The Scottish Parliament

Health and Sport Committee

7th Report, 2008 (Session 3)

Stage 1 Report on the Health Boards (Membership and Elections) (Scotland) Bill

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The Scottish Parliament

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Remit and membership

Remit:

To consider and report on (a) health policy and the NHS in Scotland and other matters falling within the responsibility of the Cabinet Secretary for Health and Wellbeing and (b) matters relating to sport falling within the responsibility of the Minister for Communities and Sport.

Membership:

Jackie Baillie
Helen Eadie
Ross Finnie (Deputy Convener)
Christine Grahame (Convener)
Michael Matheson
Ian McKee
Mary Scanlon
Dr Richard Simpson

Committee Clerking Team:

Clerk to the Committee
Callum Thomson

Senior Assistant Clerk
Douglas Thornton

Assistant Clerk
David Slater

Committee Assistant
Kiran Haksar

The Scottish Parliament

Health and Sport Committee

7th Report, 2008 (Session 3)

Stage 1 Report on the Health Boards (Membership and Elections) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Health Boards (Membership and Elections) (Scotland) Bill ("the Bill") was introduced by Nicola Sturgeon MSP, Cabinet Secretary for Health and Wellbeing ("the Cabinet Secretary"), on 25 June 2008. The Bill is accompanied by Explanatory Notes (SP Bill 13-EN), which include a Financial Memorandum, and a Policy Memorandum (SP Bill 13-PM), as required by the Parliament's Standing Orders. The Parliament designated the Health and Sport Committee as lead committee for the Bill. Under Rule 9.6 of the Parliament's Standing Orders, it is for the lead committee to report to the Parliament on the general principles of the Bill.

2. This report sets out the policy intention behind the Bill and gives a brief overview of its main provisions, the Scottish Government's consultation and the Committee's scrutiny. It goes on to consider the likely impacts of the Bill on public involvement in NHS Scotland and the accountability of health boards and their members. In the remaining sections, the report considers the Bill's provisions relating to the composition of health boards, arrangements for health board elections, the pilot and evaluation process, the Financial Memorandum and powers to make subordinate legislation. The Committee's conclusions on the principles of the Bill are given at the end of the report.

Policy intention

3. The Policy Memorandum places the Bill within the context of the Scottish Government's *Better Health, Better Care* action plan.[1] It describes the Bill's aims as—

- improving public and community engagement and involvement;

[1] Scottish Government (2007) *Better Health, Better Care: Action Plan* Scottish Government. Available at: http://www.scotland.gov.uk/Publications/2007/12/11103453/0 [Accessed 11 December 2008]

- giving practical effect to the mutual/co-ownership concept of the NHS in Scotland by giving the public (the co-owners) the opportunity to vote onto their local health board their own representatives; and

- allowing the public voice to be heard and listened to at the heart of the decision-making process of health boards.[2]

Provisions of the Bill

4. The Bill provides for the introduction of direct elections to health boards, by way of pilots. At present, health boards are appointed entirely by Scottish Ministers through the public appointments process. Directors may be (a) senior employees of the health board, who serve as executive directors, or (b) non-executive directors. Local councillors have also been appointed as non-executive directors of health boards. The proportion of the board made up by executive and non-executive directors varies across Scotland.[3]

5. The Bill proposes that health boards would consist of three categories of member: a chairman and other members appointed by Scottish Ministers, local councillors also appointed by Scottish Ministers and members directly elected on a four-year mandate. The Bill further provides that councillor members and directly elected members counted together must form a majority of the board and that at least one councillor is appointed from each local authority within the health board area.[4]

6. Arrangements for holding health board elections are partly set out on the face of the Bill, with much of the detail left to subordinate legislation. The Scottish Government has provided the Committee with drafts of the regulations that are expected to be laid under the Bill. The Bill and draft regulations envisage an election using a form of single transferable vote, treating most health board areas as a single ward, with people eligible to vote from age 16.[5]

7. As noted above, the Bill provides that elections to health boards would be introduced on a pilot basis. The draft regulations and Financial Memorandum are premised on pilots being held in two health board areas. The Bill specifies that the pilots are to last for up to seven years, with the roll-out of direct elections to be authorised through subordinate legislation after an evaluation report has been laid before the Scottish Parliament.[6]

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[2] Health Boards (Membership and Elections) (Scotland) Bill. Policy Memorandum, paragraph 4. Available at: http://www.scottish.parliament.uk/s3/bills/13-HealthBoards/b13s3-introd-pm.pdf [Accessed 11 December 2008]

[3] Cabinet Secretary for Health and Wellbeing, written submission to the Health and Sport Committee, 2 September 2008

[4] Health Boards (Membership and Elections) (Scotland) Bill section 1(2), and section 2(2) inserted schedule 1A paragraph 2(3). Available at: http://www.scottish.parliament.uk/s3/bills/13-HealthBoards/b13s3-introd.pdf [Accessed 11 December 2008]

[5] Scottish Government, written submission to the Health and Sport Committee, 29 November 2008; Health Boards (Membership and Elections) (Scotland) Bill section 2(2) inserted schedule 1A paragraph 10(1)

[6] Health Boards (Membership and Elections) (Scotland) Bill section 6(1), and section 7

Scottish Government consultation

8. The Scottish Government's consultation on the proposals in the Bill ran from 8 January 2008 until 1 April 2008.[7] The consultation paper was split into two sections: the first section dealt with existing arrangements to improve patient engagement with the NHS; the second section covered proposals to introduce direct elections to health boards. The Scottish Government received 142 responses to its consultation and published the *Local Healthcare Bill Consultation: Analysis of Responses* on 3 July 2008.[8]

Committee scrutiny

9. The Committee issued a call for evidence on 2 July 2008 and received 59 written submissions from public, private and voluntary sector organisations as well as members of the public. On the basis of the written evidence received, the Committee took oral evidence from—

- Scottish Government officials (5 November 2008);
- NHS Ayrshire and Arran, NHS Lothian, NHS Tayside, the Electoral Commission, the Association of Electoral Administrators (Scotland and Northern Ireland Branch) ("AEA") and the Society of Local Authority Chief Executives ("SOLACE") (12 November 2008);
- the British Medical Association ("BMA"), Royal College of Nursing Scotland ("RCN"), UNISON, the Convention of Scottish Local Authorities (COSLA), South Lanarkshire Council, West Lothian Council, Consumer Focus Scotland, Inclusion Scotland and Voluntary Health Scotland (19 November 2008);
- the Cabinet Secretary for Health and Wellbeing (26 November 2008).

10. The Committee thanks all those who made submissions in response to the call for evidence and gave oral evidence. Written submissions received by the Committee and *Official Reports* of the oral evidence taken are annexed to this report.

PUBLIC PARTICIPATION IN THE HEALTH SERVICE

11. As stated earlier in this report, two of the key aims of this legislation as set out in the Policy Memorandum are to lead to more members of the public becoming involved in the health service and to give patients a greater say in how the health service is run.

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[7] Scottish Government (2008) *Local Healthcare Bill: Consultation Document*. Scottish Government. Available at: http://www.scotland.gov.uk/Publications/2008/01/04140108/1 [Accessed 11 December 2008].

[8] Scottish Government (2008) *Local Healthcare Bill Consultation*: *Analysis of Responses.* Scottish Government. Available at: http://www.scotland.gov.uk/Publications/2008/01/04140108/1 [Accessed 11 December 2008].

12. Establishing whether health board elections encourage public involvement is one of the key aims of the pilot process. Section 5(1) of the Bill specifies that the evaluation of the pilots to be laid before the Parliament must contain an assessment as to whether elected members have "led to increased engagement with patients and other members of the public".[9]

Giving the public a greater say

13. Of the 54 responses to the Committee analysed by the Scottish Parliament Information Centre ("SPICe"), 20 were grouped as "unclear or made no comment" on the principle of direct elections to health boards. Of the remaining 34 responses, opinion was split: 15 (44%) were in favour of direct elections and 19 (56%) were against.[10]

14. Many of the individuals and organisations that responded to the Committee's call for evidence believed that the views of the public were not adequately represented within health-service decision-making, although their views differed on direct elections.

15. COSLA told the Committee that, when their health and wellbeing executive group discussed the issue,—

> "…many views were expressed on how we should achieve a more democratic and publicly accountable health board system. However, it was clear that the current system was acceptable to no member in the room. Some wanted directly elected boards and some wanted an increase in council representation, but everybody wanted more elected people at the table".[11]

16. UNISON told the Committee that it believed that the democratic element in health boards "is indirect in the extreme" and that its support for direct elections in public services was a point of principle.[12] UNISON's representative told the Committee—

> "The key point is that, since it was created in 1948, the NHS has not been directly accountable to and engaged with the public. It has been a top-down organisation—a we-know-best organisation that thinks that all the issues are far too complicated for mere mortals to understand and that democracy is therefore not appropriate. We have to change that culture, and that is why direct elections have come in."[13]

17. Some organisations argued that a significant benefit of having directly elected members is that they would be more accessible to the public. MS Society

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[9] Health Boards (Membership and Elections) (Scotland) Bill section 5(1)(c)
[10] Scottish Parliament Information Centre. (2008) *Health Boards (Membership and Elections)(Scotland) Bill SPICe Briefing 08/59*, page 9. Available at: http://www.scottish.parliament.uk/business/research/briefings-08/SB08-59.pdf [Accessed 11 December 2008]
[11] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1316
[12] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Cols 1299-1230
[13] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1296

Scotland said that it envisaged elected members being "more accessible and amenable" to meeting with patient groups and charities.[14] Howwood Community Council suggested the practice of elected representatives regularly holding surgeries with their electorate, as MSPs and MPs do, as an example of how having elected representatives on boards could improve patient engagement.[15]

18. Organisations that were sceptical about direct elections, such as Consumer Focus Scotland, argued that this democratic element already exists, through boards' accountability to ministers and the Parliament.[16] The Royal College of Nursing argued that the public were already entitled to sit on health boards, by being appointed as non-executive directors.[17] Some of those who submitted evidence, including an experienced non-executive director, argued that making the non-executive appointment route more accessible and giving extra support to non-executive directors was an alternative to direct election.[18]

19. Some local authorities, such as South Lanarkshire Council, argued that greater democratic representation on health boards was desirable, but would be better achieved by increasing the number of local councillors on boards instead of direct elections. They drew attention to the increasing areas of joint working between councils and health boards and expressed the belief that, in view of councillors' existing mandate to represent local people, there was no need to create an additional group of elected people with a potentially conflicting mandate.[19]

20. The NHS boards that gave oral evidence generally accepted the need for greater public involvement and engagement in the service delivery of boards, but expressed scepticism about whether directly elected board members would achieve that aim. They also expressed reservations about the impact on the corporate governance and accountability of NHS Boards of having some members directly elected and others appointed.

21. The Cabinet Secretary told the Committee that patients and the public have a right to be heard in health board decision-making as co-owners of the NHS—

> "Health boards take decisions on how vast amounts of taxpayers' money are spent, which impacts on the most cherished and cared-about services in the country, so it is right that the population at large have a say over who sits on those boards, to make them more representative and more democratically credible."[20]

22. **The Committee acknowledges the steps that have been taken to improve consultation by health boards with the public but notes, however, that the experience remains mixed. The Committee considers that there is a**

[14] MS Society Scotland, written submission to the Health and Sport Committee
[15] Howwood Community Council, written submission to the Health and Sport Committee
[16] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1338
[17] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1309
[18] Geraldine Strickland, written submission to the Health and Sport Committee
[19] South Lanarkshire Council, written submission to the Health and Sport Committee
[20] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1351

difference between the public having a right to be heard and the willingness of health boards actively to listen and reflect public concerns.

Diversifying public engagement

23. Some organisations suggested that direct elections would allow groups that found it difficult to participate in existing NHS structures, for example by being appointed as non-executive directors, greater opportunity to have a say in the running of the NHS. Representatives of Inclusion Scotland told the Committee that the appointments system "is dramatically failing disabled people and patients", pointing to figures showing that 2% of appointees to public bodies are disabled, compared to 20% of the general population. They identified direct election as a possible opportunity for "people from all backgrounds to get involved".[21] However, they also noted that disabled people would face barriers to election that would need be overcome and expressed concern that disabled people who were elected could lose out financially as remuneration would be "clawed back" through the benefits system.[22]

24. Voluntary Health Scotland also felt that direct elections could widen participation by opening "a channel" for hard-to-reach or excluded groups to get involved with the support of third-sector organisations.[23]

25. While these two organisations saw direct elections as opening up opportunities for traditionally excluded groups, some respondents were concerned that direct election could further exclude them. For example, BMA Scotland cited evidence from New Zealand suggesting that those standing for direct election tended to come from health professional, local authority or other professional backgrounds and not from groups that did not previously engage with the health service.[24] Stonewall Scotland raised concerns that moving away from the public appointments process would make the NHS "the only public service that is not guaranteed to have full cultural competence" and may marginalise unpopular minority groups.[25]

26. NHS Lothian told the Committee that it was already undertaking work to bring previously excluded groups into public engagement initiatives and expressed doubts that direct elections would assist in this process—

> "On direct elections, we should bear it in mind that broad sections of the population do not engage with such processes […] we would want to use resources that would be expended on such elections to reach out to sections of the population with whom we have difficulty engaging on health and health inequalities issues, and who are unlikely to engage in a normal democratic process."[26]

[21] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Cols 1339-1340
[22] Inclusion Scotland, supplementary written submission to the Health and Sport Committee
[23] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1338
[24] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1310
[25] Stonewall Scotland, written submission to the Health and Sport Committee
[26] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1269

27. The Cabinet Secretary told us that direct elections would allow health boards to better represent the "broad spectrum of opinions in the areas they represent".[27] She believed that the single transferable vote would help achieve this and that the impact on equality and diversity would be assessed as part of the evaluation of direct election pilots – although she did not believe that they were sufficient to solve some of the problems in themselves.[28] She said—

> "… boards with a majority of locally elected members will be able to confront issues and decisions with additional credibility and will help to re-establish public confidence in the decision-making process."[29]

28. **The Committee is concerned that efforts to promote diversity among appointees to public bodies appear to be failing. It is hoped that direct elections would have a positive role to play in this respect but the Committee has seen little concrete evidence to suggest this. The Committee therefore believes that elections alone will not be sufficient to bring about the change that is required. The Committee agrees with the Cabinet Secretary that any pilots should be subject to a rigorous evaluation of their impact on the diversity of people sitting on health boards. The Committee believes that it is important that this evaluation should also assess whether direct elections have made equalities issues more integral in the implementation of policies by pilot boards.**

Impact on existing public participation schemes

29. As indicated above, some organisations made reference to existing initiatives being undertaken to improve public engagement. These initiatives include the development of public partnership forums within community health partnerships and the creation of independent scrutiny panels to examine controversial decisions. Evidence on their effectiveness was mixed. For example, NHS Tayside told the Committee that public partnership forums had done "a tremendous amount of excellent work" but that they were "not the whole answer" as their membership was not representative. They went on to outline other work in areas such as patient groups for particular conditions, voluntary groups and so forth.[30]

30. Our respondents disagreed on the implications of direct elections for these schemes. Organisations in favour of direct election tended to express the view that the two approaches would be mutually reinforcing. For example, Voluntary Health Scotland told the Committee that direct election would add a new "channel" for people to become involved in the health service that would complement existing initiatives. UNISON argued that "democracy is about the opportunity to engage at different levels" and that public engagement initiatives are "not a substitute for having a say at the top level in the organisation".[31]

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[27] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1349
[28] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Cols 1369-1370
[29] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1346
[30] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1273
[31] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1313

31. Organisations that were more sceptical about direct elections tended to view them as being in conflict with, or an alternative to, existing initiatives to increase public involvement. For example, BMA Scotland expressed concerns that policy emphasis would shift to direct elections to the detriment of existing initiatives, without the latter having had the time or resources to prove to be truly effective.[32] NHS Lothian and NHS Tayside both indicated that the resources to fund health board elections would probably come at the expense of investment in other forms of public engagement.[33]

32. The Cabinet Secretary told the Committee that she did not believe direct elections were incompatible with other initiatives to promote public engagement. She said—

> "… the Government is committed to improving public engagement and involvement with health boards through further work with existing bodies, including community health partnerships and initiatives such as the development of a participation standard. However, direct elections represent a significant step in addition to strengthening engagement and involvement in ensuring that the public voice is heard and listened to at the heart of local national health service decision taking."[34]

33. **The Committee recognises that progress has been made in consulting the public since 1999 but considers that NHS boards have yet to achieve adequate public participation and accountability.**

34. **The Committee believes that initiatives such as public participation forums are not mutually exclusive with direct elections and have the potential to complement them. However, the Committee accepts the point made by NHS boards that funding direct elections from existing health board allocations could have resource implications for other schemes to improve public participation.**

Participation in elections

35. There was scepticism from some organisations that elections would be greeted with enthusiasm among the public. Several organisations, such as West Lothian Public Partnership Forum, cited relatively low turnouts in local and national government elections as evidence that there would be little public interest in voting in, or standing for, health board elections.[35] MS Society Scotland expressed support for direct elections; however, it was concerned that low turnout and higher-than-expected electoral costs could undermine elected members' credibility.[36]

36. BMA Scotland cited the experience of other countries and states that hold elections to health service bodies as evidence that elections would not encourage

[32] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1306; British Medical Association Scotland, written submission to the Health and Sport Committee
[33] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Cols 1277-1278
[34] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1346
[35] West Lothian Public Partnership Forum, written submission to the Health and Sport Committee
[36] MS Society Scotland, written submission to the Health and Sport Committee

widespread public participation in the NHS. It pointed to turnout figures of less than 0.07% (1 in 1,500) in some local elections to Boards of Governors of English Foundation Trusts. BMA Scotland also cited reports on the outcome of health board elections in New Zealand and Saskatchewan, Canada. In the case of Saskatchewan, it said that the turnout in the 1999 health board elections was 10% and a 2002 report had concluded—

> "… health board elections are costly, cumbersome and produce low voter turnout and have failed to foster a more active, engaged citizenry, committed to common goals. In light of these experiences, their continued use should be questioned if efficient, effective participation and public commitment are desired goals."[37]

37. In the case of New Zealand, BMA Scotland cited a 2005 report stating that elections to district health boards had failed "to make a substantial contribution to the democratisation of health care systems in New Zealand."[38] In oral evidence, BMA Scotland and the RCN told the Committee that the number of candidates in these elections had fallen sharply and turnout (50% in 2001, 43% in 2007), whilst comparable with Scottish Parliament elections, had to be seen in the context of New Zealand general election turnouts of over 80%.[39] BMA Scotland said that the New Zealand evidence suggested that people elected to boards were themselves quite happy with direct elections but that "the population seems turned off by the whole thing".[40]

38. The Cabinet Secretary told the Committee that the falling turnout in New Zealand health board elections followed a trend seen in national elections over the same period.[41] The Scottish Government told the Committee that it had taken some lessons on board from the New Zealand experience in terms of the detail of the Bill. In relation to the effects on public engagement, it was stated—

> "Perhaps the directly elected members taking their seats on district health boards did not prove to be as big an advantage as it was thought that it would be in bringing local people on to the health board, but on the whole people are happy with what is now in place in New Zealand. The study stated that there was no case for change."[42]

39. **The Committee notes the experience of other countries as an indicator of how health board elections might be received by the public in Scotland. However, it notes that these experiences suggest that turnout in such elections would be low relative to other elections and is concerned that this could, if it were repeated in Scotland, undermine the credibility of directly elected representatives.**

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[37] Quoted in BMA Scotland, written submission to the Health and Sport Committee
[38] Quoted in BMA Scotland, written submission to the Health and Sport Committee
[39] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1294; turnout figures from SPICe Briefing 08/59.
[40] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1294
[41] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1355
[42] Scottish Parliament Health and Sport Committee. *Official Report, 5th November 2008,* Col 1255

Public participation

40. **The Committee agrees that public participation in health board decision-making needs to be increased. The Committee also agrees that direct elections to health boards have the potential to improve public participation and involvement. However, the Committee has not seen enough evidence to convince it that direct elections are necessarily the most effective way to achieve this goal.**

ACCOUNTABILITY AND GOVERNANCE

Accountability of health boards

41. The Policy Memorandum for the Bill states that health boards would continue to be accountable to Scottish Ministers and would be required to comply with regulations and ministerial directions.[43] In oral evidence to the Committee, Scottish Government officials told the Committee that accountability would remain with Scottish Ministers and directly elected health board members would be bound by the same corporate governance arrangements as non-elected members. In particular, elected board members would be expected to "maintain the board's unity and solidarity rather than take up opposing positions".[44] The Cabinet Secretary reiterated this and stated that training would be in place for new board members.[45]

42. Despite this, many of those who submitted evidence to the Committee were of the opinion that the presence of elected members would, in practice, lead to a change in the accountability of health boards. Some organisations supported this perceived shift in accountability as a major benefit of the Bill. For example, UNISON told the Committee that, whilst corporate governance arrangements would remain in place, "a form of local accountability" would also be created. It argued that this could lead to a culture change in the NHS.[46] UNISON also argued for a "more local government-style model, whereby executive members would become advisers and officers to the health board"[47] and directly elected members only would constitute the majority of elected members on the board.[48]

43. Local Health Concern expressed similar views, identifying boards' accountability to ministers as "the problem at present". Its argument was that board members, including those appointed to give the "impression of public involvement", cannot put the public's views due to the risk of de-selection.[49]

44. Similarly, Voluntary Health Scotland stated—

[43] Policy Memorandum, paragraph 13
[44] Scottish Parliament Health and Sport Committee. *Official Report, 5th November 2008,* Col 1245
[45] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Cols 1349-1359
[46] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1296
[47] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1302
[48] UNISON, written submission to the Health and Sport Committee
[49] Local Health Concern, written submission to the Health and Sport Committee

> "Within the health-facing third sector in Scotland there is a generalised belief that health services should be accountable both to ministers and to the people they serve and whose taxes have enabled the NHS to exist."[50]

45. Other organisations, particularly NHS boards, expressed concern that the presence of directly elected members could confuse accountability and damage the national cohesion of the NHS. They saw a tension between boards as a whole being accountable to ministers but directly elected members considering themselves accountable primarily to their electorate. For example, the Chairman of NHS Lothian told us—

> "My concern is that directly elected members might consider their sole accountability and loyalty to be to those who elected them, which could make them out of step with Government policy and the board's agreed policy."[51]

46. NHS Tayside echoed this point, adding that ensuring boards' compliance with decisions made by central government "would be a major problem".[52]

47. NHS Lothian was also concerned about the election of single-issue candidates, which they thought could "destabilise" boards.[53] NHS Ayrshire and Arran was concerned that national policies decided by ministers could be opposed by councillors and elected members who, together, would make up the majority of the board.[54] BMA Scotland warned that the "dual accountability" of directly elected health board members could lead to "an additional, and possibly conflicting political environment at the local level".[55] A number of organisations were concerned that directly elected members could bring party politics into health boards. For example, Local Health Concern proposed prohibiting "party" candidates.[56]

48. As an example of how this tension might develop, NHS Health Scotland suggested that direct elections could hinder efforts to tackle health inequalities.[57] Stonewall Scotland went further, arguing that ministerial control over boards had to be firm—

> "A process which relies upon campaigning to a majority creates a very real danger of ignoring excluded groups, such as lesbian, gay, bi-sexual and trans-gender people. A focus on services of high public resonance such as consultant-led maternity or blue-light A&E risks marginalising services such as mental health."[58]

49. UNISON did not believe this dual accountability would cause difficulties for elected members or boards as a whole. It argued that local authorities are

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[50] Voluntary Health Scotland, written submission to the Health and Sport Committee
[51] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1265
[52] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1267
[53] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1264
[54] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Cols 1262-1263
[55] BMA Scotland, written submission to the Health and Sport Committee
[56] Local Health Concern, written submission to the Health and Sport Committee
[57] NHS Health Scotland, written submission to the Health and Sport Committee
[58] Stonewall Scotland, written submission to the Health and Sport Committee

examples of directly elected bodies subject to lines of corporate governance and statutory control.[59] This point was also made by the City of Edinburgh Council, which called for a "statutory reference" for the role of local authority elected members, in order to recognise the need of members to represent constituency and local authority views as well as fulfilling their duties as members of the board.[60] UNISON argued that tensions between the local priorities of elected members and national policy could have positive results, such as ensuring policy better reflected local concerns.[61]

50. Consumer Focus Scotland did not accept the comparison with local government, arguing that there is a fundamental difference between local government and a national service such as the NHS. It expressed concern that the public would expect directly elected members to have the lead policy role, as in local government, when in fact that responsibility remained with ministers.[62] Other organisations echoed the concern that there may be a degree of disillusionment among the public once the limitations of directly elected members' mandate became clear. For example, the British Dental Association said—

> "In instances where difficult or unpopular decisions need to be taken, the presence of elected patient representatives may be useful in giving patients a real say in how these decisions are made. However, if appointed members or ministers are able to subsequently overturn the decisions of elected patient representatives, those individuals and those who elected them could feel disenfranchised."[63]

51. The Cabinet Secretary told the Committee that potential tension between local and national policy would not be created by direct election to boards; potential tension already existed wherever a local decision-making body had to implement national policies. She acknowledged examples where health board decisions had been overturned by ministers. She argued that the key benefit of direct elections was that the people implementing decisions locally would be better placed and would have greater credibility in applying those decisions.[64] Finally, she denied that the proposal would destabilise boards—

> "I would not propose or pursue any policy that I thought would have destabilising effect on our boards, so I fundamentally disagree with that point of view."[65]

52. **The Committee accepts that the Bill does not alter health boards' accountability to ministers. The Committee agrees that this is the correct approach to take in the interests of maintaining consistent national policy and standards across the NHS. The Committee accepts that tensions may develop on some issues between local and national priorities.**

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[59] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1302
[60] The City of Edinburgh Council, written submission to the Health and Sport Committee
[61] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1302
[62] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Cols 1332-1333
[63] British Dental Association, written submission to the Health and Sport Committee
[64] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1357
[65] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1357

53. **Directly elected members would also be accountable to their electorate for the local delivery of policies set by ministers. The Committee considers that there is a danger of disillusionment with the process and with boards if the distinction between local accountability for delivery and national accountability for policy is not fully understood by the public. The Committee recommends that the Scottish Government ensures that there are public information campaigns accompanying pilots of, and any future, direct elections in order to raise awareness of the extent of directly elected members' role and the fact that responsibility for policy remains with ministers.**

COMPOSITION OF HEALTH BOARDS

54. Section 1 of the Bill sets out the types of member that would comprise health boards. The Bill specifies that the chairman of the board would be appointed by Scottish Ministers and continues to provide for members to be appointed directly by Scottish Ministers. The Bill also provides for a least one councillor for each local authority within the health board area to be appointed to the board by Scottish Ministers and for directly elected members to sit on the board. Councillors and elected members together must form a majority of the board.[66]

Majority of elected members

55. NHS boards told us that their concerns about accountability and the possibility of boards opposing government policy, outlined above, were partly founded on the fact that the Bill provides for elected and councillor members to comprise a majority of the board. NHS Lothian suggested that, as an alternative, a few seats on the board could be allocated to individuals elected through opt-in elections, such as those held in some English foundation trusts.[67]

56. Against this, the City of Edinburgh Council argued that it would be inequitable to expect elected members (be they councillors or directly elected members) to contest elections based on the decision-making record of a body in which they were a minority.[68]

57. As discussed in paragraph 42, UNISON argued that local authority members should not count towards the majority of elected members on health boards.[69]

Local authority members

58. In addition to providing for directly elected members, the Bill provides a statutory basis for the appointment of local councillors to health boards and sets a minimum presence of one councillor from each local authority within the health board area.[70]

59. Glasgow City Council told the Committee—

[66] Health Boards (Membership and Elections) (Scotland) Bill section 1(2)
[67] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1271
[68] The City of Edinburgh Council, written submission to the Health and Sport Committee
[69] UNISON, written submission to the Health and Sport Committee
[70] Health Boards (Membership and Elections) (Scotland) Bill section 1(2)

> "Local authority elected members bring a perspective to Health Board membership that not only cuts across NHS and local authority services but also broader themes of Community Planning. This can be invaluable in providing a broad context to inform debate about service change and the needs of communities."[71]

60. Some organisations, chiefly local authorities such as South Lanarkshire Council and Argyll and Bute Council, said that they would prefer a greater proportion of the board to be comprised of local councillors as an alternative to direct elections.[72]

61. COSLA told the Committee that there was no consensus among local authorities on the precise composition of boards. However, its Spokesman for Health and Wellbeing did express the view that directly elected members and councillors could work together on boards without tension arising between them.[73] Of the local authorities that submitted evidence to the Committee, four were in favour of direct elections to health boards and six were opposed. A further six did not express a clear opinion either way.[74] COSLA representatives agreed that this reflected the representations that they had received.[75]

62. UNISON told the Committee that local councillors saw their role on health boards as ensuring joined-up working between organisations, rather than acting as representatives of their electorate. As such, it did not believe that councillors should count towards the majority of elected members on the board.[76] COSLA and South Lanarkshire Council rejected the claim that local authority members saw their role on health boards as being different from their representative role.[77]

63. The Scottish Health Campaigns Network said that it did not support expanding local authority representation as this was often "variable in quality", with some councillors remaining silent on issues within their areas.[78]

64. The Cabinet Secretary said that local authority members should be on health boards "because local authorities and health boards are increasingly jointly responsible for decisions that impact on local services".[79] However, she pointed out that local authorities and health boards deal with different issues, despite this increasing overlap.[80]

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[71] Glasgow City Council, written submission to the Health and Sport Committee
[72] South Lanarkshire Council, written submission to the Health and Sport Committee; Argyll and Bute Council, written submission to the Health and Sport Committee
[73] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1329
[74] SPICe Briefing 08/59, page 10.
[75] COSLA, supplementary written submission to the Health and Sport Committee
[76] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1301; UNISON, written submission to the Health and Sport Committee
[77] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Cols 1316-1317;
[78] Scottish Health Campaigns Network, written submission to the Health and Sport Committee
[79] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Cols 1362-1363
[80] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1350

65. **The Committee believes that local councillors have an important role to play on health boards and welcomes a statutory basis for their presence.**

Executive members

66. In addition to councillors, health boards are comprised of two types of appointed member – executive members who are senior employees of the board and non-executive members who are not board employees. NHS Lothian and NHS Tayside told us that they each have six executive members of the board out of a total of 26 and 22 board members respectively.[81]

67. The Bill would preclude certain employees of health boards from standing for election, but would continue to allow them to be appointed by Scottish Ministers.[82] Scottish Government officials told us that they envisaged that the list of people disqualified in this way would primarily consist of those who give advice to the board on a regular basis.[83]

68. Some of the evidence the Committee received, such as that from the Alliance of Allied Health Professionals, advocated changes to the Bill to ensure the appointment of individuals from particular professions to health boards.[84]

69. Some organisations expressed in evidence serious misgivings about executive members of the board being members of the board or having a vote at board meetings. For example, UNISON said that the board could not hold executive officers to account when those officers have a voting place on that board. However, it said that it would like to see clinical and staff representatives to continue to have a vote on the board.[85] COSLA agreed. Its representatives found it "strange that an officer should be able to vote on a report that he or a member of his staff will have prepared".[86]

70. In answer to these criticisms, the RCN said that it "could not see how taking a vote away from one or other clinical lead on a board – someone who comes to the board with specific expertise – would necessarily lead to increased public engagement."[87]

71. The Cabinet Secretary said—

> "It is right that we retain a mix of members on health boards. Executive directors, for example, bring the necessary managerial, financial and clinical expertise to the boards' workings."[88]

[81] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Cols 1275-1276
[82] Scottish Government, supplementary written submission to the Health and Sport Committee
[83] Scottish Parliament Health and Sport Committee. *Official Report, 5th November 2008,* Col 1241
[84] Alliance of Allied Health Professionals, written submission to the Health and Sport Committee
[85] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Cols 1302-1303
[86] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1316
[87] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1307
[88] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1351

72. **The Committee agrees that health board employees who regularly advise the board should be prohibited from standing for election to health boards, providing that the Scottish Government clarifies that the prohibition applies only where advice is tendered in a professional capacity and subject to clarification about the application of the term 'regularly'.**

ARRANGEMENTS FOR HEALTH BOARD ELECTIONS

Voting system

73. The Bill specifies a system of preferential voting for health board elections, with the detail to be specified in regulations.[89] The draft regulations seen by the Committee would introduce a form of single transferable voting ("STV") comparable to that used in local government elections in Scotland.[90] Relatively few organisations that submitted evidence commented on the use of the single transferable vote. Those that did, for example Fairshare Voting Reform or West Lothian Council, were generally supportive.[91] However, some respondents, such as the Scottish Health Campaigns Network, expressed a preference for first-past-the-post voting.[92]

Electoral boundaries

74. The Bill specifies that each health board area should normally be considered a single electoral ward for the purposes of health board elections. However, it would also allow election regulations to divide health board areas into multiple wards.[93] Fairshare Voting Reform expressed concern about the use of the word "ward" in this context, suggesting that it could cause confusion with the wards used for local government elections.[94]

75. The Cabinet Secretary told the Committee that a single-ward system and single transferable vote would help to ensure that boards were not dominated by candidates elected on single issues. Beyond this, it would be the electors' decision as to whom they elected and she was not concerned by single-issue candidates being elected.[95] Some organisations, such as NHS Lothian, had expressed the view that candidates elected on single issues had the potential to "destabilise" boards by focusing debate on a narrow range of issues.[96] West Lothian Council told the Committee that, in its experience of working with councillors with single-issue mandates, this was not a problem.[97]

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[89] Health Boards (Membership and Elections) (Scotland) Bill section 2 inserted schedule 1A paragraph 8
[90] Scottish Government, written submission to the Health and Sport Committee, 29 October 2008, Draft Health Board Elections (Scotland) Regulations
[91] Fairshare Voting Reform, written submission to the Health and Sport Committee; West Lothian Council, written submission to the Health and Sport Committee
[92] Scottish Health Campaigns Network, written submission to the Health and Sport Committee
[93] Health Boards (Membership and Elections) (Scotland) Bill section 2(1), inserted schedule 1A paragraph 3(1)
[94] Fairshare Voting Reform, written submission to the Health and Sport Committee
[95] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1359
[96] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1264
[97] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1321

76. UNISON told the Committee that, although it favoured single wards in principle, there was a case for splitting up larger, more rural health board areas into smaller wards to ensure a more equitable geographic spread of candidates.[98] Highland Council told the Committee that NHS Highland would, if treated as a single ward, have an electorate of 220,000 – covering two local authority areas. It said that managing an all-postal ballot covering an area of this size "is beyond the experience of local government staff".[99] Electoral officials described it as "a mighty undertaking".[100]

77. Electoral officials, the Electoral Commission and the Local Government Boundary Commission all identified potential administrative difficulties caused by a lack of coterminosity between health board and local authority electoral boundaries.[101] SOLACE also told the Committee that there could be community planning benefits to ensuring coterminosity. However, it accepted that it would be difficult to achieve.[102] The Scottish Government told the Committee that it had no plans to alter health board boundaries to ensure coterminosity with local authority boundaries, either for the pilots or roll-out.[103]

78. **The Committee accepts that treating health board areas as a single electoral "ward" is reasonable in principle, but may cause difficulties in larger and more diverse health board areas. It therefore believes that the flexibility shown in the Bill is sensible.**

Postal ballot

79. The draft election regulations shown to the Committee propose an all-postal ballot. Under existing arrangements for postal votes in local authority and national elections, voters are required to provide "personal identifiers" – for example, a signature – to ensure the security of their vote.

80. Electoral officials told the Committee that requiring personal identifiers in all-postal ballots would require collecting those identifiers from the 85% of the voting population who do not currently use postal ballots, and could disenfranchise voters who did not wish to comply with these regulations.[104]

81. Despite identifying additional costs and administrative burdens associated with collecting personal identifiers, both the Electoral Commission and organisations representing electoral officials expressed the view that personal identifiers should be required in the case of a postal ballot as a matter of principle. The Electoral Commission told the Committee—

[98] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Col 1293
[99] Highland Council, written submission to the Health and Sport Committee
[100] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Cols 1286-1287
[101] SOLACE *et al*, written submission to the Health and Sport Committee; Electoral Commission, written submission to the Health and Sport Committee; Local Government Boundary Commission, written submission to the Health and Sport Committee
[102] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Cols 1283-1284
[103] Scottish Parliament Health and Sport Committee. *Official Report, 5th November 2008,* Cols 1251-1252
[104] SOLACE *et al*, written submission to the Health and Sport Committee

> "The principle we abide by is that if an election takes place, regardless of what it is for, it should be robust and accepted by everyone who is involved. The principles that we follow…should apply to health board elections just as they apply to other elections, so that following such an election, everyone who is involved in it can accept the result. For postal votes, we favour the use of personal identifiers."[105]

82. The City of Edinburgh Council stated that, in its view, not enough safeguards existed to undertake an entirely postal ballot. It added that it they would prefer to see consistency in approach across all elections, a view shared by the organisations representing electoral officials.[106]

83. The Cabinet Secretary told the Committee that she did not intend to require personal identifiers for the pilot elections, although she said the issue could be revisited during roll-out.[107] Firstly, she told the Committee that their use would "significantly increase the cost of the pilots" from, on average, £2.60 per vote to around £3.60 per vote. Secondly, she said that—

> "it would significantly jeopardise the timescale for the pilots, given the significant amount of work that will have to be done, not just after voting to check identifiers, but at the front end of the process to establish the personal identifiers for every person in the population."[108]

84. **The Committee considers that health board elections should be seen to be taken as seriously as other statutory elections. The experience of the Scottish general elections in May 2007 shows that the robustness of any new elections introduced in Scotland will rightly come under serious scrutiny. Whilst the Committee recognises that there would be significant cost and logistical implications, the Committee recommend that the Scottish Government reconsider using personal identifiers for postal votes in health board elections. If the cost and logistical implications are too great to be overcome, the Scottish Government may also have to reconsider holding an all-postal ballot.**

Franchise

85. The Bill proposes allowing 16- and 17-year-olds to vote in health board elections. In general, those who expressed a view in principle on this issue were in favour of allowing 16- to 17-year-olds to vote in health board elections. However, some of those in favour, for example NHS Tayside, expressed the view that it should be considered in the context of other elections to ensure consistency.[109] This was echoed by the AEA, which said that there was the potential for confusion

[105] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1282
[106] The City of Edinburgh Council, written submission to the Health and Sport Committee; SOLACE *et al*, written submission to the Health and Sport Committee
[107] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Cols 1360-1361
[108] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1360
[109] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1280

if 16- and 17-year-olds could vote in a health board election, but not in a local authority election potentially on the same day.[110]

86. The Electoral Commission opposed allowing 16- and 17-year-olds to vote in health board elections, citing its 2004 report, *The Age of Electoral Majority*, which concluded that there was insufficient evidence of demand for such a change or of a likely impact on young people.[111]

87. Election officials expressed concern that including 16- and 17-year-olds on the electoral register could raise child protection issues, if the details of 14- to 15-year-old attainers were routinely collected and published.[112]

88. The Scottish Government told the Committee that a special "young persons register" would be created to record the details of 15-year-olds. This register would not be made public.[113] The Electoral Commission said that such an option might make it harder to engage young people with the election process.[114] The Cabinet Secretary told us that—

> "we want direct elections to health boards to include as many users of the NHS as possible. That is an important way to introduce young people to the democratic process as they reach adulthood, as it concerns a public service of which they already have considerable experience."[115]

89. **The Committee has serious concerns about the proposal for a private young persons' register and does not find this to be a recognisable part of the usual democratic process, while accepting that publication of the register would raise wider child protection implications. These are complicated issues to resolve and the Committee calls on the Scottish Government to come forward with specific proposals to address those concerns in advance of Stage 2.**

90. The Cabinet Secretary stated in oral evidence that there is no hurdle in the Bill that must be overcome in order to be eligible to stand for election. She said she had "no intention of lodging an amendment that would have that effect", arguing that "people should be allowed to stand without having to overcome a particular hurdle". She also indicated willingness, however, to consider introducing a hurdle if the Committee wanted to pursue the matter.[116]

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[110] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1289
[111] Electoral Commission, written submission to the Health and Sport Committee
[112] SOLACE *et al*, written submission to the Health and Sport Committee
[113] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Cols 1371-1372
[114] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Col 1281
[115] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1347
[116] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Cols 1359-1360

91. **The Committee believes that the Scottish Government should reconsider introducing a minimum threshold for candidacy to health board elections.**

PILOTS

92. The evidence that the Committee received suggests a clear acceptance that pilots of health board elections should be introduced before introducing such elections nationwide. This majority view included organisations such as NHS Orkney which opposed the principle of health board elections, but welcomed the commitment to pilot the proposal first.[117] Those organisations that opposed pilots, such as Local Health Concern, tended to favour immediate roll-out across all health boards and viewed pilots as an unnecessary delay.[118]

93. Some organisations wanted guarantees that the pilot process would be independent and a robust test of the policy. BMA Scotland's written evidence said that the evaluation should be carried out independently through a competitive tendering process and suggested that—

> "… pilot projects are often accompanied by additional energy, support and resources, resulting in positive outcomes and evaluations. Subsequent roll-out of pilots, implemented without this initial level of interest and funding, can sometimes fail to generate the same results."[119]

94. The RCN suggested in its evidence that pilots of health board elections alone would not be sufficient to provide a robust test of the policy. The RCN proposed a three-way pilot programme, whereby one health board would run a pilot of elections, a second would receive an equivalent amount of funding to expand its existing public participation programmes and a third would continue with its existing arrangements.[120] In oral evidence, RCN representatives told us—

> "Our concern is that, if we plough forward with health board elections without testing other pilots at the same time, the pilot will simply test whether elections work. We believe that we should test how we ensure that the Scottish public are best engaged—and feel that they are being best engaged—within the decision-making of their local NHS board. We are not convinced that, on its own, piloting health board elections will do that."[121]

95. The idea that the pilot process should be wider than just a pilot of direct elections gained support in oral evidence from three NHS boards, BMA Scotland, Consumer Focus Scotland and Voluntary Health Scotland.

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[117] NHS Orkney, written submission to the Health and Sport Committee
[118] Local Health Concern, written submission to the Health and Sport Committee
[119] BMA Scotland, written submission to the Health and Sport Committee
[120] Royal College of Nursing Scotland, written submission to the Health and Sport Committee
[121] Scottish Parliament Health and Sport Committee. *Official Report, 19th November 2008,* Cols 1295-1296

96. The Cabinet Secretary stated that the evaluation would be "done independently".[122] She added that she was considering piloting alternative approaches in parallel with direct elections. She did not have any details of what these approaches would be at the time of the evidence session. She said, however, that the Bill's purpose was to give the necessary statutory authority for health board elections to be tested through pilots and that piloting alternative approaches should not impact upon that.[123]

97. **The Committee believes that the pilot process should be a robust test of whether direct elections to health boards result in greater public participation in health board decision-making. The Committee welcomes the Cabinet Secretary's commitment that the evaluation will be independent. The Committee recommends that the Scottish Government publish, in advance of the pilots beginning, the criteria on which success or failure will be judged.**

98. **In order to make the pilot of direct elections a robust test of the policy, it will be necessary for the Scottish Government to run additional pilots of initiatives to increase public participation alongside those for direct elections. The results of the pilots for direct elections should be compared with the outcome of these additional pilots and developments in boards where no initiative takes place. The Committee calls upon the Cabinet Secretary to come forward, before Stage 3, with a clear proposal and timetable for additional pilots, based upon the evidence the Committee has received.**

FINANCIAL IMPACT

Finance Committee scrutiny

99. The Parliament's Finance Committee considers the financial implications of legislation through scrutiny of financial memorandums produced to accompany bills introduced in the Parliament. The Finance Committee has a systematic approach to its consideration of financial memorandums, applying a different level of scrutiny depending on the significance of the proposals for public expenditure.

100. In relation to the Bill, the Finance Committee sought written evidence from organisations financially affected, using a standard questionnaire. It also took oral evidence from electoral and Scottish Government officials and produced a report to the Health and Sport Committee, attached as Annexe D to this report.

Financial Memorandum

101. The Financial Memorandum sets out the costs envisaged by the Scottish Government relating to the publicising and running of health board elections based on an assumed turnout of 60%, remuneration of elected members at around £7,500 per annum and running the evaluation of the pilot process. The Financial

[122] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1353
[123] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1362

Memorandum initially set out total costs of £2.86 million for the two pilot boards envisaged in the draft regulations, with an estimate of £13.05 million for elections in all health boards.[124]

102. The costs outlined in the Financial Memorandum were subsequently revised in a letter from the Cabinet Secretary to the Committee. As a result of this revision, the total costs in the case of roll-out were estimated at £16.65 million.[125]

103. The Finance Committee, in its report to the Committee, stated that it would have been helpful for the Financial Memorandum to take greater account of the range of costs that could result from health board elections and supporting elected members – for example, depending on the size or demographics of the health board area.

Funding health board elections

104. Many of those who submitted evidence to the Committee expressed concern that the costs of running health board elections would result in less money being available for front-line health services. For example, the RCN stated that—

> "… we are also deeply concerned by the increase of over £8 million pounds in the estimated recurring costs, from £5 million in the consultation document to £13.05 million in the notes to the Bill as published. This is to be met from existing budgets and we fear this could impact on frontline health services, particularly given the tight financial situation of this spending cycle."[126]

105. Several organisations believed that the costs of running health board elections may prove to be higher than anticipated. For example, the City of Edinburgh Council considered the £200,000 set aside for public information and advice to be insufficient.[127] The Chartered Institute of Public Finance and Accountancy considered the calculation used to estimate the total cost of national health board elections to be "basic in nature", and election officials said that they believed the costs "had not been fully investigated".[128] Scottish Government officials also told the Committee that the costs would increase by a further £1 per voter were personal identifiers to be used in the postal ballot and, in evidence to the Finance Committee[129], they revealed that Returning Officers' personal fees were not covered by the Financial Memorandum.[130]

106. NHS Ayrshire and Arran and NHS Lothian both accepted that, while the costs of running health board elections would be significant, they were small in the

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[124] Health Boards (Membership and Elections) (Scotland) Bill Financial Memorandum, paragraphs 61, 65 and 66. Available at: http://www.scottish.parliament.uk/s3/bills/13-HealthBoards/b13s3-introd-en.pdf [Accessed 11 December 2008]
[125] Scottish Government, supplementary written submission to the Health and Sport Committee 12th September 2008
[126] Royal College of Nursing Scotland, written submission to the Health and Sport Committee
[127] The City of Edinburgh Council, written submission to the Health and Sport Committee
[128] Chartered Institute of Public Finance and Accountancy, written submission to the Health and Sport Committee; SOLACE *et al*, written submission to the Health and Sport Committee
[129] Scottish Parliament Health and Sport Committee. *Official Report, 5th November 2008,* Col 1254
[130] Scottish Parliament Finance Committee (2008) *Report to the Health and Sport Committee on the Health Boards (Membership and Elections) (Scotland) Bill*, paragraph 31

context of overall health budgets. They both agreed that the costs being discussed could be absorbed without seriously impacting on front-line services. However, NHS Lothian and NHS Tayside both indicated that the costs would probably be funded from existing expenditure on public engagement, and NHS Ayrshire and Arran said that it would be a legitimate question to ask what would have to make way to fund direct elections.[131]

107. The Scottish Government has undertaken to fund pilots of health board elections from central funding.[132] The Finance Committee in its report on the Financial Memorandum noted that, whilst additional funds would be allocated for pilot elections, there is still uncertainty about funding for health board elections should they be introduced nationwide.[133]

108. This Committee understands that, unlike the pilots, it is not planned that direct elections, once rolled out nationwide, would be centrally funded.[134]

109. **The estimates of the costs of health board elections outlined in the Financial Memorandum are basic in nature and have already been subject to some change. In particular, the Committee does not believe that there is sufficient certainty about the total costs of health board elections were they to be rolled out nationwide. This is important in view of health boards' assertions that funding direct elections could impact upon other public participation programmes.**

110. **There is a separate issue of the costs incurred should personal identifiers for postal votes be implemented. The Committee requests that the Scottish Government provide details of how much extra funding, in total, would be required to implement this system in the pilot elections.**

111. **The Committee endorses the Finance Committee's recommendation that the evaluation of the pilots should include a full assessment of all the costs of the pilot exercise and a restatement of the expected roll-out costs.**

SUBORDINATE LEGISLATION

112. The Subordinate Legislation Committee undertook scrutiny of the delegated powers contained in the Bill and took oral evidence from Scottish Government officials. Its report is included at Annexe E. The Subordinate Legislation Committee drew the Committee's attention to a number of issues, which are discussed as follows.

[131] Scottish Parliament Health and Sport Committee. *Official Report, 12th November 2008,* Cols 1277-1278
[132] Scottish Parliament. *Official Report*, 30th October 2008; Col 11919; Finance Committee report, paragraph 24
[133] Finance Committee report, paragraph 38
[134] *Official Report, Finance Committee,* 4th November 2008; Col 767

Power of Scottish Ministers to remove members

113. Section 1(5) of the Bill provides that regulations may be introduced to specify circumstances in which "the Scottish Ministers may determine that an elected member is to vacate office before the end of [their term]."[135]

114. The Subordinate Legislation Committee drew these powers to the Committee's attention on the following grounds and recommended that the regulations be subject to affirmative procedure—

> "(a) the evidence from the Scottish Government officials indicated an intention to apply the same criteria in relation to elected members, as may be applied to appointed and councillor members. However, as the Bill is drafted, future Regulations could set out different criteria for different types of member;
>
> (b) the decision to allow Ministerial discretion to require early vacation from office in yet-to-be-prescribed circumstances applying to publicly elected members is a significant issue, which has the potential to be controversial,
>
> (c) the Scottish Government in its written response and evidence have indicated that a "best interests of the national health service" test will be applied for all types of members, but as drafted the Bill will allow future regulations to change that criteria. (However, initial draft Regulations have been produced (amending the Health Boards (Membership and Procedure) (Scotland) Regulations 2001, which reflect that criteria.)"[136]

115. Several organisations, chiefly local authorities, expressed concern that the power to remove elected members from office could potentially undermine the democratic process. The City of Edinburgh Council stated that—

> "Elected members should only be able to be removed from office if they are found to be in substantial breach of recognised codes of conduct, or other regulations, and on the recommendation of the Standards Commission."[137]

116. The Cabinet Secretary told the Committee that such powers had never been used in relation to appointed members and would be less likely to be used for elected members. However, she argued that the powers were necessary to ensure consistency across all health board members and reinforce boards' accountability to ministers.[138] She accepted that the use of the power to remove a directly elected member would be highly controversial—

> "It would be very controversial for any health minister, now or in future, to remove a member from a health board. It would put the minister under great

[135] Health Boards (Membership and Elections) (Scotland) Bill section 1(5)
[136] Scottish Parliament Subordinate Legislation Committee (2008) *Report to the Health and Sport Committee on the Health Boards (Membership and Elections) (Scotland) Bill*, paragraph 16
[137] The City of Edinburgh Council, written submission to the Health and Sport Committee
[138] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Cols 1367-1369

> scrutiny, requiring him or her to justify the decision. That in itself would operate as a discipline in the exercising of the power".[139]

117. **The Committee has difficulty with the power to remove elected board members from office, even in very exceptional circumstances and requires further clarification, prior to Stage 2, on what those circumstances might be and what safeguards would be in place.**

Roll-out

118. Section 7 of the Bill provides for the roll-out of health board elections nationwide by use of a "roll-out order" subject to negative procedure. Section 7(3) states that such a roll-out order may only be made once an evaluation conforming to the requirements of section 5 has been published. The roll-out order may modify the text of the legislation, or any other enactment, as ministers consider appropriate.

119. The Subordinate Legislation Committee drew this power to the Committee's attention on the grounds that—

> "(a) the Parliament is being asked through the Bill to approve a delegated power (in section 7(4)) which contains this degree of flexibility to modify enactments at the time of a "roll-out", by affirmative procedure regulations; and
>
> (b) the Scottish Government has not to date clearly addressed the question as to why this power to modify enactments could not be drafted more narrowly. For example, by permitting only such modifications necessary to deliver the objectives of the Bill (on a roll-out). As currently framed this power could be used to amend matters of principle such as the franchise or STV voting mechanism."[140]

120. In written evidence to the Subordinate Legislation Committee, the Scottish Government undertook to introduce an amendment at Stage 2 that would make the roll-out order subject to affirmative procedure if it modified the parent legislation.[141] The Cabinet Secretary reiterated this in evidence to the Health and Sport Committee and said that this power would allow the Parliament to take account of issues arising from the pilots when rolling out elections across all health boards.[142] She stressed that roll-out and amendments resulting from it could not take place without further parliamentary procedure and stated her view that the Parliament would remain "in the driving seat every step of the way".[143]

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[139] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1368
[140] Subordinate Legislation Committee report, paragraph 61
[141] Scottish Government, supplementary written submission to the Subordinate Legislation Committee
[142] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1363
[143] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1364

121. **The Committee believes that the decision to introduce health board elections to all health board areas involves a decision of principle that should be subject to rigorous parliamentary scrutiny. This view is reinforced by the fact that a roll-out order could fundamentally alter the proposals for health board elections outlined in the Bill.**

122. **The Bill as drafted ensures that roll-out cannot go ahead without parliamentary process. However, the Committee does not agree with the Cabinet Secretary that the arrangements for roll-out of health board elections specified in the Bill would put the Parliament in the "driving seat"[144] of the process, especially as current plans are to roll out under negative procedure if the subordinate legislation would not lead to any "substantive changes in the text of the Bill"[145]. In particular, whether the roll-out order is subject to affirmative or negative procedure, the Parliament would have no opportunity to propose its own amendments to the arrangements for health board elections at the time of roll-out. Furthermore, the timescales involved in the passing of subordinate legislation would be unlikely to allow the Parliament to gather its own evidence on roll-out, and rejection of a roll-out order would not constitute rejection of roll-out *per se*.**

123. **The Committee recommends that the Bill be amended to make any roll-out order subject to a form of affirmative procedure that would place additional requirements on the Scottish Government (sometimes referred to as "super-affirmative" procedure). In particular, the Committee recommends that a requirement be placed on the Scottish Government to conduct a consultation on roll-out and lay the responses before the Parliament, in addition to the evaluation report. The Committee also recommends that the procedure require the Scottish Government to publish a draft version of the roll-out order at the same time as publishing the consultation. The Committee also recommends that, if a roll-out order is rejected by the Parliament, ministers should be required to lay an order under section 6 of the Bill revoking the pilot order.**

124. **Finally, the Committee recommends that, at the time of a draft roll-out order being published in the manner described above, the appropriate committee of the Parliament conduct an inquiry into it.**

Revocation of pilots

125. Section 6 of the Bill provides that the pilot order would automatically be revoked after seven years and that ministers could revoke that order on an earlier date. If the pilot order were revoked prior to a roll-out order being made, then sections 1 to 7 of the Bill and paragraph 2 of the schedule to the Bill would be repealed.

[144] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1364
[145] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1348

126. The Subordinate Legislation Committee recommended that a revocation order prior to the expiry of seven years should be subject to affirmative procedure on the grounds that—

> "This power is considered to be novel and unusual. It enables the Scottish Government to revoke the pilot arrangements and repeal Bill provisions without further Parliamentary procedure (within 7 years after the date of the first Health Board elections.)"[146]

127. In evidence to the Committee, the Cabinet Secretary said that she was considering the case for revocation to be subject to parliamentary procedure, although she would not provide a guarantee that an amendment would be lodged.[147]

128. **The Committee welcomes the Cabinet Secretary's commitment to consider further the power to revoke pilots without parliamentary procedure. The Committee considers that ministers should not be able to abandon a policy agreed by the Parliament without its approval. The Committee agrees with the Subordinate Legislation Committee that this power should be subject to affirmative procedure.**

129. **The Committee notes that revocation of the pilots would also revoke the statutory basis for local authority members to sit on health boards. It calls on the Scottish Government to clarify its intentions in this respect, should pilots not be rolled out.**

CONCLUSION

130. **Whilst the evidence that the Committee received indicated a need to improve public accountability in health boards, the majority of the evidence received did not suggest an overwhelming case for direct elections or widespread enthusiasm for their introduction as a means of solving this problem. However, there was a broad consensus in the evidence that the proposal, if it proceeds, should be piloted. The Committee therefore believes that piloting direct elections, alongside pilots of alternative schemes, is the correct approach to take.**

131. **Given its title and drafting, the passing of this Bill by the Parliament could be interpreted as support for the principle of direct elections to health boards, rather than simply for the introduction of pilots to test that principle. The Committee believes that this is regrettable, as the purpose of pilots is to gather evidence on whether the policy will work. The Committee asks the Cabinet Secretary to consider whether changing the title of the Bill would be appropriate.**

132. **Taking into account all of the issues examined in this report, the Committee recommends to the Parliament that the general principles of the Bill be agreed to, on the understanding that such agreement relates to the**

[146] Subordinate Legislation Committee report, paragraph 52
[147] Scottish Parliament Health and Sport Committee. *Official Report, 26th November 2008,* Col 1366

introduction of a variety of pilots and should not be taken to pre-empt any decision that the Parliament may later be asked to take on the principle of rolling out direct elections to health boards nationwide.

HEALTH AND SPORT COMMITTEE

ANNEXE A: EXTRACT FROM THE MINUTES

18th Meeting, 2008 (Session 3)

Wednesday 18th June 2008

Forthcoming legislation: The Committee agreed that the clerks should issue a call for written evidence following introduction of the bill and also agreed to consider in private possible candidates for oral evidence following consideration of written evidence received; to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses in respect of consideration of this bill, and to consider in private drafts of the Committee's report to the Parliament on the bill.

22nd Meeting, 2008 (Session 3)

Wednesday, 24th September 2008

Health Boards (Membership and Elections) (Scotland) Bill (in private): The Committee agreed its approach to scrutiny of the Bill at Stage 1.

26th Meeting, 2008 (Session 3)

Wednesday, 5th November 2008

Health Boards (Membership and Elections) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

> Kenneth Hogg, Deputy Director, Health Delivery, Beth Elliot, Solicitor, and Robert Kirkwood, Policy Officer, Scottish Government.

27th Meeting, 2008 (Session 3)

Wednesday, 12th November 2008

Supplementary Health Boards (Membership and Elections) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

> Prof Bill Stevely CBE, Chairman, NHS Ayrshire and Arran;
>
> Dr Charles Winstanley, Chairman, and Prof Heather Tierney-Moore OBE, Director of Nursing, NHS Lothian;
>
> Sandy Watson OBE, Chairman, and Peter Williamson, Director of Health Strategy, NHS Tayside;
>
> John McCormick, Electoral Commissioner, and Andy O'Neill, Head of Office, Scotland, Electoral Commission;
>
> Robert Jack, Society of Local Authority Chief Executives;

William Pollock, Chair, Scotland and Northern Ireland Branch, Association of Electoral Administrators.

28th Meeting, 2008 (Session 3)

Wednesday, 19th November 2008

Health Boards (Membership and Elections) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Dr Dean Marshall, Chair of Scottish General Practitioners Committee, British Medical Association;

Rachel Cackett, Policy Advisor, Royal College of Nursing Scotland;

Dave Watson, Scottish Organiser, Policy, UNISON;

Cllr. Ronnie McColl, Spokesman for Health and Wellbeing, and Ron Culley, Policy Manager, COSLA;

Harry Stevenson, Executive Director of Social Work Resources, South Lanarkshire Council;

Graeme Struthers, Head of Support Services, West Lothian Council;

Douglas Sinclair, Chair, and Liz MacDonald, Senior Policy Advocate, Consumer Focus Scotland;

Pat McGuigan, Director, and Bill Scott, Policy Officer, Inclusion Scotland;

Phil McAndrew, Information Officer, Voluntary Health Scotland.

Health Boards (Membership and Elections) (Scotland) Bill (in private): The Committee agreed to consider issues arising from the evidence at its next meeting.

29th Meeting, 2008 (Session 3)

Wednesday, 26th November 2008

Health Boards (Membership and Elections) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Nicola Sturgeon MSP, Cabinet Secretary for Health and Wellbeing, Kenneth Hogg, Deputy Director, Health Delivery, Robert Kirkwood, Policy Officer, and Kathleen Preston, Solicitor, Scottish Government.

Health Boards (Membership and Elections) (Scotland) Bill (in private): The Committee considered options for its draft Stage 1 report.

30th Meeting, 2008 (Session 3)

Wednesday, 10th December 2008

Health Boards (Membership and Elections) (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to. The report, as amended, was agreed to.

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