



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

FINANCE COMMITTEE

Wednesday 16 September 2015

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FINANCE COMMITTEE

22nd Meeting 2015, Session 4

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)

*Richard Baker (North East Scotland) (Lab)

*Gavin Brown (Lothian) (Con)

*Mark McDonald (Aberdeen Donside) (SNP)

*Jean Urquhart (Highlands and Islands) (Ind)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Garry Coutts (University of the Highlands and Islands)

Laura Duffy (Scottish Government)

Claire McDermott (Scottish Government)

Professor Anton Muscatelli (University of Glasgow)

Alastair Sim (Universities Scotland)

Kerry Twyman (Scottish Government)

Craig White (Scottish Government)

Stephen White (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Finance Committee

Wednesday 16 September 2015

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Kenneth Gibson): Good morning and welcome to the 22nd meeting in 2015 of the Finance Committee. I remind everyone present to turn off mobile phones, tablets and other electronic devices.

I would welcome to the meeting and to the committee our new member, Jackie Baillie, but unfortunately she is not here. We will have to wait until she arrives for her to declare her interests.

In the meantime, our first item of business is to decide whether to take item 4 in private. Are members agreed?

Members indicated agreement.

Health (Tobacco, Nicotine etc and Care) (Scotland) Bill: Financial Memorandum

09:31

The Convener: Item 2 is to take evidence from the Scottish Government bill team on the financial memorandum to the Health (Tobacco, Nicotine etc and Care) (Scotland). I welcome to the meeting Claire McDermott, Craig White and Dan Curran. Members have received copies of the briefing notes and all the written evidence that has been submitted. I will start with some questions and then open it up to the rest of the committee.

In paragraph 10 of the financial memorandum, you suggest that health boards are expected to incur "modest costs", which you estimate

"could range from £10,260 to £41,064".

What assumptions are those figures based on?

Claire McDermott (Scottish Government): The figures were provided by NHS Greater Glasgow and Clyde based on the provision that it had put in place at one of its hospital sites to promote compliance with its smoke-free grounds policy, which is an entire grounds policy.

The Convener: Those are the figures for each site. Obviously, there are quite a number of sites across Scotland. How many sites are there?

Claire McDermott: We estimate that there are about 149 sites, which excludes mental health and specialist hospitals.

The Convener: So the range for the total cost would be between about £1.5 million and £6 million.

Claire McDermott: Yes.

The Convener: I do not really see that upper figure in the financial memorandum.

Claire McDermott: Forty thousand pounds would be on the more expensive side. The estimate for that was based on a large site at NHS Greater Glasgow and Clyde.

The Scottish Government provides £10.5 million a year for NHS boards to deliver the tobacco control strategy. That includes providing cessation support. However, it is difficult to disaggregate the figures for the additional cost to NHS boards as they all operate entire grounds policies at the moment and have different levels of provision in place for promoting compliance with those policies.

The Convener: The Government is expected to incur costs

"in the region of £300,000"

in relation to raising awareness about smoke free areas in hospital grounds. The financial memorandum states that

"this is subject to a fairly high degree of certainty, as it is based on recent ... campaigns".

However, my local health board, NHS Ayrshire and Arran, has expressed doubts about whether the sum is sufficient given the large sums spent on previous high-profile media campaigns. How does it compare?

Claire McDermott: I am not sure where that confusion has come from. We contacted NHS Health Scotland, which was involved in preparing the green curtain campaign for NHS smoke-free policies. The £300,000 in the financial memorandum is based on the figure for that campaign.

The Convener: The submission from NHS Ayrshire and Arran has expressed concerns that it has bespoke signage already and that, because you intend to do something nationally, that will impact on its existing ability to deliver smoking cessation services. If the health board already has bespoke signage, is there an intention to replace that, or would you be happy to allow the board to retain it? If the health board has to replace it, there will be a financial impact on it. If that is the case, will the Scottish Government pay for the new signage?

Claire McDermott: We have said that we would meet the costs for the statutory signage. NHS boards have an entire grounds policy. We are proposing a perimeter around hospital buildings. There would need to be statutory signage to make people aware that smoking was an offence in that area rather than a policy. However, we would see that as complementing the signage that health boards already had in place. The wording for the signage would be a matter for regulation. I think that it would be possible to work with health boards to ensure that the signage aligned. For example, the statutory signage might say that the grounds are smoke free but it is an offence to smoke within a certain perimeter. That would allow the two sets of signage to work together.

The Convener: Part 2 of the bill relates to a duty of candour. The bill will introduce a duty on organisations providing health and social care to ensure that, where death or harm has resulted from an unintended or unexpected event, people are notified, an apology is made and actions are taken to keep people informed of a review of the events and of further steps taken. What sort of events are we talking about here?

Craig White (Scottish Government): The sorts of events that are likely to come within the scope of the duty of candour are unintended or

unexpected incidents that result in death or significant harm. The bill which, as you know, is currently being scrutinised by the Health and Sport Committee, includes definitions of significant harm such as permanent lessening of bodily functions or

"changes to the structure of the person's body".

It would be very significant and serious levels of harm resulting from systems and process failures in the health and social care system.

The Convener: Negligence, in effect.

Craig White: Negligence would be determined by a legal process. The duty of candour procedure, as proposed, would be applied on the basis of the incident having occurred. In some cases, it may be an incident that is subject to future legal scrutiny and to a claim being made for negligence, but the duty of candour procedure itself is silent in relation to determining the negligence.

Mark McDonald (Aberdeen Donside) (SNP): My question is about the regulations on nicotine vapour products. I note that the financial memorandum estimates that the regulatory costs will be £1 million to £1.5 million. However, the estimate from the Convention of Scottish Local Authorities is £2 million. Will you comment on whether the £1 million to £1.5 million is proportionate? If you consider that COSLA is overestimating, will you say why?

Claire McDermott: We have not yet had a breakdown of the £2 million from COSLA. We continue to work with COSLA. The financial memorandum highlights that the fact that the market for NVPs is evolving quite quickly makes it difficult to estimate the cost. COSLA is working to break down the figures and say how the £2 million is made up. We remain open. Our figure—£1 million to £1.5 million—is based on the best data that we have available to us about the number of additional retailers that COSLA would be expected to manage for enforcement purposes. However, we continue to work with COSLA to assess its figures.

Mark McDonald: So it is possible that, because there might be overlap in the case of existing tobacco retailers who begin to stock NVPs, there might be a double-counting exercise rather than new money being required, because those premises would already be subject to regulation.

Claire McDermott: Yes.

Mark McDonald: Glasgow has requested in its submission that, when the funding is allocated, rather than it being subject to the traditional funding formula, it is based more specifically on the number of premises that each local authority would be expected to cover. Is the Scottish

Government open to that, or would it need to be determined with COSLA?

Claire McDermott: That is something that we could consider. We have not set exactly what the enforcement requirements will be because there might be a lower level of enforcement than is currently expected for tobacco. That would be commensurate with the lower level of harm that NVPs present. Perhaps it would be a matter for the local authority funding distribution group to decide how that money is distributed to local authorities. However, there are certainly two approaches that we could put forward for consideration.

John Mason (Glasgow Shettleston) (SNP): I have a couple of points. I want to follow up what the convener said about hospital grounds in effect being split between a bit that has statutory regulation and another part that has just the local regulation. I think that it has been suggested that having that split in itself costs extra money, and one suggestion is that it would be simpler to have a ban in the whole area. Will you explain why that is not the case?

Claire McDermott: Yes. We considered that. When we consulted, we considered a number of approaches, including non-legislative measures to support NHS boards to enforce their smoke-free grounds policies. However, in considering what legislation would be appropriate, we had to take into account the different sizes of hospital grounds. For some people, there might be a very short distance to walk to get outside the grounds, but for others the distance could be a matter of miles.

We wanted to provide a proportionate and consistent approach across NHS boards, and we think that a perimeter approach captures the highest volume of traffic of people. The ultimate aim is that people do not have to walk through clouds of smoke to get into hospital. That approach captures where the main traffic of people is around hospitals.

John Mason: The hospitals that I know are quite varied. Glasgow royal infirmary is almost all in one building, whereas Stobhill hospital is spread out over umpteen buildings. Are you happy that the costs will cover both situations?

Claire McDermott: Yes.

John Mason: On the duty of candour, I am struggling to see what is new that should not be happening already and therefore why there are any extra costs. The bill talks about “unintended or unexpected” events, but does the NHS not deal with those all the time?

Craig White: You are right to highlight that. Some elements of the duty of candour procedure

are already part of good practice, particularly in the NHS, although we know from work that has been undertaken that there is still variation, particularly in relation to staff support, support for people who are affected by unintended events that result in death or harm, and training for staff. The resources that are outlined in the financial memorandum as they relate to the NHS therefore focus mostly on the training and support elements of the duty of candour procedure.

Some other health and social care providers, which are perhaps smaller organisations, that will come within the scope of the duty may not, because of the rarity of such events, have developed procedures and approaches that encapsulate all the elements that the bill outlines—disclosure, review and apology, and training and support.

John Mason: I can understand that. If a nurse works in an accident and emergency department, I presume that he or she will deal with such things all the time because of his or her training or experience.

Craig White: Even for front-line nurses and medical and care staff who deal with difficult and traumatic events, having to deal with an episode of unintended or unexpected death or significant permanent physical injury is not that common. We know that some of the challenges that that presents to individual staff require specific training and support. Staff deal with such things day to day, but we are talking about the sorts of harm that result from systems and process failures, which staff do not always feel confident to deal with.

John Mason: Thank you.

The Convener: I welcome Jackie Baillie to the committee and to the meeting. This is her first meeting as a full member of the committee. She has replaced Malcolm Chisholm, who was a very diligent member of the committee. I invite Ms Baillie to declare any interests that are relevant to the committee’s remit.

Jackie Baillie (Dumbarton) (Lab): I have nothing relevant to declare, but I hope to be just as diligent as Malcolm Chisholm.

The Convener: Thank you. Coming here on time would be a good start. [*Laughter.*]

Jackie Baillie: Come on. Allowing for traffic from the west coast of Scotland to here is sometimes a challenge.

The Convener: The convener is not interested in excuses.

Jackie Baillie: I look forward to the Government improving the road network.

John Mason: There are trains.

09:45

The Convener: Trains, indeed.

Okay, Jackie—your questions.

Jackie Baillie: Thank you very much, convener. I am really looking forward to being on the committee.

I want to concentrate on the duty of candour. The Scottish Public Services Ombudsman thought that there would be a rise in the number of complaints. Does it not follow that there is likely to be a rise in the number of negligence claims—something that the convener also raised? Has there been any assessment of what the value of those could be?

Craig White: I will start with the ombudsman's suggestion that there might be a rise in the number of complaints. To take the NHS as an example, the feedback is that when there have been such events and there is early disclosure, support, engagement and involvement of the people affected, and there is a commitment by the organisation to review and learn from what has happened in a way that actively involves the people affected, the result is often that a complaint is not made. People are satisfied that the organisation is taking things seriously, keeping them involved and letting them know the outcome of a review. That is reflected consistently in feedback that we receive about the handling of adverse events.

That is also something that we have had feedback on in relation to negligence claims. Many people embark on a legal process because there is no dialogue with the organisation and they are not getting answers to the questions that are keeping them awake at night. When those people are spoken to, they will say that they do not want a similar thing to happen to someone else and that that is their primary motivating factor for engaging with the organisation.

There is some international evidence that, when healthcare systems implement new policies and procedures that support disclosure and apology, the number of claims can reduce. Therefore, those are elements where we would expect there to be a positive impact as a result of the duty of candour procedure, although the number of claims and complaints will be monitored closely in the initial months and years of implementation.

Jackie Baillie: On the basis of that monitoring, will there be flexibility to respond should the number of claims increase?

Craig White: In the NHS, the central legal office will have factored that into its on-going planning in relation to claims. That office has discussed with the policy team the possible impact of the implementation of the duty of candour; it is part of

its planning assumptions. There will be regular engagement and feedback around the early observations, if and when the procedure is implemented.

Other organisations will need to be considered. I am thinking of smaller organisations that are not likely to have claims very often, given the extreme nature of the events that come within the scope of the procedure. Some of the training and support resources that have been identified will be focused on helping those organisations to plan and think about the impact of the two issues that have been raised.

Gavin Brown (Lothian) (Con): I want to ask about the enforcement of smoke-free areas in NHS grounds. Does the Government acknowledge that there is likely to be a short-term increase in the demand for enforcement?

Claire McDermott: The Scottish Government currently provides £2.5 million a year to local authorities to enforce smoke-free legislation that has been in place since 2006. It is estimated that 149 hospitals will be involved, extending the smoke-free legislation modestly, I think. We have not had any breakdown of costs from COSLA; that is part of our discussions with COSLA. We will probably consider that alongside the funding that local authorities already receive to implement smoke-free legislation.

Gavin Brown: You are saying that the Government view is that there might be a short-term increase. Does the Government have a view on the likely size of that short-term increase, or do you just acknowledge that there is likely to be an increase?

Claire McDermott: We remain open minded at the moment. We have not yet had any breakdown of the figures from COSLA on a national basis, albeit that COSLA does not cover all local authority areas. We will be open minded when considering what COSLA puts forward.

Gavin Brown: You are saying that, if evidence is provided by COSLA or others, the Government is open minded about funding this, at least in the short term.

Claire McDermott: Yes.

The Convener: There are no further questions from the committee, and no further points from witnesses, so I will wind up the session. Thank you very much for answering our questions this morning.

I am now going to call a recess until 11 o'clock—

Mark McDonald: That is very generous.

The Convener: Sorry. I call a recess until 10 o'clock to enable our other witnesses to be seated.

09:50

Meeting suspended.

10:00

On resuming—

Higher Education Governance (Scotland) Bill: Financial Memorandum

The Convener: Our next item of business is evidence taking from Universities Scotland on the financial memorandum to the Higher Education Governance (Scotland) Bill. This session will be followed by a session with the Scottish Government's bill team.

I welcome to the meeting Alastair Sim, Professor Anton Muscatelli and Garry Coutts. Members have received copies of all the written evidence that has been submitted, along with a briefing note from the clerks, but before we move to questions, I ask Mr Sim to make a brief opening statement.

Alastair Sim (Universities Scotland): Thank you very much, convener.

We have substantive and evidenced reasons for being concerned about the prospect of Office for National Statistics reclassification of universities as a result of the bill. Our concerns arise from our consideration of the relevant ONS guidance on reclassification, and consideration of the bill alongside the cumulation of other controls on universities. We have reflected on the European system of accounts 2010 and ONS and Treasury guidance on its application.

In brief summary, our reasons for concern are as follows. Government powers over an institution's constitution are an indicator of control that the European system of accounts regards as defining whether an institution should be classified as being in the public sector. The bill expressly gives ministers the power to amend universities' constitutions by altering the composition of their governing bodies. It changes universities' constitutions by giving ministers the power to determine the selection method and term of office of the chair of the governing body. It also expressly gives ministers the power to change universities' constitutions by changing the membership of their internal academic regulatory body, the academic board or senate. Treasury guidance on sector classification makes it clear that that is a risk, even if ministers do not themselves appoint the members of a governing body.

The very wide powers that section 20 of the bill gives ministers to amend primary legislation affecting universities' governance, and therefore their constitutions, are also a risk factor. Treasury guidance says explicitly that, even if powers to control an institution's strategy or constitution are

not exercised, the fact of the existence of the controls is what will be taken into account in a reclassification decision.

Governmental control of pay rates is regarded as an indicator of public sector status. The bill expressly provides for that in relation to the chairs of universities' governing bodies.

In applying the European standards, the ONS will take a view on the overall level of control that is exerted by Government on universities. As well as applying the European system of accounts test of whether Government is able to determine the general policy of institutions, it will look at the specific indicators of control. The new powers that are proposed in the bill would have to be looked at alongside significant existing Government controls and influence on universities' strategy and operations. Cumulatively, those factors create a very significant risk of ONS reclassification.

Controls other than those in the bill that would be taken into account include the detailed ministerial guidance on the priorities for use of public funding by the university sector; the detailed outcome agreements between the Scottish Further and Higher Education Funding Council and individual institutions to give effect to that, which effectively determine institutions' strategy in relation to recruitment and teaching of publicly funded students, publicly funded engagement with industry and public funding of research; and adherence to the higher education governance code as a condition of public funding. In addition, there are financial controls that are exercised through the Scottish funding council, which include influence on pay through requiring institutions to have regard to public sector pay policy; the requirement for institutions to seek permission to borrow money above thresholds established by the funding council; and the requirement for institutions to receive permission from the funding council before they can grant security over land or property, or offer guarantees or indemnities above certain thresholds.

Professor Muscatelli and Mr Coutts can set out the impact that ONS reclassification would have on their institutions. All universities are concerned about the issue and its impact on entrepreneurial activities, business relationships, capacity to invest and capacity to attract philanthropic support.

We have had some discussion with the Scottish Government but, given the uncertainties, we have not been put in a position that gives us confidence that the issue has been properly investigated. Given the risks to the sector, we feel that university leaders need to have absolute certainty that the bill will not lead to universities being reclassified by ONS.

The Convener: Thank you very much for that opening statement. Our evidence session with the bill team will follow this one, so a lot of the concerns that you have expressed will be put directly to the bill team. I hope that, by the end of this morning, we will have some answers one way or the other.

Obviously, we want to put some questions to you. It seems that your overwhelming concern is about the issues that you have just raised with regard to the potential for reclassification. What legal advice have you received on that? Have you been in direct contact with the Office for National Statistics?

Alastair Sim: We have sought our own legal advice on that. Our legal advisers have also worked with colleges on ONS reclassification issues, so they are really closed engaged with the issues. The advice that we have had from our legal advisers is that the bill, when looked at cumulatively along with the existing indicators of Government control, creates a significantly increased risk of ONS reclassification.

The Convener: Okay. The second part of my question was whether you have been in touch with the ONS directly to speak to it.

Alastair Sim: We have not been in touch with the ONS directly, not least because we are trying to manage a risk here. If we were in touch with the ONS directly, I have some concern that we would catalyse the risk that we are trying to avoid.

The Convener: The very fact that we are discussing the matter in the public domain means that it will not be a secret to the ONS that it is a concern. The concerns that you have raised have been raised with us by a number of education institutions, as you would imagine. I find it a little bit odd that you have not contacted the ONS, because I do not think that it would come as a bolt out of the blue—it is not as if it would say, "We weren't actually thinking of reclassifying them, but now that the universities have contacted us directly maybe we will just do that." To me, your response seems rather weak.

Alastair Sim: I can see your point. I have to say that I think that the responsibility lies with the Government to give us a really firm assurance that the issue has been dealt with through proper due diligence. At the moment, we simply do not have that assurance. I really feel strongly that that is where the responsibility lies.

The Convener: I can categorically assure you that these questions will be put directly to the Scottish Government bill team and we will not demit our responsibilities in that regard.

Garry Coutts (University of the Highlands and Islands): In practice, the Office for National

Statistics has made it clear over a wide range of issues that it makes a determination once it has seen what has happened on the ground. Getting advice from it in advance is not something that has happened before. I think that that was the case with the Aberdeen relief road and other proposals that have come about. It has proved very difficult to get definitive advice from the ONS and, because it is completely independent, its analysis can change. The advice that might be available today might not be the advice that is given in the future. It is not an organisation from which people have had much success in getting clarity of advice on the approach that it will take until the decision has been made.

The Convener: If that is the case, what categorical assurances could the Scottish Government give you that its proposals would not impact on reclassification, given that you are saying that you cannot find out whether an organisation will be reclassified until after legislation has been passed?

Garry Coutts: That is exactly the risk that I am highlighting. I am not sure that we would be able to get that sort of guarantee, so the question that remains is whether what the bill is trying to achieve is worth creating that risk.

The Convener: Okay. Our job is obviously to look at the financial aspects, not necessarily the policy objectives.

Professor Muscatelli, did you want to add something?

Professor Anton Muscatelli (University of Glasgow): Yes. I just wanted to follow up on that point, which I think is very important.

As Mr Sim highlighted, the sections that perhaps bring the greatest risks, which are sections 8, 20 and 13, are not central to the review of higher education, which was seen as being implemented as part of Government policy, so to my mind it is a question of minimising the risk and seeing whether we can improve the bill through this dialogue. Mr Coutts is absolutely right that there are no guarantees here, but the issue is whether we can ensure that we do not crystallise that risk.

The Convener: You talk about improving the bill. Do you want it to be improved or would you prefer it not to proceed full stop?

Professor Muscatelli: Are you asking me, convener?

The Convener: Yes, I am asking you as a witness.

Professor Muscatelli: My view is that there is a clear mandate for the bill, because not only the Government but other stakeholders in Parliament have said that there are issues that the bill should

confront. There are different views among my stakeholders in the university. We have to recognise that. There are things that can be improved. That is my personal position.

The Convener: Okay. Let us move on a wee bit. You say:

“The Government has provided no explanation of why it considers that additional Ministerial powers are desirable.”

You go on to say:

“The detailed assumptions contained in the financial memorandum were not the subject of consultation.”

What kind of discussions did you have with the Scottish Government specifically on the financial memorandum?

Alastair Sim: On the financial memorandum, we had none whatsoever. The consultation on the legislative proposals asked in very general terms what costs and savings there might be, but the specific figures that were presented in the financial memorandum were not subject to consultation. We could have helped to refine those, so I regret that.

If I may pick up on Anton Muscatelli's point about ways forward, the ministerial powers in the bill that are causing us concern were not the subject of consultation, either; they were not included in the consultation. The discussions that we have had with Scottish Government officials lead us to think that they were trying to solve the technical problem of how to enable continual evolution of the membership of governing bodies in ways that do not require constant primary legislation, but I think that what has happened is that they have, to some extent inadvertently, come into territory where a risk has been created of ONS reclassification. We are very anxious to find a way forward that takes the ministerial powers out and reframes the way in which those issues can be dealt with. We do not think that due diligence has been done on managing that risk.

The Convener: Since the financial memorandum was published, have you had any discussions with the Scottish Government or its bill team?

Alastair Sim: Yes, we have. In particular, we have raised our concerns—both orally and in writing—about the ONS reclassification issue. At the moment, we are waiting for a substantive response.

The Convener: Right—that is fine. I will not press that further. I was going to but, if you have not yet had a substantive response, I will not.

Committee members might want to ask questions that arise from other submissions, because you are the umbrella organisation. An issue that has been raised by a number of

organisations, including Universities Scotland, is the possible loss of charitable status, but you did not mention that in your submission. Is that because you now accept that there would not be a loss of charitable status? In its evidence to the lead committee, the Office of the Scottish Charity Regulator seems to have made it clear that, in its view, that would not be an issue.

Alastair Sim: We have reflected on OSCR's advice. A brief summary of OSCR's position would be that although the bill in itself probably does not lead to a risk of reclassification for charitable purposes, if ministers used their powers to amend the membership of governing bodies, to amend the membership of academic boards or to make the very general changes to legislation that section 20 allows them to make, that could lead to a situation in which OSCR had to re-examine whether universities were meeting the charity test in relation to ministerial directions. I am taking that at face value.

One thing that OSCR recognises—this is pertinent to the ONS reclassification point—is that the bill gives ministers power to alter the constitution of universities, and that is one of the risk factors in relation to ONS reclassification.

The Convener: That is an important point, but OSCR said:

“we do not see anything to prevent any conflicts of interest arising for charity trustees nominated under the provisions in the Bill being dealt with in a way that enables the trustees to meet their duties.”

It also said:

“we do not see that the provision for charity trustees to be nominated in terms of the Bill will be incompatible with good practice”.

Alastair Sim: In a sense, I am taking that at face value. That is OSCR's view.

There are issues that will arise for people who have been nominated by interest groups to serve on governing bodies about how to reconcile their mandate from the interest group with their overall duty in relation to the good governance of the institution. There might be situations in which they will have to absent themselves from the business, because the mandate from the interest group might be different from the duty to the overall institution. I am not saying that that is unmanageable, but it will create difficulties for individuals in certain situations.

The Convener: I do not want to delve much deeper into that, as several colleagues want to ask questions. I will just touch on one further point. You said:

“as every member of this committee can confirm, university chairs have much more demanding portfolios than can be addressed in 6 days per annum. The time commitment is at least one day per week, and in recent

years has been greater than this ... Regrettably, it appears from the Financial Memorandum that the Scottish Government does not understand the significance of this role and the time required to fulfil it.”

You obviously have significant concerns about the financial memorandum, leaving the ONS issue to one side. What kind of financial impact do you think that that underestimation, as you put it, will have on the universities?

10:15

Alastair Sim: The Scottish Government's modelling figure for remuneration for chairs is a rate of £512 per day, I think. If you apply that to a kind of median number of days for which a chair would typically be working on university business, which is about 40 days, you end up with a figure of about £368,000 of expenditure on remunerating chairs across the sector.

Our concern, first and foremost, is not necessarily with that amount of expenditure across the sector; it is really about due diligence. If the developers of the bill conceive the chair's role as simply being to chair a meeting six times a year, they have failed to understand what the role of a chair of a governing body is. Mr Coutts makes a significantly greater contribution than that through his role.

The Convener: It raises concerns about other aspects of the bill if that point is not understood, as you suggest.

Garry Coutts: There is also an issue around the roles that other people on courts would be playing, too. People who chair finance and general purposes or audit committees also have a significant responsibility. As soon as we start paying or remunerating certain members at a daily rate for the work that they do, that brings into question why other people who also contribute a lot of their skill and time for what are very important functions of the institutions are not also being remunerated. It looks very much like the non-departmental public body model of remuneration, which would be a big change for the sector. Of course, that would also increase costs.

The Convener: Leaving aside the ONS issue for the moment, do you feel that the financial memorandum in any way effectively represents the financial impact of the proposed legislation? Are you happy with some but not all of it, or are you not happy with any of it?

Professor Muscatelli: Without a doubt, the biggest risk financially is the ONS issue. The rest is of an order of magnitude that is more to do with how the proposed measures are designed to ensure that the governing body is effective, as has been pointed out, and—this relates to Mr Coutts's point—the costs of membership are more in line

with what we would find on a health board or an NDPB. That would probably give us a closer estimate of what the amount would be. Financially, the biggest risk comes from the ONS reclassification issue, without a doubt. As I am happy to outline, that is how universities operate: they do so substantially by using their operating surpluses to make substantial capital commitments. That is the key area of concern.

Alastair Sim: My real concern with the financial memorandum is about the quality of thinking that has gone into this work. For instance, a cost of £1,000 is being projected for the electoral process for a chair of court. I have looked at the evidence that has been submitted by universities—and I have run electoral processes for alumni members of governing bodies—and the universities are saying that, to run a proper electoral process costs £21,000 to £30,000.

As Anton Muscatelli says, it is not the big money that is the concern, in a sense. If the assumptions in the financial memorandum are so at variance with what institutions are saying the actual costs would be, that gives me concern about the quality of thinking that has gone into the issues behind the bill, including the ONS reclassification issue.

Garry Coutts: There would also be a requirement for us to change our articles of association to meet the new terms. The last time we did that, we had to consult about 17 different organisations, all of which had a view on our articles. There are also the legal fees. That is a huge complication. It is the opportunity cost, rather than the real cost, that is significant.

The Convener: That has been suggested in a number of pieces of evidence, but I have not asked you a question about that, as I am trying to leave some questions for colleagues, who may wish to explore some of these areas.

The first member to ask questions will be Gavin Brown.

Gavin Brown: Good morning. Mr Sim, you said that Universities Scotland has taken legal advice. I presume that the lawyers have examined Treasury guidance, ONS publications and so on. If I heard you right, the legal view is that the bill would significantly increase the risk of reclassification by the ONS.

Alastair Sim: That is correct.

Gavin Brown: Obviously, we can put questions to the Scottish Government, but you said that you have had no substantive response from it. When, to your knowledge, was the ONS issue first formally raised with the Scottish Government either in a meeting or in correspondence?

Alastair Sim: I raised the matter very shortly after the bill was published. I think that it was in

email correspondence with officials on 17 June that I said that it was a significant issue and that we needed to be assured that the Government had bottomed it out. Having not had such assurances, I wrote to officials on 13 August setting out a series of questions about the bill generally and the advice that we had taken on the bill, and asking for a range of assurances. I know that they are working on it, but we have still to see a written response to that.

Gavin Brown: So, when I put questions to the officials, I can say without doubt that you raised the matter with them in late June at a meeting—

Alastair Sim: I wrote about it in correspondence in late June. I also discussed it with officials at a meeting in late June.

Gavin Brown: You then wrote formally to officials on 13 August and that letter has not had a formal reply.

Alastair Sim: Not yet.

Gavin Brown: I have not been able to find anything in writing about the Scottish Government's official view. I will ask the Government, of course, but is the official line on the issue clear to you? Is the Government saying that there is something to review, or nothing to review? Is there any indication of what the broad line might be?

Alastair Sim: In the conversations that we have had with Scottish Government officials, their initial line has been that they do not think that there is a problem because there is no plan for direct ministerial control over appointments to governing body membership or for new controls over borrowing. The latter was one of the factors that the ONS considered in deciding on the classification of further education colleges.

As I tried to set out at the beginning of the session, the guidance and the practice of the ONS show that it looks much more widely at indicators of Government control over strategy and the constitution of organisations. My view is that the due diligence has not been fully carried out. The Government has looked very narrowly at the issue, but if it was to step back and consider the guidance and the practice of the ONS, it would realise that it needed to take a wider view of managing the risk.

Gavin Brown: For the sake of argument, let us assume that the legal advice that you have been given turns out to be correct, the bill passes with no amendments and the reclassification by the ONS occurs. What are the main consequences for the sector and for the individual universities that are represented here today? I am interested in the views of all panel witnesses.

Alastair Sim: In aggregate, we are concerned that institutions would not be able to borrow money to invest or to hold over reserves from one year to another so that they could invest in teaching and research. We are also concerned that we would lose philanthropic support, because people do not want to give their charitable donations to central Government bodies. Professor Muscatelli and Mr Coutts have probably been considering the impact for their individual institutions and can exemplify that in concrete detail.

Professor Muscatelli: I am happy to say that my university is about to embark on a major capital programme, partly because we have recently acquired land, as some of you will know, and we have grown by about 20 per cent in the past couple of years.

Our governing body has approved a plan that will involve an investment of about £775 million over the next 10 years. It is a significant capital programme in terms of its positive economic impact on Glasgow and, indeed, Scotland. The programme has to be financed from our operating surpluses. This year, we will run a surplus of the order of £20 million. We have built up cash reserves that will be of the order of £145 million by the end of this financial year. All those reserves could not be used if reclassification occurred; they could not be carried over, as Mr Sim has pointed out.

The other important area is philanthropic income, because we will need to fundraise. We have plans to raise about £110 million over a period of time to help to fund the capital programme. Again, it is difficult to do that without being able to carry over money.

Those are the financial dimensions of the impact of the proposals on an institution such as the University of Glasgow, but you can multiply it many times if you look at other similarly sized institutions.

Garry Coutts: We already have some practical experience of the impact. Our academic partners that deliver HE for us are further education colleges, which experienced reclassification more than a year ago. That has already had a significant impact on them. They cannot retain reserves from one year to the next, and any reserve that is created has to go into an arm's-length foundation, which is beyond their control. Although there is as yet no direct experience of those arm's-length foundations doing other than returning resources when required—for building projects or whatever else—to the institutions that generated them, there is no guarantee at all that they will do that.

We are in the middle of looking at procurement process for student residences, and the finance

companies that are looking into it are wanting to see the strength of our covenant. If our reserves are put into arm's-length covenants that are off our balance sheet, the cost of our borrowing will be significantly higher, if we can borrow at all.

If we want to develop new courses and partnerships with our communities and with industry to develop what is required for the area that we serve, we need to be able to take risks. If we do not have some reserves, our ability to take risks when working on annualised funding is much reduced.

There would be very significant issues if we were not able to operate in the way in which universities have traditionally operated. We have not had the same luxury of several hundred years' worth of history as Anton Muscatelli's organisation, but we want to be able to develop a relationship with our alumni and with businesses in the Highlands and Islands, and to develop the sorts of reserves that will allow us to become a powerhouse that will develop and support change in our region. We are very concerned that, if we are classified as a public body, we will lose the opportunity to do that.

Gavin Brown: Mr Sim, is that something that Universities Scotland could do? I would be very interested to see the potential aggregate impact. We have heard about the University of Glasgow, and we have heard from Mr Coutts, too, but it would be quite interesting to know what the likely cumulative impact would be across the board if this were to happen—obviously, there are two issues there. Is that something that Universities Scotland could provide?

Alastair Sim: Yes. I can give you a sense of that at the headline level. At the moment, from the latest available figures, universities' overall level of borrowing is about £530 million. The consequences of taking that on to the public balance sheet are quite concerning.

I will not go into tax relief, as that is more linked to the charities issue, but the overall level of capital investment by universities each year is about £377 million. If that is put at serious risk by our inability to borrow or because of borrowing coming within tight Government public spending controls, our capacity to make that investment so as to provide the best possible facilities for students and research will be severely hampered.

Gavin Brown: I will move on to the subject of charitable status. The convener has asked a number of questions on this subject, and this question is sparked by his questions—I am grateful to him for that. If I have read the OSCR advice correctly, it did not refer at all to the ONS issue; it was considering charitable status entirely

in its own right. That is just my reading of it—obviously, OSCR could respond to that.

You may not know the answer, but my question is this. OSCR considered charitable status in its own right but, for the sake of argument, let us assume that the ONS reclassification does occur. Presumably, charitable status falls overnight, as a central Government organisation could not have charitable status. I have not considered the matter legally, but I am wondering whether you have looked into that question.

Alastair Sim: I think that separate legislation would be required. Essentially, the colleges became classified as central Government bodies, with the impacts that Mr Coutts has described. However, the Government legislated to create a specific legislative exception for the colleges, so that they can retain charitable status, even though they do not meet the normal charities test because they are under substantial ministerial direction. In my view, if ONS reclassified universities—with the grave impacts that we have described—the Government would need to legislate for us to retain charitable status.

Gavin Brown: Again, this question was raised slightly earlier. One witness wrote to us and basically said, “Kill the bill.” Assuming that that does not happen—there are negotiations and discussions to happen, and so on—are there obvious things that could immediately be removed from the bill that would, if not eliminate the risk, turn it into a minor risk instead of a significantly increased risk? Are there specific sections that could come out quite easily?

10:30

Alastair Sim: Yes. Section 8 gives ministers the power to change who is on the governing body of an institution. Section 13 gives ministers the power to change the internal structure of universities, by changing who is on the academic board or senate. Section 20 gives ministers an extraordinarily wide power to amend primary legislation. Those are the provisions that raise the critical risk factors. There are also new ones, which were not in the consultation on the legislative proposals. There is creative scope for a rethink about how to do things in those sections in order to take ministers out of the equation.

Gavin Brown: I am grateful.

Jackie Baillie: I think that you are right to be cautious about the application of ESA 2010, given that the Government's infrastructure projects have also been caught up in these issues.

I wish to tease out some of the financial aspects. Mr Sim has spoken in general terms about universities borrowing £530 million a year.

What kind of projects is that for, typically? What would a delay in that money being available do to those projects?

Alastair Sim: I will let my colleagues talk about the impact on specific institutions, which will illustrate that in a more concrete way. What is typically being done with that borrowing by universities? We have a great deal of estate that is not fit for purpose. Just under half our estate is in what is called conditions C and D and either is in need of immediate replacement or is falling apart at the seams and will need replacement very soon. Often, that applies to 1960s and 1970s estate, which is also hideously carbon inefficient. A lot of work is going on to renew the estate and make it fit for purpose for students and fit for purpose in carbon reduction terms.

On the research side, as innovation progresses, we endlessly need to ensure that we have the facilities and equipment to keep Scotland right at the cutting edge of research. When we start falling back on the competition, it is hard work to make up lost ground.

Looking more widely at our economic impact, if we are going to be competitive and ensure that Scotland is a place that attracts international talent at both student and academic levels, we need to be able to say that we have facilities that can compete with those of countries that have much higher levels of investment. That is hard work.

Professor Muscatelli: One of the important things is the economic leverage effect. Ten or 15 years ago, many more capital grants were being given through the funding council and other agencies. Because of spending cuts, those grants have had to be reduced. In many respects, we have been able to do things that have helped to offset that. As has been pointed out, universities are major economic engines in the economy. We are able to invest for the long term in a way that is very difficult to do with public money, because of the constraints on public budgets. The impact is huge.

I will give an example of the sort of project to which Alastair Sim alluded. In preparation for our major infrastructure development, we are installing a combined heat and power system across our campus in Glasgow. That is a £14 million to £16 million project. It will probably reduce our energy running costs by about £2 million to £3 million per year, and it will reduce our carbon footprint by 20 per cent. That has had a huge positive impact, and it has been well received.

Those are the sorts of things that are important, apart from the cutting-edge research, which is of course hugely important. We have a major quantum technology hub, at £29 million, which has required several million pounds of investment to

set up. It is one of the four quantum tech hubs in the UK. Such projects can be done only over the long term; they cannot be done on a short-term basis year by year.

Garry Coutts: We are a very different sort of institution, and the vast majority of our estate is owned by our academic partners rather than by us directly. We are in a very different position from other institutions. The issue is about being able to make investment. We want to provide state-of-the-art research facilities, as we need to increase the amount of research that takes place in the Highlands and Islands. We are in the process of developing a lot of those facilities but we are reliant on people at Highlands and Islands Enterprise and direct grants to be able to do that.

In the future, when the public settlement will be tight and we want to be more self-sustaining, we want to develop such partnerships, develop capital reserves and be able to make such investments ourselves. We want to have exactly the same sorts of opportunities as the University of Glasgow and the University of Edinburgh have had because of their history. If we do not have the opportunity to maintain reserves, that will be gone from us.

Jackie Baillie: I am picking up from you a direct impact on capital and an indirect impact on revenue, which is equally concerning.

In an earlier answer, Mr Coutts said that the ONS does not give advice in advance, but I understand that the Scottish Government is currently in dialogue with it about new models for infrastructure projects. Therefore, perhaps we should seek assurances that the Scottish Government is in dialogue about the implications of the bill for ESA 2010.

In seeking legal opinion, are you aware of any other European universities or colleges that have similar governance arrangements with their countries that might point a way through the difficulties of ESA 2010?

Alastair Sim: Not in detail. To answer that question at an aggregate level, one of the reasons why universities throughout Europe tend not to do as well as UK universities in international league tables, for instance, is that they are often subject to a narrow range of controls by their national or regional Governments. Often, those include controls over whether they can acquire and dispose of property and controls over senior appointments.

Anton Muscatelli might know more about this than I do, but it is not untypical for delegations to come to Universities Scotland to learn about how we manage a system that is respectful of universities' contribution to the public good while also creating the space of autonomy in which we can act entrepreneurially in the public interest. We

are in a happier space than many European partners and competitors. They have certainly looked to the UK as an example of how we carve out a space of responsible autonomy in which universities have the entrepreneurial capacity to act in the public good.

Professor Muscatelli: I certainly know that from Europe. In some European countries, universities are firmly in the public sector and capital investments have to be carved out from public spending. In a country such as Italy, if a campus has to be renovated, central Government has to budget for that in its public spend.

I will answer a different aspect of the question. When colleges were reclassified, it happened not only in Scotland but in England and Wales. I gather that the Welsh legislation is interesting, because it introduced elements that allowed greater student and staff representation on the governing bodies while allowing the colleges to be reclassified as non-profit independent organisations. There are models that could be considered to avoid the level of control that we are talking about while addressing the concerns that stakeholders have about how governing bodies should be composed.

Jackie Baillie: It strikes me that nobody has asked the ONS for its view on the matter, unless the Government has. Would you regard that as helpful?

Alastair Sim: If we are looking for assurances from the Government, we need to be sure that they are reasoned assurances and, given that the Government cannot control the ONS, that would mean assurances that it had agreed with the ONS.

John Mason: The Universities Scotland submission says:

"ONS's programme already includes an intention to review the classification of higher education institutions."

Leaving aside the bill, is there already a question on that point?

Alastair Sim: That comes back to what I said in the beginning about the accumulation of the risk. Under the existing control regime, there are some controls over borrowing, we work to quite a tight financial memorandum from the funding council and we have an outcome agreements framework in which what universities deliver is clearly a negotiation with a Government agency. We are already in territory where we are starting to look at the ONS over our shoulders. Adding the risks that the bill poses would put us in a position of quite substantive worry.

The ONS exercise was stimulated by something different. It was stimulated by questions about how universities are classified in England, given that they are increasingly reliant on fee income.

Nonetheless, if we look at what has happened before, we see that the ONS's exercise on further education colleges was catalysed by its look at sixth-form colleges; we cannot be confident that the ONS will approach the exercise narrowly. Previous experience indicates that it will not.

John Mason: Can you put figures on the risk? As an accountant, I like numbers. Is the risk already 75 per cent and the bill will take it up to 76 per cent, or is the risk 50 per cent and this will take it up to 75 per cent? Can you give us any indication?

Alastair Sim: Intuitively, I find it easier to put the risk in terms of red, amber and green. I would say that the impact of ONS reclassification would be at the top end of red, while its likelihood is hovering on the amber to red border.

John Mason: Is that the position already?

Alastair Sim: No. That is the position with the bill.

John Mason: What would be the risk without the bill?

Alastair Sim: Without the bill, I would probably put the risk at lower amber.

John Mason: So you think that at the moment we are moving around within amber, but the impact would be up in red. I am with you.

We have already touched on the financial concerns, but I want to ask about a number of issues that arise, especially in the submission from the Committee of Scottish Chairs. First of all, on operating surpluses, it appears that the colleges have found a way round that matter. I am on a charity that is actually a pair of charities; one holds funds and feeds into the main charity once in a while. That sort of model is quite normal, so this should not be a serious problem, should it?

Garry Coutts: I think that it would be a serious problem. It is not necessarily a problem today, if there are trustees on the charitable body who are completely in tune with the way it was set up. However, the bodies that we are talking about will be established forever. The new charities—the arm's-length foundations—have the powers to appoint their own trustees and, over the generations, they will change. That is what I fear. The ALF's powers are for supporting educational activity, but not necessarily in the institutions that put money into it—there is no tie-up there. If I was lending people money on the basis that they had access to resources through the ALFs, I would not take that covenant as being particularly strong.

John Mason: Have you had that discussion with the banks?

Garry Coutts: I have not had those discussions myself, but we have had recent experience with

regard to our current procurement of student residences. The strength of our covenant—the ability of the university to hold reserves to make sure that the revenue payments are covered—was essential to that procurement process. If that money were to be held in an ALF, we would not be able to give that assurance.

John Mason: What if the separate trust made that commitment at the same time?

Garry Coutts: They might be able to do that, but that would not be guaranteed.

John Mason: I do not want to get into too much detail here—and I will come back to Professor Muscatelli in a minute—but I just wonder whether there might be ways round some of these things.

Garry Coutts: There might well be, but they would not be as safe, as secure and as clear cut. My argument would be: why would you increase the risk if it is not essential to achieve the purposes of the bill?

Professor Muscatelli: I want to make two points. At the moment we fundraise through a trust, which is a separate charity, but because there is control, it is consolidated into our accounts. Anything that is created will have to be arm's-length in order to get around the ONS problem.

From my point of view—and this comes back to the point that I made about improving the legislation—the declared intent of the legislation is to create transparency and accountability. I do not think that taking reserves out of an organisation and putting them into one that does not have the same transparency and accountability is a solution to that problem—if that is the problem that we are trying to solve.

One could argue that if we put lots of staff and student representatives on to the ALF, we could end up exercising control and consolidating that back into the organisation. Those are the complex issues that are generated by trying to create different structures. There might be a solution, but none of us has the full picture. The issue is about managing that risk.

10:45

John Mason: The committee is looking at the financial aspects, but with regard to democratic accountability and transparency, which you have just have just highlighted, I was going to ask whether your concerns about finances are real or whether they are a smokescreen, because the universities do not actually want democracy and transparency.

That argument seems to have been made in a letter in today's *Herald* from Dr Iain Banks,

president of the University and College Union in Glasgow, who refers to

“the difficulty faced by staff and students wishing to influence a governance structure that is too often focused on business rather than education or research”.

That is the counter-argument to all of this. The Education and Culture Committee will be looking at the substance of that, but I need to be convinced that you have financial concerns and that the issues that you are raising are not just a smokescreen.

Professor Muscatelli: I assure you that I have financial concerns. I recognise that stakeholders have different positions; indeed, that is why the bill has been introduced.

On the issue of the finances and ONS reclassification, many stakeholders who have expressed concerns about transparency and accountability would agree with the point that we are making. For example, an institution might end up running a deficit because of unexpected circumstances—say, a cut in its research take. Clearly, staff and students would like a smooth glide path in that respect, and that is what we can provide with the ability to carry deficits forward and use cash reserves. I cannot guarantee this, as I cannot read the minds of other stakeholders, but I suspect that, on that issue, there would be quite a lot of agreement across the sector.

To reiterate, our concerns relate to sections of the bill that were not in the original review of higher education governance. They are additional parts that, to be quite honest, I do not think any of us expected.

Garry Coutts: This is a very important question. I believe that, if the financial consequences of the bill were not there, we would be able to work with Government and have a good discussion about the issues that are being addressed in the bill in relation to transparency and representation on university governing bodies. Indeed, we have moved a very long way with the introduction of the code of good governance for university courts, which is already having a significant impact on their make-up. The code has not yet had its first formal review, but we agreed with Government that it would be reviewed to see what its impact was. There is a lot that we can do to make sure that we meet demands for transparency and representation and that our institutions evolve and are fit for purpose today.

My question is whether the bill addresses the sorts of concerns that Dr Banks and others have raised. We are putting a huge amount of risk into our institutions as a result of the bill's financial consequences, but I do not believe that its other provisions address the concerns that people have raised sufficiently to ensure that they achieve what

is wanted. What we need is a better dialogue with Government to try to make sure that we can get institutions and governance arrangements fit for the future.

Alastair Sim: Very briefly, I would say that the problems that we have raised with this committee are very real concerns, but they are real concerns that are capable of creative resolution. If the powers in the bill that are given to ministers are looked at again and alternative ways of doing things found, the ONS risk could be managed downwards. I would like to be confident that that would be the case.

John Mason: I take the point. The committee has had issues with the ONS in totally separate spheres, and that might be a whole question that we need to look at separately.

Do I take it, then, that you are not arguing that ministers control the universities by putting in a structure for electing the governing bodies? That sort of thing happens in the commercial sector—indeed, it happens all over the place. Theoretically, Government can interfere in anything. There is never total freedom from the risk of Government control, is there?

Alastair Sim: What I tried to argue at the beginning is that one must consider this in the round with regard to the accumulation of Government controls. We have quite an intense relationship with Government in terms of specifying what our outputs should be and being accountable for those. However, when we look at the ONS risk factors relating to a cumulative pattern of influence or control and the specific risk factors in relation to whether the Government has the capacity to amend the constitution of an institution, we find ourselves in territory where there might be cause for serious concern that the risk of ONS reclassification has been heightened. That is simply a result of taking an objective look at the guidance and considering ONS's behaviour in relation to other sectors.

John Mason: Okay. I will leave it at that.

Richard Baker (North East Scotland) (Lab): Mr Coutts has spoken about the experience of restructuring in the college sector and its impact on financial arrangements. Is it fair to say that not all the college sector's issues of concern have been resolved yet? I have certainly been made aware of some quite technical issues that have raised fundamental problems for colleges. For example, if a college runs its own training company—as some colleges do, and they are often multimillion-pound businesses—there is a question whether it can use its own insurance scheme or whether it has to use the Government insurance scheme, which can have severe repercussions. I understand that some of those

issues have not yet been resolved. Is that your experience, Mr Coutts, or do you think that most of those questions have been settled?

Garry Coutts: A number of workarounds are being used, but a huge amount of time and effort has been invested in looking at how we manage that part of our business rather than in looking at our primary purpose of ensuring that we make good-quality education available to as wide a group as possible.

The University of the Highlands and Islands is the regional strategic body for the colleges that operate in our area. We now find ourselves in the position that in order to help an institution that happened to run into financial difficulty in-year, we would have to keep a top slice from all the institutions to cover that during the year—which would mean that we would have a surplus that would be immediately taken away from the colleges' main purpose and put into an ALF—or, if we did not take that top slice, the college in financial difficulty could end up running a deficit, which it would not be allowed to do.

There are significant risks in the college sector that we have not yet fully experienced, because it is still the very early days of the new regime. It would be crazy to introduce the risk that we are discussing into the university sector if the legislation does not add some overwhelming value to counteract it.

Richard Baker: From what you are describing, it seems that there has been an opportunity cost to the sector.

Garry Coutts: Absolutely—a huge opportunity cost.

Richard Baker: The opportunity cost is a result of having to undertake that work and create the new structures, which does not sound particularly efficient. Are you also saying that there are future risks—or potential problems—that have not yet transpired?

Garry Coutts: I can assure you that when we and the chairs and principals of the individual colleges meet together, as happens regularly, we spend about 80 per cent of our time considering governance and management issues instead of education, which is a real tragedy. Much of that discussion is created by the complexity that has been introduced by the ONS issue and other aspects.

Richard Baker: Mr Sim, the convener has rightly pointed out that the committee will have a chance to speak to the bill team about the negotiations and discussions—or lack of them—with the ONS. Some members have already referred to what happened with the review of the capital programme and the reclassification by the

ONS as a result of European system of accounts rules. For me, that shows that neither the ONS nor Europe is taking a laissez-faire approach to these matters. Given the Scottish Government's problematic experience, which has had real impacts on capital funding arrangements, are you aware of any work that it has undertaken on the issue? Has there been any reconsideration of the issue or has there been a lack of dialogue from the Scottish Government on that?

Alastair Sim: I am not aware of any reconsideration of the issue. In our minds, what happened with the Aberdeen western peripheral route has heightened the risk. As you have suggested, we are now seeing quite an activist ONS, which is taking a really close look at whether things are tipping over from private to public sector classification. At roughly the same time, it has taken a very close interest in housing associations in England, not on the basis of ministers taking direct power to appoint members of housing association boards but on the basis of their exerting influence over housing associations by making disposal of their stock a policy priority.

In my mind, the risks around ONS issues have been heightened by its recent decisions. Personally, I do not feel confident that the bill has been properly considered in the context of such heightened risks.

Richard Baker: So you would hope or expect that that heightened risk would be taken into consideration, but you have had no reassurance from the Scottish Government that it has done so.

Alastair Sim: To be fair, the people in the Scottish Government to whom I speak say that they have reached their view on the ONS issues. However, although they necessarily take a wide view of the guidance and ONS practice, I think that they have not opened it up widely enough to take a holistic view of the risks that it poses.

Richard Baker: Finally, why were those issues not foreseen in the review process? Were those issues not anticipated because they were not expected to be problematic, or did the review believe that its views and objectives could be achieved without creating such problems?

Alastair Sim: I would say the latter. Whether one is fully in accord with what was recommended in Ferdinand von Prondzynski's review, one has to admit that it did not conceive of Government taking extensive new powers over universities. It was much more about an internal reform of university governance. The idea that ministers would take powers that could enable them, by regulation, to alter the composition of governing bodies or academic boards does not sit comfortably with the findings of that review. If members read Ferdinand von Prondzynski's

evidence to the Education and Culture Committee, they will see that, although he is clearly supportive of the broad principles of what the bill seeks to achieve, even he expresses concern about the means by which the bill sets out to achieve its aims, particularly with regard to the new powers given to ministers.

Richard Baker: So even the chair of the review has concerns about the bill's impact and how its objectives are being pursued.

Alastair Sim: Yes.

Richard Baker: That is very helpful to know.

Mark McDonald: I want to cover a number of areas. First of all, Mr Sim, you said that the costs of appointing a chair have been significantly underestimated, and you then used the comparison of the election of alumni members to the court. The financial memorandum says:

"Although costs will depend upon the nature and size of the electorate which features in the regulations, it is considered that the maximum cost of this election would be broadly equivalent to the cost of electing a rector within the ancient universities."

I do not get to vote for the rector of the University of Aberdeen, but I do get to vote for the alumni members of the court, because the vote is carried out across all the alumni. Surely you are not suggesting that the electorate for appointing the chair will be thrown open to the university's alumni. After all, they will not have that much interest in who chairs the university court; I certainly would not be that interested, given that I graduated from the university more than a decade ago.

Alastair Sim: I will let Anton Muscatelli talk about the costs of electing the rector, but all we are referring to is the evidenced experience of institutions that have run a proper due process, which is managed through the Electoral Reform Society and which we would need if the election were to involve the wide constituency of students and staff. I also note that section 4 of the bill specifies other categories of elected members—

Mark McDonald: But this is not going to touch the cost of an alumni election, is it?

Alastair Sim: It depends on how it is organised. If you are going to do it properly, it has to be professionally organised, and that has a cost. I am just citing what institutions have said. Those costs of £21,000 to £34,000 give you at least a ballpark figure, and it is far removed from the projection of £1,000 in table 1 of the financial memorandum.

11:00

Mark McDonald: Professor Muscatelli, have you anything to add?

Professor Muscatelli: I am afraid that I do not have estimates to hand. Electronic voting methods with a constituency of staff and students would require higher set-up costs, but I do not imagine that running costs would be particularly high.

Most of us have effective human resources systems that tell us exactly who is on the electoral roll. The set-up costs would probably involve a ballpark five-figure sum, but after that it should be possible to run the system quite effectively. I do not think that that element is the significant cost.

Mark McDonald: A point was raised regarding the difficulties that are faced by those members from a nominating body and the potential for them to represent that body as members of the court or the board. However, that issue arises for many people who are appointed to charitable trusts and boards. I served as an appointed member from Aberdeen City Council on a number of charity boards. There are explicit rules about which hat you wear when you sit around the table, and that situation is presumably not going to change as a result of this legislation.

Alastair Sim: Your comment about explicit rules about which hat someone is wearing is important, and we certainly want that to be clarified during the bill process. Many institutions will have a trade unionist who is elected by staff and who serves on the governing body in the understanding that their role there is as a governing body member with corporate responsibility for the good governance of the institution. However, there is a difference between that position, which is quite proper, and the possibility that someone is there—as they might have been in a 1970s public corporation—because they have a mandate to pursue matters for their interest group and that is their only role on the board.

As the bill goes through Parliament, I want to see absolute clarity that, if someone is on the governing body because they have been nominated by an interest group, their responsibility should be—as you have described it—to the good governance and strategy of the institution and not to the constituency that nominated them.

Mark McDonald: I want to interrogate the point about reclassification a little further with your forbearance; it might take a bit of time for me to quote the relevant passages.

Universities Scotland states in its submission that the heightened risk comes from

"Power to decide how people should become chairs ...
Power to decide how long people should serve as chairs ...
Power to determine the remuneration of chairs ... Power to determine the composition of institutions' governing bodies"

and

"Power to determine the internal structure of institutions, with particular regard to the composition of the academic board."

Although the OSCR submission does not reference ONS reclassification, it nonetheless interrogates each of those areas in turn. It states:

"Appointment of the chairing member ... does not give Ministers the power of appointment or removal of a chairing member".

It goes on to note:

"Moreover, regulations cannot be made without consultation with the older university involved."

On remuneration payable, it states:

"Our view is that this would not in itself amount to an ability for Ministers to exert control in a way that is central to the activities of the HEI. Again, Ministers must consult with the older university involved before making regulations."

On composition of the governing body, it states:

"These sections do not give ... Ministers the power to appoint or nominate members to the governing body: this power lies with the various nominating bodies. Nor do they give Scottish Ministers the power to remove members of the governing body. In our view therefore they do not give Ministers any power to control the HEI's activities."

On composition of the academic board, it states:

"These sections do not give ... Ministers the power to appoint members to the academic board. Nor do they give Scottish Ministers the power to remove members of the academic board ... In our view therefore they do not give ministers any power to control the HEI's activities."

OSCR has given cognisance to each of the points to which the ONS will give cognisance and has concluded that the provisions do not amount to ministerial control. Presumably, therefore, the ONS will look at the legislation through the same lens.

Alastair Sim: The ONS will look at the legislation through a different lens: that of the European system for accounts and the various pieces of guidance on the interpretation of that system.

The Treasury's guidance on the interpretation of the European system of accounts explicitly states that power to change the constitution of a body is an indicator of ministerial control. As I set out at the beginning of the session, ministers are expressly taking the power to change the constitution of bodies, so we are definitely at heightened risk of ONS reclassification, especially in the context of the accumulation of existing controls that could be taken into account by the ONS as indicators of government control.

Mark McDonald: Were the current regulations and rules on the composition, constitution and so on of universities a result of statute?

Alastair Sim: There is a difference between rules that are made as a result of statute and rules that are made as a result of ministerial decision. At various stages over the centuries, Parliament has taken powers to make legislation about the composition of university governing bodies.

The ability of Parliament to do that would not lead to ONS reclassification, but the bill does something that has not been done before in Scotland: it gives ministers the power directly to change who is on a university's governing body or the balance of membership of its internal structures, particularly the academic board. That is a marked departure from what Parliament has previously thought it appropriate for ministers to do.

Mark McDonald: Speaking hypothetically, if that could happen only through further primary legislation, that would give you comfort, and the bill could remain as it was drafted.

Alastair Sim: That would be a different matter, yes.

Jean Urquhart (Highlands and Islands) (Ind):

Thank you for all the information so far; it has been interesting. I have one simple question. Why do you think that the bill has been introduced? What do you think the Government wants to see changed as a result of it?

Alastair Sim: We can debate the merits of the bill, but the Government has, at various stages, said that it does not intend certain elements of the von Prondzynski review's recommendations to be taken forward simply by the sector's own action; they will require legislation to make them happen. The merits of that will be debated as the bill moves through the parliamentary process.

I understand the intention, but the issues that we are discussing with this committee are, in a sense, unintended impacts of that intention, and we think that those unintended impacts need to be intelligently managed.

Professor Muscatelli: I agree with that. The central intent of the bill would not be modified. If the Government's intention is to apply the recommendations in the von Prondzynski review of higher education, that would not be modified by addressing the issues with section 8 and section 20, because those sections go beyond the original review and are about potential future changes.

Coming back to an earlier question, if that were to be done through primary legislation and did not introduce control, there would be less of a risk than there would be if it was done through regulation.

Garry Coutts: There has, for understandable reasons, been an awful lot of pressure from staff and students regarding representation on the

courts. In order to ensure that staff and students are properly engaged, we are looking at institutions that have been going for hundreds of years and need to evolve.

There has been a lot of pressure for a commitment to ensure that those constituencies have a voice on the governing bodies. I think that a commitment was made to legislate for that, when there is no requirement to do so. The bill is designed to meet pressure from particular constituents rather than to address the purposes that have been stated. We can achieve the aims in relation to the concerns of trade unions, staff members and students in other ways, and by continuing to evolve the code of good practice. That is where we should go.

Jean Urquhart: Is it a matter of trust? Has the Government been pushed to introduce the legislation? Students and trade unions have demonstrated outside Parliament but the universities did not seem to react. Is it fair that they should try to react to that?

Garry Coutts: I think that universities have reacted to it. The code of governance has gone an awful long way. Looking at the representation on our courts and the expansion of their membership, it is clear that things have changed a lot.

I would welcome a full review of the way in which the code has impacted on the effectiveness of our courts. Such a review is scheduled but, unfortunately, the bill is preventing us from progressing with it. In my view, it would be sensible to hold that review and take full account of it before we make a judgment about whether legislation is required to make it go further. I believe that we can achieve the Government's intentions as regards representation on courts without the need for legislation, which carries a huge amount of risk and could be very detrimental to the sector.

Professor Muscatelli: It is also a diverse sector, as you will appreciate if you look at the different structures of the governing bodies across the piece. On the governing body of my institution, we have six representatives of the academic staff, two staff representatives who are elected—who are invariably trade union members put forward by their trade unions because they have an electorate who can get them elected—as well as two student representatives and a rector, who is currently not attending meetings but who may attend meetings if he or she wishes. It is a different structure from that of other institutions, and the issue is how that diversity can be managed sensibly to meet the aspirations of other stakeholders such as staff, students and trade unions and to allow good governance to be exercised. That is the problem that the bill is trying to solve, and if we can do that we will be in a good place, but in the context of the

Finance Committee's interests, I am more worried about the financial consequences.

Mark McDonald: Mr Coutts appeared to indicate that the bill's proposal to amend the governing structures, in and of itself, gave him concern, but Mr Sim's response to my earlier question seemed to say that the power of regulation, or the ability for secondary legislation to make amendments following that legislation, was the more pressing point of concern. I want to get to the nub of the matter. Is it the panel's view that there should be no legislation in relation to the composition of the bodies, or is it the fact that the legislation could be amended by secondary legislation that is the problem?

Alastair Sim: There are two different levels of concern. One is the concern about financial impact, which is the one that we have described. If the Scottish Government were to look again at the ministerial powers and take out the ministers' power to amend the constitution of governing bodies and the ministers' power by regulation to amend the composition of academic boards, that is likely to manage the ONS risk factor—the specific issue that we have been describing to the committee.

The wider issue for genuine debate is whether the bill is necessary, given that the sector has already introduced a higher education governance code and that every institution already has robust representation of students and staff on their governing bodies. That is a moot point that will be debated as the bill goes through the Parliament.

The Convener: That concludes the questions from committee members. I thank the witnesses for responding to all our questions.

11:13

Meeting suspended.

11:20

On resuming—

The Convener: We will continue our consideration of the financial memorandum to the Higher Education Governance (Scotland) Bill by taking evidence from the Scottish Government's bill team. I welcome to the committee Laura Duffy, Kerry Twyman and Stephen White. I have offered the bill team the courtesy of their making a brief statement, as our previous witnesses asked to make such a statement, but that has been declined so we will go straight to questions from the committee. I will ask the opening questions and will then open up the session to colleagues around the table.

As the convener of this committee, I have seen dozens of financial memoranda over the years, but this is the first time that 90 per cent of the discussion has been about what is not in the financial memorandum—you will be aware of that from this morning's deliberations. Let us get straight to the point. In putting together the financial memorandum, what due diligence was undertaken to take into account the concern—which took up most of the evidence that we heard this morning—about the potential impact of the bill in respect of the Office for National Statistics?

Stephen White (Scottish Government): Consideration of the risk attached to the reclassification of Scottish universities by the ONS was not something that we thought would be in the financial memorandum. However, I will work back to where it was first considered as a substantial risk. It is not a risk that appears in the financial memorandum because we had analysed it carefully for a number of years.

Going back 18 months, to the genesis of the bill, we looked at what had come out of the 2012 review of higher education governance, which was chaired by Professor von Prondzynski. We looked at what the code of conduct had achieved and the recommendations in that report, which we thought might form the basis of the bill. The issue of reclassification was factored into all that thinking, and there was thorough analysis of the “European system of accounts: ESA 2010” guidance on the indicators of control. The summation of that work, which involved dialogue across Government, was that the final planned content of the bill would be compliant with those indicators of control, which is why the financial memorandum does not feature analysis of that.

The Convener: Okay. Can you pull your microphone forward a wee bit? You are speaking quite quietly, and we want to make sure that we can all hear you.

One of the things to come out of this morning's evidence from Universities Scotland is also in the written evidence that we have received, so you will be aware of it. The committee of Scottish chairs has stated that

“it would be very ill-advised for the Government to press ahead with the proposed legislation without having first obtained a categorical assurance from the ONS that the new Ministerial powers will not lead to universities being reclassified as ‘Central Government.’”

Has that taken place, and have you taken legal advice on that?

Stephen White: It is my interpretation that the ONS will not give categorical analysis or summation statements on the plans of this or any Government. It will look at what a Government has legislated and provided for when that is in front of

it, and it will make a judgment. It is an active organisation that takes an interest in many areas of public policy and finance, but there has been no discussion in which it has assessed and cleared any of the bill's content. That is not how the ONS works. However, the Treasury will often encourage Governments across the UK to have prior dialogue with it.

The Convener: To be fair, what you have just said is what came out of the evidence session this morning. It is almost as though you have to wait until the dust has settled before you can see whether there will be an impact for the ONS. In evidence this morning, Mr Coutts, who is sitting behind you, said that it would be crazy to take the risk of going ahead with the financial aspects of the bill under these circumstances. What is your response to that?

Stephen White: There has been thorough consideration of the risk, with the emphasis being squarely on the indicators of control. I have removed the indicators from my folder, but I will not read them all. Eight principal indicators of control are set out in the European guidance. For example, the guidance talks about the first indicator of control being the

“rights to appoint, veto or remove key personnel”.

The bill is about the how, not the who; it is about process, not people. Nothing in the bill will require higher education institutions to ask ministers for permission to do anything.

There has been a lot of discussion of the secondary legislative powers. We have heard loud and clear what people have said today and there is also a lot of compelling written evidence. We will look at all that. In essence, the secondary legislative powers were an attempt to futureproof the bill so that primary legislation is not required to do something when modification would be a good alternative.

It is not about ministerial control; there have been assertions that ministers may find themselves on governing bodies. There is absolutely no intention on the Government's part to do that or to have any direct involvement in or control over appointments. It is about the process. That type of direct appointment, veto, removal of personnel and so on runs through most of the first two or three indicators of control. The indicators also mention ownership of voting interests, rights to control through contractual agreements and so on, and control in other areas.

There has been a thorough examination of the indicators of control, of the Treasury extrapolation of the European guidance and of the European guidance itself. The Scottish Government's conclusion is that the risk that is posed by the bill does not advance beyond any risk that existed

prior to it. That also came out in the previous evidence session.

Kerry Twyman (Scottish Government): We have not been able to approach the ONS directly on the issue, because that is not how it works, but I will say a little bit more about the finance directorate's relationship with the ONS over the last nine, 10 or 11 months in the light of the on-going capital issues that have been raised. We are cognisant of reclassification issues across the board; we are very aware of them and the risk was highlighted very early in the process. We have been developing close relationships with the ONS because of the capital discussions and, more widely, because there is recognition that the Scottish Government needs to have wider skills and knowledge around ONS classification.

On the back of that, we did a workshop a few weeks ago with the ONS, at which we went through all the indicators and the various scenarios that would lead to an indicator being triggered. We did not talk specifically about universities, but Stephen White and I both attended that workshop and asked questions that were specifically about the bill, although we did not ask about specific elements, because the ONS does not want to answer questions about specifics.

We probed the matter further and the ONS is coming back tomorrow for another series of meetings with finance professionals in various policy areas. We will again tease out those very issues, so that we have greater understanding. Although we cannot go to the ONS with a scenario and get a direct answer, it has been extremely helpful in this more roundabout way. It has given us a lot of time and has given us the assurances that allow us to make risk assessments.

We are, in effect, being asked to do a risk assessment of there being an ONS reclassification trigger. I guess that the question is this: are we to stop a wider potential benefit because of a risk, or are we to do the assessment, define the risk as low and proceed with something that we think provides greater benefit? In this case, we have decided that there is low risk and it is around factors that were already present in universities. In our belief, nothing that is being done will increase that risk.

Stephen White: I add—if it even needs to be said—that there is absolutely no intention on the Government's part that reclassification would be an outcome; it is something that we would seek actively to avoid. That is probably understood, but I say it in case it needs to be said.

The Convener: To be fair, I think that everyone understood that, but it helps for you to say it in any case—that is positive.

In your view, is reclassification a red herring?

Stephen White: It is not for officials to agree or not with that proposition. We have assessed risk very carefully—not just recently but over a long period—and have also had dialogue in this realm previously with the ONS and universities. It is an active issue—it is not something that has shot up recently. We always take seriously anything that any stakeholder or partner says and we look at the evidence to this committee and to the Education and Culture Committee, but on balance the Scottish Government's view is that no additional risk is posed by the bill and that its provisions are compliant with the ESA indicators of control.

11:30

The Convener: You have talked about a number of discussions, but the feeling that stakeholders—the universities—were not actively consulted on the financial aspects has come out of a lot of the evidence. Numerous submissions say the same thing. The submission from the Committee of Scottish Chairs says:

"The detailed assumptions contained in the financial memorandum were not the subject of consultation."

Universities Scotland said that the

"consultation document contained no detail on financial assumptions."

Further to that, we have heard this morning that there was a meeting with the chairs in June, and the Scottish Government was written to on 13 August, but a response has not been received, despite over a month having elapsed. Will you talk about that? Would it not have been a positive thing to have responded in writing to that letter prior to this meeting—not least to have advised the committee?

Stephen White: We have noted that we got that letter, and we said that we would assemble a response as quickly as possible. It is quite a substantial piece of correspondence that covers a number of items. Complex and serious issues were posed to the Government, so a variety of colleagues are ensuring that we give the correct answers. I can guarantee that a response will be returned to Universities Scotland. I think that colleagues from Universities Scotland would concur that the memo to us was substantial, but of course we will respond to it. It would have been ideal if a response had been given prior to today, but we are still working through the range of issues.

On the financial memorandum, there has been quite a lot of emphasis on the secondary legislation elements and their financial impact linked to the overall reclassification risk. The opinions and views that have been shared in

evidence will be considered when we look at how they are currently framed. It is open to the Government to do that. I had the benefit of sitting at the back of the room and hearing the evidence from colleagues earlier, when things were probably expressed in a new way compared with how they were expressed in prior dialogue. We will take particular note of the idea that risk could be addressed by looking at the content of those opinions.

The point was made that there was no consultation on the financial aspects. I think that I said earlier that the views of colleagues were slightly surprising in the sense that those aspects were largely intended as future proofing. Maybe in another bill such sections would have passed off without as much comment, but I acknowledge the clear concerns and views of many who have submitted evidence. There has been some commentary about ministerial control: I think that I said before that ministers, or direct appointees of ministers, sitting on any university governance structure is not the objective at all.

The Convener: Okay. Let us look at issues relating to the financial memorandum. It talks about

"Discussions with partners and stakeholders for whom there may be modest financial implications, to be absorbed within existing budgets".

We should take on board the view that has been expressed that there have not been as many discussions as there could have been.

The financial memorandum goes on to say that

"There is no information readily available to calculate staff costs associated with the recruitment of a chair"

and

"It is also anticipated that governing bodies will meet on average between four and six times per academic year."

You will be aware that those issues have been hotly disputed. In particular, there appear to be concerns that the bill does not take into account what the true costs would be. For example, the University of Edinburgh said:

"The Bill as drafted would involve significant compliance costs for our University which we estimate at £79,500 in one-off costs and up to £125,000/year in annual recurring costs."

This morning, witnesses have said that the financial memorandum does not seem to express any real understanding of what the role of a governing chair would be and that the role is much more substantive than appears to be understood. Will you comment on those issues?

Stephen White: I will start with the central criticism. We are examining the core of the job in looking at remuneration for would-be elected chairs, if the bill is enacted. The jobs are different

in different higher education institutions, and many variations on the number of days required—25, 30 and 50 for example—have been cited. We are examining the core of the job so as not to overstretch the coverage of what would be statutory remuneration. I should say that by "remuneration" we mean allowances; it is not salary, wages or pay. However, given what the evidence has presented and what colleagues said earlier, it is fair to say that the focus was pared back a little too much. We concede that it is our job to consider all the evidence and to revisit some of the assumptions, particularly in respect of the number of days that a chair spends doing their job.

The Convener: On elections, the University of Dundee said that

"A recent election at the University of Dundee for the post of Graduates' Assessor on Court which was outsourced to the Electoral Reform Society cost £21,000",

but you suggest that the election of a chair with a minimum of two candidates would cost only £1,000.

Stephen White: That is only a partial estimate. Laura Duffy will be able to confirm whether this is right, but I think that it relates to expenses for the candidates. I think that the financial referendum concedes that, because the franchise for the election is not yet clarified, it is difficult to estimate exactly how much it would cost. There are also many different ways to hold an election with a range of costs. To make a general point, institutions already incur many of those expenses. Therefore, in compiling the financial memorandum, it was particularly difficult to estimate the net additional cost over and above what is already spent on such items.

Laura Duffy (Scottish Government): The cost of the election would be dependent on the franchise. If the franchise was simply the governing body, the cost would be almost negligible. If it went beyond the institution and included alumni, as was discussed earlier, the electorate would be vastly greater than if it was kept to staff and students. Therefore, as Stephen White indicated, it was difficult to quantify in the financial memorandum what the cost would be, with the bill including a regulation-making power. It is also difficult to separate out the additional costs for different institutions.

There are electronic systems that can be purchased for limited cost that cover numbers that sit around staff and students. That would not incur excessive costs.

Stephen White: The estimations of cost are about compliance with the bill. Extending a practice beyond legal compliance could result in many different costs. For example, one institution might use one newspaper and comply with the

legal obligation in the bill, but another institution might decide to use four or five newspapers. The costs will be different depending on the approach that is taken. A smaller scope could comply with the bill. It is not that there is a tariff of different approaches.

The financial memorandum's estimates are not about underestimating anything or giving the impression that there are no costs. There was a central challenge in identifying the additional costs, and the evidence that has been gathered by the committee and the submissions to the Education and Culture Committee will inform additional work on the financial memorandum.

The Convener: You might not have considered the ONS classification to be as big an issue as it has become. However, given the concerns that have been raised about the lack of consultation on the financial memorandum, is there anything else that is not in it that you would include if you were to redraft it?

Stephen White: My opinion, based on all the work to date, is that the financial memorandum would not require the inclusion of a treatment of the hypothetical cost of a risk. It is not an exact science, but that is my summation.

Jackie Baillie: When did you become aware of ESA 2010 and its impact on classification?

Stephen White: I and my predecessors in the higher education division would always have been aware that ESA 2010 was a determinant of classification of universities, but in the context of the project that we are talking about, I suppose that we can start with 2012, when Professor von Prondzynski's review was published. After that there was consideration of whether there would be legislation, and then there was a code of conduct for a period, so there was always knowledge that reclassification was an issue.

The matter was looked at in earnest and in great detail across Government after the consultation on the bill ended in January 2015, and there was Cabinet consideration of it. Knowledge of ESA 2010's determinant role is there all the time, but specific reference to the issue in detail came after the consultation closed, when we were looking at all the views.

Jackie Baillie: That is helpful clarification, because the Scottish Government certainly did not think that there was a problem until it came up against reclassification in relation to its infrastructure project. It is interesting that you had some inside knowledge that other people did not have.

In January 2015, who did you talk to? Who have you taken advice from about reclassification?

Kerry Twyman: You mentioned capital projects classification. To be honest, our thoughts about reclassification in this context would have come before January, on the back of the college reclassification. When the college reclassification was initially being looked at, back in 2011-12, universities were considered in the round in those discussions—we alluded to that earlier. In many respects, the issue of college and university reclassification was on the table long before the Aberdeen bypass problems were being looked at, so I would not say that consideration followed the bypass project classification; we were always aware of the issue following the discussions around colleges.

Stephen White: That is what I wanted to impress on the committee. The issue is an evident part of how we work and has always been there for universities; however, specifically in relation to the bill, the point at which we went through the Cabinet process and looked at the matter in detail was after the consultation on the bill.

The items in the consultation are not exactly the same as the items in the bill, so the matter had to be looked at specifically in that context. Two of the items in the consultation were not taken forward at all. Once we had the final shortlist, if you like, the analysis was conducted in detail—within Government, to answer Jackie Baillie's second question. The analysis was conducted in the context of the full range of interests across Government—finance, legal, policy and so on.

Jackie Baillie: Do you mean that you have received only internal advice and have not sought external advice? Has all the advice come from within Government?

Stephen White: Yes, on the bill and its compliance with ESA 2010. As I said, it is not the convention that Governments approach the ONS regularly to sense-check things at their inception.

You referred to dialogue on infrastructure issues, which comes later down the line, but in the bill that we are talking about—in relation to which things were looked at on a case-by-case basis—the period of intense examination of compliance was the first half of this year, after the consultation ended in January.

Jackie Baillie: Okay. We heard today about an exchange of letters, and I think that Universities Scotland is awaiting a response. If you have been looking at the matter in detail since January, surely you are in a position to respond to the detailed letter that you received from Universities Scotland.

Stephen White: I think that in that letter, which runs to half a dozen pages, Universities Scotland is looking for a categorical guarantee that the ONS will not seek to reclassify—I might have paraphrased that wrongly; only the ONS can give

that guarantee. Although it would be easy to dispatch a quick answer on that point, some of the detailed questions about the legal underpinning of other parts of the bill must be worked through with great care to ensure that our answers are correct. Only the ONS can reclassify, and it will not give a categorical, binary answer on the provisions in any bill until it sees how the bill is enacted.

Jackie Baillie: Will the Scottish Government consult the ONS not for a definitive view, because the ONS will not give you that, but for advice as you have been consulting it through the workshops, which seem to have taken place only recently?

Kerry Twyman: It took a long time to schedule the workshop that took place in the middle of August. The person who led it is the key ONS individual who provides advice to the committee that makes the decisions, so his time is extremely limited. We began talking to the ONS in May or June about setting up the workshop and decided to leave it until after the summer holidays, which is why we chose mid-August.

The point is that reclassification risk is on our radar. When we look at all policy decisions regarding legislative policy or things of that nature and when we look at risks in the round—financial, policy or stakeholder risks—reclassification is very firmly on our radar. Looking at it has become part of our normal course of business over the past few years.

11:45

Stephen White: There has been no specific tailored dialogue with the ONS on the Higher Education Governance (Scotland) Bill. In the case-by-case approach that we took, our deep analysis of the indicators of control suggested that the bill did not present a risk that would warrant such dialogue. I am not involved in the work on infrastructure, but, whatever that dialogue consists of, I expect that it is the result of a process that has gone on to reach that point. All risk assessment in this area is different; it is not all the same assessment.

Jackie Baillie: With due respect, given that you are talking about a risk assessment that is based on how ESA 2010 is applied and given that the bill flows from that, I would have thought that there would be a heightened risk or at least a heightened awareness in the Scottish Government of the potential risk in ESA 2010. I would have thought, therefore, that you would have had early engagement with the ONS for advice as a matter of good practice.

Kerry Twyman: I think that we are not making ourselves clear. The way that the ONS works does not include a facility for us to go to it for advice

early on. In the workshop, it came out that the ONS is extremely busy. The formal channels do not work in that way. Hypothetically speaking, if we were to go to the ONS with a request about a bill of this nature, I think I know what the answer would be. We used our skills and experience and the knowledge that is within the Scottish Government to assess the risks. Then, as I have said, we used our wider understanding, based on discussions with the ONS around other reclassifications, to build into that assessment.

Stephen White: I am keen to answer your questions as fully as possible. There are two different assessments of risk involved. I am not involved in the infrastructure side, but I imagine that there are specific points at which the answer will be yes or no—that we can or cannot do things. What stakeholders who take a different view from that of the Government are assessing is a less direct risk to do with a process being set in train for putting a chair of court in place in a certain way or for determining the composition of a governing body. That is not the same as a very detailed point about a financial instrument, structure or model—those things are different.

I reinforce the point that we take a thorough look at risk. The Government takes the risk issues that are raised by stakeholders very seriously; there is not a blasé approach to risk. We have looked at the risk of reclassification in detail and it is our considered opinion that the risk is in compliance with the indicators of Government control. That is our summation at the current time.

Kerry Twyman: As we have also tried to make clear, we deem reclassification to be a low risk. However, if, as a result of a wider ONS review of universities, there were any risk of reclassification—ministers have made it clear that that is not a policy goal—we would take what measures were required to ensure that universities were not reclassified. There is a precedent in what happened with the college reclassification in England and Wales, where the ONS permitted a review of the control mechanisms to ensure that colleges remained outwith the boundary.

We need to make the position very clear. We carried out a full risk assessment in which we looked at ESA 2010, using our knowledge and in discussions with the ONS, and deemed there to be a very low risk that what was contained in the bill would lead the ONS to look at the universities and reclassify them. We were also very clear that, if that were to happen—I stress that we deemed that to be an extremely low risk—we would do whatever it took to ensure that the universities remained outside the boundary.

Stephen White: In the middle of that strategic take on it, there is some ground for profitable dialogue between the Government and partners

on the content of the secondary legislative provisions. That point has been reinforced again and again. Colleagues have said that the bill would benefit from such dialogue and that it would address issues of risk. That would be better than a call for the bill not to be progressed at all. I would take particular note of what colleagues have said on that point.

Jackie Baillie: That is helpful. I appreciate the reassurance that ministers do not intend reclassification. I do not think that anybody around this table has called for the bill to be scrapped, but I would certainly encourage that listening mode around what amendments could be made.

You have proceeded on the basis of an internal risk assessment without having taken any external advice, but, if universities were reclassified, there would be an opportunity cost that I do not think would be appreciated by the Government or by universities. In the thorough risk assessment that you have talked about, did you also assess the opportunity cost that there would be if capital were counted against public borrowing? That might happen if the classification goes against you.

Stephen White: The short answer to that question is no, because the risk assessment led us not to do that work in the financial memorandum. However, we have all the figures that were put before us by colleagues in the higher education sector who shared in evidence their view of those opportunity costs, and we will examine those thoroughly.

Jackie Baillie: Thank you.

The Convener: Are you saying that, although reclassification is extremely unlikely, if it happened you would look again at the bill's provisions to reverse that reclassification?

Stephen White: No. I am saying that I cannot fail to have taken note of what colleagues have said today and that a dialogue on the modification of some of the provisions might help to address the risk rather than withdrawal of the bill, which is what has been suggested in some of the media.

All that I am saying is that we will look at the evidence that has been given and advise ministers on what it might mean and how it links to risks. I am not giving the figures credence by saying that, but we have them at our disposal and we can review them. Whether or not they are accurate, we have the figures to look at, but that does not change our essential summation not that the risk is just very low but that we do not think that there is a risk of a problem with compliance with the indicators of control. The bill does not advance any current risk substantively.

Kerry Twyman: Going back to your original question, we are aware of what the reclassification

of universities would mean. I work closely with colleges and I am on the phone almost every day with financial directors and the SFC. We are aware of the long process that colleges have gone through, which has been difficult and is by no means at an end. We are aware of the size of universities' reserves, the amount of their borrowing and their capital projects. We have been doing a lot of work with them on their 10-year capital planning. I cannot give you the figures right now, but we are very aware of the extent of the financial implications of reclassification. It is something that we absolutely want to avoid.

The Convener: That is why I was a bit confused by Stephen White's answer to Jackie Baillie. I understood you to be saying that you do not think that reclassification will happen but that, if it did, you would be willing to look at the provisions again and take them out of the bill. When I asked Stephen White whether that was what he meant, he said no, so I want you to clarify that key point. You are saying that there is a low risk of reclassification and that you do not think that it is likely. However, if it does happen, will the Scottish Government act to change the bill's provisions to ensure that reclassification is not subsequently implemented?

Stephen White: My opinion is that the Scottish Government will not want to do anything that will hasten reclassification, but we do not think that there is any risk of that. Kerry Twyman is trying to make everyone aware that we take the issue seriously and that such an outcome would not be desired. Colleagues have said that a discussion about potential modification of the bill might lower the risk, but the Government does not think that the risk needs to be lowered. Nevertheless, if it will help to build consensus and improve dialogue and relationships, the Government will look at that.

As I say, we do not think that reclassification will happen. Even if it did, it would not happen during the bill's passage. For that to happen, the bill would need to become an act and the ONS would have to go through a long process of poring over every element of it, but that is entirely theoretical.

The Convener: Yes, indeed.

Gavin Brown: You have said that the ONS is pretty busy, that it does not work in the way that has been suggested and that it does not have the facility to make a binding decision. Has the Scottish Government written to the ONS and asked for some guidance, advice or thoughts on the bill?

Kerry Twyman: No, because there is no process for asking for the ONS's advice on work that we are undertaking. The way that the process works is that the ONS decides whether to review a body for reclassification. If a new body comes into

existence or results from a merger, we will write to the ONS and the Treasury to let them know that the new body is being formed and give our view on what its public status will be. That is what happens when a new body comes into existence.

However, in a situation such as this, when we have created a piece of legislation, there is no trigger activity of a new body being formed that requires reclassification, so there is no mechanism for going to the ONS; it is down to the ONS's decision. The ONS would write to us and say that it had decided, because of the new piece of legislation, to undertake a review of the status of universities. At that point, the ONS would come to the Scottish Government to discuss the issue.

Gavin Brown: I accept that there is a convention and that there might not be a trigger mechanism and so on, but why have you not written to the ONS, given that we got burned over capital projects and are keen to avoid that experience? The ONS may write back and say that it is not going to tell you anything, but I find it surprising that you have not written to the ONS and asked the question.

Stephen White: That is tied up with our analysis of risk. There was no requirement to write to the ONS. The view of heightened risk in relation to the bill, in its coverage in the media, is relatively recent. The provisions in the bill are all informed and inspired by what was in the 2012 review as refined by the consultation that ran from late 2014 to 2015. Much of what was in that consultation is intact and in the bill. It is only in recent weeks that the risk of reclassification by the ONS has been heavily covered in the media and in dialogue. I am not diminishing the importance of that risk. However, the bill's content was not devised in the recent past; the concepts have been around for years, during which time the ONS was not cited.

My understanding is that, if we wrote to the ONS, it would not say yes or no. The ONS gave a response to *The Scotsman* at the end of August for its article about the financial impact of reclassification. Its opinion was sought and—I am paraphrasing roughly—it said that it took note of the development but would not give an opinion until it had looked in detail at the provisions and their outcome. It was thus drawn on the issue in the press, but only in a very limited way. I understand that the ONS will, perhaps through the Treasury, have a policy dialogue on request, but that would never lead to any determination that would create the authorising environment in which to proceed.

At the start of a process, things can change. After a consultation, two of the proposals can go and four can be left. It is a moveable picture. The ONS likes to see the settled picture—as the convener said, it likes to see the end point.

Gavin Brown: I will not dwell on that issue other than to say that, in my opinion, it would be worth the Scottish Government writing to the ONS formally and asking whether it could tell us something—we understand that it cannot provide a full opinion—so that we do not get burned. That is just my opinion.

In your evidence today, you have told us that you have undertaken a full risk assessment, a thorough consideration of the risk over the long term and a thorough analysis of the European system of accounts and so on over a period of years and specifically since January 2015. That sounds like a phenomenal amount of work. In the interests of transparency, can the committee please see some of that work?

Stephen White: We would need to provide ministers with advice on that, and it would depend on what form the work takes. We can certainly consider that direct request. We will sort through the constituent parts of that collection of work and reply to the committee.

Gavin Brown: I will not ask you to go further than you are able, but can you ask the cabinet secretary formally whether the committee can have access to the very detailed analysis? That would furnish the debate and it would help.

Stephen White: You have made the request and it has been recorded.

Gavin Brown: Thank you. The reclassification issue is not in the financial memorandum and also does not appear in the business and regulatory impact assessment. Can you explain why it does not appear in that document?

Stephen White: It does not appear there roughly for the same reasons that it does not appear in the financial memorandum. The summation of our assessment of risk was that it did not warrant inclusion in that document either.

Gavin Brown: You did all that analysis. Jackie Baillie put the question to you about what external advice you had taken, and you said that you had not taken formal advice from the ONS.

Have you taken any other external advice? Have you taken legal advice, for example? Have you spoken to experts in the field, or have you only had internal discussions?

Stephen White: There has been no external liaison on the matter. It is a sensitive issue and we would not have a wide consultation on that point alone when the issues were being unpacked in great detail internally. We did not conduct external discussions or take expert advice from outwith Government.

Gavin Brown: Of course it is a sensitive issue. I accept that, but I want to clarify the point. Your

decision, which you stated categorically with some strength, is that there is no risk at all, but just to be clear—

12:00

Kerry Twyman: We said that there is a low risk. We have never said that there is no risk.

Gavin Brown: You said that there was no additional risk beyond the current risk.

Stephen White: There is no additional risk beyond the risk that is already identified. It is accepted in the field that a modicum of risk exists in certain facets of the structure of university governance—financial and legal arrangements, and so on. “Modicum” is the word that I would choose. However, the bill’s provisions do not advance that existing risk base.

Gavin Brown: It is not that there is no risk—I did not mean to suggest that—but that there is no additional risk, so you were quite right to say that there was a low risk overall. You have reached that view and expressed it with some strength, but, just to be clear, have you taken advice from any external source on the matter?

Stephen White: No.

Gavin Brown: I hope that I am not misquoting you, then, by saying that your view is that what the bill proposes does not go beyond the current risk at all—not by a millimetre or a fraction.

Stephen White: Our assessment is that any current level of risk is not advanced by the provisions in the bill, set against an analysis of the ESA 2010.

Gavin Brown: All right. I will ask one final question, which I think that you have already answered in part. Let us assume that, as it did with the AWPR, the Scottish Government has got it wrong. Perhaps I should say not that you have got it wrong, but that the Government has taken a different view from the ONS, which could have consequences. The Scottish Government did not seem to think that there was a risk in advance of the AWPR project. We have been bitten before and that is why the committee takes the matter so seriously.

Have you done any work on the financial consequences of reclassification, should it occur? You have heard what university representatives had to say today. Has the Scottish Government done any of its own work on what the financial consequences could be if you get it wrong?

Stephen White: No. In our assessment reclassification remains a hypothetical event, so no work has been done on it. In fact, that would be very complex. That is why earlier I respectfully referred to what has been offered in the evidence.

We might not agree that there are any costs, but at least we will do stakeholders the service of looking at what they have said and at the opportunity costs that they have identified. As I said, we might not agree on what is the reality, but we will look at what they have said. There has been no specific, tailored work on costs of that sort.

Kerry Twyman: As we stated, we have a full understanding of reclassification’s financial implications, which were mentioned earlier, because we have been through college reclassification. In almost every instance the financial implications are the same, although they may be magnified for the universities. Although we have not looked at the specific numbers, I would say that we have a clear understanding of what the financial implications would be across the sector, because of our experience of college reclassification.

Stephen White: The Government is well versed in such work, but in case it sounds as if we are being dismissive, I should stress that the reason that we have not done work on university reclassification is that we have had the detailed risk assessment—it hangs on that point. If we had thought that there was a need to do that work, we would have done it, but the risk assessment suggested otherwise.

Gavin Brown: I have a final question, purely on a matter of detail. Universities Scotland wrote to you on 13 August and you have not responded yet. Although the letter is six pages long, you have done all the work and a huge amount of analysis, so when should Universities Scotland expect a reply?

Stephen White: We will reply as soon as possible. We are working on that now and I do not expect that Universities Scotland will have to wait too much longer. On the specific ONS point, as I said in response to an earlier question, the answer will be quite short because, as I recall, the letter asks for an absolute guarantee that reclassification will not happen, and the answer will be compiled out of the points about risk analysis and assessment that I have made today.

An overall response to the letter will be sent as soon as possible. I suspect that we are more than halfway through working on it, but there is no purposeful delay.

Gavin Brown: Forgive me for pressing you on this point, but are we talking about days, weeks or months?

Stephen White: We are talking about weeks at the most, certainly not months.

Gavin Brown: Thank you.

Richard Baker: You have made clear your view that the ONS will not give you a categorical opinion on whether the provisions in the bill would lead to reclassification. I understand that, although, as Mr Brown said, it is worth asking the ONS for its advice anyway. However, given the fact that the ONS's job will be to provide an interpretation in relation to the European system of accounts, could you have dialogue at a European level or approach those who are responsible for running that system for their view on whether the provisions risk reclassification?

Stephen White: In my view, we have at our disposal all that we need through the ESA guidance, the Treasury's guidance and the chance to engage with the Treasury, which has experts whose full-time job is to advise on such issues. There is no practical need to invite a European conversation about the issue.

Richard Baker: However, could you do so, theoretically?

Stephen White: Theoretically, we could open up a dialogue with any interested party, but we have what we need at our disposal. We have already used what we have at our disposal in written form. In fact, I have it here with me: the ESA indicators of control.

Richard Baker: I am puzzled that you have not sought any external advice, given the fact that you have acknowledged that there is a risk, even if it is low, and the fact that Universities Scotland makes it clear that its legal advice says that there is a significantly increased risk of reclassification. To me, that makes it clear that it would be sensible to take external advice.

Stephen White: If Universities Scotland wants to share that advice, we would happily consider it. However, we felt that our internal assessment of risk was adequate. I wonder what external advice would offer that would be different. Risk assessment is not an exact science and external advice might be open to opinion. We might find external advice that has a negative opinion, but what would be the worth of external advice that seemed to lack objectivity regarding a pro opinion? We have examined the matter in great detail and our opinion is that the risk is not advanced.

Richard Baker: After the experience of the Aberdeen western peripheral route, to which Mr Brown referred, the Scottish Government would be wise to take a belt-and-braces approach to the matter and seek external advice, to minimise any potential for risk.

I understand from earlier evidence that the chair of the 2012 review has said that the intentions of his review can be achieved without entertaining the risk of reclassification and without proceeding

with the provisions in the bill as it stands. You have talked about the potential to review the bill at the point when the risk is realised, if that happens. If the bill and the intentions of the review can be progressed without the risk, why not take that action now, prior to any problem arising, rather than having to address events through a potentially difficult and troublesome process once legislation is in place?

Stephen White: There are quite a few layers in your question and I will try to answer the whole of it.

I have not yet read Professor von Prondzynski's submission to the Education and Culture Committee, so I do not know what he has said in it. Having been in his company at a recent meeting, I know that he remains very supportive of the bill. He might be making a technical point. Obviously I am an official, not a minister, but if the secondary legislative powers could be modified in a way that did not harm the bill's overall policy intention, the Scottish Government would be open to a conversation on that. If such modification minimised risk or the perception of risk, that could be beneficial.

The time to think about doing that would be when the bill progresses through Parliament. I take it from your question, perhaps wrongly, that you think that it might be left until after the bill becomes an act. However, the Scottish Government will consider the scope of the secondary powers during Parliament's consideration of the bill.

Richard Baker: It was suggested earlier that, if reclassification took place, legislative changes would be considered at that point. However, I am heartened to hear you say that those matters will be considered during the progress of the bill and that you are open to that dialogue. That is certainly helpful.

Stephen White: It is not in my gift to say what will happen but, given what has been said in evidence and the emphasis that has been placed on the sections on secondary powers—section 8 and so on—it is entirely legitimate that everyone should have a joined-up dialogue on the matter.

Richard Baker: Kerry Twyman said that it has been a difficult process for colleges to organise workarounds after reclassification. If the worst happens and the bill goes through as currently proposed and leads to reclassification of universities, would universities be compensated for the undoubted extra burden that would be placed on them by having to create similar workarounds?

Kerry Twyman: If reclassification is triggered it does not come into immediate effect. The colleges in England and Wales were given a period in

which to review their control mechanisms and make changes that would keep them outside the boundary. That is what we were saying.

There is a very low risk of reclassification and we do not believe that the bill will change that. That is a key point. The risk already exists because of the nature of universities and their interaction with the Scottish Government. If a reclassification decision was triggered by an ONS review, which could well be triggered by a review of universities down south—that is the most likely scenario—we would ask for a period in which to review the entire structure around universities, which could lead to changes that would keep them outwith the boundary.

Stephen White: That is a helpful procedural explanation. I want to reinforce our view that the risk is very low. Obviously, after having a detailed conversation about the matter today, we know that there is an existing risk base, but we know that it is low. Some of the issues about reclassification were raised in meetings in 2012—even in 2011—but no work has been taken forward on that. It is not as if we are already dealing with a high risk base; the risks are marginal and low. My assessment is not off the cuff; it is based on my experience of the last four to six years. In the realm of higher education governance I have heard questions that refer to a bigger world of reclassification issues. They are not necessarily all the same, but they should all be looked at with reference to each other.

Your question was about recompense, which is a few too many hypotheticals ahead. We do not think that the bill spurs the risk of reclassification. I take on board the issue when I am asked a question on it, but I do not think that reclassification is a likely outcome, given where we are today.

John Mason: Carrying on with the present theme, Stephen White has said that he feels that there is a very low risk of reclassification at the moment, leaving aside the bill. The universities told us earlier that they thought we were in the amber area of risk. They said that the bill would take us from low amber to high amber—or bright amber or something. I would have preferred numbers, but we will go with the colours. Do you agree with their assessment?

Stephen White: No. I respect their assessment, but I do not agree with it. I agree with the colour that they used first; the impact would obviously be red and no one wants to see that happen. If we must use colours, I would put the risk as more of a green one, but I would not be dismissive of other views. We have to take seriously what people feel strongly about. The universities have expressed that both today and in written evidence.

John Mason: If there is a risk around reclassification—and if we accept that it is quite low—would you say that the greater risk lies in the current position rather than in what the bill is doing? If arrangements had to be undone, redone or reorganised, it would not be about this bill but would arise from the existing situation.

Stephen White: That is a fair point. I do not want to talk in absolutes about risk, but the bill in itself does not add any risk, or adds very negligible risk.

As for the substance of the risk, I would not want to overamplify that either. We cannot be complacent, but nobody has raised the existing risk in this debate until perhaps the past four to six weeks. There was no mention of the ONS risk in the dialogue when the consultation was open. Professor von Prondzynski's report and very thorough review was conducted and a lot of the ideas were posited in that report, but talk of the risk has been heightened only very recently.

12:15

John Mason: It has been suggested that we might go to some theoretical outside body to get a more definite ruling on reclassification and so on. I am interested in whether such an organisation, body or individual exists, whether in Scotland or in the UK. Leaving aside the ONS, is there anybody that we could go to? We could go to six lawyers and get six opinions.

Kerry Twyman: I agree completely with that assessment. Over the past year or two, the Scottish Government has spent a lot of time working on reclassification issues. Indeed, off-the-cuff remarks have been made to the effect that the ONS now considers the Scottish Government to be a leading expert on reclassification because of the time that senior finance colleagues and ministers have spent on the issue. I do not know of anyone that one would go to, other than the Scottish Government finance directorate or the Scottish Futures Trust, which we have spoken to, who would potentially be more experienced in the matter than the ONS, Eurostat and the Treasury.

John Mason: That is helpful. Another suggestion is that we write to the ONS. However, given that it is a sensitive issue, would writing to the ONS increase the risk of its undertaking investigation or even reclassifying? If I think that I might have driven over the speed limit last night, it might not be the best thing for me to write to the police saying, "I might have done 31mph. Do you want to check that?"

Stephen White: That is a fair comment, and that has probably informed the work on this going right back. I have answered questions about internal versus external advice. If Governments

anywhere were to consult such a body every time that a policy was taken forward, the answer might be, “We will need to think about it for a good while before we get back to you, and a determination will not be forthcoming until you show us exactly what you want to do.” Conventions are made to be broken, but I do not think that we thought it necessary to write to the ONS as part of the policy development, particularly given the risk analysis.

John Mason: Is there a slight risk that doing that would damage our case?

Kerry Twyman: Yes.

Stephen White: Yes, and it would certainly delay matters. The ONS looks at things in excruciating detail.

Kerry Twyman: Because of how the process works, if we had written to the ONS we would not have received a response one way or the other, or we would have received a stock response saying, “We will not consider this until the legislation has gone through and the changes have been enacted.” However, as you say, a flag would have been raised.

John Mason: That is helpful. Thank you.

I have one or two points on a different subject. The Delegated Powers and Law Reform Committee has been mentioned. I happen to be a member of that committee. Given that the universities have raised the issue, might the Government consider increasing the level of parliamentary input so that, for example, where negative procedure has been used in the past, affirmative procedure might be used in the future?

Stephen White: Yes. More fundamentally, from what has been said today, it seems that the content of those secondary powers would be looked at in the light of the evidence that was submitted to both committees. I cannot predict exactly what that would mean but, given that concerns have been raised, we will look thoroughly at the content, the impact and the intent of the secondary legislation. I restate that the intent was to future proof the legislation in some way. I am not being dismissive of people’s views of risk, but it is about good housekeeping; there is no intent to advance ministerial control through those secondary powers. However, given that those issues have been raised, I am sure that the Government will consider them.

John Mason: It could be perceived that using negative procedure to confer some secondary powers would give ministers slightly more leeway than using affirmative procedure.

Stephen White: Yes. I think that I am right in saying that most, if not all, of the secondary powers that would give ministers the ability to

change the legislation are subject to affirmative procedure.

John Mason: We heard earlier that it was not the Government’s objective to appoint an individual to a university’s governing body, for example. Can you clarify that? Would it be possible for the Government to appoint somebody in that way?

Stephen White: I do not know whether that would be possible as a point of law, but it would be completely undesirable. The word “objective” might have suggested that there is some ambiguity, but there is no ambiguity. The Government would never want to directly put anyone on any governing structure in a university, and that includes ministers. I know that concerns or views have been expressed about that, but that is not the intention.

John Mason: So it is a matter of putting a process in place.

Stephen White: It is just a process. It is the how, never the who.

John Mason: It does not involve giving the Government the power to appoint an individual.

Stephen White: No—in no way does the bill do that. In fact, nothing in the bill requires an HEI to ask the Government permission for anything.

John Mason: OSCR made the point in its letter that there is a slight distinction between the four older universities and the more recent ones, in that part 1 of the bill might become part of their constitution. Is that a concern, or is it just a technicality?

Stephen White: OSCR develops its argument to say that, although the constitutions would be altered by certain provisions in the bill, that would not jeopardise—that is my word, not OSCR’s—their charitable status. That is its conclusion.

John Mason: On the question whether the Government gets involved in the process of governing bodies being appointed, does that happen in other fields? Does the Government get involved in the process of people being appointed?

Stephen White: I could not speak authoritatively on that, but it might do with public sector bodies. However, universities are autonomous bodies so the Government would never have any notion of being directly involved in the process for the appointment of individuals to govern the structures.

John Mason: I am talking about putting the actual process in place—I am referring to charities and outside organisations. Perhaps it is unfair to ask you about that.

Kerry Twyman: We have said before that there was a precedent, in the sense that the Government can call for a proportion of a board to be of a certain nature, even in private companies. There are definitely precedents, although we are not experts on the subject, so we could not give you examples.

The Convener: Does Mark McDonald have a question?

Mark McDonald: I had only one question, and the deputy convener has asked it. It was not about speeding.

The Convener: That concludes questions from committee members. I have one or two wee points that I wish to raise before we finish. We have not really touched on them, but they are specific to the financial memorandum.

I refer to a couple of pieces of evidence that have been received. The first is from Scotland's Rural College. When asked whether the

"estimated costs and savings set out in the FM are reasonable and accurate",

the college responded:

"The experience of SRUC in relation to changing Articles of Association indicates that the assumption in the FM of the time and cost required to amend HEIs governing instruments is not accurate and that it significantly understates the resource requirement both for the Scottish Government and for the institutions involved."

How did you come to your assessment regarding the costs of that?

Stephen White: Laura Duffy might have a perspective on that. I hope that I have understood the question correctly. I am not sure that the financial memorandum specifies an analysis of the costs of updating governing instruments in light of the bill's provisions. Updating governance as part of the compliance with the code of conduct, as well as many other decisions that HEIs want to make, is part of mainstream business, and any provisions that the bill would bring forward, should it be enacted, would be staggered in their implementation.

All institutions are different. They all have different numbers of staff and legal advisers. It is difficult to grasp on to any standard estimation of cost. Forgive me if I have misunderstood the question but, if that is the item that SRUC is homing in on, it might involve a long-term activity. There might be a spike, if a new bill becomes an act. We take what SRUC says about costs, but we found it very challenging to identify and package up any standard costs in that regard, given the staggered nature of the time that it would take to change ordinances and governing instruments after the bill became an act.

If SRUC is homing in on a slightly different issue, I apologise for giving the wrong answer.

The Convener: No—I think that your answer is fine.

Another organisation, Queen Margaret University, said:

"We would ask the Committee to note that the process of securing Privy Council and Scottish Government approval for a relatively straightforward amendment to the University's Order of Council, to bring it in line with the Scottish Code, has taken some 16 months. This process commenced in June 2014, and the amendment is due to commence in late September 2015."

Basically, it is saying that the changes that the bill would bring in would have all sorts of legal consequences, advice would have to be sought, administrative time would be required and so on. It is saying that that has not been accounted for in the financial memorandum.

Stephen White: No. I refer to my previous answer, about the difficulty of isolating costs for different organisations given their different needs and the different adjustments that are required to get standard costs.

Reform to the Privy Council process was an item in the consultation. Ministers decided not to pursue that in the bill, for many reasons, but I would cite the deep complexity of the historical arrangements through which we have arrived at the current system. There are some features that are regrettable, including the time taken, the detailed legal matters and the going back and forth between legal advisers. However, as part of the announcement about the bill, ministers mentioned a separate piece of work involving the Privy Council and a modernisation conversation, which would commence before any new legislation was thought of in the future. Although that does not relate directly to the issue of cost and time, such activity will try to truncate the processes and save institutions money in the long run.

The Convener: Thanks very much—that is helpful.

Thank you all for your responses to our questions. Would you like to make any further points before we wind up this evidence session?

Stephen White: No.

Kerry Twyman: No.

The Convener: Thank you. That ends the public part of the meeting.

12:26

Meeting continued in private until 12:27.

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