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Official Report

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

Wednesday 14 April 2010

Session 3

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LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE
10th Meeting 2010, Session 3

CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

DEPUTY CONVENER

*Alasdair Allan (Western Isles) (SNP)

COMMITTEE MEMBERS

*Bob Doris (Glasgow) (SNP)
*Patricia Ferguson (Glasgow Maryhill) (Lab)
*David McLetchie (Edinburgh Pentlands) (Con)
*Mary Mulligan (Linlithgow) (Lab)
*Jim Tolson (Dunfermline West) (LD)
*John Wilson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Margaret Curran (Glasgow Baillieston) (Lab)
Alison McInnes (North East Scotland) (LD)
Margaret Mitchell (Central Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

John Blackwood (Private Rented Housing Forum)
Kennedy Foster (Council of Mortgage Lenders)
John Gell (Private Rented Housing Forum)
Russell Gunson (NUS Scotland)
Deborah Lovell (Law Society of Scotland)
David Middleton (Sustainable Communities (Scotland))
Katharine Sacks-Jones (Crisis)

CLERK TO THE COMMITTEE

Susan Duffy

LOCATION

Committee Room 2

Scottish Parliament

Local Government and Communities Committee

Wednesday 14 April 2010

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Duncan McNeil): Welcome to the 10th meeting of the Local Government and Communities Committee in 2010. I remind members and the public to turn off all mobile phones and BlackBerrys.

Under agenda item 1, we must agree whether to take in private agenda item 4, which concerns consideration of further work on equal pay. Do we agree so to do?

Members *indicated agreement.*

Housing (Scotland) Bill: Stage 1

10:01

The Convener: Agenda item 2 is an oral evidence-taking session on the Housing (Scotland) Bill at stage 1. We will hear evidence from two panels of witnesses. The first panel will focus on issues around private housing, including landlord registration, the licensing of houses in multiple occupation and local authority powers to deal with disrepair in private houses. The second panel will focus on the bill's provisions on the protection of unauthorised tenants.

On our first panel, we have John Gell, from the Royal Institution of Chartered Surveyors in Scotland, who is the chairman of the private rented housing forum; John Blackwood, from the Scottish Association of Landlords, who is a member of the private rented housing forum; David Middleton, from Sustainable Communities (Scotland); and Russell Gunson, the head of policy and public affairs for the National Union of Students Scotland. Thank you all for your attendance this morning.

As we have previously indicated, instead of having opening statements, we will move directly to questions.

Alasdair Allan (Western Isles) (SNP): As the convener has said, one of the issues that we are interested in is landlord registration. Do any members of the panel have views on the fees, not least the fees that local authorities will be able to charge a registered landlord for subsequently nominating an unregistered agent?

David Middleton (Sustainable Communities (Scotland)): As I understand the situation, the fees for landlord registration contribute to a self-financing licensing system. One of the concerns that Sustainable Communities has is that although the fees might be felt by landlords to be fairly high, they will not provide enough income for regulation to be carried out correctly. In our experience, the enforcement processes are extremely underresourced, which means that those landlords who do not comply with the legislation tend to get a free run and are seldom brought to book.

Our thoughts are not that the licence fee should be increased—we think that it is probably high enough and we do not want to deter the provision of accommodation for single people—but that there should be an income stream coming from the use of fines levied on transgressors. At the moment, those fines go to the Exchequer, because the whole process is carried out through the criminal justice system. Our evidence suggests that if the transgression were made a civil offence, the funds that were gained from fines would be

available to local authorities, which would increase the enforcement activity and make it much more effective without increasing the cost to the public purse.

We have been given arguments as to why that should not be the case, but civil fines are used in connection with many transgressions, such as parking offences, and civil proceedings are used in connection with quite serious issues, such as freeing children for adoption. Local authorities are well versed in how to act in civil processes.

John Blackwood (Private Rented Housing Forum): Since the proposal was first made, the Scottish Association of Landlords has campaigned for the application fee to be proportionate, given that regulation and the legislation are designed to create a light-touch system. We still believe that that should be the case and that the same fees should be set for landlords, regardless of where they operate in Scotland.

There is an issue around enforcement, which costs money, as has been pointed out. However, anyone who evades registration and is caught for doing so should subsequently pay a higher fee. I have no issue with those fees being substantially higher.

Alasdair Allan: Do other members of the panel agree with Mr Middleton that the offence should be a civil offence rather than a criminal one?

John Blackwood: We echo that view.

Russell Gunson (NUS Scotland): We have no view on that particular issue.

Alasdair Allan: Mr Middleton touched on the adequacy or otherwise of the proposals to deal with the continued risk of what we might call unscrupulous landlords failing to register. Indeed, it has been suggested that fees might deter landlords from registering. I do not subscribe to that idea, but do any of the witnesses have a view on it?

John Blackwood: The fees do not preclude people registering; they are not a deterrent at all. They are nominal, as I already mentioned. If the issue was the same throughout Scotland, I might have a different view on the matter. However, some local authorities are able not only to implement the local landlord registration scheme but to enforce it adequately based on their fee levels and have good results in catching unregistered landlords. Some other local authorities are not carrying out any enforcement at all. I do not understand that, and it is up to those local authorities to defend their position on the matter. It is important to note that the issue is not fees per se but enforcement and the resources that local authorities employ in the relevant teams to carry it out.

Russell Gunson: I echo those points. The NUS believes that enforcement of landlord registration could be improved. It is patchy throughout Scotland and dependent on the priority that the local authority gives to catching unregistered landlords. We welcome the proposed increase in the fine for unregistered landlords from £5,000 to £20,000. We would also welcome awareness raising among students and tenants in the wider population about their rights and the system of registration for landlords and HMOs in general.

Alasdair Allan: You mentioned that the situation is patchy throughout the country. What number of local authorities are doing little or nothing to pursue unregistered landlords?

Russell Gunson: It is difficult for us to know the unknown in terms of unregistered landlords. Last year, research was undertaken to estimate the number of private landlords in the private rented sector but, until local authorities begin greater enforcement, it is tricky to know how many unregistered landlords there are.

David Middleton: Our understanding is that the licensing scheme was introduced because of concerns about danger to young people in particular who were in flats of a very poor standard that did not have proper fire procedures or exits. Some young people died. The intention was to increase the quality and safety of such accommodation. To that extent, it seems slightly strange that a light touch should be applied to the whole scheme, not only to responsible landlords, many of whom are members of landlords associations, but to landlords who are prepared to ignore the registration schemes with impunity for years on end.

In our experience, there is no proactive regulation. That is not the case everywhere but, in many places, local authorities simply wait until issues come to them, and the worst that happens to an unregistered landlord who is caught is that he is encouraged to get a licence, so there is no deterrent. Some unscrupulous landlords continue to operate in an atmosphere of impunity. We see that not from anecdotal evidence but from real evidence. A number of people who have operated without licences for years have come before licensing meetings that we have attended but they are never refused licences. They are simply given licences and made legal, so there is no incentive for a landlord to get a licence with the soft-touch regulation at the moment. That is one of the major failings of the process.

John Blackwood: I have a point of clarification on what Mr Middleton said. I think that he is referring to the legislation on HMOs, which was introduced to protect tenants' safety. Landlord registration is very different; it is a light-touch mechanism and was brought in not under the

safety banner but to improve standards in the private rented sector in Scotland and to facilitate contact between local authorities, landlords and tenants.

To go back to the idea that enforcement is patchy throughout Scotland, the registration scheme works very well in some areas, both urban and rural; it just depends on the resources that local authorities put into those teams. There are good results from the scheme in terms of partnership working with local landlords and communities. However, we are disappointed that that is not the case throughout Scotland, and we feel that something should be done about enforcement.

I like to think that we represent good landlords in Scotland, and it is not fair that other landlords operate without being duly registered—it is not a licence—and nothing is done about it. That is not on, and it sends out a bad message to unregistered landlords, who will just sit back and say, "Why should I bother? No one will do anything about it."

Increasing fines is one way of dealing with the issue, but our written evidence to the committee makes it clear that although the fine is currently set at £5,000, it makes no difference to an unregistered landlord whether they are fined £5,000 or £20,000 if no one enforces it in the first place. A fine is no deterrent in itself; we support the principle of it as long as it is enforced.

David Middleton: Can I add a postscript to that?

The Convener: Excuse me, Mr Middleton—I will let Mr Gell in first.

John Gell (Private Rented Housing Forum): I want to raise the issue of awareness. There are landlords out there who deliberately evade registration, but many landlords simply do not realise that they need to register. The whole business of landlord registration should be given a much higher profile through publicity, which needs to be resourced, so that we reach a situation in which a tenant would no more rent from an unregistered landlord than he would use an unregistered dentist.

The Convener: Mr Middleton, did you want to come back in briefly?

David Middleton: I simply want to add a postscript on the issue of prosecution. I take the point about the distinction between landlord registration and HMOs, but all HMO landlords have to be registered under the landlord registration scheme, so they fall into that category too.

If non-registration is a criminal offence, it is a matter for procurators fiscal, who are generally very busy people who have to prioritise cases. We suspect—and it is probably sensible—that HMO transgressions come fairly low down the scale.

In our experience, it is difficult for procurators fiscal to give the issue priority. As the standard of evidence is much higher for criminal than for civil cases, it is more difficult for local authorities to bring cases and for the procurator fiscal to be convinced that he can win a case. The civil process involves a lesser standard of evidence—a balance of probabilities—and so is much easier to administer; it can be done by the local authority's own staff.

The Convener: We would not ask witnesses to name and shame local authorities that are not proactively dealing with the issue, but you indicate that you have some knowledge about best practice, which might be helpful to the committee. You may wish to relate that information here today, or to provide the committee with further information on any work that you have done on where registration is being carried out well or acceptably in comparison with other areas—to which you have alluded—that are not as proactive.

John Blackwood: I am happy to come back to the committee with that information, rather than—as you say—naming and shaming some local authorities today. We have some evidence of good practice.

Our membership base covers the whole of Scotland, and we have found that many landlords are reporting unregistered landlords to our local offices. They are the neighbours of landlords who are renting out properties for the same amount of money despite being unregistered. Our attitude is that we are part of the enforcement mechanism.

We often get in touch with local authorities and say, "Here's the address and the name of the landlord"—in some cases, we can even give the landlord's address. We tell them, "Go ahead and take enforcement action against them—they are unregistered." We follow that up with particular local authorities to see whether they are doing it. We know that many are not and we can provide evidence of that.

Equally, other local authorities have never engaged with the private rented sector before and—with due respect—have never valued what the private rented sector is doing to help the local economy and to create sustainable communities. The bill has encouraged them to consider how they can create sustainable partnerships with the private sector, which we use as a good practice model. The Scottish Government has done a lot of research into different practice the length and breadth of the country, and I am happy to provide more information on that to the committee in written form.

10:15

Jim Tolson (Dunfermline West) (LD): Good morning, gentlemen. I would like to address the part of the bill that deals with maintenance and enforcement powers. You will be aware that section 139 will extend the situations in which local authorities can pay a missing share into a maintenance account to cover an owner who is unwilling to pay their share of the cost. That will enable maintenance work to go ahead when there is a missing share and the local authority will be able to recover the expenses from the responsible owner. Will the proposal allow local authorities to pay a missing share of a maintenance contract in the context that the Government has set out? Will local authorities encounter problems in trying to recover the cost of the maintenance from owners? In short, are the proposals reasonable and workable, and what effect will they have on local authorities?

There is silence. Do not all answer at once.

John Blackwood: Shall I answer? We are all fighting for it.

Jim Tolson: Go ahead, Mr Blackwood.

John Blackwood: We fully support the proposal, which addresses a big issue for us. You will hear from many groups in our communities that absentee landlords sometimes do not pay their share. Equally, I can tell you that owner-occupiers often do not pay their share but leave such matters up to landlords who, arguably, have a greater interest in doing up the common stair or whatever because they have to show their property every six months and actively sell it. Often, they act as unpaid pseudo-factors and are left with the bill. We feel that such a situation is unfair not just on landlords but on any neighbour; therefore, we support any mechanism that will enforce common repairs by getting the missing share or shares.

You asked whether the proposal will work. I am afraid that it is up to local authorities to use the power. Whether they feel that they will be resourced to do that is another question. We know of good practice in some parts of Scotland where local authorities quite readily issue statutory notices to improve properties. I believe that that has been common practice in the city of Edinburgh since the 1970s, but the situation is not echoed throughout Scotland. Perhaps that good practice could be rolled out.

Russell Gunson: It is not greatly within the locus of NUS Scotland, but it is fair to say that when absentee landlords do not pay their share quickly that reflects poorly on the tenants, and students are sometimes picked out by the rest of the stairwell. We would welcome anything that could be done to get common repairs done more quickly and fairly.

David Middleton: It is a serious problem in tenanted properties and flatted properties where there are common areas. I agree with what my colleagues say about absentee landlords, which is particularly true if their agents are not working effectively—although, in some cases, they do not even have agents. We have absentee landlords who live as far away as Bahrain, who are very difficult to get in touch with and who ignore all their responsibilities other than that of collecting the rent.

I have experience of the situation in St Andrews, where we do not have many tenement properties but we have an outstanding conservation area, of which about 85 per cent is occupied by students. Serious property decay is resulting from landlords not meeting their responsibilities. Some landlords are good, but sufficient are not and neglect the appearance of buildings, to the extent that the conservation area appraisal and the St Andrews town guidelines say that such buildings seriously blight what is supposed to be the most historic small town in Scotland.

The issue extends not only to buildings but to the maintenance of public spaces. Gardens in two areas in St Andrews are opposite rather than behind the houses that they serve, as in places such as Edinburgh. The association that looks after those gardens finds it difficult to obtain maintenance contributions from HMO landlords, who form almost 90 per cent of the property owners in those areas. That is a serious situation for the quality of the environment. The issue is not tackled by landlord registration or any other measure, because the inspectors of such properties tell us that their responsibilities end at the front door of a flat—they do not consider common areas.

Jim Tolson: Does Mr Gell have no comment? If not, that is fine.

The Convener: Witnesses are not compelled to respond—otherwise, we would be here all day.

Jim Tolson: Indeed—I was just ensuring that Mr Gell was not indicating that he wanted to speak.

I am pleased to hear that the proposal is welcome among landlords as well as users, but Mr Blackwood made an important point that is similar to a previous one. No matter what legislation is put in place, the question is whether it will be enforced in practice. My concern with the measure and some others that the Government has proposed is that they place an additional burden—whether large or small—on local authorities, which do not have the budget and far less have the manpower to enforce actions. The Government's suggestion

is helpful, but I question its effectiveness and enforceability.

The Convener: I do not think that that was a question, so we will move to Mary Mulligan.

Mary Mulligan (Linlithgow) (Lab): Good morning. We have discussed landlord registration, which was introduced back in the Antisocial Behaviour etc (Scotland) Act 2004. As we have heard, some landlords—for whatever reason—are not registered. Will the measures in the bill change that?

John Gell: The provisions should help. The proposal for local authorities to require agents to produce lists of their landlord clients and managed properties should help, but I return to the point about raising awareness levels. Many people—tenants and landlords—do not realise that landlord registration exists and is a requirement.

David Middleton: That might be generally true, but exceptions exist. Some landlords have agents who act professionally but do not appear to advise their landlord clients of the law. There is no excuse for that.

The landlord registration scheme in general is fairly new, but the HMO legislation, which is a subset of the scheme, is about 10 years old. We might expect it to take time for legislation to bed in and for people to become aware of it, but there is no excuse for anyone who becomes a private landlord in a responsible way not to be aware of the legislation.

There is a difference between the clients whom my colleagues on the panel represent and another group of people, who are buy-to-let speculators. They buy one property as an investment, are not particularly interested in what happens as long as the rent comes in and will certainly not put out any money that they do not have to. Going into the HMO business is very attractive for buy-to-let speculators because of the assured income from students, for instance, and because HMO landlords who accommodate students do not pay any council or business tax on their property. As such, there are people who are in the business if not for a quick buck, then for income and the accruing value of the house with minimal expenditure. I exonerate the colleagues on my left, Mr Gell and Mr Blackwood, who represent responsible landlords; it is the irresponsible landlords who are bringing the whole process into disrepute.

Russell Gunson: There are quite a few points that we can perhaps get on to later and on which we may not agree. On the landlord registration scheme, enforcement is on two pillars: on one side, it is for local authorities to prioritise it, if they have the resources; and on the other side is raising the awareness of tenants, the people in neighbouring properties, landlords and prospective landlords.

There are measures in the bill that will help awareness raising to some extent. For example, the additional information for the register is a step forward, as it will allow people to check more easily whether they live in or next to a property that is registered. However, the bill could go a great deal further, and both enforcement by local authorities and awareness raising could be improved. Our student association members at colleges and universities across Scotland do a great deal of work to raise awareness among students, but they have a lot of other things to raise awareness of, so a bit of help would be fantastic.

John Blackwood: We have always supported the principle of landlord registration because of the good that it can do in communities and to improve the image of the sector, which is of utmost importance to us as an organisation. The disappointment that we perhaps share with some elected members is that it is not really doing the job that it set out to do.

There is the argument that we are still in the early days, but we are now a few years down the line and I would like to think, at least, that enforcement is happening. When we hear that in some areas only a few people—fewer than 10—have been refused, we have to question whether the scheme provides value for public money and whether enforcement is being carried out.

I am pleased that the Scottish Government is undertaking a review of the landlord registration scheme, its uptake and the lessons learned, and we will watch with interest for the results from that. It would be a shame to throw the baby out with the bath water, because the principle is sound, but I am afraid that the practice has turned out to be very different. As far as we are concerned, the fact that we are not publicising landlord registration sends out the wrong image to society, as John Gell has already mentioned. Few people know about it—tenants and landlords alike.

Given the economic circumstances over the past year, many people have become landlords by default. It is incredibly easy to become a landlord: you can purchase a property and your solicitor will not tell you that you need to register as a landlord; and you can get a buy-to-let mortgage and the mortgage provider will not tell you that you need to register. There are many different processes to go through first but, rightly or wrongly, nobody informs landlords about registration.

Many people inherit property and decide that rather than sell it—last year they could not sell it—they will rent it out. Often they become default or accidental landlords, as we call them. Some of

those people are starting to sell up, but last year we certainly found that there was a problem because the level of awareness of the rights and responsibilities of landlords was incredibly low. I am afraid that that will always be the case as the market changes, but we need to do something about awareness raising and proper enforcement—or, to be frank, not do it at all, because it could be doing more harm than good to the image of the sector.

10:30

Mary Mulligan: There seems to be unanimity on the need to raise awareness and for a more consistent approach. Earlier, we heard about inconsistencies between local authorities. Will you say a little bit more about exactly how you would raise awareness and whether raising awareness needs to be part of the bill? What should the Scottish Government do to ensure that local authorities play their role and are proactive on registrations and follow-ups? You mentioned that people are perhaps coming into the market accidentally, but they still have an obligation to be registered.

John Blackwood: There are some examples. Some local authorities actively search the market. They look at advertised properties and check whether individual landlords are registered. That is a good start. A property must be advertised somewhere, whether in the local papers, on the internet, in agents' windows, or on "To Let" boards, all of which can be followed up. However, not all local authorities do that. The process is time consuming and costs money or resources; nevertheless, it is a way in which there can be early engagement with landlords and early enforcement. As I said, some landlords might not know about registration, so that approach in itself is an awareness-raising mechanism.

Some local authorities have set up landlord forums, and they know, especially through their housing benefit records, whether landlords receive housing benefits—if those benefits are still paid directly to them. At least they will have a record of that somewhere. The same applies to the council tax register. Local authorities have gone directly to landlords, and some have developed strong relationships with landlords as a result. Training has been offered in the city of Edinburgh, and some areas have become partners in the Landlord Accreditation Scotland scheme, which the Scottish Government funds. There are many initiatives.

I am afraid that it is up to each local authority to consider the value of its local private rented sector. As members well know, local authorities in some areas cannot ignore that sector; they rely on it to provide valuable housing. It is therefore in their interest to ensure that landlords are as informed as they should be and provide safe and decent accommodation for customers or tenants.

There are good examples out there, and we would like to see more awareness raising of those examples to encourage other local authorities to do the same and see the value in their sector. However, I am afraid some local authorities still think that they do not need to engage with the private rented sector. That is a very short-sighted approach for any local authority, regardless of its housing dynamics.

David Middleton: We have concluded that there are two inhibitions to local authorities actively following up enforcement. The critical issue is the lack of resources—that is, the lack of cash. Things cannot be done without increasing the licence fees of other landlords, and the responsible landlords bear the brunt of that. I think that my local authority raised the licence fee quite modestly in order to appoint enforcement officers. However, our experience was that those officers were quickly drawn into the business of straightforward registration, for example, so there is no dedicated enforcement process whatsoever.

I should re-emphasise a point that I made earlier. If there was a civil process and fines for transgressions went to local authorities, an income stream would be provided in a system that otherwise must be self-financing.

Russell Gunson: A great deal of awareness raising needs to be done among tenants and wider society as well as among landlords. Ideally, there should be a national campaign, but it would be more realistic to use tenants' existing contact points. A private housing bill will potentially be introduced that will include provisions on pre-tenancy packs, a tenancy deposit scheme and council tax exemptions for students. Generally, there are student associations and other contact points for students and so on. It is about working with what is already there, but allowing resources to go into those areas to allow people the time and space to do that kind of work.

Patricia Ferguson (Glasgow Maryhill) (Lab): I want to consider the issue of HMOs in more detail. I was interested in one of the comments made in Mr Middleton's submission about tenemental properties. There are a great many such properties in my constituency, so I am familiar with the issues and problems that arise. Your paper seems to suggest that tenemental properties should not be used as HMOs. Are you thinking of all such properties or only those that would require some major adaptation?

David Middleton: Next week, the committee will hear from Jean Charsley, who is based in Hillhead in Glasgow, which is almost totally composed of tenemental properties. The point that

she makes, which the committee will no doubt hear, is to do with the subdivision of tenemental properties and the way in which the traditional stacked services in such properties are sometimes relocated. Instead of being in a stack down a building, services can be over people's living rooms, which means that they get noise from flushing toilets, washing machines and so on. I should probably leave that issue to Jean Charsley—we will be in danger of repetition and of wasting the committee's time if I go into it in too much detail. There are particular issues in tenemental properties when the number of HMOs in one building is overwhelming. It can reach the stage at which there are only one or two permanent residents who experience all the difficulties of a concentration of HMOs.

The comment in the Suscoms submission to which you refer is that, no matter where they are, concentrations of HMOs are detrimental to a community. They change its nature. There is often a progression from reasonable numbers of HMOs to overwhelming numbers of HMOs, as they tend to congregate together. If you live in a tenemental property—or, indeed, in any other kind of property—and your neighbours are being replaced by short-term and in some cases seasonal residents with an average tenancy of 10 months, the "pride of place" in that community begins to evaporate, as our submission says. People who live there permanently have few or no long-term neighbours. The community starts to deteriorate in a number of different ways, including those that we heard about earlier, such as the difficulty of maintaining a property if there are absentee landlords.

There are other, more subtle changes in communities. There comes a tipping point at which that community moves almost relentlessly towards being a monoculture of young, single people living in HMOs. If that occurs, the services in the neighbourhood tend to reflect the needs of that population. In places such as Marchmont and—speaking from experience—St Andrews, the family-orientated shops change into fast-food outlets, takeaways and so on. The intention of the social legislation to promote and maintain mixed and sustainable communities starts to evaporate in relation to such communities. Certainly in situations I can think of, the people who are left behind tend to be the older members of society who are less mobile than younger people. You tend to get little pockets of isolated elderly people living in a community where there is an enormous turnover, every 10 months on average, of the whole community.

That is detrimental to amenity but, more important, it is detrimental to mental and physical health. The bill is intended to improve the quality of housing and of the communities where those houses are. However, the planning system does not recognise many HMOs—it tends to be totally blind to them—so the issue is under the planning radar. The result is that some communities in Scotland are moving towards being almost totally populated by young, single people who are there for only a short time, with a few surviving members of the permanent community that once was.

Five years ago, when we started considering the issue, we concluded that we and other, similar members of the community were a threatened minority. Because things have moved on in the past five years, many people such as myself are now an endangered species.

The Convener: I remind the witnesses that we are into our last half hour of the session. I would appreciate more concise answers, so that we can get everyone in. Sorry about that, Patricia.

Patricia Ferguson: That is fine.

As I said, I am familiar with the issues and problems relating to HMOs, particularly in tenemental properties. I was trying to establish whether Mr Middleton's organisation contends that tenemental properties should not be used as HMOs.

David Middleton: We do not have a view on that. In Glasgow, only certain types of properties can be used as HMOs. For instance, an HMO must have immediate access to the street. That is partly because of fire regulations and partly to do with avoiding disturbance, as HMOs tend to have more adult people in them than the average household. Other local authorities say that HMOs are not practical in certain situations. An example might be the top storey of a four-storey tenement, where there might be fire safety issues, such as a lack of easy access.

Tenements in which the properties are almost all HMOs are virtually a student residence, but without all the normal features of a warden, fire drills and a responsible person to arrange evacuation in case of an emergency. When whole buildings are used in that way, there are real concerns about fire safety.

Patricia Ferguson: Fire safety is of course one of the issues that the HMO legislation addresses.

I ask Mr Middleton, and perhaps Mr Gunson, what they consider to be a reasonable population density of people living in HMOs in a community.

David Middleton: That is an interesting question. If one starts by considering what is a normal and viable mixed community, we find that young people make up about 20 per cent of such a community. That coincides with what we believe is a tipping point. When 20 per cent of properties in a community are HMOs—which means that the proportion of young people is higher than that

because of the higher density in HMOs—that is the tipping point at which the community starts to move towards being almost a total HMO situation. There seems to be a process that cannot be stopped when the HMO population figure gets to about 20 per cent.

We would have thought that something below 20 per cent would be quite reasonable. That would have the benefit of allowing young people to live in a sustainable community that is able to provide the kind of support that some young people might need from time to time, but also one in which there is a mixture of different people. It could be described as a mixed sustainable community.

10:45

Russell Gunson: There are quite a few points that we disagree with there, and there are quite a few points to go through, but I feel the need to put a few things on the record.

We talked earlier about the subdivision of property in tenements. Students and tenants groups more generally are probably at one with people who do not want overcrowded properties that are subdivided too much. It is quite interesting—or perhaps ironic—that some of the proposals for capping or reducing the number of HMOs in a given area would increase both the pressure on the remaining HMOs and the benefit of making such subdivisions. If, as Mr Middleton suggested, we do not want overcrowding and oversubdivision of properties, we therefore do not want to reduce the number of and increase the pressure on the remaining HMOs in a given area.

There are some assertions beneath some of the things that were being said about concentrations of HMOs overwhelming other residents or bringing a monoculture to a particular area. I dispute those assertions. There is a great deal of diversity in HMOs. Of course, there is the example of the archetypal, traditional student, but there are also increasing numbers of young professionals and couples living with others in shared flats, and of people who cannot afford to buy their first property—there are even more of them in the current economic downturn. The idea that HMOs bring with them a particular group of people and many negative aspects is not necessarily true. That perception needs to be dealt with, but not by reducing or putting caps or limits on the number of HMOs.

That point also answers the question of density from our point of view. We are not talking about a homogenous group of people or properties threatening the indigenous population in a community. We are talking about a great deal of diversity in HMO properties.

The overriding point for us is that HMOs are about safety, not social engineering. HMO licences were brought in and made mandatory after two young students died in a fire in Glasgow. If we start to mix safety with social issues around services, as important as those issues are, we start to threaten the integrity of the safety legislation. Above all, to us that is the last thing that needs to be done. There are other ways of tackling the issues, perceptions or assertions that are being made, but risking tenants' safety is not the way to do it.

Patricia Ferguson: I record that the tragic death of the two students took place in my constituency, and we all want to avoid that happening in the future. However, do you accept that for communities that are close to a university—or to several universities, as in Glasgow—there is a problem with the density and number of HMO properties? Because they are in old, traditional tenemental properties with large individual rooms, they are subdivided. The HMO legislation, which deals with the provision of safety measures, such as fire doors, can be part of the problem in such properties, because the people who live underneath them might be subject to the noise of fire doors closing at all hours of the day, which is a particular problem if the people concerned are not active. Does the NUS appreciate that, and is it willing to take on such issues?

Russell Gunson: The NUS does not want a situation to arise in which some people feel that they have a greater right to live in a certain area than other people. That is a general principle.

On the issue of the negative aspects of living beside HMOs, there is a perception issue. Our members are working with local communities to make that perception a bit closer to reality—I accept that we could do more in that regard, and perhaps we could be helped to do so. Blaming negative things in a community on HMOs or groups of students is an easy path to take, but it does not necessarily reflect the truth of the situation.

On HMOs leading to fire door noise and so on, I would ask who would replace the residents of HMOs if we got rid of them, which is what would happen in some people's ideal world. The properties are large, tenemental residences—in Marchmont, they have five or six bedrooms. Who would replace the diverse group of people—they are not just students—who currently live in them? I often hear the argument that young families would. However, those properties are large and expensive to buy, so I would question how practical that suggestion is.

The overriding issue is that HMO licences are about safety. The issue is not necessarily about

antisocial behaviour. There are ways of dealing with antisocial behaviour that do not involve risking the safety of tenants or students.

We are engaging with people on the negative aspects of living beside HMOs and I am sure that, with the help of others, we could do so to a greater extent. Equally, however, we have to ensure that we have the perception of the problem in perspective.

Patricia Ferguson: Do members of the panel think that the bill should extend the definition of HMOs to include short-term and holiday lets, which often cause difficulties in communities? I point out that HMOs existed before the legislation; it was just that there were no provisions in place to regulate them in any way.

Russell Gunson: That is one part of section 141 that we agree with. We disagree with the links that are made between HMOs and planning and the discretionary powers that are given to local authorities, but we agree with the proposal to extend HMO licensing to other properties. A problem exists in relation to the sort of properties that you mention, and I think that addressing it would help with regard to the credibility of the HMOs with which we are concerned.

John Blackwood: We have been talking about the issue of holiday lets for a long time. It is perhaps more appropriate that it be covered not by HMO licensing but by landlord registration—at the moment, the owners of holiday-let properties do not even need to be registered. A lot of our members have encountered situations in which they cannot get people to rent their property because there is a holiday let above it and people cannot get a night's sleep because of stag and hen parties enjoying themselves.

Having said that, in some parts of Scotland, people rent their properties as holiday lets for only short periods of time, such as during the Edinburgh festival or, in more rural areas, during golf tournaments and so on—that goes back to what David Middleton said about St Andrews. Requiring HMO licences and so on in connection with such temporary lets is a bit onerous and would have a detrimental effect on the local economy. Landlord registration is perhaps a more appropriate method of regulating that area than HMO licensing.

David Middleton: Sometimes, HMOs and short-term lets are the same thing. For example, in places such as St Andrews, a flat can be student accommodation during the term and a holiday let in the vacations.

There are problems with party flats, which my colleagues in Edinburgh and Glasgow, in particular, find difficult. Hostels that are located in tenement buildings also cause difficulties, again because there is a succession of short-term residents and it is difficult to build a community on the basis of populations that change a great deal.

Mr Gunson talked about the perception that there are difficulties, but it is more than a perception. There have been several research studies on the matter. Universities UK carried out a study, in which it talked about the deterioration of community life when HMOs start to predominate and recommended action to change that. In England, the Government carried out surveys and, as a result, amended the Town and Country Planning (Use Classes) Order 1987, which is secondary legislation, to avoid concentrations of HMOs, because of the overwhelming evidence of difficulties for communities. I disagree with Mr Gunson on this occasion; we are talking about not perception but hard fact, which has been well researched.

The Convener: The committee would appreciate further information on the issue, if you have it.

David McLetchie (Edinburgh Pentlands) (Con): Perhaps Mr Blackwood or Mr Gell will answer a few factual questions, to put the matter in perspective. How many landlord registrations are there in Scotland?

John Blackwood: Off the top of my head, I think that we are talking about 200,000 or thereabouts. I am sorry—

David McLetchie: Is that 200,000 separate landlord registrations? If someone owns two properties in adjoining local authorities, will they be registered twice? Will there be one landlord but two registrations?

John Blackwood: I think that that could be the case.

David McLetchie: How many houses are we dealing with?

John Blackwood: There are statistics on that. I am sorry, but I do not have them with me and cannot give you a figure off the top of my head.

David McLetchie: I think that you said that fewer than 10 people who applied for landlord registration had been refused. Is that right?

John Blackwood: Yes. Very few applications have been refused.

David McLetchie: That is a fact. How many people who were registered have been deregistered?

John Blackwood: Again, it is a very small number. It is less than 10.

David McLetchie: How many people have been prosecuted for failing to register?

John Blackwood: Again, it is a small number. I am sorry, but I do not know the exact numbers. The Scottish Government holds the numbers.

David McLetchie: I am sure that we can get them. In essence, we set up a registration scheme nearly six years ago that has created a bureaucracy that involves 200,000 landlords and many more homes. Hardly anyone has been prosecuted for failing to register, hardly anyone has been refused registration and hardly anyone has been deregistered. However, you think that it is a good scheme, in principle. Will you explain its value?

John Blackwood: We supported the scheme when the Antisocial Behaviour etc (Scotland) Bill was introduced by the Executive. At the time, it was intended to be a selective landlord registration scheme, so that local authorities could introduce a scheme where they thought that there was a need to do so. We fully supported that approach, which was intended to tackle bad landlord practice and perhaps would have helped more in inner cities and in some other communities. At stage 3, the bill was amended to provide for a mandatory registration scheme for all landlords, regardless of where they operated in Scotland.

David McLetchie: If I remember rightly, a mandatory scheme was never consulted on by the Scottish Government in the earlier stages of the bill, but was included at stage 3 without proper consultation with practitioners. Is that correct?

John Blackwood: That is true. Stakeholders such as the private rented housing forum were not involved. There was no consultation. When the bill was introduced, it was not the Executive's intention to introduce a mandatory scheme.

David McLetchie: Therefore, a mandatory scheme was brought in at the last minute, which, on the basis of the evidence to date on registration, non-registration, prosecution and deregistration, does not seem to have been particularly successful in policing the industry. Is it the case that we still have thousands of unregistered landlords?

John Blackwood: Yes, indeed.

11:00

David McLetchie: I have a question about the relationship between registration and the payment of housing benefit. If a tenant applies for housing benefit for assistance in paying his rent on a property, is any check done to find out whether the landlord—who is, in effect, the recipient of that benefit, or who benefits from it through the rental payment—is registered?

John Blackwood: Again, that varies from local authority to local authority, as you can imagine. Some local authorities are active in carrying out checks of their housing benefit records. As you will appreciate, as those are Department for Work and Pensions records, there are data protection issues about local authorities accessing that information, but some local authorities can do that. A phone call can be made to a colleague in revenues and benefits to ask whether landlords X, Y and Z are registered. In some areas the two departments speak to each other, but in other areas that does not happen at all.

David McLetchie: So such information and data can be shared. Is it correct that there is no legal barrier in the form of restrictions on the use of data by the council's housing benefit section and the section that deals with landlord registration and that one is free to share information with the other?

John Blackwood: Data protection issues are involved, but some local authorities have developed protocols for checking that information, which might involve the landlord registration department getting in touch with the benefits department or vice versa. Protocols are in place, but data protection remains an issue for many authorities. We have repeatedly said that such landlords should surely be the first whose registration status is checked, but we know that some local authorities still do not check their own housing benefit records or, for that matter, their council tax records.

David McLetchie: I was just coming on to council tax records. Is that another area in which there are data-sharing issues? The council tax register shows whether someone is an owner or an occupier of a property. When it is clear that someone is an occupier rather than an owner, how does the process of ensuring that the owner of the property is a registered landlord work?

John Blackwood: Technically, that is the easiest mechanism to use, because the council tax records are the most comprehensive, so it is known who the landlords are, who the occupiers are and who is due to pay the council tax. It is my understanding that those records are easy to check.

David McLetchie: Right, but that is not being done universally, either.

John Blackwood: It is being done in some but not all local authority areas.

David Middleton: I would like to make a quick comment on whether it is legally competent for such records to be checked for that purpose. In another incarnation, I was a data protection consultant. It is quite clear that local authorities have a right of access to records such as council tax records in situations in which they are attempting to prevent or detect a crime, and illegal

operation of a house in multiple occupation is, of course, a criminal offence. There are no legal inhibitions on local authorities; there is just a reluctance on the part of some of them to carry out such checks, which is difficult to understand. Council tax records are highly informative when it comes to exempt properties such as those that are occupied by students.

David McLetchie: Thank you. That was extremely helpful.

Awareness has been mentioned in the context of the letting of properties. Is there any requirement on a letting agent, whereby before he can advertise a property for let he must verify that the landlord on whose behalf he is acting is a registered landlord?

John Blackwood: No, none at all. We believe that that is a loophole in the legislation. Bad landlords could operate behind agents. There is nothing in the landlord registration scheme to regulate the actions of agents.

David McLetchie: I know that there is an association of letting agents. Does it have a code of practice that requires its members to verify that their clients are registered landlords before they proceed to find tenants for them, even if that is not a legal requirement?

John Blackwood: I believe that that is the case; John Gell might be able to say more about that. A lot depends on the scale of that organisation's membership, because many agents are not members of any professional or trade body.

David McLetchie: We tend to assume that landlords and tenants are strangers to each other and that there is no family or community relationship or friendship between them. As a result, we tend to see the whole thing as a completely commercial transaction. However, in many lets, often involving students or other young people, there is some family or community relationship or friendship between the landlord and the occupier. I suspect that such situations not only raise questions about landlord registration and whether the person concerned is aware that they are actually a landlord but get us into issues such as tax avoidance and the kind of discreet private arrangement in which someone lets a person have their flat for a certain payment. How does the extent of that kind of family or friendship tenancy compare with that of what we might call the more commercial, arm's-length, stranger relationship between landlord and tenant?

John Blackwood: We think that that happens to a substantial extent but, again, all our evidence in that respect is anecdotal. The situation exists—obviously, it must exist—but we do not know its exact extent.

For us, the issue is more evident where landlords own only one property. The majority of landlords in Scotland own only one or two properties. I joke with friends of mine who, when I ask them whether they rent out a flat on a commercial basis to someone, say, "Yes, but I'm not a landlord." For some reason, they think that they have to own 10 or more properties to qualify as landlords.

A lot of people out there are, as you say, renting to their sister's friend or, for that matter, their own sister. That is certainly not uncommon in the private rented sector. Indeed, it is more common with inherited properties; for example, a child might inherit their parents' house, but their own child might live in the house under an informal arrangement that does not involve the payment of any rent.

David McLetchie: The son or daughter at university might not pay any rent for, say, their parents' flat, or indeed their own flat, in Marchmont, but the friends who share it might. Would that make the parents or the student—who might have had the flat bought for him or her—the landlord? Perhaps Mr Gunson could comment on that.

Russell Gunson: We do not have hard facts about this but, from anecdotal evidence, the answer is yes. I know from personal experience that in a proportion of flats the landlord is a family member or indeed is living in the property with four or five other people.

David McLetchie: Do the NUS and its member organisations make it clear to students that in some instances they are not just tenants but landlords and therefore should be registered?

Russell Gunson: As I said earlier, the members of our student associations in colleges and universities do as much as they can to raise awareness not only of tenants' rights but—for a much smaller proportion of students—landlords' rights. However, if we had the resources, we could do far more of that work.

John Wilson (Central Scotland) (SNP): Good morning, gentlemen. Before I get on to my questions, I would like to make a couple of brief points. I am interested to see the details that Mr Blackwood will provide on the number of registrations that have been made, particularly in light of Mr McLetchie's question about the number of landlords who have registered and, indeed, the number of properties that are currently registered for letting purposes.

At our meeting with Fife housing partnership, the person from the council who was responsible for registering private landlords said—if my memory serves me correctly—that there could be anything up to 9,000 private lets involving

unregistered landlords. That is the scale of the problem in Fife. If that is replicated in other local authorities throughout Scotland, we could have a massive underregistration problem. That brings us back to Mr Middleton's issue about the resources not being available to carry out the monitoring if every landlord were registered.

We have talked about the HMO issue in relation to university towns and areas. As a member of the Public Petitions Committee, I have seen some of the worst aspects of private landlords on a visit to Govanhill. There are 1,200 private lets in Govanhill, and the standard of the accommodation that is being let there is atrocious. Effectively, we are dealing with slum landlords again. It would be interesting to find out how many of those landlords are registered and about the problems with registration in that area.

My question is particularly for Mr Gunson, although I hope that other witnesses will take it up. In an earlier answer, you referred to the proposed housing (private sector) bill—I understand that that is its working title—which will address other aspects of private sector housing provision in Scotland. Is it your contention that the provisions of that proposed bill should have been included in the Housing (Scotland) Bill in order to accommodate and cross over some of the issues that we are discussing today regarding landlord registration and HMOs? Would you have preferred a comprehensive bill that took in housing provision in every sector rather than one that separated or hived off different aspects of housing provision in Scotland?

Russell Gunson: The NUS has been grateful to be involved in the private rented sector working group that has been considering the proposed private housing bill. We have found it useful to talk through the issues that we hope will be in that bill and some that will be dealt with following its publication and, I hope, enactment. We would not go so far as to say that we want to combine the proposed bill with the Housing (Scotland) Bill or take the private housing provisions out of the Housing (Scotland) Bill and save them for the proposed bill. However, there has been a great deal of housing legislation over the past 10 or 11 years, and perhaps it would have been better to consider some of the Housing (Scotland) Bill provisions in the next housing bill—the proposed private housing bill.

There are some things that we can do now. For example, providing more access to information on the register is sensible, and does not need to be seen in the context of other proposals. Our priority in the Housing (Scotland) Bill is the HMO issue and the idea of linking that with the discretionary power in planning. The proposed private housing bill is all about ensuring a flourishing private rented sector in Scotland and a supply of good-quality property. In our view, that issue could work against that. There are things that we can go ahead with. We would not go so far as to say that you should lop out all the private rented issues and put them into the proposed bill, but it will be necessary to ensure that the two pieces of legislation work together.

John Blackwood: It is, inevitably, confusing that we could be looking at so many issues in two different bills addressing the same sector and landlord registration. When the Housing (Scotland) Bill was being drafted, we did not know that a private sector housing bill would be introduced later this year. Therefore landlord registration and HMO licensing came within the current bill. I do not envy elected members their task, towards the end of the year, of debating two bills on very similar subjects. Nevertheless, that is what we have and we must campaign during the passage of each of those bills individually.

11:15

David Middleton: Sustainable Communities (Scotland) has not been involved as a stakeholder in discussions on the content of the private rented sector bill. Therefore we know that it does not reflect many of our concerns.

To comment on linkages, I would say that we are particularly interested in the linkage with planning, which Mr Gunson mentioned. The current issue is that, as so many HMOs are under the planning radar, any change that requires the securing of planning consent before an HMO licence is approved will miss out an enormous number of HMOs, therefore no matter what it does, the planning system cannot really evolve sensitive local policies to deal with HMOs. A change made in Parliament to, for example, the use classes order could give local authorities the facility to make good policies for dealing with HMOs in their own area, but with so many HMOs not currently in the planning system any policies that councils attempt will not be effective.

The approach might make things worse in some circumstances. Requiring certain kinds of HMOs to gain planning consent as a prior condition for registration would simply put pressure on HMOs that are not in the planning system. That would be bad for communities such as St Andrews, where there has been a reduction of 2,000 people in the permanent population in the past 10 years as family homes have been converted to houses in multiple occupation to accommodate increasing numbers of university students. That is an area of housing pressure. Social housing is now being taken over for HMOs in areas such as St Andrews simply because the planning system cannot take account of the change that is taking place. There

are concentrations of HMOs and overwhelming changes to communities that are near universities. One could make similar comments about Glasgow, which is bigger but where HMOs tend to congregate.

I may have extended the question a little. My apologies for that, but I felt that it was important to make those comments.

John Wilson: Thank you.

Bob Doris (Glasgow) (SNP): Given the time, I will be quick and ask one specific question. I have other questions on HMOs, but I will restrict myself to asking them of next week's panel.

Section 136 will give local authorities the power to require certain individuals to give particular information about landlords of specific properties. That could put a duty on tenants to reveal details of landlords, and if they fail to disclose that information or give false information they could be left open to a £500 fine. I see that as a significant part of the bill. Do you have a view on that?

Russell Gunson: I will answer briefly, as I know that we are running out of time. We were not keen on that proposal in practice. I can see why in principle we might want as many levers as possible to get information about landlords, but in practice asking tenants with short assured tenancies, who may have only months left of security of tenure, to give evidence against their landlord would often be asking them to choose between eviction and giving information to the authorities. I can see the reason for the provision, but I am not sure that the unintended consequences have been fully recognised.

David Middleton: I confirm what Mr Gunson said. Many tenants in HMOs are frightened to spill the beans on landlords, if you like, simply because they think that that might put their tenancy at risk. There are many ways other than legal processes in which landlords can make life uncomfortable for tenants who are causing them difficulty, and there are even fewer restrictions on illegal landlords. We are sympathetic to tenants who find difficulties with landlords.

I have one other comment. If we are thinking of proof—for prosecution at least—criminal standards of proof are extremely difficult to obtain. Civil standards would be much easier to meet and would provide an effective basis for bringing people to book.

John Blackwood: We do not have an issue with the principle of section 136. I am sure that the last thing that a local authority would want to do is use it, but landlords and tenants have responsibilities, and ensuring that the legislation is enforced is uppermost in our priorities.

The Convener: That concludes this evidence session. I thank all the witnesses for their time and the evidence that they have provided this morning. We will have a short pause while we set up the next panel.

11:20

Meeting suspended.

11:25

On resuming—

The Convener: We come now to our second panel of witnesses. I welcome Deborah Lovell, a partner at Anderson Strathern, who is representing the Law Society of Scotland; Kennedy Foster, policy consultant for Scotland at the Council of Mortgage Lenders; and Katharine Sacks-Jones, policy manager at Crisis. We have been notified of an apology from Keith Dryburgh of Citizens Advice Scotland, who cannot be with us this morning.

Let us move directly to questions from the committee, if witnesses are okay with that.

Mary Mulligan: The bill deals with unauthorised tenants who find themselves at risk of losing their home because a mortgage has not been paid and repossession has been sought. How big a problem is that?

Katharine Sacks-Jones (Crisis): It is hard to know the true extent, as the problem is largely hidden. Throughout the United Kingdom, advice agencies are reporting that thousands of people are in that situation. We suspect that many more people do not seek advice, preferring to use the limited time that they have to find alternative accommodation.

In England and Wales, Communities and Local Government has estimated that about 324,000 households are considered to be unauthorised tenancies. Those tenants would be at risk of short-notice eviction should the landlord's property be repossessed. CLG's estimate for the actual number of repossessions was much smaller—about 2,000 to 3,000 last year. Those figures are all estimates.

Crisis carried out a survey among advisers in the private rented sector at the beginning of last year. About 60 per cent of the advisers who responded said that they had seen people in the circumstances that I have just described. That included a number of advisers in Scotland—in Inverclyde, Glasgow and Renfrewshire. We know that the problem exists in Scotland. A much smaller pool of Scottish advisers responded, but about 50 per cent of them said that people in those circumstances had approached them. Of those, 80 per cent said that the most common outcome for the people concerned was that they became homeless.

Mary Mulligan: Clearly, we do not have exact figures, but everybody has anecdotal evidence of the problem, and my colleague Hugh Henry has raised it in the Parliament in relation to constituent cases. Where it does arise, what is the best way for us to support the tenants concerned?

Kennedy Foster (Council of Mortgage Lenders): First, the phrase "unauthorised tenant" is not the best use of language. The person who does not have authority to proceed with the let is actually the landlord.

If a landlord approaches a mortgage lender for their consent, which is implied in all buy-to-let mortgages, the lender will honour the tenancy until it comes to an end. The only consent that most lenders will give is to short assured tenancies. Once possession of a property is taken, a lender will allow the tenancy to run to the end of its natural life. We are only discussing situations where the landlord has breached the terms of their mortgage, by not approaching the lender and getting consent to the tenancy.

I hope and expect that most lenders would work with the tenant in such a situation to achieve a favourable outcome. However, under Scots law, if a lender takes possession proceedings against the borrower and the tenant remains in the property, the lender cannot simply take possession of the property. Under the Housing (Scotland) Act 1988, the lender must apply for a notice of eviction. I am told by solicitors who act in the field that, from when the lender decides that they want an order for possession to the time of a notice of eviction, the court process can take between 200 and 360 days, depending on the availability of court time.

11:30

Katharine Sacks-Jones: That is absolutely true from the lender's point of view. I should make it clear that I am definitely not an expert in Scottish law on such matters, so I defer to my colleagues on that. However, I know that tenants might not be aware of such proceedings going on. The proceedings can have been going on for hundreds of days, but the first that the tenant knows about them is right at the end of the process when they literally have only a couple of weeks or sometimes even less time to leave the property. That is when the real problems arise. Even though we are talking about a relatively small number of cases, the impact on those individuals and their households is significant. The experience can be distressing and can cause financial hardship. People need to find alternative accommodation at very short notice, which can mean that they become homeless. The impact on the individuals, however few, means that we should take action.

Mary Mulligan: There are suggestions that two to three months would be a reasonable period, but Mr Foster has just said that the process for a notice of ejection would take longer than that. I assume that the notice of ejection has to be served on the tenant, so they know at that stage.

Kennedy Foster: The repossessions group has been reconvened to consider the issue. We had one meeting a couple of weeks ago and the next meeting is tomorrow. One thing on which we have focused is the serving of the possession notice and whether there could be improvements in that process. I am not an expert on court procedure, but my understanding is that, when a possession order is served, it is served on the occupier of the property. In England and Wales, the wording of such notices has been changed so that they are addressed specifically to any prospective tenant of the property. That is to encourage people to open the notice. As a matter of good practice, many lenders serve the possession order through sheriff officers and ask them to check whether there are people in the property. The repossessions group is considering whether it should be a requirement for all possession orders to be served by sheriff officers, just to check whether there is somebody in the property who is not an owner-occupier.

Katharine Sacks-Jones: We certainly support those moves. One issue at present is that tenants do not always receive the initial notice, so any strengthening of the notice procedure would be welcome. As Kennedy Foster said, the procedure has been changed in England and Wales so that the notice is now addressed to the tenant or occupier. The problem remains that such notices are in essence unaddressed mail. I am sure that members are only too aware of the huge amount of unaddressed junk mail that comes through the letterbox. It is therefore reasonable that people do not always open and read all that mail.

Another issue is that some tenancies start after the original notice has been served, so the tenant does not receive the initial notice of the possession hearing. Particularly given the length of time that those hearings take, it is not unusual for a landlord to put a tenant into the property after proceedings have started to try to get a bit more income. Of course, the tenant is completely unaware that those proceedings are under way. There is no mechanism to let them know about the proceedings until right at the end.

Mary Mulligan: That is helpful in clearing up the current situation and the changes that could be made. It would be useful to approach the Scottish Government about feedback from the repossessions group so that we can use that information when we consider what to include in the bill.

Kennedy Foster: We envisage that the repossessions group will produce its report in advance of the completion of the bill, as we did with the Home Owner and Debtor Protection (Scotland) Bill.

David McLetchie: As Mr Foster is a member of the repossessions group, I want to ask him about it and the proposals that it is considering. I am sure that you will recall from our evidence sessions and report on the Home Owner and Debtor Protection (Scotland) Bill that severe criticisms were made in the committee and the Parliament of the adequacy of the consultation on a number of its measures, the extent to which stakeholders had or had not been involved, and the extent to which they agreed or did not agree with specific proposals. Do you have any confidence that what will emerge from this discussion on a particular aspect of the Housing (Scotland) Bill will be any more surely and soundly grounded than what we had to deal with in considering the previous bill?

Kennedy Foster: I think that the repossessions group met between February and the end of May last year. It is fair to say that, in the final meeting, we started to consider the position of tenants in the situation that we are discussing, but we did not have adequate time to deal with the matter. I left the last meeting of the group thinking that further meetings would be convened to consider the position of tenants, but for whatever reason, that did not happen.

There was a consultation at the beginning of November, to which we responded. I do not think that only we were unhappy about the proposals in the consultation. We recommended that an expert group be put together again to consider the position, and I am delighted that the Scottish Government has reconvened the repossessions group to consider the topic thoroughly. I hope that all parties will support the proposals that will be made. However, it is early days, obviously. We have had only one meeting; another is scheduled for tomorrow and another is scheduled for May.

David McLetchie: So a group is considering a particular issue following a consultation paper that outlined a number of options. I think that there were three options.

Kennedy Foster: That is right.

David McLetchie: If I understand the bill correctly, we are being asked to give ministers the power to introduce a set of regulations—by statutory instrument, I presume—to implement any proposals that you may come up with. Is that right?

Kennedy Foster: My understanding is that the Scottish Government will lodge amendments to the bill at stage 2.

David McLetchie: Our briefing says:

"the Bill would give Ministers the power to make provisions they consider appropriate to protect or help unauthorised tenants".

Is that correct? That suggests to me that we are being asked to give general authorisation to a power to make instruments to implement changes in the rules that your group may recommend. Is that not correct?

The Convener: As things stand, no amendment has been lodged, although there may be an expectation that amendments will be lodged.

David McLetchie: I am trying to establish whether it is a fact that the repossessions group has as yet agreed on no concrete proposals to deal with the issue that we are discussing.

Kennedy Foster: The reconvened repossessions group has had only one meeting, which was two weeks ago. It will have a further meeting tomorrow. There are no concrete proposals as we speak.

David McLetchie: So there are no concrete proposals, and it is not necessarily to be assumed that there will be concrete proposals. If the matter is being reviewed, I presume that it is competent for and open to the repossessions group to say that it thinks that the existing law is satisfactory and that changes are not needed. Is that correct? Surely that is a possibility.

Kennedy Foster: I would not deny that it is. However, the repossessions group could, as it did when it met last year, come up with not only legislative proposals, but practical proposals to be implemented.

David McLetchie: Indeed—a code of practice might be put in place, or the practice of sending a sheriff officer to serve a repossession notice might be required, as you suggested. I am trying to get at the point that, instead of this committee or another parliamentary committee examining and asking about a set of specific and detailed provisions in primary legislation, I understand that we are being asked to approve an order-making power for ministers to produce in a statutory instrument a set of proposals that might or might not emerge as the result of consultation and deliberations in your repossessions group. Is that correct?

Kennedy Foster: That is not my understanding. I understood that stage 2 amendments to the bill would be lodged with any proposals from the repossessions group, so I have learned something that I did not know.

David McLetchie: We will verify the intention with ministers. The briefing that has been given to committee members suggests that the bill

provides an order-making power and that detailed provisions would be in secondary rather than primary legislation. Perhaps we will get to the bottom of that with the Scottish Government in due course.

Do you prefer one of the options in the consultation paper? Does the law, as opposed to practice, need to change?

Kennedy Foster: We need to look more widely than simply at the law. The problem is created by the fact that the landlord has not obtained the lender's consent. Surely that is the first thing that should be tackled. In fairness, the Scottish Government has done quite a lot of work over the years in the private rented sector on the landlord registration scheme and accreditation schemes. Work needs to be done on the front end.

The situation does not need major change but, if it were to be changed, a lender would look for certainty. The best option for certainty is probably the second option that was outlined in the consultation paper, which involved two months' delay.

David McLetchie: Do Ms Sacks-Jones and her organisation have a view on which of the options that the consultation paper outlined is to be preferred, if any?

Katharine Sacks-Jones: From our point of view, which is the tenant's point of view, option 3 offered tenants the most protection, because it would mean that the tenancy was binding on the lender. However, I understand that that is quite a burden for a lender who has not consented to the tenancy to bear.

Option 2 had advantages, but it did not allow flexibility in the time that was granted and it did not give tenants the right to seek recall, so they could not come forward later in the proceedings. That relates to the problem that I mentioned of tenants being unaware of the initial proceedings.

We preferred option 1, which struck a fair balance between the burden that is placed on the lender and the tenant's rights. Tenants would have the right to be heard at the repossession hearing and the right after that to seek a recall notice. The court would have discretion to take into account the tenant's situation—for example, whether they had children, a disability or another vulnerability—and to give a length of notice that would fit the tenant's circumstances. Option 1 was our favoured option.

David McLetchie: A tenant can be given a meaningful right to be heard at a repossession hearing only if they know of the hearing. Is not the problem that tenants receive all this mail and do not know what is going on?

Katharine Sacks-Jones: That point is valid. Such a right would need to be accompanied by strengthening the notice to tenants. However, the position would be slightly mitigated by giving tenants the right to seek a recall notice so that, if they became aware of proceedings later—for example, when the lender sought to enforce possession—they would still be able to request a notice period.

11:45

David McLetchie: You are basically saying that, in all good faith, a lender can have taken action, gone through the appropriate processes, served the appropriate notices, gone before a judge, been granted a repossession order and so on; yet, on the day that they seek to take physical possession of the property—perhaps with a view to instructing an estate agent or somebody to go in, measure up, sell it and get on with liquidating the security—if there is somebody in that property, we have to say, "Hang on. Stop. We're all going back to the start again." The matter can then go back to court and more time will elapse.

Katharine Sacks-Jones: There are two points to make on that. First, that would happen only in circumstances in which the tenant was not aware of the proceedings earlier. What tenants want most is certainty—they want to know when they will have to move out and to be given the time to find new accommodation. In our experience, that is what tenants want. They would not seek to prolong the proceedings in any way. Secondly, the amount of time that we are talking about is not huge in the context of the whole proceedings. We envisage that sheriffs would grant only a couple of months' notice to give the tenants the opportunity to find somewhere else to live. We do not envisage the process taking a lot of extra time at the end. Also, that option would need to be accompanied by enhancement of the notice. It is in everyone's interests for the tenant to be aware of the proceedings earlier, for the lender to be aware that the tenant is there and for the tenant to come forward at that stage and request a notice period.

David McLetchie: I do not quite follow the difference between option 1 and option 2. If option 1 is to allow a court to grant a delay of the repossession for a period, but that period has ended and somebody has physically gone to the property with a repossession notice and seen that there is somebody in the property at that point, would it not be reasonable to take option 2, as Mr Foster suggests? Option 1 can be followed only if people know that proceedings are going on.

Katharine Sacks-Jones: As I understand it—I might have to defer to my legal colleagues—under option 2, the tenant would have the opportunity to

come forward only at the repossession hearing. A lot of tenants are not aware of that. After that, there would not be an opportunity for them to come forward. If they missed the initial repossession hearing for the reasons that I outlined, they would not have the opportunity to come forward. Also, there would be no flexibility in the amount of time that the sheriff would be able to grant them as notice. Option 1 would offer flexibility in the length of the notice period and would also offer the tenant the right to seek a recall notice, which they could do much later in the proceedings if they were unaware of the initial possession proceedings.

David McLetchie: Mr Foster, do you want to comment on that?

Kennedy Foster: The situation that you describe is exactly the situation that lenders often face at the moment. At the very last minute, when they go round to repossess a property, despite the fact that sheriff officers have visited the property, they find somebody in the property. In that situation, if the person declines to move out voluntarily, the lender has to go back to the court and seek a notice of eviction under the 1988 act.

Something else that must be borne in mind is that, under the Conveyancing and Feudal Reform (Scotland) Act 1970, a lender has a duty, in taking possession, to put the property on the market and to obtain the best possible price for it. We have a similar duty regarding mortgage regulation. The lender's contractual duty is obviously to the borrower, and the longer that it takes to put the property on the market for sale, the more we could be regarded as being in breach of our duty towards the borrower, particularly in a market in which house prices are falling. In our response to the Scottish Government, we highlighted the fact that it must take into account the legal position in which lenders find themselves in such circumstances. A balance needs to be struck.

David McLetchie: Surely you could not be in breach of a contractual duty if there was a statutory prohibition on taking a particular course of action. A later statutory requirement must surely override the contractual arrangement, must it not?

Kennedy Foster: That would need to be considered.

David McLetchie: So, in other words, the earlier provision in the 1970 act would have to be amended and qualified by reference to any legislation that might be proposed now. Is that what you are saying?

Kennedy Foster: Yes.

Bob Doris: Given the exchange between Mr Foster and Mr McLetchie, it might be helpful to point out that the briefing paper that the Scottish Parliament information centre has prepared for us states:

> "The policy memorandum (paragraph 236) explains that more detailed proposals on protecting tenants affected by repossession action against their landlord may come forward at stage 2, by amendment, if required."

I think that that is similar to what Mr Foster said, but Mr McLetchie has a point about whether those measures would be included in the bill or whether the provisions would be made by statutory instrument and whether they would be a statutory obligation or a protocol. I agree with Mr McLetchie that we need to tease that out, because it seems clear that such amendments may be made at stage 2.

I hear that we need certainty in the process not only for vulnerable tenants but for lenders and borrowers. I assume that that is why Mr Foster is attracted by option 2. If you had had your repossession, were going for eviction but chapped the door and found a tenant whom you did not expect to be there, when would the clock start counting under that option? Would it start from the day that you chapped the door and engaged with that so-called unauthorised tenant irrespective of when the case presented at court? Should a two-month delay be a statutory obligation in every case in which someone who seeks to repossess finds a tenant of whom they were unaware? Should the clock start counting at that point and would 60 days be a reasonable minimum time for that tenant to find alternative accommodation? Is that the balance that you are striking? I am trying to flesh out what option 2 means.

Kennedy Foster: I think that that is right. It would be from the time that the lender discovered that there was a tenant in the property.

Bob Doris: So if it was seven days or 10 days before any legal steps were to take place, day 1 would be the day on which there was a chap at the door and someone said, "You're evicted. Ah—I didn't know you were there." When would the clock start counting?

Kennedy Foster: We have to consider the matter in the round. South of the border, the tenant has been given the right to appear at a repossession hearing at the outset. I understand that, if the tenant does not appear at that hearing, they have a right to come forward again at some later stage and the 60 days runs from then. However, if the tenant was represented at the original hearing, the two-month period would run from that day.

Do you agree with that, Katharine? I think that that is the English legislation.

Katharine Sacks-Jones: Yes, that is the case. It is from when the tenant makes a representation to the court.

Bob Doris: How would the three of you feel about that delay being a statutory requirement in Scotland? Ms Sacks-Jones is looking for flexibility, so I guess that she would seek a two-month minimum with flexibility for exceptional circumstances. Would you like two months to be a statutory minimum?

Katharine Sacks-Jones: I think that the reason that it is two months in England and Wales is that tenancy law is quite different there and tenancies are a lot less secure. That is the reason why we argue for a longer period in Scotland, because tenancies often have a longer notice period. However, we would like the tenant to be given a statutory minimum two-month notice period at the very least. It is important that that period be from when the court grants it, because, until the court grants it, the tenant cannot be sure that they will get those two months. Tenants would welcome having surety that they know the date by which they would have to move out and that there was a reasonable lead-up time to enable them to find alternative accommodation. We would, of course, like there to be extra flexibility, particularly for tenants who might be vulnerable, have a disability or have a young family, who might need longer to move.

Kennedy Foster: Lenders would favour certainty. One condition that has been included down south in the Mortgage Repossessions (Protection of Tenants etc) Act 2010 is that, during the two-month period, the tenant should pay the rental payment to the lender and, by accepting that rental payment, the lender does not in effect become the landlord.

The Convener: Does that act include any other provisions on which the witnesses wish to comment? Are there any measures in it that would improve the situation in Scotland, provided that they took account of the particular situation in Scotland? Will the introduction of that legislation in Westminster aid the discussions in the repossessions group?

Kennedy Foster: At our meeting tomorrow, I think that the repossessions group will look at the English act. However, it must be borne in mind that the circumstances south of the border were completely different. I understand that the English act came out of a case involving Horsham Properties Group Ltd. In England, under the Law of Property Act 1925, the lender can appoint a receiver of rents, who in effect receives the rental payment and pays it on to the lender. We do not have such a concept in Scots law. I understand that the Horsham Properties Group case involved a buy-to-let mortgage for which the possession order was granted almost instantaneously, so the tenants were required to leave the property almost immediately. Under Scots law, tenants have the protection that they can be evicted only through a notice of eviction.

Katharine Sacks-Jones: My understanding of the Horsham Properties Group case is slightly different. I understand that the issue was about cases in which the borrower hands the key back directly to the lender without going through any court proceedings, which has an impact on the tenants even if the tenancy was authorised.

The 2010 act was introduced because, about a year and a half ago, advice agencies started to see a real increase in the number of people presenting in that kind of situation. Literally at the very last minute, people found bailiffs turning up at the door. In some cases, people came home to find that the locks had been changed. People were being given very short notice to leave their property. Along with several other advice agencies, Crisis raised the issue with the Government, which had focused mainly on home owners in its repossessions work. We made the case that tenants are also victims in the recession, so we should not ignore the rights of tenants and focus purely on home owners. The Westminster Government acknowledged the problem, so it ensured that the act was developed in consultation with the CML in England, with specific mortgage lenders, with advice agencies and with lawyers.

It is felt that the act provides the fairest possible compromise in recognising the rights of the tenant, who is the most vulnerable person in the situation, without being unduly burdensome on the lender. The act tries to maximise the opportunities of ensuring that the tenant is aware of the proceedings and provides for some changes in practice, such as measures to strengthen the notice that is sent out to the property. The idea is that the tenant should have an initial opportunity to come forward. However, as we know that tenants are not always aware of the notice—for the reasons that I mentioned, such as that they did not receive the notice or their tenancy was started after the notice was served—there needs to be a further opportunity for tenants to come forward so that they are not faced with losing their home with very little notice. We feel that the act strikes the right balance. The CML in England had a couple of reservations about the wording, but it was quite happy to support the broad principles of the act.

The Convener: Broadly speaking, are there provisions in that legislation that could be used to enhance tenants' rights in Scotland, or are the provisions not applicable to the Scottish legal system, as Kennedy Foster suggested?

Katharine Sacks-Jones: Again I profess that I am not an expert on Scots law, but I am struck by the current lack of clarity, not only for the tenant but for the lender, and by the lack of surety around the point in the proceedings at which the tenant

might need to leave their home. The introduction of new legislation would provide that extra security, which would be an advantage for the lender as well as the tenant.

12:00

The Convener: It is win-win, Mr Foster—do you agree with that position?

Kennedy Foster: We must bear in mind that Scots law is completely different from English law in this field. There is considerable protection for tenants under Scots law at present: a lender cannot take possession without having served a notice of eviction under the 1988 act. We must consider the issue in the round with regard to issues such as the notices that are served and how they are served.

I am not certain that that requires new legislation; I would like to see how we work through the issue in the repossessions group.

The Convener: There is some agreement. Ms Lovell, do you have any views on the matter? We always, when we examine such issues, consider whether England and Wales are catching up with the situation in Scotland, or whether—in this case—we will fall behind as a result of the bill.

Can you give us some clarity?

Deborah Lovell (Law Society of Scotland): The Law Society of Scotland fully represents all its members. I had a chat with Katharine Sacks-Jones before the meeting, and my understanding of the law is that there are protections for tenants and procedures that have to be followed.

There seems to be a practical difficulty, from the perspective of the lender and the tenant, in identifying an unauthorised tenant. Because of the way in which actions for possession currently run, it could be argued that unauthorised tenants have slightly more protection because the sheriff has discretionary grounds on whether or not to end the tenancy.

There must be a balance. The relationship between the lender and the borrower is completely separate from the relationship between the landlord and the tenant. I am not convinced that we need further layers of legislation if something can be agreed in practical terms. It seems to be more of a practical issue with regard to how people are identified and how and at what point they have an opportunity to make their views known.

We would welcome certainty, if that is possible, for all our members, but we have to balance all the views, including those of borrowers who enter into agreements with lenders. We need to consider how imposing more on lenders will affect their relationships with borrowers. That is quite a small issue; it has not been brought to my attention at our conveyancing committee in relation to unauthorised tenants. Perhaps a balance can be achieved through the repossessions group, which can consider the implementation of practical changes through some sort of code of practice rather than through legislation.

John Wilson: Good afternoon. It is clear that we need to get our heads round the issue of unauthorised tenancies. For clarification, has the Mortgage Repossessions (Protection of Tenants etc) Bill been approved by the Westminster Parliament?

Kennedy Foster: Yes, it has.

Katharine Sacks-Jones: It received royal assent last week. The bill had cross-party support; there was really no opposition to it in Parliament.

John Wilson: That is fine—I wanted clarification, because our information papers refer to that piece of legislation as a bill.

The issue of unauthorised tenancies seems to arise mainly when someone borrows money from a lender to purchase a property and decides to rent it out without advising the lender. I want to clarify the difference between those people and others who borrow money to become a landlord and make the lender aware of that.

Kennedy Foster: In our view, the situation arises mainly in the case of owner-occupier mortgages where, somewhere down the road, the owner-occupier decides to let the property. With a buy-to-let mortgage—where somebody is buying the property with a view to letting it—there is normally an implied consent by the lender. In our view, the issue is restricted in the main to owner-occupier mortgages.

John Wilson: I have to ask the question that we asked previously. We do not have broken-down figures for the number of repossessions that take place in Scotland. You said earlier that you felt that the number of unauthorised tenancies that are affected by the repossession of properties from borrowers who had let their property was very small. Can you quantify those in relation to the total number of repossessions that take place in Scotland annually?

Kennedy Foster: I cannot quantify them. The only evidence base that I have is from solicitors who act in this field for lenders, who tell me that they do not come across a great number of cases in which there is a tenant in the property when they take possession.

John Wilson: Are tenants who find themselves in an unauthorised tenancy through no fault of their own aware of their rights? Where the lender seeks repossession of the property, who makes

the unauthorised tenants aware of their right to appear in court, present evidence and defend their position? Who advises tenants in such situations? We discussed earlier the issue of who gets notified about the lender's action to repossess the property. In many cases, the unauthorised tenant would be the last person to become aware of the repossession action and the last person to be able to defend themselves against it. Do the witnesses have any comments on that?

Katharine Sacks-Jones: I think that that is certainly the case. There is confusion about what rights, if any, the tenant has and the tenant is certainly the last person to be made aware of whether they can make representations. I do not know whether there is any best practice among lenders about notifying tenants of their rights.

Kennedy Foster: My understanding is that if the tenant is prepared to co-operate, most lenders will work with them to try to resolve the situation.

John Wilson: In your experience, how would the situation be resolved?

Kennedy Foster: It would be resolved in much the same way as a situation where a borrower faced possession: we would suggest that they take advice from one of the advice agencies. The lender cannot advise somebody in that situation. You have to remember that the lender is the innocent party in such situations. The person who has failed to comply with their obligation is the landlord.

Deborah Lovell: I think that the issue is that once the tenant is aware of the position that they are in, there are avenues for them to get advice. It is set out quite clearly in the legislation what steps would have to be taken to remove the tenant. The issue is how and at what point the tenant is made aware of their position and whether that can be done through improved notices. After the tenant is made aware of their position, there is quite a clear process for them—they can approach the citizens advice bureau or someone else to get advice.

John Wilson: Mr Foster mentioned the 1970 act, under which there is an onus on the lender to get the best return from a property where a borrower fails to meet their mortgage payments, in order to protect the borrower. Is there not a conflict between the lender's obligation to make the best return on the property, however it decides to dispose of it, and what we are trying to achieve by way of the bill in terms of protecting unauthorised tenants in particular as well as authorised tenants?

Kennedy Foster: My point in raising the matter is that there is a balancing act. Obviously, where a mortgage is in arrears, interest continues to accumulate. On an average mortgage of roughly £110,000 and an average interest rate of about 3.5 per cent, interest will accrue at just over £300 a month. In many such situations, there is no guarantee that the rental payment goes to the lender.

John Wilson: Could you clarify that?

Kennedy Foster: The person could still be in the property and yet the mortgage is not being paid. I do not know where the rental payment is going.

John Wilson: If the person who borrowed the money to purchase the property can no longer repay the mortgage and the lender takes action to repossess, it could be argued that it is in the lender's best interest to engage with the tenant to recover the rental income as a contribution towards the outstanding debt. It is not the tenant but the borrower who has accrued the debt. If the person is renting the property—authorised or unauthorised—I assume that the lender is receiving what, in business terms, would be called a rental income that has the potential to cover the mortgage payment, or a slightly higher amount.

Kennedy Foster: My understanding is that, under the existing law, if a lender starts to receive rental payment direct from a tenant, the lender would, in effect, become the landlord. In the new act south of the border, one provision is that rent is paid direct to the lender during the first two-month period without the lender becoming a landlord.

John Wilson: I will throw open to the panel this question about the protection of unauthorised and other tenants in this situation. I understand Mr Foster's point that lenders would not want to see themselves as landlords, but surely there is an obligation or onus on some of those lenders. You indicated that it is not up to the lender to ensure that the borrower is using the property on which the money has been lent. That is a matter for the individual and the lender has no control over whether the borrower rents out the property in an unauthorised tenancy or over how the borrower uses the money. You said that the lender may be a victim in these circumstances. How can that be the case if a lender can recover at least some of the arrears from a tenant who pays rent on a monthly basis by whatever means? Surely the lender continues to get an income on the property. In certain circumstances, the lender may have to become the landlord. If, as we heard, a lender collects rental income for up to or over 300 days, they are, in effect, acting as a landlord.

Kennedy Foster: They are not doing that at the moment.

Deborah Lovell: There is a difficulty here because we are talking about unauthorised tenancies. It is one thing where the lender and the borrower have agreed to everything and have understood the situation—certainly, in commercial transactions, there might be rental assignations

and so on. However, when the borrower is in breach of a clear obligation in their contract with the lender, there are other laws, such as the common law of landlord and tenant, that impose obligations and duties on the lender if they step into the landlord's shoes. The difficulty is that the consequences down the line affect borrowing for everyone if the lender is asked to adopt all those additional duties and obligations through a debtor's breach of a clear obligation.

12:15

Katharine Sacks-Jones: It should be noted, though, that we are talking about a relatively small number of cases; we are all agreed that the number is not huge, so it would not have a large impact on borrowing for everyone. The monetary impact on lenders is quite small, whereas the impact on tenants of the disruption and distress caused to them, and the monetary losses that they suffer, is far more significant.

Deborah Lovell: Tenants have protection under the existing law.

Katharine Sacks-Jones: I am not 100 per cent clear on whether, under the existing law, tenants have an opportunity to come forward and make representations at the initial possession hearing for a notice period. If that opportunity does exist in law, given that tenants are often not aware of those initial possession proceedings—indeed, the tenancy might have started after the possession proceedings—we need to look at how we can ensure that the first time the tenant knows that something is amiss is not right at the end of the proceedings when they are on the verge of being evicted. We need to see what we can do at that end of the process to support the tenant and to ensure that they have a notice period and are not left facing homelessness.

The Convener: Bob Doris, you have a brief point to make on this issue before we move on.

Bob Doris: My understanding is that, at that point, the lender would have to get a notice of eviction under the 1988 act. That needs to be formalised at stage 2 of the bill. John Wilson talked about the lender not wanting to act as landlord because of all the additional obligations and bureaucracy involved. There are two lawyers here, so perhaps they could tell us whether it would be possible to use the bill as a vehicle for giving special dispensation to lenders in such circumstances for a finite period of time. I know that there are dangers in that, but could there be a transitional arrangement of three or four months during which the lender could collect the rent directly?

Katharine Sacks-Jones: That was exactly what happened in England under the act to which Mr Foster referred. It said that the lender could collect the rent but would not assume the duties of a landlord or create a tenancy. Lenders were concerned about that, so it was written into the legislation and they were given that assurance.

Kennedy Foster: As I understand the English legislation, the tenant has to pay the rental payment direct to the lender during a two-month period.

Bob Doris: Is that without any additional obligations on the lender?

Kennedy Foster: Absolutely.

Bob Doris: So it can be done.

The Convener: How could that be achieved in guidelines without being challenged legally?

Kennedy Foster: It is in statute south of the border.

The Convener: Yes, but if we want to create the flexibility that we have spoken about here outwith legislation, how could guidelines provide similar flexibility for unauthorised tenants that would give comfort to the lenders that they would not be challenged subsequently? We do not have the act here. The implication is that, under the proposed guidelines, a tenant would be taken on for two months but, when the lender comes to evict them, the tenant could challenge the lender technically as if they were a landlord.

Katharine Sacks-Jones: It seems to me that it would be in everyone's best interests if such provisions were in statute rather than in guidelines because that would provide absolute clarity and would not be open to any challenges.

Kennedy Foster: I cannot see how guidelines could overrule legislation.

Deborah Lovell: I know that Katharine Sacks-Jones is concerned that, at the point at which action is brought against the debtor, the lender is entitled to take action to recover the property, and they can do that only by raising an action for possession against the tenant. That action for possession will take as long as the court action takes. If I am right, her concern is that the tenant may have an action served on him and not realise until an order is granted. At that point, the action is against the tenant—they are entitled to go to court. There are discretionary grounds in the 1988 act. The sheriff does not have to grant an order for possession, so surely the key is getting that action for possession served on the tenant, and not necessarily even a two-month notice period or anything else. The key is surely to ensure that the unauthorised tenant is aware that an action for possession is being raised against them.

Katharine Sacks-Jones: I do not see how you could ever make that the case, given that a lot of

tenancies will start after that initial possession hearing takes place. Even if we strengthened the notice, and did everything possible to try to increase the likelihood that the tenant is aware—

Deborah Lovell: Even if it does, there has to be an action for possession against the tenant no matter who that tenant is. We are talking about two separate actions. There is an action against the debtor by the lender, and there is an action against the tenant, whoever that tenant is. The key is ensuring that the tenant is aware that an action is being raised against them because that gives the tenant an opportunity to make representations and a period before they have to remove, even if an order is granted against them.

The Convener: We are coming to the end of the meeting. Although we will receive the conclusions of the repossessions group, I am sure that many interesting discussions will take place before those conclusions are provided to us. I thank you for your time and for the evidence that you have provided.

Subordinate legislation

Registration Services (Fees, etc) (Scotland) Amendment Regulations 2010 (SSI 2010/92)

Home Energy Assistance Scheme (Scotland) Amendment Regulations 2010 (SSI 2010/110)

Local Government (Allowances and Expenses) (Scotland) Amendment (No 2) Regulations 2010 (SSI 2010/111)

12:22

The Convener: Item 3 is consideration of three Scottish statutory instruments, all of which are subject to the negative procedure. Members will have received a copy of the instruments. No concerns have been raised and no motions to annul have been lodged. Do members agree not to make any recommendations to Parliament in relation to the instruments?

David McLetchie: The fees payable for marriages and civil partnerships are subject to annual review. In one instance, the increase is from £28 to £30, and in another it is from £50 to £55—in the latter case that is an increase in one year of 10 per cent, which is well above the rate of inflation. It suggests that a new tax on marriages and civil partnerships is being introduced by the present Administration, which I would have thought was against the spirit of the times. However, if that is what it costs, I will say no more.

The Convener: I will resist the temptation to respond to that. Does the committee agree that it does not wish to make any recommendation on the instruments?

Members *indicated agreement.*

12:24

Meeting continued in private until 12:50.

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