

BREASTFEEDING ETC. (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Breastfeeding etc. (Scotland) Bill introduced in the Scottish Parliament on 16 December 2003. It has been prepared by Govan Law Centre on behalf of Elaine Smith MSP, who is the member in charge of the Bill, under Rule 9.3.3A(b) of the Parliament's Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. A Financial Memorandum (and Presiding Officer's statement on legislative competence) is published separately as SP Bill 15–FM.

POLICY OBJECTIVES OF THE BILL

2. The purpose of section 1 of the Bill is to safeguard the right of a child under the age of two years of age to be fed milk in a public place or licensed premises, where the child is otherwise lawfully permitted to be. Accordingly, the Bill does not affect Scottish licensing law, nor does it prevent a business from excluding breastfeeding on its premises where the lawful custom or practice is to exclude children generally. Where a child is lawfully permitted to be in a public place or licensed premises, that child may be fed bottled milk, and the child's mother (or any other woman who has charge of the child) will be entitled to breastfeed him or her if she so chooses. Any person who deliberately prevents or stops (or attempts to prevent or stop) a person from bottlefeeding or breastfeeding a child in such circumstances will be guilty of an offence, liable on conviction to fine not exceeding level 4 on the standard scale (currently £2,500).

3. The health benefits of breastfeeding for both mothers and babies are increasingly recognised, both worldwide and in the UK.¹ By recognising and protecting a child's right to be breastfed, the Bill would support the take up and duration rates of breastfeeding. Section 4 of the Bill requires the Scottish Ministers to directly promote and support breastfeeding. This new duty would help Ministers meet their own targets. Since 1991 there has been a national initiative to increase breastfeeding rates, which in some areas are as low as 13% at around six days of newborn life.² The then Scottish Office set a target in 1994 of "more than 50% of women to be still breastfeeding their babies at 6 weeks of life by 2005".³ More recently, the *Scottish Diet Action Plan* (1996), the *Priorities and Planning Guidance for the NHS in Scotland 1999-2002* (1998) and the White Paper *Towards a Healthier Scotland* (1999) have reiterated the need to

¹ *Breastfeeding in Scotland Statistical Sources*, Scottish Executive Health Bulletin 58(1), 2000. Available on-line at: http://www.show.scot.nhs.uk/breastfeed/stats.htm#1_5

² Warren J, *Breastfeeding in Scotland – Where Are We Now?*, Health Bulletin 1998, 56(4): 772-9.

³ Scottish Office, Management Executive Letter: MEL (1994) 110, *Local Breastfeeding Targets*, Edinburgh: Scottish Office, 1994.

encourage and support breastfeeding. In 1995, only 36% of Scottish mothers breastfed at 6 weeks of life, while in 2000 the proportion had increased to 40%.⁴ A recent Scottish audit of NHS health board action on breastfeeding suggests there is wide variance in the promotion and support of breastfeeding across Scotland. Two of Scotland's 15 health boards did not have a breastfeeding strategy.⁵ Section 4 of the Bill would help the Scottish Ministers achieve uniformity in the support and promotion of breastfeeding in Scotland.

4. Where a mother, father or carer decide to bottlefeed their child the Bill ensures that this can be done without hindrance in certain public or licensed premises. Often the reason why carers decide to bottlefeed their child is because of social and cultural attitudes.⁶ The Bill aims to help tackle and address negative attitudes in Scotland. Such attitudes can be detected not only in the low incidence and duration of breastfeeding but also in the response of partners, family, friends and the general public towards breastfeeding mothers. Media reports highlight hostility to mothers who breastfeed in public settings⁷, but in general the media represent bottle-feeding as normal, whilst breastfeeding is represented as problematic, humorous and associated with middle-class or celebrity mothers.⁸ A breastfeeding mother can experience negative comment or be asked to stop feeding and resume feeding in the public toilets. This has a negative effect on breastfeeding both in the short and the long term and causes distress to mother and baby. Embarrassment is commonly cited as a major factor for choosing not to breastfeed.⁹ Recent research has shown that there is still a lack of knowledge about the benefits of breastfeeding in the general public.¹⁰

5. Many state legislatures in the United States of America have introduced legislation to encourage and support breastfeeding.¹¹ While a variety of approaches have been taken, some states have adopted a similar stance to the Breastfeeding etc. (Scotland) Bill. For example, the Minnesota State Legislature passed a law in April 1998 which provides that: "A mother may breastfeed in any location, public or private, where the mother and child are otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast-feeding".¹² Many states in the US have introduced breastfeeding laws to support and encourage breastfeeding for major health and economic reasons. For example, section 1 of the State of Washington's Second Substitute House Bill 1590 of 2001 affirms that: "(a) Breastfeeding is one of the most important contributors to infant health; (b) Breastfeeding provides a range of benefits for the infant's growth, immunity, and development; and (c)

⁴ *Infant Feeding Survey 2000*, Department of Health, the Scottish Executive, The National Assembly for Wales and the Department of Health, Social Services and Public Safety in Northern Ireland. Available on-line at http://www.show.scot.nhs.uk/breastfeed/stats.htm#1_1

⁵ 'Audit of NHS Board Action on Breastfeeding', March 2003, Jenny Warren, National Breastfeeding Advisor. Available online at: http://www.show.scot.nhs.uk/breastfeed/NHS_board_action_03.htm

⁶ Infant Feeding Survey, cited above.

⁷ "Breastfeeding mother in bus ban", *Scotland on Sunday*, 8 August 1999.

⁸ Henderson L, Kitzinger J, Green J (2000), *Representing infant feeding: content analysis of British media portrayals of bottle feeding and breastfeeding*, *British Medical Journal* 321:1196-1198.

⁹ Infant Feeding Survey, cited above.

¹⁰ Health Education Board for Scotland (HEBS), *Development of mass media breastfeeding campaign*, 2001. Available on-line at <http://www.hebs.com/research/pd/index.htm>

¹¹ Elizabeth N. Baldwin and Kenneth A. Friedman, *Current Summary of Breastfeeding Legislation in the U.S.*, La Leche League International: <http://www.lalecheleague.org/LawBills.html>

¹² 1998 Minn. ALS 407; 1998 Minn. Chapter Law 407; 1997 Minn. S.F. No. 3346; Minn. Stat. § 145.905

Breastfeeding improves maternal health and contributes economic benefits to the family, health care system, and workplace”.¹³

ALTERNATIVE APPROACHES

6. Some state legislatures have promoted breastfeeding as part of a wider anti-discrimination strategy. For example in Australia, the Queensland Anti-Discrimination Act 1991 (ADA) prohibits discrimination against women on the grounds of gender, and specifically breastfeeding.¹⁴ With regard to breastfeeding the ADA initially only applied to the “provision of goods and services”.¹⁵ In other words, those not supplying good or services (for example, a member of the public sitting in a café) appeared not subject to the ADA.¹⁶ However, full protection under the ADA (including in the workplace) was extended to breastfeeding by the Discrimination Law Amendment Act 2002.¹⁷ The ADA is underpinned by a significant legal and administrative infrastructure. Complaints under the ADA are investigated and pursued by an Anti-Discrimination Commission¹⁸, and ultimately may be determined by a specialist Anti-Discrimination Tribunal.¹⁹ The tribunal has a range of disposals available including compensatory awards.

7. Legislation relating directly to equal opportunities and sex discrimination law is a reserved matter in terms of Section L2 of Part II of Schedule 5 to the Scotland Act 1998 (c.46) and, therefore, beyond the legislative competence of the Scottish Parliament. Accordingly, it is not possible for an anti-discrimination approach to be considered. Following a wide ranging consultation,²⁰ the member in charge of the Bill agreed that, as the purpose of the Bill was to improve child health by recognising a child’s right to fed milk, the Bill should follow the approach adopted by many USA state legislatures. That approach typically amends criminal law statutes, and makes provision for legal recognition (and clarification) of the child’s right to be fed milk in public places where the carer and child are otherwise permitted.²¹ The Bill adopts a gender neutral approach. The right of men and women to feed their child milk in certain public and licensed premises is recognised and protected. Matters of Scots criminal and private law are generally devolved to the Scottish Parliament.²² Scots criminal law provides a more effective and efficient vehicle than Scots private law as there is already an enforcement and administrative infrastructure in place.²³

¹³ Second Substitute House Bill 1590, Chapter 88, Laws of 2001, 57th Legislature, 2001 Regular Legislative Session: http://www.leg.wa.gov/sl/1590-s2_sl.pdf

¹⁴ Section 7(1)(e), Anti-Discrimination Act 1991. Available on-line at: http://www.gu.edu.au/ua/aa/ss/pdf_documents/Anti_Discrimination_Act1991.pdf

¹⁵ Section 7(2), of the 1991 Act, cited above.

¹⁶ See section 46(1) of the 1991 Act, cited above.

¹⁷ Available on-line at: <http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2002/02AC074.pdf>

¹⁸ The Commission has its own website: <http://www.adcq.qld.gov.au>.

¹⁹ Decision of the Queensland ADA tribunal are available on-line: <http://www.austlii.edu.au/au/cases/qld/QADT>.

²⁰ Consultation details are discussed in paragraph 9.

²¹ See footnote 10 above.

²² Certain home affairs matters (such as drug trafficking) are expressly reserved by Head B of Part II of Schedule 5 to the Scotland Act 1998 (c.46) – available on-line at: <http://www.hmso.gov.uk/acts/acts1998/19980046.htm>

²³ If the Bill had pursued a Scots civil law route aggrieved individuals could have been provided with a compensatory remedy, with the inherent problem that many people in Scotland would not qualify for civil legal aid (or would qualify with the need to pay a significant financial contribution), and would not be able to raise civil proceedings.

8. In the context of providing support and encouragement to mothers' breastfeeding the World Health Organisation (WHO) has called for action on a number of initiatives.²⁴ Key initiatives of the WHO strategy include:

- all governments should develop and implement a comprehensive policy on infant and young child feeding, in the context of national policies for nutrition, child and reproductive health, and poverty reduction.
- all mothers should have access to skilled support to initiate and sustain exclusive breastfeeding for 6 months and ensure the timely introduction of adequate and safe complementary foods with continued breastfeeding up to two years or beyond.
- health workers should be empowered to provide effective feeding counselling, and their services be extended in the community by trained lay or peer counsellors.
- governments should review progress in national implementation of the International Code of Marketing of Breastmilk Substitutes, and consider new legislation or additional measures as needed to protect families from adverse commercial influences.
- governments should enact imaginative legislation protecting the breastfeeding rights of working women and establishing means for its enforcement in accordance with international labour standards.

Not all these initiatives are within the competency of the Scottish Parliament, for example, legislation affecting employment law is reserved to the UK Parliament. A fundamental WHO policy approach is that non-governmental agencies, and community-based groups should play a part in encouraging breastfeeding. The new section 38A(2) (introduced by section 4 of the Bill) would enable Scottish Ministers to disseminate promotional information on breastfeeding by whatever means, including statutory and voluntary sectors.

CONSULTATION

9. In August 2002, the sponsoring member undertook a wide ranging public consultation on the Bill's principles.²⁵ Responses were received from 25 NHS authorities, 12 local authorities, 4 elected members, 12 trade unions and associations, 14 midwife or breastfeeding groups, and 93 individuals. Support for the Bill was overwhelming.²⁶ The Bill itself was drafted in consultation with an advisory group, which included the National Breastfeeding Advisor, Jenny Warren OBE, along with various academics, health visitors, licensing law officials, an ex-Strathclyde police officer, Govan Law Centre, La Leche League, Scottish Consumer Council, Gorbals Health Centre, the Royal College of Midwives, the National Childbirth Trust, the Child Poverty Action Group, UNICEF, the STUC, and UNISON. The Bill's proposal received cross-party support from the following MSPs: Dennis Canavan, Margo MacDonald, Ms Rosemary Byrne, Dr Sylvia Jackson, Rhona Brankin, Mrs Margaret Smith, Mr Jamie Stone, Nora Radcliffe, Patrick Harvie, Bristow Muldoon, Marlyn Glen, Maureen Macmillan, Mr John Home Robertson, Karen Gillon,

²⁴ WHO, *Global Strategy for Infant and Young Child Feeding*, ISBN 92 4 156221 8, 2003. Online at: http://www.who.int/child-adolescent-health/NUTRITION/global_strategy.htm

²⁵ Respondents were asked for comments on 10 key issues, including a child's right to be breastfed and bottlefed, and the need to support and encourage breastfeeding. The consultation paper is available on-line at <http://www.babyfriendly.org.uk/pdfs/consultationpaper.pdf>

²⁶ A detailed analysis of consultation responses will shortly be available on <http://www.elaine-smith.co.uk>.

Susan Deacon, Carolyn Leckie, Frances Curran, Rosie Kane, Tommy Sheridan, Michael Matheson, Roseanna Cunningham, Colin Fox, Christine Grahame, Helen Eadie, Chris Ballance.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

10. While the purpose of the Bill is to safeguard a child's right to fed milk in a public place (where that child is otherwise lawfully permitted to be) the Bill should also help to encourage the take-up and duration of breastfeeding. Any increase in the take-up and duration of breastfeeding in Scotland would assist the health and opportunities of children generally.

11. The Ontario Human Rights Commission has recently sponsored INFACT Canada to promote the rights of children to breastfeed.²⁷ The message promoted is "Don't think of it as a woman's right to breastfeed. Think of it as a baby's right to eat". The Bill would recognise and protect this right as well as the right of a child to be bottlefed milk. The Convention on the Rights of the Child (CRC) guarantees parents and children access to information and support in the use of basic knowledge of the advantages of breastfeeding. Breastfeeding can be seen as "adequate food", the right to which is set forth in Article 25 of the 1948 Universal Declaration of Human Rights and Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights. Article 6.1 of the International Code of Conduct on the Human Right to Adequate Food provides "The state must also protect the right of women to breastfeed their babies for at least six months of life". The Bill would help to provide such protection.

12. The Bill has no specific or particular implications for island communities, local government or sustainable development.

²⁷ INFACT Canada poster can be viewed on-line at: <http://www.infactcanada.ca/HRLegislation.html>

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