that Scottish Water may appeal against the granting of the original licence under paragraph 1(11) of Schedule 2.

253. Sub-paragraph (11) provides that the decision of the Court of Session in an appeal under sub-paragraphs (10) or (10A) shall be final.

254. Sub-paragraph (12) ensures that any attempt to assign a water or sewerage services licence will be a transfer for the purposes of paragraph 3 of Schedule 2 to the Bill.

**Paragraph 4: Powers of entry etc.**

255. Paragraph 4 provides for the Commission to have powers of entry to premises so as to enable it to discharge its duty, under section 8 of the Bill, to monitor and ensure compliance with licence conditions. Sub-paragraph (1) empowers the Commission, or anyone authorised by it, to exercise the powers specified in sub-paragraph (2).

256. Sub-paragraph (2)(a) enables the Commission and its officials to enter (i) the premises of any water or sewerage services provider (“the first category”), (ii) the premises of anyone that a provider has arranged to provide with services (“the second category”), or (iii) the premises of any other person (“the third category”). Sub-paragraphs (2)(b) and (c) respectively make provision for powers to inspect such documentation and articles, and to remove them from the premises, as the Commission considers necessary to give effect to its monitoring and compliance
duties. The exercise of the powers of entry is qualified by sub-paragraph (3). Thus whereas the Commission, or anyone authorised by the Commission, can enter the premises of a licensed provider in terms of the first category at any reasonable time without notice, they can only enter premises falling within the second and third categories on giving 24 hours' notice. Moreover, sub-paragraph (4) specifies that premises in the third category can be entered only where the Commission is satisfied that gaining access to premises in the first and second categories only would not be sufficient to enable it to discharge its monitoring and compliance duties. In practice, this would mean that the Commission could seek entry to premises in the third category only where it had grounds for believing that it might obtain there information relevant to monitoring and compliance that could not be obtained in any of the premises in the preceding two categories. The effect of these qualifications is to direct the Commission's powers of entry, first to the premises of service providers, then to the premises of customers of service providers, and only in the last resort to premises in general.

257. Sub-paragraph (5) requires that the Commission be given reasonable assistance by the owners and occupiers of premises that are subject to the exercise of the Commissioner's powers of entry. This duty extends to those who are present on the premises when the powers are being exercised.

Paragraph 5: Powers of entry etc.: further provision

258. Sub-paragraph (1) empowers the Commission, or anyone authorised by it, and subject to the terms of any warrant, to be accompanied by others on, and to take equipment on to, the premises so as to be able to conduct monitoring and enforcement activity effectively. Where appropriate, this must be done in a manner consistent with the terms of any warrant granted under paragraph 6. The sub-paragraph also requires anyone exercising a power of entry and if required to do so, to provide written evidence of their authority to do so. Sub-paragraph (2) requires those entering premises to leave them in a condition no less secure than that in which they found them.

259. Sub-paragraphs (3) to (5) provide protection for those whose premises are entered under paragraph 4(2). Sub-paragraph (3) places a duty on the Commission to pay compensation to anyone who suffers damage or loss as a result of the powers of entry being exercised except where such loss or damage is attributable to the fault of the person who sustained it. Sub-paragraph (4) makes it an offence for anyone to disclose any commercially sensitive information obtained as a result of exercising the power of entry. Sub-paragraph (5) provides that anyone obstructing the Commission, or failing to provide assistance to the Commission, in the exercise of the powers at this paragraph is guilty of an offence. The penalties for these offences are set out in sub-paragraph (6) and are up to the statutory maximum fine (currently £5,000), where convicted by a Sheriff sitting without a jury, or, where convicted by a jury, an unlimited fine.

Paragraph 6: Warrants

260. Paragraph 6 provides for a sheriff or justice of the peace to grant warrants where this is necessary to give effect to the powers of entry conferred at paragraph 4.

261. Sub-paragraph (1) establishes, that a sheriff or justice, where satisfied that evidence provided to them on oath meets at least one of the conditions specified at sub-paragraph (2), can issue a warrant authorising the Commission, or those authorised by it, to enter premises as
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23), as amended at Stage 2, and which was introduced in the Scottish Parliament on 11 June 2004.

provided for at paragraph 4(2). As a warrant authorises the use of force if necessary, the power to issue a warrant is qualified to ensure that it is exercised only after there has been proper consideration of the circumstances. Sub-paragraph (2) specifies the conditions at least one of which must be satisfied before a sheriff or justice issues a warrant. In essence these ensure that a warrant will be issued only in circumstances where entry cannot be gained without one, or where entry is required urgently. Sub-paragraph (3) further qualifies the power to issue a warrant in cases where the conditions in sub-paragraphs (2)(a) and (b) are satisfied, by requiring the Commission to have given notice of the intention to apply for a warrant, save where to have done so would defeat the purpose of gaining entry to premises.

262. Sub-paragraph (4) provides that a warrant remains in force until the purposes for which the warrant was issued have been fulfilled, for example when entry to the premises cited in the warrant has been gained.

Paragraph 7: Enforcement notices

263. Paragraph 7 gives the Commission power to issue enforcement notices and describes the process to be followed in issuing these notices.

264. Sub-paragraph (1) gives the Commission power to issue enforcement notices if a water or sewerage services provider has contravened or is contravening a licence condition and the contravention is likely to recur. The Commission can do so only where it appears to it that the provider is not taking appropriate steps to remedy the contravention or prevent it from recurring. Any enforcement notice that the Commission issues must contain information about the contravention and the steps required by the provider to remedy it and about the timescales for doing so, as specified at sub-paragraphs (2) to (4).

265. Sub-paragraphs (5) and (6) specify the steps that the Commission must take before issuing an enforcement notice, including consultation with Scottish Water and other appropriate persons and allowing the provider to whom the notice will relate to make representations. Sub-paragraph (7) requires the Commission to have regard to any representations made to it by the provider about an enforcement notice. Sub-paragraph (8) requires copies of enforcement notices to be sent to Ministers and Scottish Water.

266. Sub-paragraph (9) gives those on whom a notice has been served a right to appeal to the sheriff against the notice within 14 days. Sub-paragraph (10) empowers the sheriff to make any order in respect of an appealed notice as considered necessary and provides that the sheriff's decision is final in such cases.

267. Sub-paragraphs (11) and (12) empower the Commission to withdraw, waive or relax any requirement of an enforcement notice, without in any way restricting its power to issue subsequently a further notice in respect of the same contravention.

Paragraph 8: Enforcement notices: offences

268. Paragraph 8 sets out the sanctions for a water or sewerage services provider, who having been served with an enforcement notice, fail to satisfy the requirements of the notice. Sub-paragraphs (1) and (2) specify that such a failure is an offence and that where a failure recurs subsequently, that too is an offence. Sub-paragraph (3) specifies that the penalties for anyone
guilty of these offences are up to the statutory maximum fine (currently £5,000), where
convicted by a Sheriff sitting without a jury, or, where convicted by a jury, an unlimited fine.

**Paragraph 9: Revocation of licences**

269. Paragraph 9 gives the Commission the power to revoke a water or sewerage services
licence under certain circumstances.

270. Sub-paragraph (1) provides that a licence may in principle be revoked. Sub-paragraph (2)
empowers the Commission to revoke a licence where there has been a failure to comply with the
terms of an enforcement notice. Sub-paragraph (3) empowers the Commission to revoke a
licence where there has been a failure to comply with a term or condition of a licence and where
it considers that the provider would fail to comply with an enforcement notice relating to the
contravention.

271. Sub-paragraph (4) allows the Commission to revoke a licence if it considers that a water
or sewerage services provider no longer has the ability to perform adequately the activities in
their licence. In making this decision the Commission must have regard to the factors mentioned
in section 7(2) of the Bill and to other matters specified under that subsection. Finally, sub-
paragraph (5) allows the Commission to revoke a licence if requested to do so by a provider.

272. Sub-paragraph (6) provides that before revoking a licence the Commission must consider
the terms and condition of the licence, the providers’ responsibilities to their customers and any
other relevant matters. Sub-paragraph (7) provides that a notice of revocation must specify the
reasons for the revocation and the date from which it will have effect.

273. Sub-paragraph (8) allows a provider on whom a notice of revocation is served to appeal
to the sheriff against the notice within 14 days. Subsection (9) empowers the sheriff to make any
order in respect of such an appeal and provides that the decision of the sheriff is final.

274. Sub-paragraph (10) requires the Commission to send a copy of the notice of revocation to
Scottish Water and the Scottish Ministers and to publish the notice, once it comes into effect.

**Paragraph 10: Penalties for contravention of licence**

275. Paragraph 10 gives the Commission the power to impose financial penalties on water or
sewerage services providers if they contravene the terms and conditions of their licence. The
Commission is required to prepare and publish a policy with respect to the imposition of
penalties.

276. Sub-paragraph (1) empowers the Commission to impose penalties for contravention of
licence terms and conditions. In the interests of transparency, sub-paragraph (2) requires the
Commission to develop and to publish, and to keep under review and revise, a statement of its
policy for imposing penalties on providers who contravene the terms and conditions of their
licences. The Executive expects the Commission to consult publicly on the basis of a draft
policy statement prior to a final statement being published.
277. Sub-paragraph (3) requires the Commission to notify a provider of its intention to impose a penalty. Sub-paragraph (4) requires the Commission to have regard to any policy statement and any representations from a provider in respect of a notice before determining the penalty to be imposed on the provider. Sub-paragraph (5) enables a provider to appeal to the sheriff within 14 days against any penalty imposed by the Commission and the penalty is not recoverable until the appeal is withdrawn or finally determined. Sub-paragraph (6) empowers the sheriff to make any order in respect of such an appeal that is considered necessary and provides that the sheriff's decision in such cases is final.

278. Sub-paragraph (7) ensures that the Commission will be able to recover any penalties that it imposes by using general debt recovery procedures and remedies. It ensures too that a former provider can be pursued for any penalty, even where it no longer holds a licence. In terms of sub-paragraph (8), the proceeds of penalties recovered must be paid into the Scottish Consolidated Fund.

**Paragraph 11: Register of licences**

279. Paragraph 11 requires the Commission to keep a register of water and sewerage services licences and sets out a list of the information which must be included in the register.

280. Sub-paragraph (1) empowers the Scottish Ministers to prescribe, by order, the manner of the register, which the Commission must keep. Sub-paragraph (2) specifies certain information, which must be included in the register and gives Ministers the power to prescribe by order any additional information which must be contained in the register. Sub-paragraph (3) provides that the register must be available for inspection by any person at any reasonable time.

**SCHEDULE 3: CERTAIN PRE-EXISTING AGREEMENTS AS TO CHARGES**

281. Schedule 3, introduced by section 18(6) of the Bill, makes provision to preserve the charging arrangements which apply where, before the coming into force of this schedule, Scottish Water have used existing statutory powers to enter into “relevant agreements” with non-household customers for charging (other than through a charges scheme) for services provided under those agreements. Once the Bill is enacted, Scottish Water will no longer have the power to enter into such agreements for charging for services provided to customers in exercise of core functions, and any charges will be determined instead according to a charges scheme (under the new section 29A of the 2002 Act) or an authorised departure from a charges scheme (under the new section 29E of the 2002 Act).

**Paragraph 1**

282. Paragraph 1 defines a “relevant agreement” and a “relevant customer” for the purpose of schedule 3. These are agreements between Scottish Water and another person in respect of “eligible premises” (as defined in section 20 of the Bill) which have been entered into before the coming into force of this schedule by virtue of the statutory powers set out in sub-paragraph (2) or otherwise and which make provision for the relevant customer to pay charges for services provided under those agreements other than by reference to a charges scheme.

283. Sub-paragraph (1A) further specifies that, for the purposes of sub-paragraph (1), an agreement between Scottish Water and another person includes an agreement to which Scottish
Water has become party in consequence of a transfer of obligations, by virtue of any enactment or contractual arrangements, which includes, for example, obligations which have been entered into by Scottish Water’s statutory predecessors and which have subsequently transferred to Scottish Water. However, it will not include those agreements to which section 47 of the Water (Scotland) Act 1980 applies. Section 47 of the 1980 Act makes provision to preserve certain agreements made between Scottish Water’s statutory predecessors prior to 1949 and their customers, regarding the provision of water supplies free of charge or on other favourable terms, in return for the granting of, for example, way leaves to lay infrastructure.

Paragraph 2

284. Paragraph 2 sets out the arrangements for relevant agreements to be identified and considered by the Commission, in order to assess the relevant charges to be paid by customers under those agreements and to determine the charges which any licensed provider, in respect of such customers, should pay to Scottish Water for services provided under those agreements.

285. Sub-paragraph (1) requires Scottish Water to send details of relevant agreements to the Commission within one month of the schedule coming into force. Sub-paragraph (2) provides for the Commission to assess, in respect of each agreement sent, the relevant charges which the relevant customer is still entitled to pay under the agreement, and based on this and the costs which any water and sewerage services provider will incur where it provides services to that customer under the agreement and any other matter the Commission considers appropriate, to determine the charges which a provider should pay to Scottish Water (as read with sub-paragraph (6)(a)).

286. Sub-paragraph (3) requires the Commission to give each relevant customer written notice of its assessment of the relevant charges payable under the agreement and the amount which Scottish Water will be able to recover from a provider in respect of the customer. This notice is also to be sent to Scottish Water and every water and sewerage services provider, by such date as the Scottish Ministers may direct.

287. Sub-paragraph (5) sets out the circumstances in which the charging arrangements at sub-paragraph (6) apply. In the case where a relevant customer is served by a water and sewerage services provider, Scottish Water can recover any charges determined under sub-paragraph (2)(b) from the provider and the provider in turn can charge the relevant customer no more than the amount set out in the relevant agreement.

288. Sub-paragraph (7) provides that Scottish Water should bear the cost of any shortfall between the charges determined under sub-paragraph (2)(b) and any charges determined under a charges scheme.

289. Sub-paragraph (8) provides that where a relevant customer is not or has ceased to be served by a water and sewerage services provider for any reason, Scottish Water should demand and recover directly from the relevant customer no more than the relevant charge as set out in the relevant agreement as assessed under sub-paragraph (2)(a).
Paragraph 3

290. Paragraph 3 makes provision in relation to the status of relevant agreements under this schedule and the application of charges schemes to them. Sub-paragraph (1) disapplies a charges scheme in relation to any services covered by relevant charges determined under this schedule unless the agreement concerned has expired or has been terminated. Sub-paragraph (2) clarifies that a relevant agreement is not to expire or terminate simply as a result of the change of a water and sewerage services provider in respect of a relevant customer.

291. Sub-paragraph (3) provides that a relevant agreement cannot be renewed on its expiry or termination or extended at any time.

SCHEDULE 4: POWERS OF ENTRY UNDER THE COAL INDUSTRY ACT 1994

292. Schedule 4 is introduced by section 23(4) and inserts Schedule 1C to the Coal Industry Act 1994. Commentary on the provisions of Schedule 1C is to be found within the commentary on the provisions of section 23 of the Bill. The Schedule makes further provision in relation to these amendments.

SCHEDULE 5: AMENDMENTS TO ENACTMENTS

293. Schedule 5 is introduced by section 25 of the Bill. The Schedule makes amendments to other enactments which are required in consequence of provisions made under this Bill.

Paragraph 1: Sewerage (Scotland) Act 1968 (c.47)

294. Paragraph 1 repeals section 29(3)(j) of the Sewerage (Scotland) Act 1968 – that provisions allows Scottish Water to set charges in relation to the disposal of trade effluent into sewers. Under the new arrangements introduced by the Bill, all such charges will be set by reference to the charges scheme made under section 29A.

Paragraph 2: House of Commons Disqualification Act 1975 (c.24)

295. Paragraph 2 repeals the section of Part III of Schedule 1 of the House of Commons Disqualification Act 1975 which relates to the Water Industry Commissioner. This specifies offices the holders of which are disqualified from being a member of the House of Commons. Since the Water Industry Commissioner is replaced by the Water Industry Commission under the Bill, the reference to the Water Industry Commissioner needs to be removed.

Paragraph 3: Race Relations Act 1976 (c.74)

296. Paragraph 3 replaces the section of Part II of Schedule 1A of the Race Relations Act 1976 which relates to the Water Industry Commissioner. This Part specifies offices the holders of which are subject to the general statutory duty to eliminate unlawful racial discrimination and promote equality of opportunity in the carrying out of their functions. As above, the reference to the Water Industry Commissioner needs to be removed.

Paragraph 4: Water (Fluoridation) Act 1985 (c.63)

297. Paragraph 4 replaces references in the Water (Fluoridation) Act 1985 to the Commissioner with references to the Commission.
Paragraph 5: Public Finance and Accountability (Scotland) Act 2000 (asp 1)

298. Paragraph 5 replaces references in the Public Finance and Accountability (Scotland) Act 2000 to the Commissioner, with references to the Commission.

Paragraph 6: Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)

299. Paragraph 6(a) to (d) repeals all references to the Water Industry Commissioner in the Ethical Standards in Public Life etc. (Scotland) Act 2000. Sub-paragraph (e) replaces these references by adding the Water Industry Commission established by the Bill to the list of devolved public bodies. This provides that the Commission and its members will be subject to that Act and required to draw up and comply with a code of conduct under the Act.

Paragraph 7: Water Industry (Scotland) Act 2002 (asp 3)

300. Paragraph 7 amends the Water Industry (Scotland) Act 2002 in consequence of the provisions of the Bill. Sub-paragraph (1) replaces references to the Commissioner with references to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under the Bill.

301. Sub-paragraph (3) amends section 3(6) of the 2002 Act (Functions of the Commissioner) and replaces references to customers there with references to persons whose premises are connected to, or might reasonably become connected to, the public water supply or sewerage systems. This ensures that, in its duty to advise Ministers on the standard of service Scottish Water provides and the manner in which it conducts relations with “customers”, the Water Industry Commission will represent those persons.

302. Sub-paragraph (3A) amends section 5 (Annual reports by, and information from, the Commissioner) of the 2002 Act in relation the content of the Commission’s annual report, to require the report to contain a summary of any action taken by the Commission in response to representations and recommendations made by the Customer Panels under the amended section 2 of the 2002 Act (as introduced by section 3A(1) of the Bill).

303. Sub-paragraph (4) replaces references to Scottish Water’s “customers” in section 26 (Customer standards code) of the 2002 Act, with reference to persons whose premises are connected to, or might reasonably become connected to, the public water supply or sewerage systems. This ensures that Scottish Water’s customer standards code will apply in relation to services provided to such persons. It also repeals subsection (2) of section 26 of that Act, which provided that a customer standards code had to be submitted to the Commissioner no later than the date on which Scottish Water first sent a charges scheme to the Commissioner. This is in consequence of the repeal of section 32 of the 2002 Act by section 18(3) of the Bill (and its replacement with new provisions as regards the determination of Scottish Water’s charges).

304. Sub-paragraph (5) repeals section 40 of the Act (Reduced charges), which allowed Ministers to provide by regulations that certain people should pay Scottish Water reduced charges. In future provision for reduced charges will be given effect through Ministers’ statement under the new section 29D which Scottish Water will take account of in making charges schemes under the new section 29A.
305. Sub-paragraph (6) replaces wording in section 49 of the 2002 Act to ensure that the Scottish Ministers and Scottish Water are obliged to carry out their functions with regard to the interests of all end users of the public water and sewerage systems. The intention of this amendment is to exclude licensed retailers from the scope of this customer interest duty. Although the licensed retailers will be customers of Scottish Water and will receive wholesale services from them, the high level customer interest duty placed on Ministers and Scottish Water is to be exercised with regard to direct (i.e. domestic) customers of Scottish Water, and customers of the licensed providers, but not the licensed providers themselves.

306. Sub-paragraph (6A) amends section 57(7) of the 2002 Act (Information and reports) to require Scottish Water to include in its annual report, information on the extent to which it has complied with requirements made under sections 12(1A), 13(1) or (5) of the Bill.

307. Sub-paragraph (7) adds the new section 56B to the orders and regulations which are excluded from those orders and regulations to be subject to negative procedure in the Scottish Parliament; and includes section 56B with the sections under which orders and regulations may be made subject to affirmative procedure.

308. Sub-paragraph (8) amends section 70 of the Act (Interpretation) to the effect that “charges scheme” has the meaning given to it under the new section 29A(1) and substitutes a definition of the Water Industry Commission for that of the Water Industry Commissioner.

309. Sub-paragraph (9) repeals Part I of Schedule 1 (The Commissioner) of the Act, since the Water Industry Commissioner is replaced by the Water Industry Commission under the Bill.

Paragraph 8: Scottish Public Services Ombudsman Act 2002 (asp 11)

310. Paragraph 8 inserts the Convener of the Water Customer Consultation Panels into Schedule 2 (Listed authorities) to the Scottish Public Services Ombudsman Act 2002, to ensure that the Convener’s activities come under the scrutiny of the Ombudsman. It also replaces the reference in that Act to the Commissioner with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under Part 1 of the Bill.


311. Paragraph 9 inserts the Convener of the Water Customer Consultation Panels into Schedule 1 (Scottish public authorities) to the Freedom of Information (Scotland) Act 2002, to ensure that the Convener is subject to the requirements of that Act. It also replaces the reference in that Act to the Commissioner with a reference to the Commission, again since the Water Industry Commissioner is being replaced with the Water Industry Commission under Part 1 of the Bill.

Paragraph 10: Public Appointments and Public Bodies etc.(Scotland) Act 2003 (asp 4)

312. Paragraph 10 repeals the entry relating to the Commissioner in Schedule 2 of the Act, and replaces it with a reference to the Commission, since the Water Industry Commissioner is being replaced with the Water Industry Commission under the Bill.
This document relates to the Water Services etc. (Scotland) Bill (SP Bill 23), as amended at Stage 2, and which was introduced in the Scottish Parliament on 11 June 2004
SUPPLEMENTARY FINANCIAL MEMORANDUM

INTRODUCTION

1. This Supplementary Financial Memorandum provides information on the financial implications of additions to the Water Services etc. (Scotland) Bill during Stage 2 consideration, and reports on changes to estimates given in the Financial Memorandum published on Introduction.

PART 1 – WATER INDUSTRY COMMISSION FOR SCOTLAND (SECTIONS 1 TO 2)

2. On Introduction, the Executive estimated the costs of appointing the Water Industry Commission to be less than £25,000 for the initial appointments (during 2005), followed by similar amounts when further appointments are required. However, the Executive has given further consideration to how best to ensure sufficient high calibre candidates are available to appoint 5 ordinary members to the Commission (as recommended by the Environment Committee) bearing in mind the particular skills required for these posts and have concluded that the appointment process should be advertised a UK wide basis and supported by recruitment consultants. We estimate that this will increase the total costs to around £45,000. As before, these costs will be borne directly by the Scottish Executive.

PART 1 – WATER CUSTOMER CONSULTATION PANELS (SECTION 3)

Costs on the Scottish Administration

3. There are no cost implications for the Scottish Administration.

Costs on local authorities

4. There are no cost implications for local authorities.

Costs on other bodies, individuals and businesses

5. Section 3A of the Bill makes several significant enhancements to the statutory role of the Water Customer Consultation Panels. The Customer Panels are funded by the Water Industry Commissioner and will be funded in future by the Water Industry Commission, who is required under the Water Industry (Scotland) Act 2002 to remunerate the Convener, Deputy Conveners and ordinary Panel members, and to supply the Convener and each Customer Panel with such property, staff and services they require, as approved by Scottish Ministers. The Commission will continue to provide this funding through its levy on Scottish Water, as approved by Ministers. This means that all water customers share the costs of the representation provided by the Customer Panels, and Scottish Ministers through approving their budget are responsible for ensuring that this provides good value for money.

6. The additional resources required by the Customer Panels’ to carry out their new functions are largely staff resources to support their new statutory functions. These will be offset by a small reduction in costs to the Water Industry Commission in respect of the complaints
handling function which is transferred from the Commission to the Convener of the Customer Panels.

7. Following preliminary discussion with the Convener of the Panels, the resources required have been estimated at 3 extra members of staff, at a cost of around £80,000, bringing the staff complement in the Convener’s office up to 6, and a total staff budget of around £152,000 per annum. However this is an initial estimate, and the Executive considers it important both to allow the Convener and the Panels further time to consider this estimate, and, once they have taken on their new functions and gained experience in delivering these, to allow their resources to be reviewed.

PART 2 – ESTABLISHING A LICENSING REGIME (SECTIONS 4 TO 17A)

8. The estimates for the costs of establishing the licensing regime under the Bill have been refined since Introduction as a result of a scoping study by Shepherd & Wedderburn, legal consultants, on the legal work required by the Water Industry Commission to establish the licensing regime has been carried out since the Bill was introduced (available at www.watercommissioner.co.uk). This places these costs, initially estimated at £1.5 million, at £1.6 to £2.0 million. This increase will be partly offset by a reduction in the expenditure previously estimated to be required on general administrative work, from £2.5 million to £2.3 million. These costs will be met through grant from the Scottish Executive.

PART 2 – SEWERAGE NUISANCE: CODE OF PRACTICE (SECTIONS 19B AND 19C)

Costs on the Scottish Administration

9. It is estimated that consultancy costs of around £30,000 will be incurred by the Scottish Executive 2005-06 to produce the draft and finalised statutory code of practice and provide other advice in connection with sewerage nuisance.

Costs on local authorities

10. In relation to local authorities, the only difference between the previous legislation under the Environmental Protection Act 1990 and the proposed statutory code is the additional duty on local authorities to assess compliance with the code, rather than simply carrying out an inspection as now. It is difficult to estimate the costs to local authorities as the main determinant of this can be expected to be the duty to assess compliance, and the frequency with which this is required is still being considered in work on the draft voluntary code. Our current projection is that inspection of compliance might be required at works which serve a population of more than 250. There are around 500 such works, and assuming a single appliance inspection per annum, at a cost of £100 in officials’ time, an estimate of £50,000 costs might be estimated. Costs will also arise in relation to investigating complaints but we would not expect these to exceed the costs incurred currently in enforcing Part III of the Environmental Protection Act 1990.

Costs on other bodies, individuals and businesses

11. It is not possible to estimate the costs of complying with a code of practice under new sections 19B and 19C of the Bill at this stage, because these are dependent on the terms of the code of practice, of which a draft is still to be consulted on, and the objectives for Scottish Water
that will be set by Ministers under the Quality and Standards 3 process for investment in the period 2006-2014. Section 18 of the Bill requires Scottish Water to be funded to deliver the objectives set by Ministers under new section 56A of the Water Industry (Scotland) Act 2002, as inserted by section 19 of the Bill. It is likely that these objectives will include action to address sewerage nuisance but the costs that arise in this way will depend on the objective set by Ministers. Costs to Scottish Water and its PFI operators to comply with the proposed statutory code are currently being considered as part of the Quality & Standards III process for determining Scottish Water’s investment objectives over the period 2006-2014.

12. These objectives will be announced shortly, and these will set parameters for the likely work required to comply with a code of practice under section 19B. However until the statutory code is finalised following consultation and guidance on ‘best practicable means’ and technical standards are completed, it is not possible to provide a meaningful estimate of the overall costs that will be incurred.

SCOTTISH EXECUTIVE
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EXECUTIVE SUMMARY

Total Bans in Ireland, Norway and New Zealand

Three countries have now implemented a total smoking ban across all enclosed work places, including bars and pubs. State legislatures within the USA and Australia have tabled proposals to implement similar bans to become effective in 2006-2007.

Unlike the countries above, an opportunity now exists in Scotland to inform the discussion on smoking restrictions in the workplace by undertaking an objective analysis of the impact of a total ban. This would more likely provide a proper consensus regarding the implementation of a total smoking ban.

Impact Likely to be Felt Greater in Pubs and Bars

Public opinion and research studies show that pubs and bars are viewed differently from hotels and restaurants in terms of a smoking ban. This is illustrated consistently by the fact that significantly less people support a total ban in pubs and bars than in restaurants or hotel areas. Even some of those studies supported by the health lobby show at least a short-term negative impact on business, with a greater impact likely in pub venues. There appears to be historical and cultural issues that have made it more acceptable to smoke in pubs than in restaurants. It is particularly the case that in all the countries analysed, there have traditionally been greater restrictions in restaurants than in pubs and bars. Therefore, the resistance to change in this sector is likely to be greater, resulting in at least a short-term shift in the demand curve for pub and bars that will be detrimental to business. The Scottish Executive's own research study acknowledges that an incremental rather than wholesale change in restrictions would be of more benefit to business. Therefore, it has to be concluded that a total ban across all sectors will be unfair to certain sectors of the hospitality industry.

Quantifying Economic Impact is Difficult

No study reviewed for this work has categorically been able quantify the effects of either a total smoking ban or smoking restrictions without imposing significant assumptions in the methodology. However, it is widely acknowledged that additional costs will be incurred by hospitality businesses, which will not necessarily be recouped by an increase in non-smoker visitation outweighing the loss of custom from smokers. Indeed, the fall in the numbers of smokers visiting pubs will be immediate, whereas no study has been able provide a timescale for the influx of new business from non-smokers that has been projected. One would have to conclude, therefore, that the short to medium impact is likely to be negative.

There is a great deal of bias in almost all the studies reviewed for this report, either by the health lobby, the hospitality industry or tobacco industry. What is required, is an objective assessment of the economic impacts of a total ban, incorporating input from all stakeholders but driven forward by government. It is reasonable to presume that the costs of such a study would be far less than what it is likely to cost both industry and government in implementing legislation that has significant resistance from a large proportion of the population.
**Fair Notice of Intention**

With the exception of Ireland, significant notice of a total ban has been given by governments reviewed for this report. This is only fair given the apparent difference in perception of the public towards smoking in different categories of hospitality premises. Also, many of the countries have implemented tobacco control measures – in particular advertising bans - well ahead of that enacted in the UK.

Legislation formulated on a narrow range of considerations has shown to result in the process of change becoming stalled or in some cases reversed.

**Lack of Transferability Studies Used in the Executive’s Case**

It has been acknowledged as a weakness in the Executive’s commissioned research that the studies reviewed do not include analysis of a total ban situation. This is compounded by an almost exclusive use of studies from the USA, particularly California, where the climate and cultural context are far removed from Scotland. Therefore, the transferability of results to the Scottish situation is likely to be minor.
2 PROJECT OUTLINE

2.1 Background

On January 2004 the Scottish Executive launched its Tobacco Control Action plan followed by various assessments of the impact of and public opinion on banning smoking in public places. This included an international Review of the Health and Economic Impact of the Regulation of Smoking in Public Places a summary and full version of which was published by the University of Aberdeen in late 2004.

On 10th November 2004 Scotland’s First Minister presented his statement to the Scottish parliament which proposed a comprehensive ban on smoking in public areas including private clubs from the Spring of 2006. His statement put forward the following reasons to justify an outright ban

- There is widespread support across Scotland for a ban on smoking in public places but there is also support for exemptions.
- International evidence shows that comprehensive, clear-cut laws to create smoke-free areas are more enforceable and effective.

This is a highly controversial and for some a problematic approach to dealing with the well documented health impacts of smoking. Indeed the negative impacts of smoking on health are not in doubt. However, what merits further examination and clarification is the economic impact of an immediately enforced outright smoking ban.

2.2 Aims and objectives

The first aim of the project was to source, review and evaluate existing research which has been undertaken in analogous destinations and countries that have legislated for either an outright or phased ban on smoking in workplaces. This included the full report, “International Review of the Health and Economic Impact of the Regulation of Smoking in Public Places”, which was commissioned by the Scottish Executive and undertaken by University of Aberdeen.

A second objective was to review the actual content and progress of legislation related to smoking restrictions in other countries. The sample of countries and states to be explored was determined by the level of appropriate documentation available, and included the Republic of Ireland, Norway, New Zealand, USA (California, Kansas, Minnesota, New Hampshire, New York) and Australia (South Australia, Tasmania, Victoria).

Research aimed to focus on identifying the impact of an outright ban on the following sectors in Scotland:

- The Pub Sector, including the Night Club Sector
- The Brewery Industry (wholesale and retail sales)
3 METHODOLOGY

3.1 Analogous Countries

The approach has an international dimension. However special emphasis was placed on the experience of countries and states within countries that have now implemented an outright ban:

- Republic of Ireland
- Norway
- New Zealand

Additionally, where significant research has been undertaken in respect of smoking restrictions in hospitality venues, these have also been reviewed.

- Australia
  - South Australia
  - Tasmania
  - Victoria
- USA
  - California
  - Kansas
  - Minnesota
  - New York
  - New Hampshire

The review of the countries and states above took the following format:

- Review of government approach to tobacco control
- Review of the process and content of legislation regarding smoking restrictions in the workplace
- A critical analysis of studies undertaken in respect of smoking restrictions and an outright ban on smoking in the workplace
- An evaluation of the approach of each country/state within the context of the Executive’s own approach

3.2 A Review of the University of Aberdeen Study

It was felt that it was also necessary to evaluate the source information from which the Scottish Executive has built its argument for a complete and immediate ban on smoking in all hospitality venues. In effect, the kernel of the Executive’s argument is that there will be little or no economic impact on the hospitality industry of an outright ban and, indeed, that if there is an impact it will be a positive one.

This is based on the findings of the study, “International Review of the Health and Economic Impact of the Regulation of Smoking in Public Places”, which was undertaken by the University of Aberdeen. This document has been evaluated for the robustness of its methodology, assumptions and findings, specifically with regard to those sections covering effects of an outright ban on the hospitality industry.
IRELAND

The outlawing of smoking in licensed premises came into effect in Ireland in March 2004, making it the first country to implement such a comprehensive ban. Surprisingly, however, unlike most of the other countries reviewed for this study, Ireland’s forthright approach to tobacco control is more recent. As the first country to implement a total ban, it has had to do so without the benefit of learning from the experience of other countries. As such, the legislative process has been stalled several times and widespread opposition evident among the licensed trade industry. Conflicting reports also had the majority of the general public either in favour or against a total ban. Likewise, studies undertaken by the government and industry have resulted in opposing conclusions on the likely economic impacts.

Compliance with the ban, although reported as high by the Office of Tobacco Control (OTC), has been mixed in different parts of the country, with many reports of low compliance in rural locations.

4.1 Legislation

Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act, 1978/

The implementation of this Act and subsequent Regulations meant that by 1991, the advertising of tobacco to the general public had effectively been outlawed – i.e. only permitted in certain areas: internal points of retail sale; duty free zones of airports and ferryports; on packages of tobacco products; and internal tobacco trade advertising not available to the public.

Tobacco (Health Promotion and Protection) Act 1988

This replaced the 1978 Act, with the main development being some restrictions on the consumption of tobacco products in particular locations, such as public transport, schools and health buildings.

Tobacco (Health Promotion and Protection) Regulations 1995

Pertinent to the 1988 Act, this Regulation provided a voluntary code of practice on smoking in the workplace but did not extend to service areas within food and drink establishments.

Public Health (Tobacco) Act, 2002 and set up of the Office of Tobacco Control (OTC)

This legislation set up the statutory body, the Office of Tobacco Control, but also for the first time sought to prohibit or restrict the smoking of tobacco products in “…all or part of a licensed premises, registered club, or place.” Effectively, this gave the Irish government the power to create smoke-free workplaces. At the beginning of 2003, the government announced that a total ban on smoking in all enclosed workplaces, including bars, would be smoke-free by January 2004. In the event, the ban was delayed by several months but came in to effect in April 2004.

The OTC held a seminar in Dublin October 2003 to allow a debate on the Economic Cost of Smoking in the Workplace. However, this transpired to be more about the wider health costs, rather addressing specific issues of the impacts on business and how they may be managed.
4.2 Evaluation of Studies

Three main studies regarding the impact of the ban were undertaken prior to its inception, one by the Irish government through the Office of Tobacco Control (OTC) and two by hospitality industry organisations – the Irish Hospitality Industry Alliance and the Vintners Federation of Ireland (VFI). These are reviewed in turn and evaluated for the rigour and validity of their methodology.

Other studies have been undertaken, by other researchers including Failte Ireland – in charge of tourism development – Tourism Ireland have produced broadly positive findings regarding tourist opinion of the ban. For example, Failte Ireland conducted a survey of overseas visitors and reported that 4 out 5 would not be deterred by the ban from returning to Ireland for a holiday. However, there was a distinct difference in support for the ban among visitors when asked about different sectors of the industry:

- 76% were in favour of the ban in restaurants,
- 69% in public places in hotels;
- 59% in the case of pubs and bars.

This would immediately suggest that such customers would also display a different approach to visitation – that is, more likely to continue visiting restaurants as normal, but change their behaviour regarding pubs where there is a greater level of opposition. The conclusion from Failte Ireland is that there will be little effect on overseas visitor numbers as those opposing the ban will be far outweighed by those in favour. However, regarding pubs, bars and nightclubs, this is not nearly as much the case. Also, for pubs and bars, the vast majority of customers are from the local community, therefore Failte Ireland's report is not of significant relevance to their situation.

For this reason, the following studies are reviewed as they look mainly at the effects of the smoking ban on the opinions, experience and behaviour of the general Irish public and hospitality providers.
4.3 Smoke-free Policies: Market Research and Literature Review on Economic Effects on the Hospitality Sector, (Office of Tobacco Control)

This study was commissioned by the Office of Tobacco Control (OTC) and undertaken jointly by University College Dublin and the market research company TNS/mrbi. The former undertook a literature review of studies throughout the world to ascertain whether a truly definitive answer can be given for the likely economic impact of a smoking ban. TNS/mrbi conducted a market research survey of the general public to identify people’s attitudes and likely pub-going behaviour once a ban was introduced.

University College Dublin

The literature review study concluded that there was little or no “aggregate” effect on sales in the hospitality sector. However, this conclusion, rather than discounting the idea that some businesses will be affected badly while others may experience positive outcomes, actually reinforces it. In this scenario, the businesses experiencing a negative impact may still have to lay off workers or even close down altogether. It would be unlikely that in this instance the businesses showing improvement would take up the slack in terms of employment.

On the other hand, it was concluded also that: “…there is little statistical evidence to support the proposition that a smoking ban in Ireland would significantly reduce sales in the hospitality sector.” Therefore, by implication this suggests that even if there is some negative impact on some businesses, they are likely to be small and not business-threatening.

Regarding the potential locational variances of a ban, the report suggests that: “The same result is seen from different data sets, different time periods and different locations.”

However, a significant part of the UCB report was in essence a “review of a review” of studies into the economic impact of a smoking ban, taking as its central reporting the evaluation of the Scollo et al (2000) report. This report, which reviewed some 100 research studies on the subject, had as its conclusion: ‘policy makers could proceed with smoke-free regulations secure in the knowledge that there would be no adverse business impact’. Therefore, one must question the choice of this research study as providing the main focus of the literature review, as it could provide only two conclusions: one, that the study is valid in its methodology and assertion that no significant negative impact is likely from a smoking ban; or two, that the methodology is flawed and the assertions are, therefore, either overstated or wrong. The review would not be able to give a third conclusion - that there would be adverse implications for industry – as a flawed methodology in the first instance would not allow for re-analysis of the data. A full new study would have be undertaken to ascertain this.

TNSmrbi Market Research

The market research study consisted of a wide range of questions regarding attitudes to smoking, with a few specifically about the smoking ban. A sample of 1,000 Adults (18+) were interviewed for the study. One of the questions posed was regarding the likelihood of visiting a pub to drink if a total smoking ban was in place. The results were:

- 13% would visit more often
- 12% would visit less often
- 64% would visit as often they did before the ban
- 10% never visit pubs anyway

This would suggest that a ban would have little effect on people visiting a pub to drink. A second question asked was whether the smoking ban would affect people’s decision to eat in a pub. The results were slightly in favour of an increase in pub visitation, with 20% indicating they would visit
more often to eat, against 7% who said they would visit less often. A similar proportion to the
drinking question indicated that they would visit as often as they had in the past.

The study also found that 35% of respondents had left or decided not to enter a pub or restaurant because of tobacco smoke. This proportion increased to 42% when looking at non-smokers only, while 16% of smokers also indicated having left a premises because of tobacco smoke.

Interestingly, when asking where smoking should be banned, the 2002 National Survey of Attitudes and Opinions does not appear to include any public areas of hospitality venues. This does not suggest that a progressive dialogue had been entered into between the government and either the public or hospitality industry.

However, the study overall is more rigorous in its methodology and does not seek to put an unjustified figure on the likely economic impact of a smoking ban. However, the timing of the survey, after an intensive and high profile campaign by the Irish government may have worked in favour of the government’s case. Also, the survey was slightly leading in its methodology in that it may have been worthwhile to ask how people’s opinion’s of a partial ban and, indeed, of no ban being introduced. This would have allowed a full comparison of the opinions of the general public towards the alternatives.
4.4 Irish Hospitality Industry Alliance – Regulatory Impact Assessment
Goodbody Consultancy Study

The IHIA study argued the case against a total ban on smoking in public places. It put forward several arguments, the main two being based on issues surrounding the health research itself and the likely economic impact of a total smoking ban.

Health research issues
The report provided some interesting arguments surrounding the validity of conclusions made by the Irish government from the available health research. In summary, these included:

- The report from which the ban was introduced was quoted as stating: “further research is required to assess occupational exposure to ETS in Ireland, especially in the hospitality industry.”
- The number of deaths from tobacco used in the OTC/HAS report was based on 14 year old data, when the incidence of smoking was 28% higher.
- The assertion from government that 13% of all tobacco related deaths come from passive smoking was not backed by any evidence.
- That only two of 145 studies regarding passive smoking used as evidence by the Irish government categorically stated that passive smoking is carcinogenic.

None of the above points necessarily discount the health issues, but they do call into question the Irish government’s rationale for introducing a complete ban based on both inadequate research and simplified conclusions.

Economic Impact
The study highlighted some significant economic impacts – all negative - of the total smoking ban in Ireland. These are shown in Table 3.1 below.

Table 4.1 – Summary of the Economic Impact of a Smoking Ban in Ireland – IHIA Study

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<tbody>
<tr>
<td>Exchequer costs (tax revenue</td>
<td>€157.5m to €944m</td>
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<td>forgone/unemployment benefit)</td>
<td></td>
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<tr>
<td>Employment</td>
<td>10,700 to 64,200 job</td>
</tr>
<tr>
<td></td>
<td>losses</td>
</tr>
<tr>
<td>Compliance cost to the Exchequer (inspectors)</td>
<td>€8.9m</td>
</tr>
<tr>
<td>Compliance cost to the hospitality sector</td>
<td>€200m</td>
</tr>
</tbody>
</table>

Some aspects of the methodology used to arrive at the figures in Table 3.1 are highly questionable. For example, the projection of 64,200 job losses is based on the extrapolation of a 30% fall in sales leading to the same fall in the number of employees (the numbers employed derived from government statistics). In an accounting sense, employee costs in the hospitality industry are not viewed as a wholly variable cost – i.e. moving directly in line with sales - therefore using such an extrapolation is unsound. Also, the figure almost matches the 65,000 total concluded from a survey commissioned by the Vintners Federation of Ireland (VFI) which asked pub workers if they thought there job would be at risk following the ban.

A further assumption is made to arrive at a cost to government of providing unemployment benefit. It assumes that the 64,200 people made redundant above would both be entitled to unemployment benefit and would remain unemployed for at least a year. It is highly unlikely that either of these cases would be true.
As such, it is concluded that the validity of these economic impact figures cannot be supported, given the lack of rigour provided in their calculation.

Review of Legislation in Other Countries

The IHIA study only addressed legislation from two countries – Finland and Canada (specifically, only British Columbia) – both of which have not implemented total bans, only restricting smoking to designated areas. The obvious purpose of this limited review of legislation was to support the IHIA’s case for the implementation of a partial restriction on smoking, allowing for smoking in designated areas. It did not take into account any of the instances where either a total ban has been implemented (especially cases in the USA) or where such legislation was in the process of being introduced, e.g. Norway, or other variations on smoking restrictions in public places.

Review of the Impact of Smoking Restrictions in Other Countries

The study provided a wider range of instances when looking at the economic impact of a total ban on smoking – British Columbia (Canada), Ontario (Canada), Ottawa (Canada), Victoria (Canada), New York (USA), Delaware (USA), California (USA), Arizona (USA), and Tasmania (Australia). However, this total analysis amounted to half a page, a length which would be considered limited if addressing only one case. Most of the above cases were summed up in one line and were referenced only as “(press reports)”. It also only highlighted individual cases where results showed a negative impact – we have shown that in most cases, for every negative impact reported there is a corresponding positive impact study.

Overall, therefore, the report’s arguments regarding the lack of rigour on the part of the government health research and policy making, proved much more persuasive than the use of overly negative scenarios in relation to the economic consequences of a ban.
4.5 VFI New York study (International Communications Research)

The Vintners’ Federation of Ireland (VFI) commissioned a US-based research company – International Communications Research - to undertake a study of licensed businesses in New York City and surrounding counties, to ascertain the perceived effects of the smoking ban introduced there in March 2003.

The specific objectives of the study were stated as to determine:

- Changes in the numbers of customers seen prior to the ban versus currently
- Changes in the number of staff employed
- Changes in monthly revenue from alcohol beverage sales
- Reasons for a decrease in staff, and what percent can be attributed to the smoking ban, and
- Effect of the smoking ban on businesses and steps taken to maintain business, if any

300 telephone interviews were undertaken from a random sample of businesses licensed to sell alcohol in New York City and adjoining areas. Just over half of the businesses served food. Half are strictly bars. Most were single location businesses.

Summary of Findings

**Employee Impact**

- One-third of all establishments reported a decline in total service-related employees since the smoking ban.
- Among respondents who have seen a decrease in staff, one-third attribute 100% of the layoffs to the smoking ban.
- Just under one-third attributed their declines to a poor economy.

- On average, establishments reported a 7% decline in waiters and waitresses they employ and an 11% decline in bartenders since the smoking ban went into effect. The number of assistant managers and kitchen staff was unchanged. The net effect is an average 5% decline across all four job types.

It must be noted however, that the margin of error given the study sample size means none of these decreases are statistically significant.

**Impact on Sales**

- Two-thirds of respondents said that they had fewer customers than before the ban
- More businesses that didn’t serve food have seen fewer customers than those who did serve food (80% versus 54%)
- Bars/nightclubs and bars/restaurants (30% each) have seen significantly larger average decreases than those in hotel bars (18%).
- Conversely, among those who claim to be seeing more customers, the average percent increase is 26%.
- One-quarter of respondents provided monthly alcoholic beverage sales figures for the months before and after the ban. This showed an 8% decline in sales
- When asked to describe how the smoking ban has affected their businesses, more than three-fourths of the bar managers/owners claimed the ban has had a negative effect.
- Drops in revenue, customer resistance, and a decrease in customer volume were mentioned most frequently.
- Nearly two-thirds of these establishments have taken some steps to maintain business in light of the smoking ban, including offering food and drink specials, providing entertainment and/or activities, and stepping up their advertising.
The sample of businesses is relatively small, leading to many of the results not having statistical significance – that there was as much chance of the ban having a neutral effect as it having the negative impact highlighted. Also, most of the responses were based on a perception of how businesses were being affected, rather than from actually provision of revenue figures. Of the quarter or so of businesses who actually provided figures, this was only for the months before and after the ban, which is probably not sufficient to be of significance.

4.6 VFI/LVA Member Survey

The VFI, in conjunction with Licensed Vintners Association and the Irish Hotel Federation, commissioned a study by Behaviour and Attitudes, a market research firm, into public attitudes to the ban. This study was not available for analysis, however the main conclusion from the VFI web site was that the ban would have an adverse effect on pub business and that 54% of pub-goers supported a “separate” smoking area over a total ban. (Publicans Propose Realistic Alternatives to Proposed Smoking Ban - “Customer Choice and Common Sense” 28 Aug 2003).

http://www.vfi.ie/aboutvfi/article_detail.asp?article_type_id=1&article_id=28

The results of this study were further analysed by Anthony Foley of Dublin City University Business School (DCU) to forecast the economic impact on pubs.

This concluded that the ban could lead to a 4%-8% drop in pub sales, up to 3,100 job losses and a fall in revenue for the government of up to €69 million. As the initial study had shown that most members expected a downturn in business, it was not surprising that the DCU figures showed a negative impact. It should be noted that the 8% drop in sales is the same as that estimated for the VFI’s New York study above. Also, the report concluded that there “could” be a decline in pub sales, which suggests that some form of sensitivity analysis may have been undertaken but that only the worse case scenario has been presented. The report acknowledges that the impact could move in either direction, and that there is a “high degree of uncertainty in assessing impact”.

5.7 Conclusions

The high level of debate in Ireland regarding the total smoking ban is very much derived from the development of uncompromising anti-tobacco smoking policies over a relatively short period of time. None of the interest groups providing an economic impact assessment of the effects of the total ban have been able to categorically prove either a positive, negative or indeed neutral outcome.

What is apparent, however, is that there was not a great clamour from the general public for a total ban. Rather, the debate has been lead in the main by health professionals and health economists who had persuaded the government prior to public discussion that a total ban was the only solution. Most public opinion surveys showed a great deal support for a partial ban, or – in the event of introducing a total ban – that pubs and bars should be differentiated from restaurants.

The progress of legislation itself has been rapid and there was an evident feeling among many that the consultation process was one-sided and over-short.
5 NORWAY

5.1 Legislation

Norway is recognised as the front runner in attempts to eradicate smoking among its population. Several key pieces of legislation have been enacted from the 1970s, culminating in 2004 with the introduction of the total smoking ban in all public places serving food and drink. With regards to workers in the food and drinks industry, it has been the Norwegian government’s official stated intention since around late 1980s to “…limit passive smoking and ensure a smoke-free working environment for this group of workers, as well.” The process of legislation that has led to the total ban is summarised below.

The Tobacco Act, 1975

Since 1975, Norway has enacted legislative measures on tobacco control, although actual official governmental discussion date back to 1964. The first measures included an outright ban on tobacco advertising and mandatory labelling of tobacco products with health warnings. Potentially as a direct result of this, tobacco consumption per inhabitant smoking daily reached a peak in 1975. (http://www.tobakk.no/materiell/pdf/Tobacco_control.pdf, Tobacco Control in Norway: Government Initiatives, Kjell Bjartveit, 2003). Among other measures, an aggressive anti-smoking advertising campaign was initiated which continued until the late 1980’s. It has been suggested that the discontinuation of this advertising campaign, as well some dilution of anti-smoking measures as a result of EU negotiations, coincided with the stagnation of the trend of less smokers in Norway (Kjell Bjartveit, 2003).

Amendment to the 1975 Act – Proposition to the Odelsting No. 27, 1987-88

This amendment had as its cornerstone the first effective measure against passive smoking. The main measure introduced was the restriction on smoking in some public areas and public transportation vehicles. It was also made apparent in the Proposition that the ultimate goal of such legislation was:

“In the long range, however, the Ministry finds that smoke-free environments should also become mandatory in public places serving food or drinks, as well as in hotels and other places providing overnight accommodation.”

Therefore, in effect the government had given the Norwegian hospitality industry some 16 years notice of the total ban introduced in 2004.

Amendment: Proposition to the Odelsting No. 69 (1993-94) or Restaurant Regulation 1995

This amendment followed on from Proposition No. 27 by revoking the exemption of hotels and other overnight accommodation providers from the smoking restrictions. These establishments effectively became smoke-free as a result in 1995. However, the exemption for restaurants and other public places serving food and drink remained intact.

Amendment 2004: Concerning act regarding changes in Act No. 14 of 9 March 1973 relating to Prevention of the Harmful Effects of Tobacco

This amendment has effectively abolished smoking in restaurants and all other public places serving food or drinks. The consultation process, related directly to this Amendment, began in 2001 with publication of a consultation document providing four proposals as how to move forward with tobacco controls in food and drink establishments. A subsequent consultation document was produced in late 2002 with a final proposal which advocated the total ban of smoking in all food and drink establishments. These consultations are provided in more detail below.
2001 Consultation – 4 alternative proposals
In 2001, as part of the consultation process towards integrating the EU Tobacco Directive into national legislation, the Norwegian government included four proposals targeted at resolving the outstanding issue of smoking in restaurants and other food and drinks places. Responses were invited, of which 108 were given. The four specific proposals were as follows:

- A continuation of the current Restaurant Regulation with a minor tightening of certain requirements.
- Abolishing the Restaurant Regulation. Mandating physically separated smoking areas in all public places serving food and/or drinks.
- Exemptions from the smoking ban for establishments able to document their fulfilment of certain requirements with regard to ventilation, division into separate zones, etc.
- A total smoking ban in all public places serving food or drinks.

Responses
The majority of those responding to the proposals signalled that they were in favour of a total ban in a public places serving food and drink. This included:

- the Norwegian Labour Inspection Authority
- the Norwegian Confederation of Trade Unions (LO)
- health sector agencies
- a majority of the Chief County Medical Officers

and
- the Hotel and Restaurant Workers’ Union – it stated that:

“a total ban is the only acceptable proposal, given our current knowledge on passive smoking and a safe working environment.” It is not possible to accept various risk levels for secondhand smoke; only a ban on smoking in enclosed spaces where people work is a viable option. Moreover, this alternative eliminates the issue of investments into ventilation systems, which may skew competition. It also simplifies control routines, and fewer opportunities for confrontations would arise between employees and guests”

Most municipal administrations (equivalent of Scottish council areas) were in favour of proposal 1 – a tightening of the current regulations.

Apparently, the Norwegian Hospitality Association initially indicated being in favour of a total smoking ban in restaurants but not in other public food and drink establishments. However, it changed its position to one of a preference for the continuation of the Restaurant Regulation but for establishments to be officially approved by the authorities (based on air quality requirements and proper ventilation systems). It also saw no practical way to create clear criteria that would differentiate a restaurant situation with that of other food and drink places.

The minority of the consulted bodies – which included tobacco industry representatives – supported no change to current regulations. Interestingly, this was not actually one of the proposals.

2002 Consultation – 1 proposal
In 2002, the government submitted its proposal that only a total smoking ban would ensure a wholly smoke-free environment for all staff working in places serving food or drinks.

Responses
Of the 91 bodies invited to submit comments, 80 were in favour of the government’s proposal and 11 were opposed. The profile of supporters and detractors was generally the same as for the 2001 proposal.

**Air Curtains/Ventilation Systems**

Within this proposal, responses were given to arguments regarding use of designated smoking areas supported by air curtains/ventilation systems. Some responses regarding this are provided in Appendix X. However, overall it was the government’s view that such systems cannot fully ensure a smoke-free environment as it does not ensure that customers observe the division between smoking and smoke-free areas. As such there is still some risk to employees in relation passive smoking.
5.2 Impact Studies Related to the Introduction of the Total Smoking Ban

For those opposed to the total smoking ban in Norway, an argument on the grounds of proving an adverse economic impact to businesses serving food and drink, would have been difficult to persuade the Norwegian government. It had stated quite clearly in its White Paper that:

“In the Ministry’s assessment, the health related rationale behind the regulation carries more weight than any negative financial consequences for the industry.”


Nevertheless the government provided an argument against any negative economic impact by ordering a review of existing studies—mainly American case studies—which it in its conclusions indicated that there would be little or no negative financial implications for hospitality businesses. The voracity of these studies have been evaluated elsewhere in this report and need not be rehearsed at this point.

5.3 Norwegian Hospitality Association Survey of Members, 2004

At the time of writing, the only impact study in Norway available for evaluation was that commissioned by the Norwegian Hospitality Association (RBL). The RBL undertook a survey of its members in late 2004 to ascertain, among other things, the impact on sales and employee numbers since the introduction of the ban in June 2004. The figures presented below have kindly been available by the RBL at short notice, and a full analysis of the survey is yet to be undertaken. Responses were given by 408 businesses, from a total sample invited to respond of some 1,200.

Respondent Profile
As shown in Figure 5.1, most businesses responding were from the food sector of the industry, with less than one-in-five representing pub and nightclub operations.

Figure 5.1 – Profile of respondents to Norwegian Hospitality Association Survey

Impact on Turnover
The impact on sales among respondent firms is shown in Figure 5.2 below. The results would suggest that the ban has had an adverse effect on sales, although it is not possible to calculate the aggregate affect. The main results, shown overleaf, are:
Overall, a more than a quarter of businesses (108 responses) have experienced a decline of more than 10%
187 businesses in total indicated experiencing a fall in sales
16% of respondents (65 businesses) experienced an increase on sales

Figure 5.2 – Impact of Ban on Turnover of Association Members

Impact on redundancies
Respondents were asked to indicate whether the number of employees had fallen since the introduction of the ban, and by how much. It must be noted that respondents were not asked to indicate whether this was as a direct result of the ban, although it could be argued that this is inferred by reference to the ban in the question. Also, the question did not allow for respondents to indicate whether the number of employees had risen since the ban was introduced. Indeed, 273 of the 408 respondents indicated “No” to this question. Many or at least some of them may have actually experience an increase in numbers employed.

This aside, the results show that overall that the number of job losses is estimated at between 192-348* by those businesses who had experienced a fall in employee numbers.

Table 5.1 – Impact on Employment in Member Establishments

<table>
<thead>
<tr>
<th>Response choice</th>
<th>Responses</th>
<th>% of total</th>
<th>Redundancies*</th>
</tr>
</thead>
<tbody>
<tr>
<td>No (responses) of total 408</td>
<td>273</td>
<td>66,9%</td>
<td>0</td>
</tr>
<tr>
<td>Yes, reduced by less than 3 employees</td>
<td>114</td>
<td>27,9%</td>
<td>114-228</td>
</tr>
<tr>
<td>Yes, reduced by 3 to 5 employees</td>
<td>16</td>
<td>3,9%</td>
<td>48-90</td>
</tr>
<tr>
<td>Yes, reduced by more than 5 employees</td>
<td>5</td>
<td>1,2%</td>
<td>30+</td>
</tr>
</tbody>
</table>

* Redundancies = Responses x Minimum/Maximum range of Response Choice

No economic impact studies have been undertaken regarding the ban in Norway given that it has only been in force less than six months. The Norwegian government in any case had made no secret of the fact that health issues related smoking will override any negative economic impact for businesses:
5.4 TV2 Straw Poll Survey

The only survey available after the ban in Norway was introduced was undertaken by TV2, one of the main Norwegian TV channels. It was reported by the organisation as “Sales numbers up after anti-smoking law”. They interviewed 50 establishments in Oslo, Bergen, Stavanger, Trondheim and Tromsø. The main results were:

22 businesses indicated that turnover had increased in June and July of 2004 compared to 2003. 14 businesses reported a decrease over the same period

This survey can be considered more a straw poll than a justifiable and sound study. In any event, almost as many businesses indicated a fall in business as reported an increase. Therefore, the results are likely to be of use as much to people for the smoking ban as against it. “Sales numbers up after anti-smoking law”

5.5 Evaluation of Restaurant Regulation, 1998

The government’s approach was to evaluate how existing legislation was being complied with, especially regarding the Restaurant Regulation (1995) detailed in the legislation section above. This involved an analysis of the experiences and policies of municipal authorities responsible for implementing the Regulation.

The main conclusions from this study were:

• business compliance varied greatly, with restaurants adhering to the regulations more than bars and clubs;
• regulations were often violated, more so within bars and clubs;
• almost one in three municipal authorities did not conducted inspections;
• varying enforcement among other authorities
• half of the inspectors thought impossible for businesses to always fully comply with regulations
• less than one-in-five of inspectors were satisfied with the regulations criteria
• more than half of inspectors wanted the restrictions tightened

A further survey was undertaken of people involved in the hospitality industry, with the main findings being:

• most bar and club businesses found it difficult to comply with the regulations
• such businesses found that customers ignored the division zones between smoking and non-smoking
• most businesses were in favour of differentiated rules for different types of operation
• only a small minority of businesses had invested sufficiently in facilities in order to comply with the regulations

Finally, surveys of the general public were undertaken in 1999 and 2001 with the main results being:

• the majority would choose to stay in a smoke-free area
• around 3 out of 4 respondents were in favour of physical barriers between smoking and non-smoking areas
• less than a third (30%) of the general public supported a total ban on smoking in restaurants;
• almost half (46%) of the public supported a total ban in pubs and bars;
Given Norway’s strong and consistent stance over almost 30 years towards reducing smoking among its population, the economic considerations put forward by opponents to the 2004 legislation have not penetrated the main driving health argument of the government.

5.6 Conclusions

Norway has been one of the most aggressive campaigners against smoking and its government has directly challenged the tobacco industry with official advertising campaigns targeted at directing public opinion against the industry. It was one the first countries to introduce a total ban on advertising, some 30 years ago in 1975.

It has to be noted that the consistently strong stance regarding a reduction in smoking held by the Norwegian government over nearly three decades has made it more difficult for certain interest groups to argue the economic case against the total smoking ban in food and drink establishments.

The implementation of a ban on tobacco advertising almost 30 years ago has to be compared with the situation in the UK where some types of advertising are still allowed. Therefore, there is a suggestion of a lack of consistency in the Executive’s argument, where on the one hand it is restricting smoking in places where smokers have traditionally been allowed to congregate, yet is still officially sanctioning the encouragement of people to start or continue smoking. Although a time lag of three decades could not reasonably be argued given the greater level of health awareness, one could also argue that it is disingenuous to continue to allow encouragement of smoking but then increase restrictions on those who smoke.

The statement of intent on the part of the Norwegian government to ban smoking in all public places serving food and drink was, in effect, provided some 14 years prior to the ban being enacted. Thus, one would have to conclude that the hospitality industry in Norway has been given ample time to adjust its operations to meet future legal obligations.
NEW ZEALAND

New Zealand followed Ireland and Norway by banning smoking in pubs and restaurants as of December 2004. This followed the initial introduction of a bill in 1999, five years prior to the law coming into force.

New Zealand’s approach to tobacco control overall can be dated back to 1963, when tobacco advertising on television and radio was effectively stopped. However, it wasn’t until 1997 when a full ban on advertising to the public was in place – similar to that of Norway shown earlier. The legislative process regarding passive smoking ultimately began with the introduction of the Smoke-Free Environments Act 1990. This, and subsequent legislation directly affecting hospitality businesses in New Zealand is reviewed below.

6.1 Legislation

The Smoke-free Environments Act (the Act) was passed in 1990.

This legislation banned smoking on most public transport, in half of restaurant seating, offices, public parts of shops and banks, and in most enclosed public places. This did not extend to nightclubs or bars.

Apparently, restaurant smoke-free areas were often ignored, although only one case had come to court by the end of the decade (New Zealand’s tobacco control programme 1985-1998 (Murray Laugesen, Boyd Swinburn) (1999).

The purpose of the Act was to:

- reduce the exposure of non-smokers to second-hand smoke
- regulate the marketing, advertising and promotion of tobacco products
- monitor and regulate the presence of harmful constituents in tobacco products and tobacco smoke
- establish a Health Sponsorship Council (the Health Sponsorship Council originally replaced tobacco sponsorship of sporting and cultural events. Now this requirement has passed, the HSC focuses on promoting health and healthy lifestyles through social marketing).

The Act:

- placed restrictions on smoking in workplaces;
- required all workplaces to have a policy on smoking and to review that policy annually;
- placed bans on smoking in public transport and certain other public places, and restricted smoking in cafes, restaurants and casinos;
- regulated the marketing, advertising, and promotion of tobacco products and the sponsorship by tobacco companies of products, services and events;
- banned the sale of tobacco products to people under the age of 16 years (raised to 18 years in 1998);
Smoke-Free Environments (Enhanced Protection) Amendment Bill 1999
This Bill proposed to extend the 1990 ban on smoking in offices, shops and public buildings to pubs, clubs, restaurants and casinos, among other enclosed public spaces. It would appear that the initial proposals looked at dividing licensed premises into smoke-free areas and with a deadline of 2007 for enactment, however this was hardened during consultation to the implementation of a total ban and introduction of the Act by December 2005. However, despite this apparent change in timing, the industry was still given around 5 years to come to terms with the implications of operating under a full ban – something that was acknowledged as positive by the Hospitality Association of New Zealand.

Smoke-free Environments Amendment Act 2003
After 397 submissions on the 1999 Bill up to 2002, a select committee recommended that smoking be banned in all workplaces including licensed premises, without exception (apart from guest bedrooms). The Bill was passed December 2003 – almost 4 years after its being proposed - and came into force on 10th December 2004.
6.2 Studies Related to the Introduction of the Total Smoking Ban

The government’s case was mainly driven by the health argument and the wider economic benefits that might be derived from a total smoking ban. No direct impact study was undertaken by government, however many studies from the USA and around the world, particularly Scolo et al (2000), were cited as evidence in their argument that a total smoking ban would have no impact or a positive impact on the hospitality industry.

Below are two studies from opposing sides to the argument, one commissioned jointly by the Cancer Society and Heart Foundation of New Zealand and the other by the Hospitality Association of New Zealand.

6.3 UMR Research Omnibus Survey

UMR Research has been polling the New Zealand public over a number of years regarding the issue of a smoking ban in pubs and restaurants. The Cancer Society and the National Heart Foundation jointly commissioned the poll. UMR undertake an “omnibus” survey which includes questions across a wide range of subjects, within which the smoking ban questions were included. This is a national telephone survey of 750 adults (18+). Prior to the ban coming into effect in December 2004, UMR presented accumulated results of past surveys, shown in Tables 6.1(a) and 6.1(b), below.

This shows that there was much more support for a total ban in restaurants than in pubs and bars. Indeed, only in November 2004 – one month prior to the ban becoming effective – was there a majority in favour of a ban in pubs and bars. As such, in the whole period when legislation was being drawn up, there was a clear majority who opposed a complete ban in pubs and bars. Therefore, there would appear to have been a consensus in New Zealand that a case existed for the legislation to be developed in a way that differentiates between different types of operations.

Table 6.1 (a) – Support for a Smoking Ban in NZ Restaurants

<table>
<thead>
<tr>
<th>Do you support or oppose a complete ban on smoking in New Zealand restaurants?</th>
<th>April 2001</th>
<th>Jan 2002</th>
<th>April 2003</th>
<th>Nov 2003</th>
<th>Nov 2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support</td>
<td>61</td>
<td>60</td>
<td>66</td>
<td>67</td>
<td>73</td>
</tr>
<tr>
<td>Oppose</td>
<td>33</td>
<td>34</td>
<td>31</td>
<td>29</td>
<td>24</td>
</tr>
<tr>
<td>Depends</td>
<td>3</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Unsure</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 6.1 (b) – Support for a Smoking Ban in NZ Pubs & Bars

<table>
<thead>
<tr>
<th>Do you support or oppose a complete ban on smoking in New Zealand pub &amp; bars?</th>
<th>April 2001</th>
<th>Jan 2002</th>
<th>April 2003</th>
<th>Nov 2003</th>
<th>Nov 2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support</td>
<td>38</td>
<td>38</td>
<td>49</td>
<td>48</td>
<td>56</td>
</tr>
<tr>
<td>Oppose</td>
<td>54</td>
<td>51</td>
<td>46</td>
<td>46</td>
<td>40</td>
</tr>
<tr>
<td>Depends</td>
<td>4</td>
<td>7</td>
<td>2</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Unsure</td>
<td>4</td>
<td>4</td>
<td>3</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

Source: UMR (2004)

The strength behind this research is that it is one of the few surveys that appears to be wholly objective in its analysis of public opinion. Of course, it was reported by the commissioning parties as justification for an across the board ban as public opinion had fortunately swung to a majority in favour prior to December 2004.
6.4 Hospitality Association of New Zealand Survey

The Hospitality Association of New Zealand undertook a survey of its membership which included restaurants, hotels, café bars, accommodation providers and pubs/taverns. A total of 343 responses were given.

As shown in Table 6.3 below, 24% of respondents had a smoke-free area available already. Two-thirds of restaurants (67%) and more than a quarter of taverns (27%) had a smoke-free area.

### Table 6.3 - Profile of Current Smoke-free Policies

<table>
<thead>
<tr>
<th></th>
<th>Restaurant</th>
<th>Hotel</th>
<th>Bar/Café</th>
<th>Accommodation</th>
<th>Tavern</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Smoke-free</td>
<td>7%</td>
<td>0%</td>
<td>5%</td>
<td>0%</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Partly Smoke-free</td>
<td>67%</td>
<td>29%</td>
<td>41%</td>
<td>60%</td>
<td>27%</td>
<td>36%</td>
</tr>
<tr>
<td>Has Separate Smoke-free area</td>
<td>20%</td>
<td>34%</td>
<td>11%</td>
<td>23%</td>
<td>26%</td>
<td>24%</td>
</tr>
<tr>
<td>Totally smoking</td>
<td>7%</td>
<td>38%</td>
<td>43%</td>
<td>17%</td>
<td>46%</td>
<td>38%</td>
</tr>
<tr>
<td>No comment</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

HANZ (2001)

**Impact on Business**

Respondents were asked to estimate what impact the smoking ban would have on business. As shown in Table 6.4, almost one-quarter of businesses felt they may have had to close altogether, while a further two-thirds (67%) thought that the ban would have a negative impact on business. Therefore, overall, 9 out of 10 operations were of the view that the smoking ban would have a negative impact.

### Table 6.4 – Perceived Impact on HANZ Members’ Business

<table>
<thead>
<tr>
<th>Possible change</th>
<th>% response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grow by 10%</td>
<td>1%</td>
</tr>
<tr>
<td>Grow by 20%</td>
<td>0</td>
</tr>
<tr>
<td>Stay the same</td>
<td>6%</td>
</tr>
<tr>
<td>Drop 10%</td>
<td>9%</td>
</tr>
<tr>
<td>Drop 20%</td>
<td>18%</td>
</tr>
<tr>
<td>Drop 30%</td>
<td>40%</td>
</tr>
<tr>
<td>Close</td>
<td>23%</td>
</tr>
</tbody>
</table>

HANZ (2001)

HANZ extrapolated the above figures to provide a worse case scenario. Generally, if consumption in licensed premises dropped by 30 percent, $78 million would be lost in sales. This was perhaps disingenuous, given that only 40% of respondents indicated a 30% fall. Such use of the results perhaps worked against their economic argument, allowing opponents to draw attention to the loose use of the data.

6.5 CONCLUSION

The main lesson that can be drawn from the New Zealand case is that government there gave at least five years notice regarding the introduction of a wide ranging ban on smoking in hospitality venues. That this was based mainly on the health argument, cannot be denied as no official government agency undertook a proper analysis of the economic issues regarding effects on industry.
Studies reviewed selectively by government and those undertaken by the health lobby and hospitality industry can be questioned on their interpretation of results and bias regarding respondents. As such, it is difficult to prove either way what the economic effects will be of the ban in New Zealand. Also, it has only been in place for a little over one month, there has not been time to measure actual post-ban impacts.
7 UNITED STATES OF AMERICA

7.1 Background

By April 1988, 125 California communities had significant non-smoker protection laws, followed by Massachusetts with 56. Communities in more than 20 other States restricted smoking including 6 of the 8 States without state-wide restrictions. Two of the major tobacco-producing States, Virginia and South Carolina, each had several counties that restrict smoking. Although Virginia had no state-wide restrictions, Arlington, Fairfax, and Prince William Counties, as well as the city of Norfolk, restricted smoking in restaurants and other public places. In South Carolina, which has state-wide limits only for school buses, smoking is restricted in government buildings in five counties. In 1987, the city of Greenville became the first in South Carolina to restrict smoking in private worksites and restaurants (Tobacco Free America Project 1987).

The following map comparisons show a decade of developments in smoking restriction legislation across 51 American states from years 1991 to 2000.

Figure 7.1: US Restrictions on Smoking in Public Places 1991 - Source American Lung Association.
At the outset it is important to add that the maps do not necessarily reflect restrictions imposed by State Law but also reflect collective but localised legislation enforced by county and city courts or self-regulation undertaken by workplace employers.

By 2003 major cities and states in the USA, including New York, Chicago, Denver, Pittsburgh and Delaware were in the process of considering or activating legislative reform to end smoking in bars and restaurants. Forty-seven states imposed laws which ranged from limited prohibitions such as restrictions in schools to laws that limit or ban smoking in virtually all public places including elevators and shopping malls. The most rigorous prohibitions target restaurants and private workplaces. All 51 states impose excise tax on cigarette sales which has been highlighted as the most effective means of controlling smoking.

‘Vermont was the first state to ban smoking in restaurants. As with Utah and Maryland, states that enacted state-wide smoking bans, Vermont’s law has plenty of loopholes so that one can smoke after dinner in a restaurant. Such loopholes drive anti-tobacco crazy so all three states have been under assault. Last year Utah refused to tighten up its smoking ban and it appears Vermont is disinclined to fiddle with its law. Strictly on an economic level, passing smoking bans during these times of economic uncertainly is irresponsible. More and more states and localities are discovering the joys of letting the market place decide smoking policies’ (Forces International 2003 [http://www.forces.org/smokingbans/smoking_bans0303.htm]).

As smoking prohibition advances there is much heated debate concerning effectiveness and economic impacts on business interests.

The following map shows the extent of prohibition across the USA with green highlighting those states that prohibit smoking in all workplaces including restaurants and bars.
Figure 7.3: Summary of Smoke-free Workplace Laws as of September 1, 2004.

The map shows the eight states that have state-wide prohibition on smoking in public places and workplaces that include bars. They are California, Connecticut, Delaware, Maine, New York, Massachusetts, Missouri, and Rhode Island. Rhode Island was the most recent addition when its law came into effect on January 2005 (American Lung Association 2004).

It is important to mention at this point that in some cases like Missouri, state-wide smoking prohibition only applies to bars attached to restaurants not freestanding bars. Aggregating both types of bar is confusing and is a common thread that runs through study reports and media comments. Nearby freestanding bars that allow smoking can be viewed as a refuge for smoking diners having a meal in a non-smoking facility. This is a choice smokers do not have in states and countries where prohibition includes all bar businesses. It is also important to note that within some states a variety of prohibition levels apply which suggests compliance potential may be perceived differently across and within different cities and counties.
The map, see Figure 7.3., was included in a report compiled by the American Lung Association. The report entitled, *Fuzzy Math: How the Tobacco Industry Distorts the Truth about the Economic Effects of Smoke-free Restaurants and Bars* raised an interesting point that statisticians can develop techniques that allow them to massage data to present bias findings. The report targets economic impact studies on smoke-free restaurants and bars which were undertaken by the tobacco industry. The critique identifies the main weaknesses in those industry led studies as poor research design, lack of peer reviewed reporting and statistical testing. The authors use other studies to support their argument. Indeed their argument can also apply to those studies that position the opposing view the report supports. For example, there is only thin evidence arguing an economic case specifically for bars with a very brief report on California bar revenues since prohibition in 1998. Because of lack of methodological detail it is not possible to support the argument that these studies themselves are representative of the bar industry. Isolating bars located within restaurant facilities and aggregating their performance data with that of free standing bars suggests a methodological issue, particularly when freestanding bars are dealt with differently in prohibition bills.

One of the main reports which upholds this argument is in the form of a letter to the editor of Tobacco Control. The report lacks a clear methodology, concerning the actual sample size in terms of businesses and percentage of free-standing bars. Their data uses aggregate bar revenues from restaurants and bars across California. More importantly the research assumes revenues have not been susceptible to any other knock other than smoking prohibition. The report does not accommodate input from actual businesses to probe performance and individual business experiences which could have been varied. This is understandable when the report was generated by authors committed to health prevention research and who demonstrate wholehearted support for pro-smoke-free legislation.

Non-compliance penalties vary and are undertaken by county health authorities. There is much pressure to encourage compliance although some penalties have been rolled back to include exemptions and waivers. For example, New Hampshire, New York and Minnesota are three of the 28 states that in 1997 legally prohibited employers from hiring or firing employees due to their off-work smoking habits. However, research interests supporting the view of more stringent smoking restrictions, are those which have encouraged states to progress outright bans in all workplaces, including bars. The reasons that lie behind exemptions and waiver applications may further explain why wholehearted support for non-smoking in all types of workplace or in specific geographic locations is more difficult to achieve.

This section will consider case studies to try to explain the scale and scope of prohibition and will highlight a range of issues to demonstrate the USA example.
6.2 New Hampshire (NH)

According to map comparisons in 1991 (See Figure 7.1) NH was the only American state to experience extensive restrictions on smoking in public places and was one of three states experiencing comprehensive restrictions by 2000. This status was achieved significantly through self-regulation and localised restrictions rather than legislation imposed state-wide.

The Clean Indoor Air Act imposed by the State in 1991 set up guidelines on how to go about segregating smoking areas. However, this policy continues to prevent municipalities from enforcing stricter legislation. With a few exceptions restrictions continue to depend on self-regulation.

Exceptions include Keene which in August 2001 was the first city in NH to introduce a ban on smoking in its 52 restaurants. This law came into effect in January 2002 and included bans in restaurant cocktail lounges with exemptions for private clubs. A year on press reports suggested a growing acceptance regardless of some business fluctuations. Anecdotal comments ranged from declining business during the week to reports of displacement of custom to businesses outside the town or to private clubs. In 2004 ironically NH has gained the reputation for being the Ash Tray of New England. Border hopping to avoid smoking bans in bars has benefited border towns in NH by displacing custom from locations like Boston in Massachusetts as the result of its recent state-wide smoking ban. Attempts to enforce legislation failed in Nashua which is located on the border of NH and Massachusetts. Attempts also failed to introduce smoking restrictions in Colebrook, which is located near the Vermont and Canadian borders.
6.3 Massachusetts (MA)

By April 1988, 56 Massachusetts communities had significant non-smoker protection laws.

A study comparing city and town level meals tax receipts collected by Massachusetts Department of Revenue from 1992 to 1998 before and after the imposition of highly restrictive restaurant smoking policies concluded that there was no significant effect on a communities level of meal receipts. For comparison purposes this was replicated using cities and towns with less restrictive or no smoking policies. The research identified a correlation between the consumption of alcohol and tobacco. The study used aggregate restaurant receipts so did not identify the performance of individual operations. The towns selected were those implementing highly restrictive policy and may have been towns where no impact would be anticipated. Hence the type of community and market these restaurants attracted may have been less sensitive to such a policy change.

In May 2003 Boston banned smoking in public places. An outright smoking ban throughout MA became effective on July 5, 2004. This banned smoking in all MA workplaces, with a few exceptions like nursing homes, some members clubs and hotel guest rooms designated as smoking rooms. Under the new law, smoking is broadly prohibited in, among other areas, workplaces, work spaces, common work areas, classrooms, conference and meeting rooms, offices, elevators, hallways, medical facilities, cafeterias, employee lounges, staircases, restrooms, restaurants, cafés, coffee shops, food courts or concessions, supermarkets or retail food outlets, bars, taverns, theatres, convention centres, schools, colleges, universities and museums.

Although employers are obligated to ensure compliance with fines against employers of up to $500 for first violation, the regulation includes some exemptions and waivers. These include exemptions for private residences, hotel, motel, bed and breakfast and lodging rooms that are designated as smoking rooms. Under the new law, smoking is broadly prohibited in, among other areas, workplaces, work spaces, common work areas, classrooms, conference and meeting rooms, offices, elevators, hallways, medical facilities, cafeterias, employee lounges, staircases, restrooms, restaurants, cafés, coffee shops, food courts or concessions, supermarkets or retail food outlets, bars, taverns, theatres, convention centres, schools, colleges, universities and museums.

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Most notable exemptions include workplaces in compliance with an earlier smoking ordinance. Ordinance 16-35 was adopted in 1993 and requires clerical, professional and business employers to ‘implement, maintain, and conspicuously post, for all employees to see, a written smoking policy…’. Unlike the new BPHC regulation, Ordinance 16-35 does not require workplaces to be smoke free. Instead the policy mandated under Ordinance 16-35 to respond to any objection by an employee about smoke in the workplace by reacting ‘a reasonable accommodation e.g. using an existing means of ventilation or separation or partition off the workspace (Goodwin Proctor, 2003).

State democratic representative Jennifer Callaghan is backing a call from her constituents (in the districts of Uxbridge, Millville, Blackstone and Bellingham) to ease legislation further. She is quoted as saying

"The smoking ban is a good law that needs some tweaking,"
"The law has a lot of merit, especially with regard to employees' health, but there has to be a level playing field," she said.

"It put establishments in bordering communities -- most of my district -- at a severe disadvantage. Yes, Rhode Island is entertaining the whole notion of a smoking ban, but it hasn't been implemented yet." (update: ban implemented in restaurants January 2005)

Custom is being displaced to membership clubs exempt from restrictions and Border States with limited restrictions e.g. bar establishments with fewer than 10 employees.

There has been an outcry from restaurant and bar owners who claim massive losses in business.
6.4 Minnesota (MN)

In 2004 the MN State Legislature introduced the "Freedom to Breathe Act" which strengthens the Clean Indoor Air Act by prohibiting smoking in workplaces including bars and restaurants. The bill was stalled in a House committee. In 2nd October 2004 the proposal passed its first legislative hurdle when the Senate Health Committee passed an affirmative voice vote after two hours of testimony and debate.

Politicians supporting the Bill emphasise its health benefits and the rights of non-smokers. Anti-Smoking activists are using the results of one state-wide and three public opinion polls which claim that two-thirds of respondents supported smoking bans in bars and restaurants.

This legislation has grown from the following localised smoking restrictions that have developed since 1975.

In 1975 MN State introduces America’s first Clean Indoor Air Act, calling for separate smoking and non-smoking sections in certain public buildings, including restaurants. This started the following rash of localised legislation that built on this initial smoking restriction.

In 1985 MN was the first state in the USA to implement a large scale tobacco control programme. A year earlier the Minnesota Department of Health introduced its first state funded anti-smoking campaign under the Minnesota Health Plan. By 1993 the Programme was dismantled because of ‘budget crisis’ and pressure from the Tobacco industry.

In 2000 Moose Lake is the first community in MN to ban smoking in restaurants, but only during certain times as set out in the legislation.

In 2000 Duluth passes a smoking ban that prohibits smoking in restaurants within certain hours. The ban is tightened up in 2001 to eliminate exemptions. However, in 2003 Duluth City Council rolls back legislation to exempts certain restaurants from ban restrictions.

In 2001 Cloquet imposes a ban on smoking in restaurants. The following year Olmsted County passes the state’s first countywide law prohibiting smoking in restaurants defined by the regulation.

In June 2004 St Paul City Council passed an ordinance to prohibit smoking in restaurants and bars with exemptions for premises with ventilated smoking rooms. The Mayor Randy Kelly vetoed the ordinance in July which was followed by two different ordinances covering both bars and restaurants and the other for restaurants only.

With effect from September 2004 Moorhead bans smoking in public indoor workplaces.

The most comprehensive ban comes into effect in March 2005 which bans smoking in private clubs and all workplaces in Bloomington.

Minneapolis passes a smoking ban that includes bars and restaurants with effect from March 1, 2005.
6.5 California (CA)

A case study of California was the only one available for the Scottish Executive to model results for Scotland. Data used covered the period prior to state-wide legislation came into effect that imposed a smoking ban on free-standing bars. This section pulls in a more recent study which suggests compliance in free-standing bars is more difficult to achieve than is the case for bar/restaurant operations.

In 1994 the CA Smoke-Free Workplaces Act was enacted, in 1995 legislating a ban on workplace smoking in restaurants. As of April 1988, 125 California communities had significant non-smoker protection laws. On January 1st 1998 it became the first American state to introduce a state-wide smoking ban in all public places including bars, taverns and gaming clubs. Employers must demonstrate clear evidence that smoking is not encouraged in the workplace through prominent signage inside and outside of premises with no provision of smoking accessories like ashtrays.

**Exemptions** are in place to include:

**Owner operated business** with no employees. Courts look carefully at how the business operates and have rejected 'sham' owner-operated businesses, for example, where each employee receives one share of stock in the company; or where the owner has placed all employees’ names on the business license as partners and part-owners in the business. If a person receives regular compensation, including tips, and must follow working instructions given by others, they are considered employees, even if they are family members.

**Retail Tobacco Shop Exemption**
A retail tobacco shop or private smokers' lounge, with its "main purpose" the sale of tobacco products. A tobacco shop may be able to sell mints, gum, or even some pre-packaged food without changing its main purpose. The law does not state tobacco sales must be a store's sole purpose, or reflect a certain percentage of sales. Such incidental sales of food might not change a store's main purpose as a tobacco retailer.

**Small Business Exemption**
In order to be exempt from the smoking restrictions a small business must have five or fewer employees and meet four conditions: (1) the smoking area is not accessible to minors; (2) all employees who enter the smoking area consent to the smoking; (3) air from the smoking area is exhausted directly to the outside by an exhaust fan; and (4) the employer complies with all applicable state and federal ventilation standards. This exception is extremely narrow and does not apply to bars.

**Other Tobacco Restriction Law**
Another law that may apply is the California Health and Safety Code Section which states "No employee shall expectorate or use tobacco in any form in any area where food is prepared, served, or stored, or where utensils are cleaned or stored" (TALC the Technical Assistance Legal Centre and BREATH, Sept. 2004).

Across the first two years since the ban was imposed media reports claim that three-quarters of people support it. This suggests that one-quarter do not. More importantly 18% of the population of California smoked prior to the ban with no decline evident since the ban was introduced. Three-quarter of restaurants also report normal trade, 14% experienced increases while 9% experienced a decline in trade (biz/ed 2004).
In order to monitor compliance, a population annual site inspection survey of a random sample of Los Angeles County freestanding bars and bar/restaurants was undertaken from 1998 to 2002. The research found clear evidence that the California Smoke-Free Workplace Law has been effective at reducing smoking in Los Angeles County bars and restaurants. **Compliance in freestanding bars was lower than in bar/restaurants but showed evidence of increasing by 8% each year.** The authors anticipated that if rates continue at this pace compliance among freestanding bars would reach the levels of bar/restaurants in approximately 3 years.

Alongside the ban the state supported education programs to help ease the transition from one legislative stage to another. The California Department of Health Services’ (DHS) Tobacco Control Section (TCS) initiated a state-wide compliance campaign which began 6 months prior to the implementation of 1998's legislative reform. This included mailings to 35,000 bar, restaurant and gaming club owners and printed media advertising state-wide. *Breath* a state wide program operated by the American Lung Association of the East Bay California smoke free bars, workplaces, bars and communities program. The website [http://www.breath-ala.org/html/about.html](http://www.breath-ala.org/html/about.html) provides fact sheets covering the legislation, technical assistance and training for communities. The website also provides recent research findings which include the following Smoke Free Bar Fact Sheets (Highlighted areas concern policy post 1998 facts following state-wide ban on smoking which included bars):
SMOKE-FREE BAR FACT SHEET

TOURISM

In 1994, following the enactment of the CA Smoke-Free Workplaces Act, California’s aerospace jobs plunged by 16.4%, the computer and electronics sectors trimmed jobs by 2.8%, agriculture dipped 2.4%. In contrast, California’s tourism employment enjoyed a healthy increase of 4.6% (Los Angeles Times, May 9, 1996 - ‘State’s Tourism Grows at Its Fastest Pace in Three Years’)

In 1995, visitor spending provided jobs for more than a half a million people and added $3.1 billion to the state and local tax coffers. (California Trade and Commerce Agency, 1996)

*After bars and restaurants went smoke-free, 1996 was a banner year for tourism in California. Hotel occupancy in Los Angeles and Orange counties was up over the previous year and southern Californian amusement parks entertained record summer crowds. (California Trade and Commerce Agency, 1996)*

The City of Monterey passed an ordinance banning smoking in bars attached to restaurants in March 1994. Since that time, Monterey’s City Hotel Occupancy Tax Total has risen steadily each year including a whopping $1.3 million jump from $9.5 million in the fiscal year 1994-95 to $10.8 million for the fiscal year ending June 30, 1996. (City of Monterey, 1996)

The number of overnight visitors in San Francisco in 1996 rose 7% over the previous year, the largest increase since 1984. (San Francisco Convention and Visitors Bureau, 1997)

“We have two lounges here at the Mammoth Mountain Inn. We have the Yodler Bar which holds about two to three hundred people. We also have the Dry Creek bar located at the Inn here and holds about 200 people as well. Our clientele is widely based. We have mostly skier California crowds in the winter and in the summer we have largely European guests. The Yodler went smoke-free in December 1993. It was sort of a test market for us. Due to its big success that year, we voluntarily implemented a smoke-free policy in Dry Creek the following year.” (Jeff Byberg, Bar Manager Mammoth Mountain Inn, Mammoth Lakes, Mono County, California, Oct., 1996)

Note:*Freestanding bars did not go smoke-free until 1998. This paragraph must refer to ‘bars in restaurants’ not ‘bars and restaurants’ as specified in this fact sheet.

Figure 7.4: Smoke-Free Bar Tourism Fact Sheet –(Source: Breath - http://www.breath-ala.org/html/work_tourism.html)

The tourism fact sheet looks very positively at tourism benefits. However, the highlighted paragraph suggests 1996 data includes data on bars. This obviously includes bars in restaurants and free-standing bars affected by localised bans as state-wide legislation did not come into effect until two years later in 1998. This is confirmed in their following fact sheet.
SMOKE-FREE BAR FACT SHEET

ECONOMICS

• The California Smoke-Free Workplace Law went into effect in restaurants in 1995 and in bars in 1998. Final Taxable Sales Figures from the California Board of Equalization for 1997 showed annual taxable sales reported by owners of establishments that sold beer and wine were $7.16 billion dollars for that year. In 1998 sales increased to $7.6 billion dollars and by the end of 1999 they had jumped $8.27 billion dollars. (California Board of Equalization, November 1999)

• Final Taxable Sales Figures for establishments selling all types of liquor were $8.6 billion dollars in 1997, before the smoke-free bar law went into effect. After the law became effective, annual taxable sales for these establishments increased to $9.08 billion dollars for 1998 and increased again to $9.82 billion dollars for 1999. (California Board of Equalization, August, 2000)

• This upward trend continued into 2000 with annual taxable sales for the entire “eating and drinking group” increasing during the first quarter of 2000 over 1999 sales by 9.8%. (California Board of Equalization, March, 2000)

• Sales tax data showed that an additional $879,816,000 in sales were made in California’s beer, wine and liquor serving establishments during 1998 as compared to 1997 - after the California Smoke-free Workplace Law went into effect for bars. (California Board of Equalization, November 1999)

• The rate of growth in beer, wine and liquor serving establishments outpaced all retail outlet taxable sales in 1998, compared to 1997, by 7.7 %. (California Board of Equalization, November 1999)

• A study by the University of California, San Francisco of bar revenue data provided by the California Board of Equalization concluded that: “As with claims of adverse effects on restaurant and tourist industries, these data further discredit tobacco industry claims that smoke-free bar laws are bad for the bar business. Quite the contrary, these laws appear to be good for business.” (Institute for Health Policy Studies, Cardiovascular Research Institute, University of California, San Francisco, 1998)

• In fact, 88.7% of Californians agree that all indoor work sites should be smoke-free. (1997, California Adult Tobacco Survey, CDHS)

Figure 7.5: Smoke-Free Bar Economic Fact Sheet (Source: breath - http://www.breath-ala.org/html/work_tourism.html)

Although the data covered in this chart applies to the situation post January 1998, only the highlighted section refers specifically to net results for bars only. The remainder specifically mentions increases in aggregate sales for all beer, wine and liquor serving establishments.
Other media sources claim that 73% of Californians now support the ban as opposed to 65% when it was first introduced (BBC Inside Out 2004).
6.6 KANSAS

A ban on smoking in Lawrence all enclosed public places including bars came into effect in July 2004. A random survey immediately after the ban found a downturn in business among 25% of Lawrence bars and restaurants. A survey of twelve bars found that 50% reported that sales had suffered. Public opinion was fairly mixed with some operators suggesting businesses and patrons would adjust to prohibition in the longer term. Public opinion suggested that some smokers would be unwilling to go outside to smoke if they had to leave drinks inside which put pressure on operators to provide beer patios or gardens.

Michael H Fox an Association Professor representing the Department of Health Policy and Management from University of Kansas Medical Center claims that:

- No recent literature credibly argues against the dangers of second-hand smoke exposure.
- Literature arguing against the need for ordinances banning indoor smoking is based on three factors
  - The freedom of smokers to smoke in public places and freedom of workers not to work in places where smoking is allowed.

Contrary to expectations tax revenues on alcohol actually increased following the ban which was partially due to price increases (6News Lawrence 2004).

Under pressure from the hospitality industry, City commissioners agreed to consider issuing an air monitoring ordinance that would compromise legislation. The commission met in December 2004 to consider the potential of allowing exemptions to establishments that could demonstrate low levels of nicotine through the use of effective ventilation and filtering systems (Lawhorn Journal World 2004).

In November 2004 Kansas City Council passed a limited smoking ban in restaurants and pubs as well as other public places. This compromised its original ordinance plans which would have implemented an outright ban in all enclosed workplaces including restaurants and bars. Pressure from business operators contributed to this action which rolled back legislation. Exemptions would be allowed for operations providing separate smoking areas and provided they could demonstrate effective air monitoring systems.
6.7 New York (NY)

New York State
The perceived success of smoking restrictions in California influenced the decision to provide similar restrictions for New York. The main criticism has been that the climatic conditions experienced by New York would not accommodate outdoor smoking as smoothly as the experience of California which has a much warmer climate all year round.

In March 2003, the New York State Legislature strengthened its state’s Clean Indoor Air Act to include state-wide smoking bans in all workplaces, including restaurants and bars. Regardless of the Empire State Restaurant and Tavern Association (ESRTA) filing a lawsuit to prevent its implementation it came into effect in July 2003.

Exemptions and waivers are enforced through county health departments. The State health department provided information for county health departments to use as a basis to enforce the act and make decisions. The State acts as enforcement officer in counties without health departments. By September 2003 it received 75 waiver requests.

Information posted on the internet claims to provide advice on how to fight the New York smoking ban while complying with the letter of the law (http://www.davehitt.com/facts/fighting.html).

The Experience of New York City
The city Ordinance affecting the largest number of people is the Clean Indoor Air Act that took effect in New York City on April 6, 1988. It applied to over 7 million people, almost 3 percent of the United States population, and bans or restricts smoking in a wide variety of public places.

In March 2003, through the New York State Legislature New York City introduced a ban in its 20,000 bars, clubs and restaurants. Bar proprietors and the city’s 1.3 million smokers took a pessimistic view. Stiff penalties will be imposed with $200 to $400 for first offenders graduating to license revocation for a third violation within a period of one year (Brick 2003).

The following rare exemptions include:

- Owner operated bars where there are no employees and where there are three or fewer principal owners who each hold at least a 25% interest

- cigar bars that were in existence on December 31, 2001 that sell or rent tobacco products and devices, and that derive 10% or more of their income from these sales or rentals

- non-profit membership associations with no employees

All of the above need to apply for exemption and register with the New York City Department of Health and Mental Hygiene.
• **Bars with small separately ventilated enclosed smoking rooms, built for the exclusive purpose of smoking.** Bar owners who wish to construct such rooms must register and file plans with the New York City Department of Health and Mental Hygiene and the Department of Buildings. These rooms must have separate ventilation systems that exhaust air to an outdoor area at least 25 feet away from outdoor dining areas, working windows, doors, and heating and air conditioning vents. They also must maintain continuous negative pressure to prevent the flow of smoke into other parts of the establishment and must not permit any employee to enter while it is in use.

**Note:** Separate smoking rooms in bars will no longer be permitted after January 2\(^{nd}\), 2006.

• **In any restaurant, smoking is limited to 25% of seating in one outdoor dining area.** An outdoor dining area is defined as one with no roof, overhang, or other ceiling enclosure. This means no protection can be used during wet weather.

• **Residential and certain day treatment health care facilities may provide smoking rooms for some patients.**

Research undertaken by *Inside Out* found the ban received a mixed response. On the one hand some businesses reported lost trade while others said the effect was minimal. More smokers were staying at home, smoking in hotel rooms or congregating in the streets causing noise and litter through dropped cigarette ends.

Other mixed messages confuse some of the issues that have been raised following the ban. Claims include ‘Sales are up in New York a year after the State-wide’. On the other hand one Manhattan bar owner claimed the smoking ban resulted in 50% loss of business with a longer downturn in trade when compared to September 11\(^{th}\). Other anecdotal press comments include reports that some customers prefer to drink and smoke in the same place and are likely to stay longer and buy more. There are also reports that there are fewer tourists and visitors to New York City with residents from the city’s five boroughs opting to seek out entertainment locally.

The post ban debate also includes arguments that suggest the ban has encouraged more people to congregate in streets, which has led to litter dropping and excessive noise. One press report claimed that the mayor was considering new noise abatement policy which would penalize those concerned.
6.8 Conclusion

Using the example of the United States of America, smoking restrictions have evolved having a long history which has built on the country’s experience of self-regulation and staged smoking control programmes. City, county and state legislative have instigated restrictions through Tobacco Control and Clean Indoor Air policy.

This slow developmental process pre-empted state-wide no-smoking bans in workplaces in California and New York which followed on the back of investment in major education campaigns. This has facilitated communities, smokers and employers a period of transition in order to become accustomed to the idea of smoking restrictions.

California and New York provide exemptions which county and state health boards have had difficulty interpreting until the state provides clear guidelines. Monitoring compliance, imposing penalties and making decisions on exemptions and waivers is ultimately at the discretion of city and county health authorities. The state only steps in if no health authority exists.

The success of California and New York smoking control is uncertain as no clear evidence is available which considers state-wide impacts.

Regardless of this state-wide smoking bans show evidence of being problematical for some communities. Minnesota and New Hampshire are good examples when the state has experienced difficulties enforcing state-wide smoking in all workplaces. Both states have experienced the need to roll-back legislation.

Border hopping has been reported as common practice when bar trade travels a short journey from one city or county to another to avoid smoking bans.
8 AUSTRALIA

Australia, like the USA, has separate state legislature that differs significantly from state to state. In this section, we will give a broad overview of the situation nationally before concentrating on three specific territories where there has been significant legislative development and corresponding research regarding its impact.

It is perhaps interesting to report a case in New South Wales where a bar worker was awarded A$466,000 in damages from her hospitality sector employers after developing throat cancer from passive smoking. This has gained widespread coverage in Australia and led to an increase in support of full smoking ban.

8.1 Legislation

Australia, along with Norway, has had a prominent role in implementing anti-tobacco control measures. Smoking is banned in most public places and workplaces throughout Australia, although the extent of restrictions varies from state to state. The federal government prepares legislation that generally has set a minimum requirement on smoking controls from which the state legislature may impose tighter restrictions. As such, the approach to passive smoking varies from state to state.

Most states have expressed an intention to implement a total ban similar to that in Ireland and Norway, although questions still remain over timing (generally, around 2007 is likely) and whether full-scale bans will indeed be implemented.

The federal government’s approach to tobacco control roughly mirrors that of other developed nations, in that measures have slowly been implemented over the last 30 or so years with an acceleration of measures targeted directly at smokers becoming apparent.

National Tobacco Strategy 1999 to 2002-03 (now extended to 2003/04)

Within the federal government’s National Strategy, there is a commitment to the following objectives

- Prevent the uptake of tobacco use in non-smokers, especially children and young people;
- Reduce the number of users of tobacco products;
- Reduce the exposure of users to the harmful health consequences of tobacco products; and
- Reduce exposure to tobacco smoke.

The aim of reducing exposure to tobacco smoke is less forceful than Norway’s commitment to rid all workplaces completely, and questions the idea of a total ban if only a reduction is the objective. The government of Australia states that there is no simple cause-and-effect in the implementation of its strategy, so that some measures will not necessarily have the effect of reducing smoking or related illnesses.
8.2 Studies Related to the Introduction of the Smoking Restrictions in Australia

Some national surveys have been undertaken in Australia regarding public opinion towards tobacco control measures. We will briefly show the results of these before looking specific studies related to smoking restrictions in some Australian states: Tasmania, South Australia and Victoria.

8.3 National Drug Strategy Household Survey 2001

As part of the National Drug Strategy referred to above, the government undertook a public opinion survey - National Drug Strategy Household Survey 2001 (AIHW, 2001) - to measure the level of support for a smoking ban across range of public places. 27,000 people participated (14+ years of age).

The main results of the survey in relation to smoking in public places were as follows:

- Support for tighter restrictions had increased since a similar survey in 1998
- 85% wanted smoking banned in shopping centres;
- 84% wanted smoking banned in restaurants;
- 61% supported smoking bans in pubs and clubs

As with surveys reviewed in other case study countries, and indeed those reviewed in the Executive’s study undertaken by the University of Aberdeen, there is a distinct difference in people’s attitudes towards restaurants compared to bars and pubs. It is understandable that an increase in support for a tightening of restrictions is evident the effect of high profile public health campaigns.

8.4 Support for smoking restrictions in bars and gaming areas: review of Australian studies


This article reviewed 40 Australian studies that looked at the attitudes of smoking restrictions bans in bars and gaming rooms. The main finding was that there was a majority support (52-68%) among respondents in the various studies for a total smoke bans in bars. However, in some of these studies the majority was small and no two studies had the same methodology or were solely investigating the proposal of a total ban. It is also the case that some of the majorities were fairly small and that most authors came from a health or related sector background.
8.5 Tasmania

Several studies have been undertaken in relation to the initial smoking restrictions implemented in Tasmania in 2001.

8.6 The Effects Of Recent Events On The Tasmanian Hotel Industry (Australian Hotel Association/Enterprise Marketing and Research Services, 2001)

This study was commissioned in late 2001 by the Australian Hotels Association (AHA) in response to the introduction of the partial ban introduced in Tasmania in September 2001. It was undertaken by a private research company, Enterprise Marketing and Research Services.

The methodology used was a survey of AHA members, exploring how firms perceived the new restrictions to have affected business. The main conclusions were that:

- 54% indicated that business had been adversely affected
- one-quarter (23%) thought the effect had been significant
- one-third (31%) experienced an increase in bottle shop sales (off-sales).
- the proportion of hoteliers reporting a fall in customers was twice that of those reporting an increase
- 38% of businesses provided new non-smoking areas specifically as a result of the new ban
- almost half (45%) reduced their food provision to meet the “snack” requirements of the new legislation

A limitation on this study was that several events had taken place in 2001 that were also cited by hoteliers as having impacted on businesses, including 9/11, the Collapse of Ansett (an airline business whose demise affected the tourism industry) and a meningitis scare.

Other weaknesses of the study have been cited as

- It is based on reported impressions of sales rather than independently collected and audited sales statements;
- Hoteliers were asked to determine which of four confounding factors impacted upon their sales. By confounding it is meant that it was impossible to determine which factor was responsible for the decline in sales
- Those who oppose legislation are much more likely to express a view than those who feel positive or neutral about it;
- It relies entirely on subjective data;
• It does not allow for accurate distinction between various events which may have affected sales in the period of study;

• It fails to identify all extraneous variables impacting upon revenue, specifically, it fails to assess the impact of the Tasmanian school holiday period (Felmingham et al, 2003)

A further study analysed Australian Bureau of Statistics retail sales data for Tasmania in response to the AHA research and concluded found no apparent reduction sales for the remaining months of 2001 since September (Scollo et al, 2002). However, the study did show a discernible short-term change in revenue. It could be argued that this change related to the shift in off-sales business, a clear indication of a change in behaviour of customers as a result of the smoking ban.

The Economic Impact of Smoke-Free Policies on the Hospitality Industry in Tasmania (Scollo, Lel & Siahpush 2002)

8.7 Analysis of the Economic Effects of Past and Future Smoking Bans in Tasmania

This study was commissioned by Tasmania’s Department of Health and Human Services and undertaken jointly by one private consultancy (Farley Consulting Group) and one university-based consultancy (Symetrics, University of Tasmania).

The study’s objective was to ascertain the economic impact of the partial ban in 2001, but also the likely effects of more restrictive bans including a total ban. One of the main points regarding impact on visiting licensed establishments was that:

• 30-40% of smokers would reduce visitation
• 25-35% of non-smokers indicated an increase in visitation

Two surveys conducted as part of this study, one of smokers and one of non-smokers, found an initial reduction in revenue (2.6%) to be the aggregate effect. However, the bias of the authors is made clear the very next paragraph by applying a scenario where all smokers return after time – leading to a 20% increase in revenue (acknowledging that this figure does not take account of a likely reduced expenditure among returning smokers – normally 1.67 times that of non-smokers).

The report suggests that above is dependent on:

“Hotel operators may have to adjust their product and marketing to attract the potential non-smoking segment that does not habitually visit their venues to realise the potential revenue.”

This acknowledges the fact that significant operational, management and marketing costs would have to be deployed to realise the proposition in many studies that the increase in non-smoker business will offset that lost from a reduction in smoker revenue.
In this scenario, it is therefore acknowledgement that many businesses will lose revenue before gaining it from the increase in non-smoker business. Unfortunately, no timescale is given on the when these changes will take place, making it difficult to plan for.

It is difficult to ascertain what type of venues are being evaluated in the report, as the terms pubs and clubs, hotel clubs are used interchangeably. It is apparent, however, that it does not properly address the effects of smoking restrictions on free standing pubs.

The study’s methodology was also highly informed by the work of Glantz and Smith, which has been reviewed earlier in this report and thought to be both biased in its interpretation and flawed in its assumptions and methodology.

It is concluded on the basis of this survey that there is strong support in Tasmania for restrictions on smoking in public places.
8.8 South Australia

Current Legislation
From December 2004 South Australian tightened its smoking restrictions by applying requiring non-smoking areas for all enclosed licensed hospitality establishments. The state government has stated its intention to phase in a complete ban on smoking in enclosed licensed hospitality venues by the end of 2007. The process of legislative discussions means that hospitality operators will have been aware of the government’s intentions for an outright ban for 4 to 5 years prior to its inception.

The effect of a smoke-free law on restaurant business in South Australia.


Centre for Behavioural Research in Cancer, Cancer Control Research Institute, The Cancer Council Victoria, Carlton. melanie.wakefield@cancervic.org.au

The study was based on secondary data produced by the Australian Bureau of Statistics (ABS) and extrapolated to find whether restaurant turnover was affected by the ban on smoking in dining areas in South Australia. This study’s methodology used time series analysis to compare the ratio of monthly restaurant turnover from restaurants and cafes to:

- total retail turnover in SA (minus restaurants) for the years 1991 to 2001;
- Australian restaurant turnover (minus South Australia, Western Australia and the Australian Capital Territory) for the years 1991-2000.

Results showed that there was no decline in the ratio of South Australia restaurant turnover to either South Australia retail turnover or national Australian restaurant turnover. The study’s conclusion, therefore, was that introduction of a smoke-free law applying to restaurants in did not adversely affect restaurant business in South Australia. Of course, this only measured the aggregate effect of the ban rather than the effect on certain types of business. It also has to be noted that all contributors to the study are health sector based and the study’s lead author, Dr Melanie Wakefield, is the Director of the Cancer Council of Victoria’s Centre for Behavioral Research in Cancer which is a major advocate of a total ban on smoking.
8.9 Victoria

On 12 October 2004, the Victorian state government announced legislation introducing total smoking bans for the first time in all bars, pubs, nightclubs, hotels and gaming venues, to be implemented by July 2007. As such, the following studies refer to smoking restrictions in Victoria rather than a total ban.

8.10 Smokefree dining: community attitudes

This study, by Quit Victoria, related to the effects of the introduction of a ban on smoking in dining venues in restaurants, cafés, hotels and licensed clubs in July 1, 2001. Results were based on a telephone survey of 2000 randomly sampled people in Victoria, conducted before and after the introduction of smokefree dining legislation of July 2001. The conclusion was that the introduction of smoke-free dining laws had not had a negative economic impact on business.

In viewing the results, it should be kept in mind that Quit Victoria states that it is “… a program housed within The Cancer Council Victoria. It is made up of a small and diverse team of people committed to reducing the harmful effects of tobacco in Victoria.” Also, the questionnaire was designed by the Centre for Behavioural Research in Cancer, before the survey was then contracted out to a market research company.

The restrictions apply to enclosed spaces in restaurant and café dining areas, and include dining areas in licensed premises.

The main findings were:

- approval for the ban increased from 80% prior to the ban to 89% once the ban had been in for 10 months
- three out of four smokers agreed with law following the ban
- just over half (58%) approved of a bans in pubs and clubs in 2002.
- Support for banning smoking in gaming venues and hotels/clubs also significantly increased over the period of the
- 4 out of 5 people had not changed their dining habits post-ban, either in terms of frequency or type of restaurant visited
- there was an increase of 6% in average spend in restaurants between 2001 and 2002
- approval for a ban in gambling venues and hotels/clubs is much lower than in dining areas. In 2001, more than one-third of smokers supported bans on smoking in gambling venues and 17% in hotels/clubs. After the introduction of smokefree dining, the support among smokers for smokefree gambling venues (52%) and hotels/clubs (25%) increased.
One in five smokers reported avoiding non-smoking venues before and after the ban. This was reported as: “there was no change in the percentage of smokers reporting avoidance of non-smoking venues”. However, as all venues were now non-smoking, the number not frequented by smokers will have increased – i.e. there will have been a loss of business from smokers. The study did not report the result in this way.

Overall, the study does have a significant level of rigour and does indicate that support for the ban in restaurants and dining areas in other hospitality venues was high. However, the results also show that there was a much lower level of support for a ban across the board in the non-dining areas of venues.

### 8.11 Conclusions

A great deal of research and debate has informed the gradual progress of many Australian state governments towards introducing potential total smoking bans in licensed premises. As with the USA, the progress has moved at a different pace between each state.

As with other countries reviewed, no conclusions on the economic impact of a total ban – or lesser restrictions for that matter – have been categorical in their conclusions. Indeed, it is almost the case that for every study undertaken, there are at least two or three rejoinders from an opposing camp. Nevertheless, the level of debate and the time period over which it has been undertaken is significant compared to Ireland and Scotland. The climate of Australia is less severe than in Scotland, however, therefore the choice for consumers is less stark, which has probably allowed for more rational discussions.

Also, federal and state governments have a long history of implementing effective tobacco control measures, similar in approach to Norway. Therefore, there has been more time for reflection on the effects of their policies and, more importantly, a more holistic or joined-up approach to tobacco control policy than in the UK and Scotland.
9 REVIEW OF ABERDEEN UNIVERSITY STUDY

9.1 Scope of Study

There is a fundamental lack of scope in the study the ‘International Review of Health and Economic Impact of the Regulation of Smoking in Public Places’ that reduces significantly the validity and relevance of its conclusions. At the outset of the section entitled “Specific Effects on the Hospitality Sector”, the study ultimately defines its geographic scope by selecting and reviewing studies from other countries. As stated in paragraph 7.15, this limits the review almost entirely to:

- smoking restrictions, not total bans; and
- the effects of these mainly on restaurants only

As such, its applicability to other sectors of the hospitality industry is questionable, as its authors clearly admit by stating that the effects of smoker and non-smoker choices (paragraph 7.10) will be different for different types of venue – e.g. hotels, restaurants, and pubs.

There is clearly no reliable argument supporting impacts on the bar industry that have been experienced by an outright ban on smoking. Therefore the interests of this important sector of the economy have not been represented fairly in research findings.

9.2 The Difference Between Sectors of the Hospitality Industry is Crucial

What is clear from the studies reviewed by the University of Aberdeen in their ‘International Review of Health and Economic Impact of the Regulation of Smoking in Public Places’ and by the studies analysed in this report, is that the pub/bar sector is likely to be more affected as the other main sectors (hotels, restaurants) have a longer history of smoking restriction development and so are further down the path towards a smoking ban. The authors themselves reinforce this by acknowledging that:

“Areas where restrictions have increased incrementally report no significant effect on business” paragraph. 7.34

Therefore, patrons of these types of establishments, who will also be pub and bar customers either following restaurant visit or on another day, will be less resistant to the change in these operations. The opportunity to move on elsewhere is of critical importance here. In economic terms, the elasticity of demand for these establishments will be less affected by the smoking ban than in pubs and bars. As shown in our review earlier, it is apparent that these same people will have a different view of smoking in pubs and bars, and so are likely to have a more pronounced reaction to a total ban imposed in these sectors.

9.3 Aggregate Effects

The study, ‘International Review of Health and Economic Impact of the Regulation of Smoking in Public Places’, acknowledges that much of the data available to them was based on aggregate effects, rather being broken down either on an inter-sectoral basis (between sectors), or indeed an intra-sectoral basis (within a sector). Our analysis of countries for this report would agree that researchers have not been willing to undertake a more in-depth analysis to determine the effects of a ban or restriction across a range of sectors or within a sector. However, the study then goes on to produce an extrapolation of data from one study (Glantz and Smith, 1997) to
estimate the likely effect on bars. This study was undertaken as a review of a previous study (also quoted in the report) to incorporate data since California state-wide legislation included a smoking ban in all workplaces including restaurants. This study was undertaken prior to its application to free-standing bars. Therefore no evidence relating to impacts on bars as a result of state-wide or national smoking-ban legislation have been considered.

9.4 Self-Interest and Bias

It is clearly evident, and the authors of the ‘International Review of Health and Economic Impact of the Regulation of Smoking in Public Places agree to an element of subjectivity (paragraph 7.16), which is mainly due to self-interest that ultimately leads to a narrowly defined research question and biased analysis of the results. This approach gives no voice to the arguments raised by hospitality business experts and the potential detrimental impact on lifestyles. Although much of this cannot be quantified, the report provides no solid evidence to argue that the bar trade and society will not suffer. However, this situation is likely to be perpetuated unless government themselves take the responsibility to commission a significant piece of research that is inclusive in its scope and design.

9.5 Is the Study Robust in its Analysis?

It is of critical importance to consider the limitations of the research findings when reviewing University of Aberdeen’s ‘International Review of Health and Economic Impact of the Regulation of Smoking in Public Places because of its use to justify the Scottish Executive’s intension to legislate an outright smoking ban in all workplaces in Scotland.

The strengths of the report are the health related economic arguments it uses to support smoking restrictions. The weakness of the report is its lack of relevant evidence to

- support the argument that an outright ban in all workplaces will reduce the number of smokers when increases in smoking may be displaced elsewhere, e.g. in the home
- make a claim that no-smoking policy will not harm the hospitality business, particularly bars.

The authors add weight to the latter argument by freely admitting that:

“...the estimates for Scotland of the impact on the hospitality sector of a smoking ban are not considered to be as robust as the estimates for the health effects”

This was likely to be the case as the authors are from a health background. The inclusion of economists familiar with the hospitality and tourism industry would have been able to provide greater insight and knowledge to this part of the study. Similarly the authors (Alamar and Glantz 1994 and Glantz and Smith 1997) who led the studies quoted in the ‘International Review of Health and Economic Impact of the Regulation of Smoking in Public Places to identify impacts of smoking bans on bars support smoke-free legislation and denounce studies that oppose their research findings. These studies did not rule out negative impacts on free-standing bar business but suggested marginal positive impacts. These researchers represent the University of California at San Francisco and are health experts committed to studies supporting health benefit arguments and advancing tobacco control policy, in this case anti-smoking legislation. Other studies that include these authors reveal their level of commitment is directed towards an outright ban on smoking. Their influence in the debate includes a whole raft of studies which undervalue research that supports tobacco industry interests. For example a paper entitled Tobacco Industry Efforts to Present Ventilation as an Alternative to Smoke-free Environments in North America written by Drope J, Bialous S A and Glantz S A, and published in 2004, concluded that:
‘it would be cheaper and simpler to end smoking’.

There is little evidence to support the claim that smoking ban inside bars will not harm business. Much of the argument has depended on study findings involving restaurants and bars within restaurants with thin evidence representing free-standing bar operations.

It can be argued that the impact of smoking restrictions on restaurant industry has been protected when diners who wish to smoke can move on to other venues like bars to smoke.

The limited methodological information they provide in reports suggests the claims they make about impacts on the bar trade are not representative.

The authors of the ‘International Review of Health and Economic Impact of the Regulation of Smoking in Public Places, confirm this and claim that:

- **the study failed to identify any statistically significant impact** of smoking restrictions on the hospitality sector.
  - Findings were consistent in demonstrating small and mainly positive effects.
  - Annual effect on the hospitality sector in Scotland is estimated to lie within a broad range of -£104m to + £299m with a central estimate of £97m.
- Evidence from research studies used to identify impacts on the hospitality sector was not as robust as those used for health effects.
  - Small non-representative sample
  - Inadequacies in study design
- **Studies used did not rule out negative impacts**
  - particularly negative impacts on bars
  - negative impacts are balanced out by gains elsewhere with spending redistributed to or from other sectors of the economy

The report’s review on impacts on restaurants and bars relies heavily on a study undertaken in California by Glantz and Smith (1997). Bar revenue referred to in the studies was restricted to a small sample of 5 cities and 2 counties in California with smoke free bar ordinances. Sales and tax covered the period 1986 to 1996, 2 years prior to the implementation of state law that imposed state-wide smoking restrictions involving free-standing bars. Hence the interpretation of bar included bar/restaurant organisations and free-standing bars where local restrictions applied.

In any event, we believe that the only way that the economic effects of a total smoking ban could be made more robust is by undertaking a level of analysis similar to that given to the health argument. A significant study of the impacts in those countries that now have a total smoking ban such as Ireland, Norway and New Zealand would be a good start. Ireland will have had the ban for a year by March 2005 and is the most analogous in terms of overcoming the problems of “Transferability” (para. 7.37) – culture, climate, local market conditions - acknowledged as a weakness in the University of Aberdeen study.
10 THE COUNTER-ARGUMENT

10.1 Smoking Harms Bar Business

This report has not found any reliable quantitative evidence to suggest that the bar trade will not be harmed by an outright ban on smoking.

A strong element of dependence on before and after aggregate sales tax revenue in pro-smoking ban research fails to identify individual business experiences. Also communities with the most restrictive policy may be those where little impact would be expected e.g. communities where smoke-free policy receives less resistance.

However, there are various sources that suggest bars will suffer. A review of economic impact studies of indoor smoking bans undertaken by University of Kansas admitted all studies had limitations. This critique acknowledged in one study that draft beer sales dropped by 13% in British Columbia during a pilot with smoke free policy but discounted this finding by suggesting this decline would be short-term. The author also admitted that individual businesses may be adversely effected which is offset by more competitive operations that adapt more easily to change (Fox 2004).

Other reports representing pro-smoking sympathizers and those from other media sources such as local and national news and press, support the argument that smoking-bans harm business. A comprehensive website provided by an American pro-smoking activist provides a range of arguments that challenge pro-smoking policy and research. The website includes a list of named businesses in USA, Canada and Ireland which have been harmed by smoking bans. Although the quality of the information this individual provides cannot be substantiated, businesses are named on the following web page http://www.davehitt.com/facts/badforbiz.html.

10.2 Smoking Restriction Policy and Human Rights

In 2000 and 2004 Walter E Williams, distinguished Professor of Economics at Virginia’s George Mason University, published a vigorous attack on smoking restriction policy by providing evidence that it contravenes principles of liberty and is founded on flawed research undertaken by the Environmental Protection Agency. His arguments include the outcome of a district court ruling in July 1999 which found the Environmental Protection Agency (EPA) guilty of ‘knowingly, willfully and aggressively reporting false and misleading information on second hand smoke’. As a result the agency’s report was nullified by a US district judge.

Williams argues that concerns about passive smoking are ‘overly alarmist’ and originate from flawed research dating back to the 1960s when opinion surveys targeted only non-smokers. He adds that other widely publicized consumption habits that lead to more prevalent health problems are not controlled through legislation. These include the link between overeating and junk food with obesity, heart disease and cancer.

Williams adds that the property rights of owners of pubs and restaurants means they should choose whether smoking should or should not be allowed on their premises to accommodate smokers or discourage them. In concludes that in a truly democratic free society employees and patrons should have the right to choose whether or not to work in a smoke-free environment.

10.3 Public Opinion

Two public opinion surveys are quoted by Forest (Freedom Organisation for the Right to Enjoy Smoking Tobacco) in their website. The first survey, which involved 1,000 adults who claimed to visit a pub at least once a week, found that:
50% disagreed with a total ban
30% agreed with a total ban

The second survey was undertaken by Omnibus (Commissioned by CAMRA, the real ale campaign group) and involved adults who regularly visit pubs. The findings reported that:

- 18% of adults support a total ban
- 40% of non-smokers agree with a total ban
- 11% of smokers agree with a total ban
- 83% of adults support the view that policy should provide a choice for smokers and non-smokers.

CAMRA believes the Hospitality industry led charter for Smoking in Public Places supports the idea that customers want comfort and choice. Charter compliant pubs would tell customers about their smoking policy before they enter the premises, so if they don’t like the policy, they can choose to go elsewhere. The Charter encourages good practice through smoke-free areas and rooms and improved ventilation and extraction facilities.

Another opinion poll undertaken in 2003 found that two-thirds of district voters in Washington DC supported a city law requiring 100% smoke-free workplaces, including restaurants and bars (www.smoke-freedc.org). This suggests that one-third did not express their support. Less than a month after the smoking ban in bars and restaurants some owners reported a decline in sales of up to 50% (www.washtimes.com/metro/20031202-100807).

10.4 Smoking in the Home

There is no reliable evidence to suggest that a total ban on smoking would reduce the number of smokers. The drug effect of smoking has been linked to relieving stress with a higher incidence of addictive smoking appearing among poorer disadvantaged communities. This would mean smokers would transfer smoking habits from public places to outdoors and to domestic living space in the home. Research undertaken by San Diego University found that infants of smokers are at particular risk of passive smoking in the home. These children are exposed to contaminated air and other toxic sources such as floors, toys, smoker’s clothes and skin. Environmental tobacco smoke in ‘outdoor smokers’ homes were up to seven times higher than non-smokers. Levels of second-hand smoke were a further eight times higher in homes where parents smoked indoors. (Forest Freedom Organisation for the Right to Enjoy Smoking Tobacco).

10.5 Advertising and Promotion to Influence Attitudes about Smoking

Scare tactics are planned by the British Government targeting anti-smoking advertising on cigarette packets to include graphic images of rotting lungs and teeth. This form of advertising is already being used by the British Heart Foundation on their website www.bhf.org.uk/smoking.

However, the pro-smoking argument suggests other impressionable media sources encourage smoking habits. Research undertaken by the University of California found that there are more tobacco-related scenes in Hollywood films than there were in the 1950s despite the fact that actual smoking rates have halved (Forest).
11 CONCLUSIONS

11.1 The Economic Impact of a Total Smoking Ban Versus Limited Restrictions

It would appear from the wide range of studies that have attempted to quantify the effects of either a total smoking ban or smoking restrictions that the results in relation to Scotland are inconclusive. This is so because most, if not all studies suffer from either a flawed methodology, biased interpretation of the results or the situation is not suitable transferable to the Scottish context – in terms of culture, climate, local market conditions or history of tobacco control.

11.2 Different Effects on Different Sectors

What is apparent, however, is that whether it is an opinion survey or economic impact study, there is a case for differentiating between the likely effects on different sectors of the hospitality industry. In particular, it is evident from nearly all the countries and studies reviewed that a greater proportion of the general public are in favour of tighter restrictions in restaurants than in pubs and bars. We would argue that this is because that the history and culture of the nations reviewed make it more acceptable for some form of smoking area to be allowed in bars, but perhaps not in restaurants. It is the case that in all the countries analysed, there has been a history of increasing restrictions in restaurants – both by law and self-imposed – ahead of that in pubs and bars. Therefore, to simply move to a situation of outlawing smoking in all hospitality venues practically overnight is less than fair to certain sectors of the industry.

From this, we would expect pubs and bars to feel the negative effects of a total ban much more keenly than in the restaurant and hotel sectors. This would encompass both the upfront costs of change (signage, training, etc.), potential effects on sales, and the dealing with a public who are evidently more reticent to a ban in pubs than in restaurants or hotels.

11.3 Fair Notice of Intention

Nearly all the governments in the countries and states reviewed for this work, with the exception of Ireland, have given significant notice of their intention to introduce a total ban on smoking in hospitality establishments. This is only fair given the apparent difference in perception of the public towards smoking in different categories of hospitality premises. Also, many of the countries have implemented tobacco control measures – in particular advertising bans - well ahead of that enacted in the UK. Therefore, even if a total ban is to be introduced, the Executive could take a lead from the experiences of other nation’s legislature.

11.4 History, Culture and Climate

It has been acknowledged as a weakness in the Executive’s commissioned research that the studies reviewed do not include analysis of a total ban situation. This is compounded by the lack of transferability of the cases used in their argument. The context of the USA, in particular California, is far removed from that here in Scotland. Therefore, it may be wiser to take the experiences of Ireland and Norway as guide to policy development and policy effects.
11.5 Opportunity for Informed Policy Development

The Executive have the opportunity to introduce truly informed legislation, by analysis of the situation in countries where a total ban now exists. Ireland, Norway and New Zealand now have an outright ban, and, in March, the Irish ban will have been in place for exactly one year. A government backed investigation into the effects of the ban in Ireland could be undertaken, using a cross sectoral group that encompasses health experts, industry practitioners and government policy makers. This would surely provide a consensus on the effects of and timescale for introducing a total ban, if that was the conclusion of the group.
APPENDIX I: REFERENCES

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The economic impact of a smoking ban in public places on the licensed trade and beer industry in Scotland

A report for the Against an Outright Ban group

28 January 2005
centre for economics and business research ltd (cebr) is a London-based economics consultancy. Since 1993, we have been producing and publishing model-based forecasts of the world and United Kingdom economies; the latter are reported in the Treasury’s monthly summary of independent forecasts.

The authors of the report and the advisers on the report are:

- Mark Pragnell, managing director
- Jonathan Said, economist
- Dominic Walley, managing economist

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London, January 2005
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Introduction

The Scottish Executive is proposing to introduce a smoking ban in public places through its Smoking, Health and Social Care bill. Unlike the proposed ban in England, where only those licensed premises that serve food will face a smoking ban, all Scottish licensed premises will be affected.

In this study, we analyse the impact of the smoking ban in Ireland, and subsequently, we apply the impact in Ireland to Scotland to understand what the impact on the Scottish licensed trade and beer industry would be, if Scottish bar, public house and nightclub customers reacted in a similar manner to their Irish counterparts.

We do not look at the impact on other sectors in the economy, because current data limitations prevent this. The impact of the ban in Norway also cannot be currently calculated, because official data is not up-to-date.

One of the limitations of a number of similar studies, is the limited degree of applicability of the economic impact of a smoking ban in one region or country to another region or country. However, it is important to look at the factual evidence on the impact of smoking bans and because of behavioural (pub-culture and smoking attitudes), economic and cultural similarities between Ireland and Scotland, we are able to (and should) apply the Irish case to Scotland.

In this report, the licensed trade includes bars, public houses, nightclubs and beer halls.

In this report, we:

• First present the key findings of our research into Ireland and into what the impact on Ireland may imply for Scotland.

• Second, we explain our statistical procedure into how we calculate the impact of the ban in Ireland on licensed premises sales and on employment in the hospitality industry.

• Third, we explain how we apply the impact on Ireland to Scotland. We present the potential impact of a smoking ban in public places as proposed by the Scottish Executive on the Scottish licensed trade and beer manufacturing industry.
Key findings

Using the most robust statistical procedure possible at the time of analysis, we find that:

- the impact of a smoking ban in public places in Ireland upon the value of bar sales is of **-7.3 per cent**. The impact of the smoking ban on the volume of bar sales is of **-10.7 per cent**. This relates to a measurement period of seven months following the introduction of the ban.

- the impact of the ban on employment in hotels, restaurants and the licensed trade is of **-5.9 per cent**. This relates to a measurement period of five months following the introduction of the ban.

Applying these figures to Scotland, we expect that:

- the value of annual turnover in the licensed trade will decline by **£105.2 million** from £1432 million as a result of the smoking ban.

- due to the difference in the selling price and profit margin of beer sales to licensed premises and to supermarkets, annual beer turnover is expected to decline by **£6.8 million** and profits by **£5.1 million**. We assume that lost sales to licensed premises are redirected to supermarkets. (No data is available on the extent to which people replace bar consumption with home consumption of beer).

- employment in the licensed trade can be expected to decline by **2,300 jobs** if licensed premises owners cut back on staff to the extent seen in Ireland. If owners follow the historical Scottish relationship between sales and employment, 1,250 jobs may be lost due to the ban.

- some **142 average-sized licensed premises** may close down as a result of decreased trade.

- the Chancellor of the Exchequer may lose out on a total of **£56 million** in annual tax revenues from Scotland in the immediate period after the introduction of the ban. In the longer term, as bars cut on costs, annual tax revenues from Scotland may decline by £44 million.

- the areas of tax revenue that will see the largest annual decline are corporate tax (£27 million in the immediate period after the introduction of a ban) and VAT by £20 million.
The smoking ban in public places in Ireland was introduced on the 29th March 2004. At the date of this report, official sales data (from the Central Statistics Office) is available for the licensed trade, but not for hotels and restaurants. Given this, we are only able to calculate the impact on sales in the licensed trade in Ireland. In addition, since information on the smoking-related-behavioural differences between hotel, restaurant and licensed premises customers is lacking, we may not make any robust inferences on the impact on the sales of hotels and restaurants.

In addition to sales data, we are also able to make use of employment data for the hospitality sector as a whole (hotels, licensed premises and restaurants). We therefore calculate the impact of the ban on employment in the hospitality sector.

We use a robust statistical method to calculate what the impact of smoking ban has been on the sales of licensed premises and on employment in the hospitality industry in Ireland from the date the ban was introduced to October 2004 for sales and to August 2004 for employment. (The statistical methodology is described in the Appendix.)

The findings of this report apply with a compliance level of 91 per cent compliance in licensed premises, as reported by the Irish Office for Tobacco Control in December 2004.

We find that the smoking ban resulted in a decline in the sales value of licensed premises of 7.3 per cent. In volume terms, the smoking ban reduced sales by 10.7 per cent. We also find that the smoking ban resulted in a 5.9 per cent decline in employment in the hospitality sector as a whole.

These findings are consistent with the findings of a BDO Stoy Hayward report which CEBR conducted in 2004 and which was based on a UK Government survey on attitudes to smoking. In that report, CEBR estimated that a ban would reduce the sales of licensed premises in Scotland by 6.3 per cent.

Given that the decline in employment in the hospitality sector as a whole is consistent with the decline in sales value in licensed premises, we may safely apply the decline in employment in the hospitality sector as a whole to the licensed trade. Indeed, this suggests that due to the ban, licensed premises owners have been shedding jobs at a slightly lower rate than the rate of decline in trade. Economic theory thus suggests that owners expect the trade decline to persist over time.

However, given that we do not know the sales impact of a ban on hotels and restaurants, we may not apply the decline in employment in the hospitality sector to hotels or restaurants, individually.
Applying the Irish evidence to Scotland

Licensed premises
The University of Aberdeen study, which is referred to in the Financial Memorandum of the Smoking, Health and Social Care bill, gives unpublished Scottish Executive data for 2003 for turnover, employment and the number of enterprises. We make use of these figures, whilst complementing the employment figures with Annual Business Inquiry (Office of National Statistics) figures and the number of businesses data with data from the Scottish Executive website. For profits, the latest available data is from the Scottish Executive input-output tables which relate to 2001.

We apply the decline in the value of licensed premises sales observed in Ireland to the annual turnover figure of licensed premises in Scotland. **This gives a decline in annual turnover of £105.2 million.** For profits, we use information from the Scottish Beer and Pub Association on the percentages of fixed, variable and semi-variable (fixed for a period of time) costs in the average Scottish public house/bar. Reducing revenues and variable costs by 7.3 per cent, as in Ireland, **we obtain a decline in profits of £86 million or 38.2 per cent.** This gives the impact in the immediate period after the introduction of a ban. In the longer-term, when licensed premises may cut semi-variable costs (at an expected rate of 7.3 per cent), profits decline by £32.8 million, or 14.6 per cent.

To study the potential impact of a 7.3 per cent decline in turnover on employment we use two methods. First we observe the relationship in Scotland between turnover and employment in the hospitality sector between 1998 and 2002 (we assume the relationship for licensed premises to be consistent with this aggregate relationship). Given this relationship and given a 7.3 per cent drop in sales, **we would expect a decline in employment of 3.2 per cent or 1,260 jobs** on ABI figures. This is consistent with economic theory: one would expect lay-offs at lower rate than the rate of turnover decline, particularly if owners perceive the decline in sales to be temporary.

Second, given that we know that employment in the hospitality sector in Ireland declined by 5.9 per cent due to the smoking ban, we apply this decrease to Scottish licensed premises jobs. Indeed, if Scottish licensed premises owners expect the trade decline to persist over time, as observed in Ireland, **employment will decline by 2,300** on ABI data.
Applying the Irish evidence to Scotland

In order to establish the number of businesses that may shut down as a result of the ban, we observe the Scottish relationship between profits and the number of businesses in the hospitality sector between 1998 and 2002. Applying the longer term decline in profits of 14.6 per cent (because businesses do not shut down on temporary losses) to this relationship, we expect a 3.3 per cent decline in the number of average-sized licensed premises or 142 licensed premises. This figure will be higher if the ban impacts more strongly on smaller-sized licensed premises. Unfortunately, no Irish information on the number of licensed premises that shut down due to the smoking ban is available to complement this calculation.

The impact of the ban upon annual taxation revenues is calculated individually for each tax. We apply the income tax standard rate of 22 per cent to the decline in employment expected in both the immediate period after the ban and the longer term and to average employee costs. Immediately after the ban, we expect a decline of £3.9 million on the ABI figures in income tax and £4.3 million on ABI figures in national insurance (employer and employee contributions). In the longer term, income tax will fall by £2.1 million on ABI figures and national insurance contributions by £2.3 on ABI figures (Note: these may be offset by higher unemployment costs for the Exchequer). As long as licensed premises do not cut their semi-variable costs, corporate tax revenues are expected to fall by £25.8 million. In the longer term, these may fall by £9.9 million. We estimate a £18.4 million decrease in VAT in line with the decline in turnover and, applying business rates of 8 per cent of turnover to a current industry poundage of £0.5, we expect a £4.2 million decline in local council revenues.

The total decline in annual tax revenues from the licensed trade is equivalent to £52.9 million on ABI figures as long as semi-variable costs are not cut, and to £40.6 million on ABI figures when semi-variable costs are cut.

Beer production

Given the lack of official statistics on the industry, we are only able to calculate the impact of the ban on profits and turnover. We use industry sensitive information on the volume, price and gross profit margin of beer sales to the licensed trade and sales to supermarkets. We assume that lost sales to the licensed trade are re-directed to supermarkets. Since the profit margin and selling price is higher for sales to licensed premises than to supermarkets, sales and profits will decline due to this re-direction. Applying a 10.7 per cent decline in licensed premises’ demand for beer (volume), we expect turnover to decline by £6.8 million and profits to decline by £5.1 million. The tax implication, of such a decline in beer turnover and profits is a decline in VAT of £1.2 million, a decline in corporate tax revenue of £1.5 million and a decline in business rates revenue of £0.3 million.
## Data and data sources for Scotland

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<td>Employment</td>
<td>2002</td>
<td>38,912</td>
<td>ONS, Annual Business Inquiry 2002 (ABI)</td>
</tr>
<tr>
<td>Number of businesses</td>
<td>2003</td>
<td>4,035</td>
<td>Scottish Executive unpublished Data: from Financial Memorandum of bill</td>
</tr>
<tr>
<td>Number of businesses</td>
<td>2002</td>
<td>4,370</td>
<td>Scottish Economic Statistics, 2004</td>
</tr>
<tr>
<td>Average employee costs</td>
<td>2002</td>
<td>£7,700</td>
<td>Scottish Economic Statistics, 2004</td>
</tr>
<tr>
<td>Licensed trade figures</td>
<td>2004</td>
<td></td>
<td>Scottish Beer and Pub Association</td>
</tr>
<tr>
<td><strong>Beer industry figures</strong></td>
<td>2004</td>
<td></td>
<td>Scottish Beer and Pub Association</td>
</tr>
<tr>
<td><strong>Annual taxation rates</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income tax</td>
<td>2004</td>
<td>22.0%</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>VAT</td>
<td>2004</td>
<td>17.5%</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>Employer’s national insurance</td>
<td>2004</td>
<td>12.8%</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>Employee’s national insurance</td>
<td>2004</td>
<td>11.0%</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>Corporate tax</td>
<td>2004</td>
<td>30.0%</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>Business rates</td>
<td>2004</td>
<td>4.0%</td>
<td>Scottish Beer and Pub Association</td>
</tr>
</tbody>
</table>
The economic impact of a smoking ban in Scotland

<table>
<thead>
<tr>
<th>Economic impact of a smoking ban</th>
<th>Licensed premises</th>
<th>Beer production</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Change in turnover</td>
<td>£ 105.2 million</td>
<td>£ 6.8 million</td>
<td>£ 112.0 million</td>
</tr>
<tr>
<td>Change in profits – immediate period after ban</td>
<td>£ 86.0 million</td>
<td>£ 5.1 million</td>
<td>£ 91.1 million</td>
</tr>
<tr>
<td>Change in profits – longer term</td>
<td>£ 32.8 million</td>
<td>£ 5.1 million</td>
<td>£ 38.0 million</td>
</tr>
<tr>
<td>Change in employment – ABI data, based on Irish decline</td>
<td></td>
<td>-2308</td>
<td>-2308</td>
</tr>
<tr>
<td>Change in employment – Scottish Exec. data, based on Irish decline</td>
<td></td>
<td>-2222</td>
<td>-2222</td>
</tr>
<tr>
<td>Change in employment – ABI data, based on past, Scottish relationship with turnover</td>
<td></td>
<td>-1258</td>
<td>-1258</td>
</tr>
<tr>
<td>Change in employment – Scottish Exe data, based on the past Scottish relationship with turnover</td>
<td></td>
<td>-1211</td>
<td>-1211</td>
</tr>
<tr>
<td>Change in number of businesses – Scottish Exec. data from Financial Memorandum of smoking bill</td>
<td></td>
<td>-131</td>
<td>-131</td>
</tr>
<tr>
<td>Change in number of businesses – Scottish Exec. data from its website</td>
<td></td>
<td>-142</td>
<td>-142</td>
</tr>
</tbody>
</table>
## The impact on tax revenues – immediate period after ban

<table>
<thead>
<tr>
<th>Change in tax revenue per year</th>
<th>Licensed premises</th>
<th>Beer production</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income tax – ABI data</td>
<td>-£ 2.1 million</td>
<td>0</td>
<td>-£ 2.1 million</td>
</tr>
<tr>
<td>Income tax – Scottish Exec. data</td>
<td>-£ 2.1 million</td>
<td>0</td>
<td>-£ 2.1 million</td>
</tr>
<tr>
<td>Value Added Tax (VAT)</td>
<td>-£ 18.4 million</td>
<td>-£ 1.2 million</td>
<td>-£ 19.6 million</td>
</tr>
<tr>
<td>Employer’s national insurance contribution – ABI data</td>
<td>-£ 1.2 million</td>
<td>0</td>
<td>-£ 1.2 million</td>
</tr>
<tr>
<td>Employer’s national insurance contribution – Scottish Exec. data</td>
<td>-£ 1.2 million</td>
<td>0</td>
<td>-£ 1.2 million</td>
</tr>
<tr>
<td>Employee’s national insurance contribution – ABI data</td>
<td>-£ 1.1 million</td>
<td>0</td>
<td>-£ 1.1 million</td>
</tr>
<tr>
<td>Employee’s national insurance contribution – Scottish Exec. data</td>
<td>-£ 1.0 million</td>
<td>0</td>
<td>-£ 1.0 million</td>
</tr>
<tr>
<td>Corporate tax</td>
<td>-£ 25.8 million</td>
<td>-£ 1.5 million</td>
<td>-£ 27.3 million</td>
</tr>
<tr>
<td>Business rates</td>
<td>-£ 4.2 million</td>
<td>-£ 0.3 million</td>
<td>-£ 4.5 million</td>
</tr>
<tr>
<td><strong>Total tax – ABI data</strong></td>
<td>-£ 52.9 million</td>
<td>-£ 3.0 million</td>
<td>-£ 55.9 million</td>
</tr>
<tr>
<td><strong>Total tax – Scottish Executive data</strong></td>
<td>-£ 52.7 million</td>
<td>-£ 3.0 million</td>
<td>-£ 55.7 million</td>
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</tbody>
</table>
### The impact on tax revenues – longer term

<table>
<thead>
<tr>
<th>Change in tax revenue per year</th>
<th>Licensed premises</th>
<th>Beer production</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income tax – ABI data</td>
<td>-£ 3.9 million</td>
<td>0</td>
<td>-£ 3.9 million</td>
</tr>
<tr>
<td>Income tax – Scottish Exec. data</td>
<td>-£ 3.8 million</td>
<td>0</td>
<td>-£ 3.8 million</td>
</tr>
<tr>
<td>Value Added Tax (VAT)</td>
<td>-£ 18.4 million</td>
<td>-£ 1.2 million</td>
<td>-£ 19.6 million</td>
</tr>
<tr>
<td>Employer’s national insurance contribution – ABI data</td>
<td>-£ 2.3 million</td>
<td>0</td>
<td>-£ 2.3 million</td>
</tr>
<tr>
<td>Employer’s national insurance contribution – Scottish Exec. data</td>
<td>-£ 2.2 million</td>
<td>0</td>
<td>-£ 2.2 million</td>
</tr>
<tr>
<td>Employee’s national insurance contribution – ABI data</td>
<td>-£ 2.0 million</td>
<td>0</td>
<td>-£ 2.0 million</td>
</tr>
<tr>
<td>Employee’s national insurance contribution – Scottish Exec. data</td>
<td>-£ 1.9 million</td>
<td>0</td>
<td>-£ 1.9 million</td>
</tr>
<tr>
<td>Corporate tax</td>
<td>-£ 9.9 million</td>
<td>-£ 1.5 million</td>
<td>-£ 11.4 million</td>
</tr>
<tr>
<td>Business rates</td>
<td>-£ 4.2 million</td>
<td>-£ 0.3 million</td>
<td>-£ 4.5 million</td>
</tr>
<tr>
<td><strong>Total tax – ABI data</strong></td>
<td>-£ 40.6 million</td>
<td>-£ 3.0 million</td>
<td>-£ 43.6 million</td>
</tr>
<tr>
<td><strong>Total tax – Scottish Executive data</strong></td>
<td>-£ 40.3 million</td>
<td>-£ 3.0 million</td>
<td>-£ 43.3 million</td>
</tr>
</tbody>
</table>
Appendix: Methodology to analyse the impact in Ireland

In order to achieve an accurate calculation of the impact of the smoking ban upon licensed premises, a number of years data after the introduction of the ban should be studied. Current availability of data does not permit this, however we believe that we can obtain a clear picture of the short-term economic impact.

Licensed premises sales are measured within the Retail Sales Index and are classified as ‘Bars’ (NACE 55.4). This classification includes 'bars, pubs, nightclubs, beer halls etc' and excludes sales through vending machines in these locations.

Data for this index with a comparable classification is available on a monthly basis from January 1996 to October 2004. We regress the index for licensed premises on the Retail Sales Index for all businesses (except the motor trade). This variable captures the economic cycle and economic conditions through general consumption expenditure. We add in monthly dummy variables to capture the seasonality effect and a smoking ban dummy variable. We study both sales value and sales volume.

Testing the model, we find the data to be heteroskedastic and autocorrelated to degree 1. We use a time-series (AR-1) estimator to fix for autocorrelation and apply logs to improve the model (to fit a normal distribution) and to fix for heteroskedasticity. We find no multicollinearity. For the sales volume regression, we include a dummy variable to account for the decline in volumes that started in August 2001. Inserting this variable improves the fit of the model and it, itself, is statistically significant.

We use the same methodology to regress employment in hotels and restaurants (NACE 55), that includes bars, pubs and nightclubs (no disaggregated data is available) on total employment in Ireland, on seasonal dummies and on a smoking ban dummy. Data is quarterly and is available from 1997 4th Quarter to 2004 3rd Quarter. We use a time-series estimator (AR-1), apply logs, find homoskedastic data and no multicollinearity.

In all three regressions (sales value, sales volume and employment), all explanatory variables (except a few seasonal dummies) are statistically significant at the 5 per cent level and the unexplained errors are low.

Clearly, we expect the economic impact to vary over time. Further data will increase the accuracy of this procedure and will allow us to establish the longer term impact. We are confident that the results are, given data available, accurate and reliable. This can be confirmed by observing the monthly trends in the variables studied.