



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

Wednesday 17 November 2010

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LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

27th Meeting 2010, Session 3

CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

DEPUTY CONVENER

*Bob Doris (Glasgow) (SNP)

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Malcolm Chisholm (Edinburgh North and Leith) (Lab)
Alex Johnstone (North East Scotland) (Con)
Alison McInnes (North East Scotland) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Tom Aitchison (Interim Electoral Management Board)
Robert Aldridge (Scottish Council for Single Homeless)
Rosemary Brothie (Shelter Scotland)
Chris Highcock (Interim Electoral Management Board)
John McCormick (Electoral Commission)
Andy O'Neill (Electoral Commission)
Mary Pitcaithly (Interim Electoral Management Board)
William Pollock (Association of Electoral Administrators)
Natalie Sutherland (Chartered Institute of Housing Scotland)
Douglas White (Consumer Focus Scotland)

CLERK TO THE COMMITTEE

Susan Duffy

LOCATION

Committee Room 4

Scottish Parliament

Local Government and Communities Committee

Wednesday 17 November 2010

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Duncan McNeil): Good morning and welcome to the 27th meeting this year of the Local Government and Communities Committee. I remind committee members and the public to turn off all mobile phones and BlackBerrys.

Under agenda item 1, I seek the committee's agreement to take in private item 7. Is that agreed?

Members indicated agreement.

Private Rented Housing (Scotland) Bill: Stage 1

10:00

The Convener: Under agenda item 2, we will take evidence on the Private Rented Housing (Scotland) Bill. I welcome to the committee Douglas White, a senior policy advocate with Consumer Focus Scotland; Rosemary Brothie, a policy officer with Shelter Scotland; Natalie Sutherland, a policy and practice officer with the Chartered Institute of Housing Scotland; and Robert Aldridge, the chief executive of the Scottish Council for Single Homeless.

As was previously agreed, due to time, we will move straight to questions rather than hearing opening statements.

Mary Mulligan (Linlithgow) (Lab): I apologise to our witnesses for the fact that I might have to leave the meeting at some point this morning.

Part 1 of the bill deals with private landlord registration. What have been the advantages, if any, of having a registration scheme?

Douglas White (Consumer Focus Scotland): We have flagged up a number of problems with the registration scheme. I understand that you heard a bit about them last week from local authorities and landlords, but we can perhaps speak more about them today. There are difficulties in terms of tenants' awareness of the scheme and in terms of local authorities' capacity to enforce the regulations as effectively as possible, and we want improvements to be made in that regard.

Overall, however, the scheme has brought some benefits to tenants. It has clearly given local authorities a greater understanding of the sector in their area and has given them an opportunity to engage with the sector in a way that they previously have not done, which has helped them to identify which landlords in the area they need to follow up and take action against. I believe that, last week, a representative of Scottish Borders Council told you about work that it has undertaken to bring unregistered landlords into the system and to improve the service that those landlords offer tenants. That is obviously beneficial, and we encourage all local authorities to undertake that work.

Rosemary Brothie (Shelter Scotland): I agree. Landlord registration has been operating for nearly four years in Scotland, but there has not yet been widespread and consistent use of its powers to stop the worst landlords letting property.

It is important to recognise the scale of the task. We are trying to register and regulate more than 100,000 landlords. It is important that there is registration, and I accept that there is the potential to do more with the scheme, but we should not put all our eggs in one basket. We should be looking at the other side of the issue and trying to ensure that consumers are better informed and more empowered so that they can contribute to the regulation of the sector.

Mary Mulligan: The bill contains some proposed changes. Are they sufficient or do they go too far? Are there other changes that you would like to see?

Rosemary Brothie: We all agree that the measures in the bill go only so far. They were put together quite quickly to respond to concerns that came out of the review of landlord registration. We are supportive of the proposals, as far as they go. However, the Government is undertaking a full review of landlord registration, and we want it to take a much broader and deeper look at the objectives of registration, at whether the system is meeting those objectives, at whether registration can reassure tenants that they are letting from a responsible landlord who is managing to a high standard, and at the ability to remove the worst landlords from the market and improve standards. We would like there to be a much more thorough examination of the objectives of landlord registration. There is potential for further reform in the future to streamline or target landlord registration more effectively.

Mary Mulligan: Did you say that a review of landlord registration is being done?

Rosemary Brothie: Yes. The Government has commissioned research into landlord registration.

Mary Mulligan: That is helpful. Thank you.

Robert Aldridge (Scottish Council for Single Homeless): Yes; that is part of what I was going to say. We are expecting a detailed report on landlord registration in the new year. The elements in the bill are important steps forward in landlord registration, and we do not object to any of them. They will make an improvement and a difference. However, the Scottish private rented sector strategy group, of which we are all members, wants to look in a lot more detail and more thoroughly at the range of regulation of the private rented sector, because a range of elements could be streamlined in one way or another, whether it be houses in multiple occupation licensing, landlord registration or landlord accreditation. A range of different issues has emerged over the years, and it is time that we took a step back and took a sensible, long-term view.

Natalie Sutherland (Chartered Institute of Housing Scotland): The CIH echoes the views of

the rest of the panel. One of our main concerns is the inconsistency in enforcement and implementation across Scotland. We absolutely believe in the benefits of landlord registration, and in improving it to ensure that we have a high-quality private rented sector.

In our evidence, we have made extra calls about how we would like the situation to be progressed in future. One of the big issues is about enforcing the existing legislation and ensuring that there is the necessary evidence to take cases to court. The court system is slow, and there is a lack of specialisation in such cases. We would like those issues to be considered in more detail. We hope that the private rented sector strategy group will do that.

There is also the landlord registration review. Wearing a previous hat in a previous life, I was involved in the first review, and at that time no one had enforced anything. The powers were relatively new, and we were still trying to get people registered. I am interested to see how the powers are being used. Are there still barriers to serving penalty notices? I am interested to see the outcome of the review, but it is a shame that it has come now and not before the bill was introduced. The timing is unfortunate.

Douglas White: I echo most of my colleagues' sentiments. The bill makes worthwhile improvements to the current landlord registration system. There is debate and discussion to be had around whether more fundamental reforms could be made, not just to landlord registration but to the whole regulatory landscape of the private rented sector, so that tenants get the protection and support that they need, and can understand how the regulatory system operates and can engage with it effectively. It should not place too great a burden on landlords, and it should be enforceable in a clear and straightforward way with the available resources. There is a discussion to be had around those issues, and I hope it will be ongoing. In the meantime, the bill will change the existing system, and that is helpful.

Mary Mulligan: That is useful, and it has kind of answered my question about other measures.

I have a quick question about enforcement, which I think you all mentioned. I am concerned about how we will encourage enforcement, even with the additional powers that the bill will provide. Do you share my concerns?

Natalie Sutherland: We do. The CIH argues that enforcement needs to be taken seriously across all local authorities, but it is not getting the required political priority. That could be tackled by ensuring that local authorities are regulated in some way in relation to their private rented sector duties, because it is our understanding that they

are not so regulated at the moment. I know that the Housing (Scotland) Bill that has just been passed, contains the Scottish social housing charter, and we argue that its scope should include regulation of the private rented sector in some form.

Douglas White: I would like to make a couple of points. One thing that the Private Rented Housing (Scotland) Bill tries to do, which is helpful, is improve the information that is provided to consumers about their engagement in the sector through tenant information packs, which we are extremely supportive of, and through the proposal to include information about landlord registration in adverts for properties to let. In trying to empower consumers in that way, the bill seeks to enhance the role that tenants and consumers are able to play in making the system work, in bringing to their attention issues of concern and therefore in supporting the enforcement of the system. It also increases the range of criteria that local authorities will take into account in determining whether someone is fit and proper to be registered. If local authorities have a clearer set of things that they know they have to look at, that might make enforcement easier for them. However, we know that local authorities are having difficulties with getting the resources to enforce the current regulations, so we might have to consider whether increasing the things that they have to take into account will increase their work and therefore result in more strain on their resources.

Mary Mulligan: That is helpful. Thank you.

The Convener: I want to go back to Mary Mulligan's questions. The evidence that has been provided does not exactly enthusiastically endorse the bill's principles. Many reservations have been expressed, there are many references to the review that is taking place, and it seems to me that there is a lot of expectation about further reform and legislation. Are you prepared to endorse the bill's general principles on the basis that it is expected that there will be further legislation and reform? What gives you the right to expect that there will be further legislation and reform? When do you expect that?

Rosemary Brothie: Your assessment of our views is right. We have been led to expect further legislation. The minister has committed to that in the future, and one of the possibilities from the work that the PRS strategy group is doing is that further legislation will be needed. The bill was developed in part by the PRS strategy group as an immediate response to some problems that were identified from the review of the private rented sector that the Government undertook. In the short timescale that we have had to develop the proposals, the Government has perhaps not been able to look strategically at some of the longer-

term, more substantial reform that is needed in the sector.

Robert Aldridge: I think that we have all said that the bill is about improving the current system. That system has been considered, and the bill aims to mend things that are broken. However, we are all committed to looking at the private rented sector's much longer-term future and at how we can make it thrive and allow it to grow while protecting consumer and tenants' rights and creating an atmosphere in which good landlords can thrive. We are looking at a range of much broader issues in the private rented sector strategy group, and we expect that the conclusions will require legislation for their implementation.

Douglas White: The bill will make a series of improvements to the existing framework, which will be useful on the whole and we support them, but, like my colleagues, we hope to engage in a longer-term piece of work that involves taking a step back from the sector, considering it more strategically and coming up with further proposals that will lead to more benefits for tenants.

The Convener: Last week, landlords gave evidence on more legislation, benefits and so on. Will the private sector be able to provide, as we expect it has to, an element of social housing in an environment of such uncertainty about more reform and legislation? People in the private sector are concerned that we may be reaching a stage at which there is too much legislation and that that will impact on the availability of homes for people who need them.

10:15

Rosemary Brothie: I understand that view and appreciate that the amount of regulation and the disjointedness with which it has sometimes been implemented has created uncertainty among landlords and letting agents. However, the PRS strategy group contains stakeholders from all areas of the PRS, including landlords and letting agents. We hope that, by working together, we will be able to come up with recommendations that will improve the circumstances of both tenants and landlords across the board. Fundamentally, all of us have the same interests. Landlords would like to be able to provide more accommodation and would like to have a thriving sector. For tenants, the availability of accommodation is central. We are all working towards the same end.

Natalie Sutherland: The CIH is mindful of the need to raise awareness of the rights, responsibilities, legislation and regulation that are in place. Sometimes that information has not been sufficiently well known or disseminated. There is a duty on all professionals, the Government, local

authorities, mortgage lenders, insurance companies and so on to ensure that people are aware of the fact that they must be registered and regulated in some way. Such awareness has been lacking.

Given the current housing market and the economic crisis, more people will become private landlords by default, as they have properties that they may not be able to sell. The CIH is seeing more people entering the sector as individual or part-time landlords. We are concerned to ensure that they are aware of their rights and responsibilities and of the regulation to which they are subject.

Bob Doris (Glasgow) (SNP): You have given interesting evidence on the need for a longer-term strategy, but I return to the specifics of the bill. Throughout our evidence taking, the issue that has jumped out at me is consumer understanding of the current situation. The bill proposes that adverts should include a landlord registration number. Will the consumer understand what the lack of such a number on adverts means?

Douglas White: At last week's meeting, there was some discussion about whether a number or a kite mark would be more appropriate. I understand some of the concerns that were expressed about what a number means. The general principle that an advert should include some kind of acknowledgment of the fact that a landlord is registered is extremely important and would help to raise awareness of the system among consumers. Whether a number or a kite mark should be used is open to discussion.

If such a provision is introduced, it must be accompanied by an awareness-raising campaign, so that tenants are aware of the fact that the number or kite mark that appears in an advert means that the landlord is registered, and that they should look out for that, be extremely wary of approaching any advert that lacks such a mark and, possibly, report such adverts to their local authority. Such a campaign would be hugely beneficial in raising tenants' awareness of the system and helping them to ensure that it is properly enforced.

Rosemary Brothie: Mr Doris is right to point to one of the key elements of the bill. Shelter supports the bill because, finally, there is to be an emphasis on information for tenants. One element that has been missing over the past few years, when we have focused on regulation and registration, is consideration of the role of tenants and consumers in this landscape. I agree entirely with Douglas White that although having a registration number on an advert is a key way of communicating with tenants, it needs to be accompanied by a much broader campaign of information, to encourage tenants to understand

much more about their rights and responsibilities and how the sector is regulated. The pre-tenancy information pack, which the bill provides for, will go some way towards addressing such concerns, but it should be a catalyst for providing tenants with much more information.

Bob Doris: That is an interesting point. I have spoken to some good landlords who say that they make a big deal of the fact that they are registered when potential tenants come to visit properties; many of them already produce their version of a tenant information pack. They see that as a real selling point, although they tell me that is only half a selling point, because most potential tenants do not even know that there is a registration scheme.

It is about putting consumer choice into the system, but there must be consumer information first. I am sure that there should be some form of high-level Scottish Government awareness raising on the matter, but we often get high-level advertising campaigns with an initial big bang and the issue is then forgotten about. How do you propose to raise awareness of the matter at a local authority level? Who should do that?

Rosemary Brothie: Picking out just one body to do the work will probably not be the answer. We envisage a sector-wide response. Yes, there is potential for leadership from the Government and local authorities, but we would like all organisations across the sector that have a stake or an interest in the private rented sector to contribute to the awareness raising.

Bob Doris: I have one final question. Given that a lot of adverts are placed in newspapers, is there a role for the media to play through working in partnership to raise awareness of the registration system?

Robert Aldridge: Yes, I think that everybody has a role to play. Once the number appears in adverts and people want to know what it is, the media will have a role in publicising that along with the range of advisers in the various sectors. Whether it is citizens advice bureaux or student advisers, a whole range of people are involved in advising potential tenants in the private rented sector, and they will all have a moral if not a legal duty to make it clear that people should look for the number.

Natalie Sutherland: As well as there being a duty to check what the landlord registration number means, people should be able to go to the public register or the local authority and check not only that the number is valid and accurate, but that there are no other concerns. The landlord might have a number, but they might have been deregistered since that number was allocated, they might be under review or there might be other concerns about them, such as a rent penalty

notice having been issued. The registration number is a good and positive step in raising awareness of landlord registration, but there might still be underlying issues that the tenant must proactively check.

Bob Doris: Sorry—who should have a duty to check that the number is valid?

Natalie Sutherland: If the number is on the advert, the tenant—the public themselves—should check that it is valid.

Bob Doris: So it is about the responsible consumer as well as the informed consumer.

Natalie Sutherland: Yes. It is not just about consumers having the number; it is about their checking it.

Douglas White: We have heard from local authorities that they would go through newspapers, checking up on the numbers. We would expect them to do that to ensure that landlords in their areas comply with the requirements of their systems.

Jim Tolson (Dunfermline West) (LD): Good morning. I want to ask the panel's views on part 3, on overcrowding statutory notices. As the witnesses will know, section 17 would give local authorities the power to serve an overcrowding statutory notice on the landlord of a house that was overcrowded. We all know of examples of that, such as where a landlord has subdivided a single flat into two or three flats. Overcrowding has an effect not just on the landlord's tenants, but on adjacent tenants and owner-occupiers—indeed, in extreme cases, a property can be overcrowded with more than 20 or 30 people who are taking part in illegal activities.

We have received a number of submissions on the subject. The main concern is that tenants may struggle to find alternative accommodation so there is a risk that they will become homeless unless local authorities have a duty to help them to find alternative accommodation. We all know that there is currently extreme pressure to make accommodation available both in local authorities and in the private sector, and I am concerned about the huge impact that the bill could have. Do you share the concerns that have been expressed in the written evidence that the committee has received about the potential for people to be put at risk of homelessness as a result of a notice being served? If so, what do you think could be done to prevent that from happening?

Robert Aldridge: In our written submission, we say that we have concerns that people will be displaced by overcrowding notices and that some kind of duty should be placed on the local authority to ensure that such displaced people are rehoused. Not everyone might be entitled to

assistance under the homelessness legislation, particularly in some of the areas that we are most concerned about, and in such cases we must ensure that people are not left on the streets. That is certainly not part of the progressive homelessness safety net that we have created in Scotland, and we want local authorities to ensure that those who are displaced are offered suitable alternative accommodation and that no one slips through the safety net.

Statutory guidance could set out for local authorities certain questions that need to be answered before issuing an overcrowding statutory notice. I point out that for people who do not have a formal short assured tenancy notice, the legal default is an assured tenancy, under which overcrowding is not a ground for eviction. As a result, a landlord would be unable to reduce numbers. We must ensure that there is some means of employing an overcrowding statutory notice legally, that the people who are displaced by it are not left homeless or destitute and that before any such notice is imposed people are aware of the implications of such a move.

Jim Tolson: You seem to be saying that although local authorities do not have a duty to find other housing for people who find themselves in such a situation, they should do what they can to make housing available, either directly or indirectly, through their services. Is that correct?

Robert Aldridge: They should have a duty to ensure that suitable alternative accommodation is made available.

Rosemary Brothie: We need to be clear that overcrowding is a symptom of economic and social inequality. There are just not enough houses at the right level of rent to allow people to live in places that are not overcrowded, and in attempting to deal with the problem we need to be concerned about and consider what will happen to those tenants in a market in which such properties might be their only option.

Shelter's view is that the powers have not been thought through as well as they might have been, and in fact have been hastily conceived. As a result, we ask the committee to consider asking the Government to go away and look again at overcrowding, local authorities' current powers to deal with it and the reasons why those powers are not working. We simply do not know enough about the circumstances of the people who live in those conditions, what their alternatives are and why local authority action is not working to know whether the powers in the bill will solve the problem.

However, I accept that overcrowding is a significant issue that should be dealt with and, if the committee is minded to support the bill's

proposals, we ask that at the very least the power to provide advice and assistance should become a duty and that there should be a duty to rehouse displaced households. A person in an overcrowded property has a right to apply as homeless to the local authority, but why do people in such situations not do so as a matter of routine? One might suppose that in certain cases people do not want local authority assistance or that, even if accommodation becomes available, such assistance will almost inevitably result in their being moved well away from their communities and links. We need to examine the alternatives for people in those circumstances much more carefully.

Natalie Sutherland: We echo and support concerns about the implications of homelessness, what happens to households served with overcrowding statutory notices and how people are informed about and consulted on the matter. A useful move that would link into the tenant information pack would be the provision of information on the maximum number of people who should be in a property. Indeed, such information should be provided at the outset of a tenancy and flagged up when concerns about overcrowding begin to emerge. Perhaps we need to look again at the definition in the Housing (Scotland) Act 1987 and decide whether it is outdated or whether the overcrowding standard itself needs to be reviewed. However, we support the provision of information on the maximum number of people in a property.

10:30

Jim Tolson: You make a good point about information packs; colleagues might want to follow that up.

Whether we are talking about overcrowding or any other issue, we often have huge problems in ensuring that the existing legislation is enforced. Does the panel think that the bill is strong enough in that regard? Is there more that we should do to ensure that that is dealt with adequately? I will ask Mr White to respond, because he has not yet had a chance to speak on this subject.

Douglas White: Are you asking about overcrowding or enforcement more generally?

Jim Tolson: I am asking about overcrowding and how the bill's provisions on that will be enforced.

Douglas White: Our views on overcrowding are probably similar to those that have already been expressed. We are concerned about the impact that the serving of an overcrowding notice on a property would have on the tenants, and we fully support local authorities being required to provide advice and support to those tenants and, if

necessary, to rehouse them. Tenants should certainly be given information up front about the maximum number of occupants that a property can have. That is essential, and it is only right and fair.

As far as enforcement is concerned, it is my understanding that the power in the bill is a discretionary power and that local authorities will be able to choose the circumstances in which they would use it. You would probably need to ask local authorities about the extent to which they would take into account the resources that they had available for enforcement when they decided whether to serve a notice in the first place. Among the other factors that they would have to take into account, if they had a duty to rehouse tenants in such circumstances, would be the availability of housing stock. A range of issues would have to be taken into account in processing such a notice, and I imagine that councils' ability to enforce it would be one of those.

Jim Tolson: At this stage, I would be interested—as would, I am sure, the rest of the committee—to find out what measures you, on behalf of Consumer Focus Scotland, feel should be in the bill to provide that protection to tenants. What do we need to do, if anything, to tighten up the bill and make it more effective on overcrowding and enforcement?

Douglas White: I suppose that it comes down to the three issues that I highlighted. Local authorities must give tenants advice and support to get the information that they require; they must have a duty to rehouse those tenants who have been subject to an overcrowding notice; and the information about the total number of tenants who are allowed in a property must be given to tenants up front, at the start of the tenancy.

The Convener: On the basis of what you have said, I presume that you are saying that, on balance, being in an overcrowded home is better than being homeless. That seems to be what you are saying, but I will allow you to come back on that.

The next step is to say that only X number of people are allowed in a home but, due to pressures of life, that is ignored and two people more than there should be are put in that home. The council comes along, says, "That isn't allowed. You know that you shouldn't be doing that," puts two people out and rehuses them. Do we seriously expect such a plan to be enforced?

Rosemary Brochie: I will address that question, but first I want to pick up on whether living in an overcrowded situation is worse than being homeless. Under the law, someone who is living in an overcrowded house is considered to be homeless. Someone who is living in such

circumstances has the right to apply for homeless status and to be dealt with as someone who is considered to be at risk of becoming homeless. Under the HMO licensing regime, local authorities already have powers to deal with overcrowding when a property is occupied by people who are unrelated. The powers in the bill have been designed to deal specifically with situations in which the members of a large family are living together or in which the occupants are not co-operating and it cannot be established whether they are related.

Let us assume that we are talking about families. It is not necessarily reasonable to expect two members of a family to go and find somewhere else to live. In other words, the entire family would have to be rehoused, and it could be difficult to find suitable accommodation for them. That is where the problem might lie.

You asked whether a local authority should be able to—I am sorry; I have lost my thread.

The Convener: I asked whether a local authority should be able to use its powers to bring the occupancy level of a house down to the agreed level.

Rosemary Brothie: One of our concerns about the powers being brought in as they are is that we do not know why people are living in overcrowded conditions. Is it because that is the only choice that they have? If they are given the opportunity to be rehoused by the local authority, they might not take that up but might instead seek to move to another property nearby and remain in overcrowded conditions, if those are the only available options.

We share the concerns that colleagues raised earlier about the powers that landlords have to require occupants to leave under those circumstances. If the tenancy agreement has not been drawn up properly and the occupants are living in an assured tenancy, the landlord may have no powers whatsoever to end the tenancy and comply with the notice.

Patricia Ferguson (Glasgow Maryhill) (Lab): I want to pursue the overcrowding issue. My understanding is that the provisions are in the bill because of issues such as the present situation in Govanhill, where people live in appalling situations and are exploited by fairly unscrupulous landlords. I think we would all agree that we want that situation to be resolved.

Am I right in thinking that the landlords who indulge in those extreme practices are the very landlords who will not be registered in the first place? Is it the logical conclusion that such situations would continue, even under a strengthened landlord registration regime, and that the local authority would still find it difficult to have

any kind of relationship with such landlords in order to try to bring about a more appropriate solution for people who are living in those conditions?

Robert Aldridge: You have hit the nail on the head. There is a very small group of appalling and criminal landlords who are not engaging with the system, and who may well put up a number of proxies as their representatives as time goes on. It may be difficult to get witnesses to come forward to give evidence against those landlords if there is a problem.

To deal with that small group of extreme landlords, we may need much wider action that is linked to tackling organised crime, which is more than a landlord registration system can manage. It is an issue of a different order of magnitude.

Natalie Sutherland: Our understanding is that the overcrowding notices will be used in extreme circumstances, in which 15 or so people are living in two-bedroom properties. That is where we see local authorities focusing their attention on using those powers.

Patricia Ferguson: That is certainly the case. Glasgow City Council and Scottish Borders Council said in evidence to the committee last week that they would use those powers only in extreme situations, and I understand why that would be the case.

If the bill's proposals are taken to their logical conclusion, are we saying that the local authority should find alternative accommodation for people in that situation? That is not what current legislation says. If your organisations think that that should be the direction of travel, we would need to consider it carefully.

Rosemary Brothie: We need to consider the consequences for tenants of using those powers and recognise why people are living in such circumstances. Some acknowledgement of that in the bill would go a long way towards reassuring us that local authorities would use the powers appropriately and responsibly.

Allied to that, our key concern is that those powers may not be effective, and may not get to the heart of or tackle the problem of overcrowding, which we identify as a significant problem with significant consequences for tenants, and for neighbours and communities. Our call for a much deeper and more thorough look at the issue reflects our concerns that the provisions might not fit the bill or solve the problem.

Natalie Sutherland: Our other concern is about the change in ownership of property. The way that the bill reads at the moment, the notice is served to the owner or landlord and, if ownership changes, I think that the notice does not apply.

The concern is about the property and the number of people who are in it. Is there a way of registering a notice on the property so that, if there is a change in ownership, the issue is addressed? People change properties quite easily and pass them on to business partners or associates. If the notice was applied to the property rather than to the owner, that might help to tackle the problem.

Patricia Ferguson: Do we need to be looking for a much closer tie to HMO licensing? We are talking about properties that will be HMOs, but they will probably not be licensed or registered in any way.

Rosemary Brothie: I think that local authorities asked for the overcrowding statutory notice because, in some circumstances, they find it difficult to establish whether an HMO is in existence. Local authorities might find that difficult, because there are language and cultural barriers to identifying and working with the occupants.

That raises concerns for us. If local authorities are saying that they are unable to establish whether a property is an HMO, or they have established that a single family is living together in the property, that does not give us a great deal of confidence that the local authority will be able to work closely with those tenants to find a way forward and enable them to move on to more appropriate housing. The risk is that a notice might be served on a landlord and, when the local authority comes back a week later, the tenants will have disappeared. What means the landlord has used to remove the tenants and where the tenants have gone might be completely outwith the local authority's control. That raises concerns for us.

I do not want the committee to go away with the impression that we are happy to accept and allow overcrowding—certainly not. It is a significant issue, and we want it to be addressed properly and appropriately.

Patricia Ferguson: Do you think that registering the number of people that could reasonably be accommodated in a property would help to get over the problem of transient occupation? I am aware of a number of issues in my constituency, and the problem is really hidden because people do not have the language or because they might be beholden to the landlord for employment and other support mechanisms. Do you think that registering the property for X number of occupants would help to get over that issue? Does overcrowding just go with the territory and lie beyond the scope of legislation?

Natalie Sutherland: It might help the situation; it would definitely be a positive step. However, if there are language and cultural barriers, we have to put information into the right language so that people can understand it and abide by it. As you

say, in extreme circumstances, the problem seems to go with the territory, but that is not to say that it is not useful to pursue the idea.

David McLetchie (Edinburgh Pentlands)
(Con): We are all familiar with the situation of an overcrowded household in which the family group has grown. We have all had people coming along to our surgeries who want to be rehoused in a larger property by their local authority or social landlord. We are all familiar with that, but that is not the only situation that can arise.

Do you accept that some people are overcrowded by choice? A group of workers might go to a city to work on a short-term project—they might be from this country or they might be migrant workers—and they might choose to live in circumstances that we might all regard as overcrowded and unacceptable because that is a rational and economic choice for them to make because it gives them accommodation at the minimum cost. It might not be of a particularly high standard, but their motivation is to maximise the amount that they can earn from that job, perhaps to support their family elsewhere in the country or, indeed, overseas. Legislation to stop that kind of overcrowding will not do them any good at all, as they would see it.

10:45

Rosemary Brothie: No. In the circumstances that you are describing, where a group of people might be coming together to work, the conditions should be controlled under HMO licensing powers. The concern is about the safety of the occupants as much as it is about the conditions that they are living in, the nuisance to neighbours or any other aspect of the property being occupied in that way. The powers in section 17 specifically address situations where HMO licensing does not apply or where it is difficult to establish whether the property is an HMO.

You are correct in that large, extended families might choose to live in overcrowded circumstances in order to keep rents low. Those circumstances exist because there is a shortage of accommodation and rents are too high for people to afford. Simply enabling a local authority to require them to leave the property does not address that underlying problem. An additional factor is how the local authority will be able to assist tenants who are in that situation. Even though most people who are resident in Scotland have the right to apply as homeless, that right is contested or does not exist for certain categories of people. That certainly applies in some cases to migrants and migrant workers.

Douglas White: David McLetchie makes a fair point. As Rosemary Brothie says, it might well be

that some people are living in overcrowded situations because the accommodation that they require is not available at a rate that they can afford. I hope that the strategy group will pick that up as part of our longer term discussion about the future of the sector and the extent to which it can meet different housing needs.

I will add just one point to what Rosemary Brothie said about the impact that overcrowding statutory notices could have in such situations. Local authorities will need clear guidance and support on when they should issue such notices and what factors they must take into account in determining what an overcrowding situation looks like. Do local authorities throughout Scotland have a consistent process for determining the impact of overcrowding on tenants' health and wellbeing and the impact on neighbours and the community? We need a consistent set of criteria that local authorities take into account when they consider whether to issue a notice. We want to see those criteria in guidance to ensure that tenants in such situations are treated in a fair and consistent manner.

Robert Aldridge: I agree with everything that has been said. I have just one point to add. Issuing an overcrowding statutory notice will always be an option for the local authority. It can choose whether to do that. If tenants have opted to live in overcrowded conditions but they are not creating a negative impact for their health or the community around them, the local authority might well decide that it is not in its interests to issue a notice.

David McLetchie: My next question partly relates to the previous one, but it is on the broader issue of how the law of contract and the private contractual relationship between the landlord and the tenant is affected by the bill, or the extent to which it should be overridden by the bill.

If there is a contract between an unregistered landlord—or, indeed, someone who has been banned from being a landlord—and a tenant, is that contract void as a matter of law? Is it overridden by the bill?

Rosemary Brothie: My understanding is that the answer is no. The contract would stand. I tried to make the point earlier that it might present problems for the landlord in trying to remove the tenant or remedy the overcrowding if they did not have the means to do so.

David McLetchie: Right. So landlord registration is ineffectual in prohibiting the creation of tenancy contracts that create rights of occupation and security in favour of tenants. There is therefore no consequence as regards that particular let and that particular tenant. Is that correct?

Rosemary Brothie: My understanding is that the local authority will have the option to prosecute the landlord, and if they have been deregistered and banned from letting, that would obviously be a good reason, but I do not think that the bill would override the contract between the landlord and the tenant.

David McLetchie: Even supposing that the landlord has been prosecuted and given the derisory fine that we heard about last week—£65 per house, in the only prosecution that has taken place in Scotland in four years—from what you are saying that would not affect the contract in relation to that property.

Robert Aldridge: I think that we are saying that we do not know. I do not think so.

David McLetchie: Right. So all this legislation is making no difference whatsoever to the creation of contracts for the letting of property, which remain perfectly valid under the general law. Is that correct?

Rosemary Brothie: That is our understanding, but the contract is with the tenant, and the tenant is presumably the innocent party here. If they have been given a contract to live in a house, it should not—

David McLetchie: I am not suggesting that the tenant should be prosecuted. What I am saying is that the whole system does not void any given contract for the rental occupation of any house or flat.

Rosemary Brothie: Perhaps that is a question to pursue with the minister. That is certainly our understanding.

David McLetchie: In that case, do you think that the law should intervene in that contract and override it? Do you think, for example, that the law should direct the tenant no longer to pay rent to the landlord but to pay it to a third party? To what extent should we interfere in such private contracts?

Natalie Sutherland: That is an area that CIH raised—

David McLetchie: Yes, that is why I raised it.

Natalie Sutherland: We raised it because we feel that there needs to be far more debate and consultation on the issue. You are talking about the banning of landlords—

David McLetchie: I think it applies whether a landlord is banned or not registered in the first place. Whether there is a ban is not material here.

Natalie Sutherland: The whole idea of the ban came in at the last minute. It was not something that the private rented sector strategy group

considered, and it is an area that we have concerns about.

You are right. If there is a contract in place, there are tenants and there is a tenancy. What are the implications for that tenancy and for the ownership and use of that property in future? Who enforces that? We have a considerable list of concerns about the existing contract and how it is monitored. I echo your concerns and I am afraid that I cannot give you an answer.

David McLetchie: Might it be a good idea if the Government thought through the consequences for the tenancies that have been created and the tenants of unregistered landlords before it introduces legislation in this area? We seem to be creating a regulatory scheme to do with registration, banning orders and—allegedly—fining people up to £50,000. Although we are being asked to approve all that, the most basic question, on the impact on the tenancy of any given house, has not been answered. All you good people, who are experts in the housing field, cannot answer that question or say whether the Government has provided an answer. Is that correct?

Natalie Sutherland: In some cases in which there have been notices or people have been deregistered, letting agents have been put in place to protect the tenants, but I do not know whether that happens throughout Scotland or in every case.

Douglas White: One point that may be worth noting is that if a landlord is banned or found to be deregistered and continues to act as a landlord, they presumably leave themselves open to further criminal prosecutions. If it is their second or third offence, presumably the actions that are taken against them become more severe, which would have an impact on their ability to continue providing that service.

David McLetchie: We heard last week that severe action resulted in a fine of £65 per house on the only person to be successfully prosecuted. It would have to get pretty severe to get up to the level of one month's rent.

Rosemary Brothie: The only point that I can add is that the evidence that the committee has heard—certainly at last week's session, to which I listened—suggests that local authorities and the Government expect such measures to act as deterrents. I accept that the deterrent is not great if the fines that are imposed are small, but the idea that a fine could be imposed would be a significant deterrent and act as an effective means of keeping people from behaving in the ways that have been described.

The Convener: I am sure that David McLetchie will be able to pursue some of those issues with the minister at a forthcoming meeting. Indeed, the

minister's officials are scribbling away at the back of the room, so he will be well aware of the issues that have been raised.

John Wilson (Central Scotland) (SNP): I will ask briefly about overcrowding, because some issues still need to be examined. I was interested in Ms Sutherland's response about the definition of overcrowding in the Scottish 1987 act.

I ask Ms Brothie whether Shelter has put together any figures. I know that you compile useful homelessness figures organised by local authority. How many of the people who are not on the homelessness register and who reside with a local authority landlord are making applications under homelessness legislation because of overcrowding?

Rosemary Brothie: You are asking what the overcrowding situation is in the social rented sector.

John Wilson: Yes.

Rosemary Brothie: I believe that overcrowding is a factor. I do not have the figures at my fingertips, but I can certainly provide them after the meeting.

John Wilson: I asked the question because, although we are concentrating on overcrowding in the private rented sector, we as a committee must recognise the overcrowding issue in the public rented sector, where many landlords are failing to honour the 1987 act—never mind our focusing on the bill that we are examining today.

In much of the debate this morning and in much legislation, reference is made to fit and proper landlords. We do not seem to have concentrated on whether we have fit and proper letting agents. Many people who rent in the private sector never meet their landlord or the owner of their property—they deal with letting agents. Does the bill go far enough to assess the suitability of letting agents, which manage and let out many properties on behalf of owners who might not be in the country or even know to whom their properties are being let?

Natalie Sutherland: CIH made it clear in its submission and has made it clear since the start that the reason for the grey area and the patchwork of legislation that involves letting agents is that letting agents are not required to register in their own right. The position is unclear in legislation. Given that the Property Factors (Scotland) Bill is being considered, we were disappointed that the opportunity might have been missed to legislate to require letting agents to be registered.

We share the concerns that have been expressed. The Private Rented Housing (Scotland) Bill provides the ability to charge fees

for unregistered agents, because they must go through the fit-and-proper person test if a landlord appoints them. It is astounding that some letting agents would not be registered and would not want to say that they were fit-and-proper, so agents should be registered.

Rosemary Brothie: It is probably in the interests of a letting agent that acts as a company and deals with the properties of more than one landlord to be registered, but it is not necessary for managing agents—who might be just individuals who operate to help out one landlord who is a friend—to register in their own right. However, I believe that landlords must nominate and give details of such agents when they register themselves.

Under consumer law, I think that whether it is in the Scottish Government's power to regulate letting agents is a difficulty. Perhaps Douglas White can add to that.

Douglas White: I think that that has been debated and that the issue of property factors has been considered in the Parliament previously. I agree with the comments that have been made so far. Provisions are in place to bring in managing agents if they are put forward by landlords and have not previously been registered. That is helpful.

There are other provisions in the bill that relate to letting agents, particularly on the charging of fees. We certainly support the provisions in the bill to clarify the law in relation to the ability of agents or landlords—I think that the question particularly applies to agents—to charge fees at the beginning of tenancies. The bill clarifies that that would not be allowed and that tenants should not have to pay such fees up front.

11:00

John Wilson: Mr White raised the issue of pre-tenancy charges, which is what my next question is about. Last week, we heard from landlord representatives, who defended the right of landlords to impose pre-tenancy charges. How would those charges affect people who are applying for a private rented house, particularly those who rely on housing benefit? How would they affect people who are entering the private rented sector? Much of the thrust of this Government bill is about opening up the private rented sector to people who would normally be expected to be housed by social landlords, and protecting those tenants. Are pre-tenancy charges a viable way forward for many people who rely on housing benefit or support? Can they afford pre-tenancy charges? Do you want to see some form of regulation on the levels of pre-tenancy charges?

Robert Aldridge: The bill suggests that we define much more carefully which pre-tenancy charges might be allowed and that everything else should be illegal. That is the right approach. Certain administrative charges can be defensible, but you are absolutely right: if we are to use the private rented sector to house more people who are currently housed in the social rented sector—I think that we all want that—we must remove the obstacles to their gaining access to the private rented sector.

It is already quite difficult for a number of people to put together a pre-tenancy deposit. I know that other proposals are coming forward about deposits and that there are deposit guarantee schemes to assist people, but adding the further obstacle of pre-tenancy charges would make things even more difficult, especially in the economic circumstances that we face. People who rely on benefits will increasingly be competing for the same properties against young professionals who are unable to get a mortgage for the first time, for example. It is important that we do not exclude from the private rented sector people who would otherwise be in the social rented sector. I agree with John Wilson.

Douglas White: I agree with Robert Aldridge. There is definitely an issue to do with clarity and fairness. Different agents or landlords may charge different fee levels and they may charge tenants for different things at the start of a tenancy. Tenants are often unsure about what they should and should not pay and about what it is unreasonable for them to be asked for. Obviously, they will be trying to secure a property and they may feel uncomfortable about challenging a charge that it has been put to them is required of them. The bill is extremely helpful in clarifying that those charges will not be allowed, and there is provision to permit certain charges in regulations. The clarity that is offered to tenants will be extremely useful.

Rosemary Brothie: The point is important to raise. I hope that the Government will consult on the charges that may be exempt from the prohibition and the levels at which they should be set. We are looking closely at whatever charges are exempted or prohibited to see how they line up with the Government's intention to open up the private rented sector to people on lower incomes. It may be acceptable to have some charges that can be laid before tenants to set up a tenancy, but they certainly should be affordable and within everyone's means.

There is perhaps another question to ask. A letting agent provides a service to a landlord, so why should they also charge tenants for that service?

The Convener: As members have no more questions, I thank the witnesses on behalf of the committee for their attendance and the evidence that has been provided.

11:05

Meeting suspended.

11:08

On resuming—

Local Electoral Administration (Scotland) Bill: Stage 1

The Convener: Under agenda item 3, we will take evidence on the Local Electoral Administration (Scotland) Bill. On our first panel of witnesses, we have three people from the interim electoral management board for Scotland: Mary Pitcaithly, the board's chair; Tom Aitchison, the former chair; and Chris Highcock, the secretary. We also have William Pollock, the deputy returning officer in South Ayrshire and member of the Association of Electoral Administrators.

As previously agreed, we will move directly to questions.

Bob Doris: I welcome the fact that the bill will put the electoral management board on a statutory footing and will implement a couple of the recommendations that Mr Gould put in his report a few years ago. Of course, in the form that is set out in the bill, the board can have statutory responsibility only for local government elections. However, a wide group of stakeholders believes that it should have statutory responsibility for elections in Scotland to the European, United Kingdom and Scottish Parliaments. The Electoral Commission also suggests that the board be given responsibility for referendums that take place in Scotland.

Would extending the responsibilities of the board in that way be desirable?

Mary Pitcaithly (Interim Electoral Management Board): Yes. That is the direction of travel that we want to go in. It would be helpful if, in time, the board had responsibility for all the elections in Scotland. We understand that that is within your power at the moment.

Tom Aitchison (Interim Electoral Management Board): As far as the European elections are concerned, regional returning officers are appointed across the UK, and Scotland is one of the regions. In a sense, therefore, the power of direction for European elections sits with the RRO. What we are discussing here is whether something similar should apply to all other elections in Scotland.

Mary Pitcaithly: Just to supplement that, the regional counting officer for the referendum that is due to be held next year will also have a power of direction.

Bob Doris: That point is worth picking up on. If the board is put on a statutory footing, will it have any degree of responsibility for any referendum that might be held next year?

Mary Pitcaithly: No, not formally, but it will operate in the same way as it did during the general election this year, when it helped to co-ordinate the approach that was taken by returning officers and electoral registration officers throughout Scotland. It will provide support and guidance for the referendum, and there will be an opportunity to develop training.

Tom Aitchison: Bob Doris began by referring to the Gould report of 2007. In many respects, that and other factors began the process that led to the interim electoral management board. Essentially, there was a desire among serving Scottish returning officers never again to go through what happened in 2007. I guess that that is the view of all parliamentarians and of others, too.

There is a good co-operative spirit among the returning officers in Scotland at present; when I was RRO for the European election, I had the power of direction. We can discuss and debate that this morning, but it will certainly help the situation. It is not as if we have to impose something on our colleagues; they want to work together and ensure a consistent approach for political parties throughout the country. They want to put as much professional expertise into election planning and management as possible.

Bob Doris: I am encouraged by that, because the reason for my line of questioning relates to concerns about fragmentation given the different responsibilities. It is positive that, although the electoral management board's responsibility will not be on a statutory footing outwith local government, you are actively working with partners to ensure co-ordination.

To progress things further, we could give the board responsibility for community council or health board elections. That would be within the gift of the Parliament. Would that be desirable or would you distance yourself from that?

Tom Aitchison: It is something that we have not rehearsed. It would be going a bit too far to think about community council elections in that regard, as they are a local matter. We have had elections to health boards in the past year or so, which are an innovation. If that was to develop into a national policy, it would make sense to bring it all to bear in one place.

There were some initial concerns about elections to health boards, which were sorted out. One part of the Scottish Government was dealing with them as a health issue and another part was dealing with elections, so it is important that it all comes together. I do not need to tell anyone in the room that elections are complex and involve a lot of complex legislation and logistics. The more the expertise is concentrated, the better.

Alasdair Morgan (South of Scotland) (SNP): Presumably the same would apply to the new crofting commission.

Tom Aitchison: There has been some talk about crofting and national parks. A range of elections fall outwith the major statutory elections. Crofting relates more to one part of the country than to other parts and, as an Edinburgh-based returning officer, it has not been high on my list of priorities in the past but, wearing my national hat, I recognise that there is a *prima facie* case for considering whether it could form part of an enlarged remit for the board in due course.

Chris Highcock (Interim Electoral Management Board): We have certainly been asked by returning officers and depute returning officers in the Highlands about our responsibility for crofting boards, community land buy-outs and national park elections.

The Convener: You mentioned the spirit of co-operation and co-ordination that now exists, and the wish to avoid a repeat of 2007. What is the collective view of the challenges that we face from any proposed referendum that coincides with the Scottish Parliament elections? If there is such a view, whom have you passed it to?

11:15

Mary Pitcaithly: The board has been discussing it since the potential for combined polls was mentioned. In the past month or so, we have had quite extensive discussions with the chief counting officer, who is the chair of the Electoral Commission, about some of the specific issues that will arise out of combining the polls on 5 May. We have been given plenty opportunity to highlight for the chief counting officer some of our concerns. Those have been listened to and the most recent draft direction from the chief counting officer has taken into account some of the comments that were submitted on the board's behalf. The board will now have the opportunity to contribute to a more formal consultation process in relation to the direction that the chief counting officer is minded to take for 5 May for counting and so on, and the deadline for that is 25 November. We will discuss it at the board's meeting this afternoon.

Tom Aitchison: Generally speaking, the board does not express a view on decisions of the Scottish or Westminster Parliaments. We have not said that having both elections on the one day is either good or bad *per se*. As Mary Pitcaithly said, we are focusing on the practical issues that will arise.

We submitted advice to the Scotland Office not long after the Westminster election earlier this year and, as Mary said, that has been followed up with consultative papers from the Electoral

Commission and other bodies that are trying to pull together the range of issues if the Scottish Parliament elections and the referendum take place on the same day, and we appear to be heading towards that.

The Convener: You raised a number of concerns. Do you feel that some of them have been addressed?

Mary Pitcaithly: Yes.

The Convener: So the Government has not just listened; it has acted.

Mary Pitcaithly: Yes, indeed.

Chris Highcock: One of our initial concerns was that the referendum is on a UK-wide franchise, whereas the Scottish parliamentary elections are on the Scottish parliamentary and local government franchise in Scotland. We made representations to ensure that the referendum is undertaken using the boundaries for the Scottish parliamentary elections, which will allow us to rationalise a lot of our planning for polling and other factors. The UK Government agreed to that and it has now been enacted for the referendum.

The Convener: What concerns are still outstanding?

Mary Pitcaithly: The current issue is the arrangements for the count and when it will take place. The current consultation with the chief counting officer relates to whether there should be a time at which all regional counting officers and counting officers across the UK should begin the count of the referendum ballot papers. There is a clear understanding that the results of the national election should not be delayed by the referendum count. That is the basis of the discussions that we have been having. What would be an appropriate start time, for example, if the chief counting officer is to determine and set a time, so that we can be absolutely sure that the results of the national elections in Scotland, Wales and Northern Ireland are not delayed by having to do both counts?

The fiscal consolidation period that we are now dealing with is a year swifter than the Conservatives argued for in opposition, and it is a year swifter again than the approach that the Labour Party took. So there are choices about how we can deliver the fiscal consolidation without creating the disruption to public services that the Conservative and Liberal Democrat Government has created.

Tom Aitchison: That is the key point, convener. There is a question about the sequence of the counts, but there is also a question about scale. To put it in context, we are talking about something that is three times the size of the Westminster election that took place earlier this year. There will be three ballot boxes—two for the

Scottish Parliament and one for the referendum. One or two colleagues here are local MSPs. Some time ago, I decided to move our count from Meadowbank to Ingliston because Meadowbank has insufficient space to accommodate the count.

If you wish, we can develop the subject further. I can give my knowledge of my favourite “Mastermind” subject: overnight counts versus daytime counts. There is a lot to be thought through. The boxes will arrive and will have to be rummaged to sort out misplaced papers. Then there is a requirement to verify the initial tallies, which will take most returning officers until 1 or 2 in the morning. As Mary Pitcaithly said, the current planning assumption seems to be that we will go on then to count the Scottish Parliament papers, although there is some debate about whether the count might be stopped at 2 in the morning and started again at 9 am. There might be instructions about when to start the referendum count; it could be at 4 o'clock in the afternoon. We need to think about the number of staff that will be involved in the count, the management of those staff and the weight of responsibility on people such as myself, Mary Pitcaithly and others who will go for 24 to 36 hours without sleep. I know that the idea is not popular but we need to have a proper debate and discussion for next May about the sequencing of the counts and how it will all roll out.

The Convener: As a committee, we have taken an interest in the matter for quite a considerable time. You emphasise the point that we need to have a much more open debate about what will happen in 2011. We look forward, I hope, to other evidence sessions in which we can focus on the issues. I note that there will be a debate on the 2011 elections in the Parliament this week, so maybe we can make some of those points individually as well.

Alasdair Morgan: In its written evidence, the Electoral Commission makes a point about deputy returning officers and their membership of the electoral management board. I know that we have a deputy returning officer with us. First, will you clarify whether there are any deputies on the current interim electoral management board?

Mary Pitcaithly: Yes, there are.

Alasdair Morgan: Have you found that to be a problem? You do not have a statutory responsibility, of course, but has that thrown up any issues?

Mary Pitcaithly: On the contrary. People who are designated as deputy returning officers have made a significant contribution to the board over the years. I understand the Electoral Commission's position on the matter in relation to accountability, but DROs are likely to continue to play an important role. There is an issue about

whether they should be full members of the board, as the bill suggests, or whether they should be advisers to the board, which is the Electoral Commission's position. Either way, people who do not necessarily carry the responsibilities of returning officers but who nevertheless have a huge amount of experience and expertise to bring to the table will always be welcome around the board table.

Alasdair Morgan: I ask Mr Pollock whether he feels that his lack of ultimate legal responsibility would inhibit him should he be appointed to a future board.

William Pollock (Association of Electoral Administrators): It would not. The deputy returning officer's input is usually much more at the practitioner level. As has been said, someone who is appointed as a chief executive and is then appointed as returning officer might have no, or very little, election experience. Deputy returning officers tend to have come through the ranks, if I can put it in that way, and gained practical experience of the day-to-day operational side of election management and delivery, so they can usually contribute details to any debate that is going on. I do not think that the accountability side would be difficult.

Alasdair Morgan: Are you saying that, in some cases, we are getting to the situation in England? Down there, the returning officer is just a guy with a chain who reads out the results, usually badly. Someone else does all the work. Does that happen in Scotland?

William Pollock: Not at all. For a start, they read perfectly. *[Laughter.]* That situation was abolished in Scotland under the Returning Officers (Scotland) Act 1977, but the same did not happen in England, where the situation continues. Returning officers have practical and—dare I say it?—strategic oversight of the election process and expect their deputies to deliver the detail. That is generally how it works.

Tom Aitchison: I did not kick him under the table, convener. *[Laughter.]*

I have a couple of points to add. In the past five or six years, when I carried on behalf of all local authority chief executives a portfolio responsibility for elections, I emphasised strongly to all colleagues how seriously they should take their responsibilities for elections. There has been a huge turnover of council chief executives in the past four or five years and I think that everybody has now had a fairly major wake-up call. On a day-to-day basis, as your question implied and Mr Pollock said, a lot of the work falls heavily on deputies. That is appropriate. However, ROs understand their responsibilities and take them seriously.

Billy Pollock is a good example of someone who is both a deputy returning officer and a prominent member of a professional electoral association. Sometimes we get a double benefit because, through our staff, we can lock into a network. In his case, it is the Association of Electoral Administrators, but lawyers and others also have professional associations. Our people have real practical experience and they are also locked into a wider professional network where they can learn, share experience, discuss issues and so on.

Alasdair Morgan: Should the fact that the ultimate legal responsibility does not lie with Mr Pollock, or with somebody in a similar position, be a bar to their being a member of the management board in their own right, rather than representing their association on it?

Tom Aitchison: No. I agree with Mary Pitcaithly. It has been of benefit to have people such as Billy Pollock sitting on the board. In law, each returning officer in Scotland still has, and will continue to have, the current legal responsibilities, unless some future electoral convener chooses to exercise a power of direction. The legal position is clear in law. You are talking about people coming together to plan, to administer and to think ahead strategically. Therefore, a range of skills—a range of backgrounds—adds to that rather than detracts from it.

Jim Tolson: I want to ask Mary Pitcaithly and William Pollock about the financing of the electoral management board. The bill's financial memorandum suggests two possible funding options: a dedicated secretariat and policy function and a portfolio model. What are the pros and cons of those models? Are they fit for purpose? Is electoral administration in Scotland adequately funded at present?

Mary Pitcaithly: Administration of local government elections is a matter for local authorities. These days, local authorities are finding things difficult—we will perhaps know just how difficult later today. We are all under pressure to be as efficient as possible; that applies to elections.

To date, I have never had a returning officer mention to me anything specific about a lack of funding for elections in their councils. We take the responsibility seriously and we are able to call on resources and so on, but that is an increasing pressure on us. Tom Aitchison may want to add to that.

Tom Aitchison: I would add a qualification to that. What Mary Pitcaithly says is correct. However, for many years, there has been a view among Scottish returning officers that councils are subsidising non-council elections such as the Scottish Parliament and UK elections. Some

examples were tested a few years ago, although I may not have the figures in my head. In Edinburgh, we reckon that a major election costs in the order of several hundred thousand pounds. There are not really sufficient moneys flowing in to returning officers to discharge their responsibilities.

In Edinburgh, where until a few years ago salaries tended to be high, it was difficult to recruit people to man the stations or to count overnight—you have to pay market rate to achieve that. That has led to a view that has been held for some years that there is insufficient recognition of the cross-subsidy from councils to non-council activity.

Jim Tolson: That is a fair point but we are trying to focus on finance and the electoral management board rather than on the delivery of elections.

I will come back to Mr Pollock. Of the two models that have been suggested for funding the electoral management board, which do you think is more suitable and why?

William Pollock: My colleagues and I prefer option 1, which is to have a dedicated secretariat and policy function. Compared with the original proposals for the establishment of a chief counting officer, with the inevitable secretariat and accommodation costs and so on that that would involve, it is a much less expensive option. There would be no payments to be made to any of the people on the board—they will be salaried by their local authority once they have been appointed. There is perhaps a small question about who should foot the bill for the expenses that board members will incur. It is suggested that that responsibility should fall on local authorities, but that might act as a deterrent to someone in Inverness or Aberdeen, for example, becoming a member of the board. Everyone is always trying to chop budgets as best we can, so it might make the board central-belt centric, if I can put it that way.

In option 1, the other eight members would be appointed to the board by the convener on the basis of their ability, experience and professional association connections, and would attend the meetings. The funding costs would be fairly low in comparison to what was originally proposed by the Gould report. Obviously, the convener, whoever that would be, would have to meet the additional expenses of attending UK-wide meetings, and at some point that should be factored in to the financial arrangements for administration of the board.

11:30

Jim Tolson: That was helpful and the committee might well agree that we should go in the direction that you have suggested.

What changes, if any, should be made to the funding of electoral administration? This might be a question for Mr Aitchison and Mr Highcock. Are there enough current resources and, if not, how much more might be required? In any case, should we not have some blue-sky thinking on from where extra funding might come? Given that in dealing with both policy direction and implementation of elections in Scotland the electoral management board will take some responsibility away from returning officers, should the extra funding that returning officers receive for managing elections be given instead to the board?

Tom Aitchison: The simple answer is no. I handed the board over to Mary Pitcaithly a few months ago, so I am slightly out of touch with the detail of all this, but I certainly recall that we were strongly in favour of option 1, which is direct funding. As Mr Pollock has said, we are trying very hard to keep our request as modest as possible. I will get the figures from my colleague in a second, but I think that we are talking about one or one and a bit policy officers and some administrative support.

Over the past three years, my council—the City of Edinburgh Council—has quite happily carried the costs of the interim board, but I think that any move to put it on a statutory footing must be recognised by setting aside some resources. We are not making an extravagant bid for more authority or power; we are making just a modest request to ensure that the board has a staffing resource to discharge its responsibilities. I know that the financial memorandum will be discussed. As I said earlier, the money that goes to returning officers might be described as adequate, but certainly not as generous, and I would be concerned if it were to be top sliced in some way to fund the board's work.

Chris Highcock: As was said earlier, the interaction that chief counting officers have had with the Electoral Commission on the logistics for next year's referendum illustrates the huge input that is required from practitioners of elections in Scotland. Given what the board has at its disposal, it is difficult to resource that sort of work, so a permanent secretariat would ensure continuity and make the board more able to deliver those requirements.

Mary Pitcaithly: Such a move would be enormously important. Under the legislation, returning officers would have exactly the same responsibility for elections that they have always had, and any payments should recognise that. Indeed, as well as his or her responsibility to the board, the board's convener would be responsible for his or her own elections, so that person should, at the very least, be entitled to expect some form of support.

The financial memorandum proposes very modest support amounting to about £70,000 and, given that the chief returning officer alternative was costed at between £1 million or £2 million, we are very much at the modest end of the spectrum. Time will tell whether that amount is sufficient, but I think that it is the minimum that would be required. Such permanent secretariat support will be critical in allowing whoever will be convener to discharge his or her duties.

Jim Tolson: I am glad that you are looking at the modest end of the scale. However, if this proposal is taken forward and results in a reduction of the overall responsibility of returning officers, who are generally chief executives of the individual local authorities, the public might well conclude that officers do not need that level of extra payment.

Tom Aitchison: Let me be clear: if the bill goes through, there will no reduction in the responsibility of any returning officer. Instead, the future convener of the board will essentially get the power of direction. For example, if a returning officer was doing something incredibly stupid with the nomination process, the person who would carry these responsibilities could intervene and say, "You're doing it the wrong way. Do it this way instead" and try to ensure that the same approach was taken in all 32 councils in Scotland. The responsibility would still sit firmly and squarely at local level.

This is partly about co-ordination and trying to plan and think ahead. Everyone in this room will know what the calendar to 2015 is like; there is only one year in which a major event is not taking place. I realise that this is not the time for it, but at some point we need a debate on the various elements of elections that, in my view, smack almost of Victorian—indeed, Dickensian—ways of working, and about how they might be switched over in the coming years. The proposal to give the power in question to one person will improve and build on the co-ordination that has been in place roughly since the time of the Gould report, but if people co-operate with each other it should be exercised quite rarely. If, in extremis, the power is needed, it will exist, but it will not diminish the legal responsibilities of individual returning officers.

Mary Mulligan: I was going to ask about the very issue that Mr Aitchison has raised. He said that the power of direction, which the bill proposes to give to the electoral management board convener, would be used rarely. However, the bill contains no sanction against those who do not follow such directions. Is that a good or a bad thing?

Mary Pitcaithly: It is difficult to think what such a sanction might be. The process has worked well so far; the power of direction was vested in Tom

Aitchison as regional returning officer for the European elections and, if my memory serves me right, he issued two directions in the last election. It would never have occurred to any returning officer not to follow those directions, so I am not sure that sanctions would make any difference.

The electoral and local government community is anxious to deliver transparent and fair elections that set the best possible example for the rest of the world, and we would all want to avoid the need for directions. However, something might arise fairly late in the day and instead of having to enter into a huge debate, returning officers would welcome a direction that made it clear that a particular course of action should be followed, which would give us the comfort of knowing that everyone was taking the same approach. After all, a key tenet of the board is to ensure consistency throughout the country.

Tom Aitchison: Mary Pitcaithly is right. Situations can arise in elections in which you have to act quickly, but in essence there should, if at all possible, be no surprises. We—by whom I mean returning officers, deputies and all those involved in elections in Scotland—plan, train and rehearse together, which is key to ensuring consistency. That is why I said that I do not think that people will suddenly start issuing direction after direction. Quite frankly, if we had to do that, we would have failed, but we need the power as a backstop against unforeseen eventualities.

Mary Mulligan: What were the two directions that you issued?

Tom Aitchison: I thought that you would ask me that, but I cannot remember.

Mary Pitcaithly: I know that there were two of them.

Chris Highcock: One direction was about ensuring that postal votes were not opened on polling day, which was meant to simplify electoral administrators' duties, and the other was to have a Royal Mail sweep on election night to ensure that everyone in Scotland had the full complement of postal votes.

Mary Mulligan: It helps to hear examples of what the power might encompass. I acknowledge Ms Pitcaithly's point that if we get the process right and reach agreement we should not have to go down the sanctions route. However, how would you handle a situation in which someone did not agree with a direction? I am assuming, Mr Aitchison, that everyone followed your word and did as they were directed. Would there have been any opportunity for someone to question either of those directions?

Tom Aitchison: I have just been reminded that there was no sanction per se when I held that

responsibility in the European elections. Your question is interesting. Elections take place in a very concentrated period of time and there is no time to hang around and have a long academic debate on such matters. You have to take a decision pretty much there and then. I realise that at one level that response sounds a bit weak, but I do not think that it is weak: we simply have to rely on our colleagues' good sense and the fact that we have planned everything together. There might have to be a fairly robust discussion about a matter, but I suppose that it would depend on how utterly important it was.

Chris Highcock mentioned a Royal Mail sweep. Royal Mail sorting centres are important, but perhaps not critical. If Mary or I get a phone call to say that a returning officer has done something incredibly stupid at nominations, for example, we have to try to exercise the full weight of authority of the convener's position. We may all need to give a bit more thought to that. There is no point in having a sanction six months after the election has gone wrong. We have to be able to deal with it on the day.

Mary Pitcaithly: Ultimately, if a returning officer has done something contrary to the convener's direction, he or she would stand on his or her own. In any court action, for example, the convener would be jointly responsible for decisions or actions that were taken by a returning officer only if those actions were in accordance with the directions. If they were not, the returning officer would have to answer for that themselves.

Alasdair Morgan: You were talking about the urgency with which directions might be given. I wonder how that fits with section 7, which says:

"Before giving a direction under section 5 or 6, the convener must consult—

- (a) the other members of the Board,
- (b) the Electoral Commission."

Mary Pitcaithly: In practical terms, my preferred mode of communicating with the board outwith board meetings would be e-mail. An example of that happened last week, when I was trying to communicate with members of the board about their views on the combined referendum and Scottish Parliament elections, and issues of count timing and so on. E-mail is a wonderful way of contacting a group of people and getting immediate responses from most of them.

However, I am sure that if there was a major issue it would be possible to bring the board together quickly. We have a schedule of meetings, but we can come together quickly when required. We could carry out a form of consultation that would not require issuing a draft. We can videoconference, as well. We have various ways of contacting each other. We would not consult by

saying, "Here's a written suggestion for a direction. You have 14 days to give me your comments." During elections, it all moves much more quickly than that.

Alasdair Morgan: That does not really put any qualification on what the directions could be. I am not a lawyer, but it may be that directions have to be in accordance with existing law. What happens if the person being directed says that what they are doing is in accordance with the Representation of the People Acts, but you say that it is not and that you are interpreting it correctly?

Mary Pitcaithly: I like to think that we would not be giving directions that would ask anyone to act contrary to any legislation. However, as we know electoral legislation is extremely fragmented—that was mentioned in one of the key recommendations from Gould—so there can often be different interpretations. As a local returning officer, I would always set great store by what the experts on the board thought might be an appropriate interpretation. However if, at the end of the day, one returning officer took a different view, there would be an opportunity for that returning officer to put his or her case to the board. We would ensure that that was factored into any discussions by the board on whether to approve the direction that was to be issued.

Section 7 is an additional safeguard, I suppose, against capricious conveners of the board issuing directions willy-nilly. Tom Aitchison has never had to consult the board formally prior to issuing a direction. However, I always, as a previous board member, felt that I was included in his decision making, although not in a terribly formal way. I do not envisage the provisions in the bill requiring a great deal of formality, either.

The bill also requires the board to come up with its own way of working, its own processes and its own procedures. We will have to take into account what opportunity there would be for a returning officer who was concerned about a proposed direction to feed in his or her view and how that view would be taken into account.

John Wilson: I want to pick up on the issue of direction from the convener. Who would the board or the convener envisage would deal with an issue in relation to the administration of elections? You are talking about a board or convener being made aware that there may be an issue in relation to the administration of ballot papers or voting procedures or whatever. Who would be able to go to the board or convener about those issues?

11:45

Mary Pitcaithly: Anyone could do that. Matters can be brought to the attention of individual returning officers, the regional returning officer or

the convener of the board by political parties, individual MSPs, members of the public or concerned electors—whoever. There is a range of opportunities for concerns to be brought to our attention. Most often, however, it is the returning officer simply wanting to check that what he or she is doing is right. There is a great deal of concern to be right and to do things properly. We are anxious to take on board any questions that people might have about whether the law is being followed in an area.

Tom Aitchison: I have a little point to add. The main professional contact is between the board and returning officers, but we should not forget the electoral registration officers, because EROs have an important role to play in election planning. Those are the two principal professional groups with whom the board will interface.

John Wilson: I was just trying to clarify how, if an individual or member of the public had a complaint about the process, they would be able to take that on if they felt that they had hit a buffer with the local returning officer, and whether they would be permitted to take an issue to the convener or the electoral management board.

Tom Aitchison: I do not think that we have discussed having the board as a complaints forum—maybe the committee would want to think about that. In essence, any local complaint in a part of Scotland should be addressed to the local returning officer, who should deal with it. We are talking about the board having a strategic and directive emphasis more than it being the place to go for somebody who has a particular issue with the way in which an election has been organised locally.

William Pollock: In the first instance, candidates are more likely to complain to the Electoral Commission, because it has helplines and so on. The commission would then put the complaint to the local returning officer or the electoral registration officer, as appropriate, to resolve. The board does not have a high public profile in that sense.

John Wilson: I thank the panel for their answers on that question. I wanted to get the issue on the record.

One other issue that has been raised with us is the transparency and openness of the board. In its written evidence, Fairshare Voting Reform states that it would like the electoral management board to make its agendas, minutes and decisions more widely available. Has there been any decision or discussion on making that information publicly available on a website or in other formats?

Tom Aitchison: I am very keen to do that, but this takes us back to the earlier questions about resources. The easiest way to make that

information available is through a website, but somebody has to put money up front to develop and maintain a website. It is another example of what we were talking about: if we received a fairly modest resource allocation to support the board's work, we could post the minutes of meetings and other information about the board—what we would expect to find on any modern website in the public sector. I am certainly keen to do that, but we have been inhibited so far. As I said earlier, until I handed the responsibility to Mary Pitcaithly, it by and large fell to my council to keep the board going—Mr Highcock works with me in the City of Edinburgh Council. There is no lack of determination on our part; it is a simple question of having resources to get the job done.

John Wilson: Thank you.

The Convener: I thank all the witnesses for their attendance and the evidence that they have provided this morning.

We will suspend for a moment while we change panels.

11:48

Meeting suspended.

11:50

On resuming—

The Convener: I welcome our second panel of witnesses, who are John McCormick, electoral commissioner, and Andy O'Neill, head of office, Scotland, from the Electoral Commission. As previously agreed, we will go directly to questions.

Bob Doris: I will start with a question that is similar to one that I asked the previous panel. In your written submission, you point out the need to put the management board on a statutory footing. At paragraph 10 of your submission, you say:

“we hope that this Bill will provide a robust framework for extending the EMB's powers to ... other elections in the near future.”

Will you expand on why that is important and whether by “the near future” you mean before any future referendums?

John McCormick (Electoral Commission): The near future would be as soon as possible. We see the electoral management board as a Scottish solution for Scotland. It would therefore be in the best interests of everyone—voters, in particular—for there to be a one-stop shop with responsibility for the conduct of all elections in Scotland.

As Tom Aitchison said, the power of direction is already vested in the regional returning officer for the European elections, and we envisage that the regional returning officer is likely to be the

convener of the management board. Under the bill, the management board will have the power of direction for local government elections. If activities come to this Parliament so that it has control of its own elections under the Calman proposals and the Scotland bill, the power of direction could come with that—as I understand it from the lawyers, it would require just an amendment to this bill. We already have statutory responsibility for the Scottish Parliament elections. That travels with this bill, and a small amendment would bring the power of direction as well.

That leaves the UK elections. The previous Labour Government issued a statement at the same time as the Scottish Government minister to say that it supported putting the electoral management board on a statutory basis for the UK elections. That has not happened yet, and we have to have discussions with the new UK Government on whether it shares the same view.

Bob Doris: We have the possibility of the alternative vote referendum taking place on the same day as the Scottish election next year; if the Calman powers are passed, this place will be in charge of the Scottish parliamentary elections; and in 2015 we could have the UK elections on the same day. Sitting with that, the management board will have the power of direction. Do you envisage the management board having the power of direction in such cases—the AV referendum or what may happen in 2015—to decide, for example, when the counts happen, whether they are overnight and which count takes place first? Should it have the power to stop a count if it feels that counters are getting too tired or there is a glitch, or should those decisions come from another place? In other words, how independent should the electoral management board be for all tiers of elections that take place in Scotland, particularly when we are dealing with a referendum on the same day as the Scottish elections or Scottish elections on the same day as the UK elections?

John McCormick: As was said earlier, if the AV referendum takes place, that will be under the Political Parties, Elections and Referendums Act 2000, which set up the commission and under which the chair of the commission is or appoints the chief counting officer. That set-up would still pertain.

Like Tom Aitchison and Mary Pitcaithly, we envisage that, as it would be in existence, the electoral management board would naturally have an interest in all electoral events—as we call them—and therefore in the referendum. As the counting officer for Scotland in the forthcoming proposed AV referendum, Mary Pitcaithly would consult her colleagues across the management board and the electoral community, as she is

doing just now with the consultation paper about counts.

The decision on counting in the referendum is for the chief counting officer because, under existing legislation, the chief counting officer is responsible for the administration of referendums. Wisely, she is consulting electoral professionals across the country, because of the coincidence of the other elections in Scotland, Wales and Northern Ireland and the local elections in England, to see what is in the best interests. The underpinning principle is that the elections to the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly take priority and should be the first to declare, so the question is what the best order is to put in place for counting on the referendum.

Bob Doris: How smoothly do you expect that to go?

John McCormick: After the events of 2007, I would be very careful about talking about anything that implied complacency in any aspect of electoral administration. We in the commission, the wider electoral community and members are sensitive about that.

The problems that occurred in some polling places in England this year affected only about 1,200 voters, but it is clear from our research that confidence in the process of that election and its outcome dropped among everybody in the UK. In 2009, 96 per cent of people across the UK—including people in Scotland especially—said that they would have confidence in the outcome of the election. Our report after May this year said that specially commissioned research showed that the confidence level had fallen to 69 per cent in England and to 70 per cent in Scotland, although the report said that the UK election was a smooth operation in Scotland.

As a result of that and the situation in 2007, we are aware of the fragility of people's confidence. When they see something going wrong, they realise that the system is not foolproof. We do not regard it as foolproof. As all of us in the room know, elections are complex. If two events take place on the same day, that is very complex. We will monitor the situation, as will the management board. My colleague Andy O'Neill will be an adviser to the board right up to 5 May next year.

Bob Doris: I will allow my colleagues to explore the tensions in joint elections in later questioning. I notice that it is hoped that the elections convener will have secretariat support and a policy remit. Is the policy remit a positive aspect of the management board? Returning officers and other professionals on the board could offer expertise outwith the political sphere. Is that a key part of the elections convener's remit?

John McCormick: You mentioned that the Gould report talked about the fragmentation of accountability. The commission is clear about the fact that the electoral management board will bring strength, accountability and transparency to the voter and give the voter confidence that the administration of elections, policy and strategy are outlined in one place.

We see a clear delineation between the three roles. Making electoral policy is the right, duty and responsibility of the Parliaments. The administration and the delivery of elections are for the electoral management board. The commission sets the standards, offers guidance and reports on the effectiveness of the delivery of elections. The three separate responsibilities are important but, of course, they overlap. The responsibility and experience in the electoral management board can contribute strongly to policy development.

Bob Doris: My reading is that the electoral management board will report to the Scottish Parliament. If it has a policy remit, it can make recommendations in its reporting to the Scottish Parliament, which could fuel further legislation to improve processes. I am trying to get at whether that is a key aspect of the bill.

Andy O'Neill (Electoral Commission): You are right—it is important that the EMB has a policy role. We recommended that it should have that in our observations on the first nine months of the interim board's activities.

Much expertise exists among ROs and DROs. Until recently, they were very much event focused—they focused on elections and EROs focused on annual canvasses. The EMB will allow them to come together, to debate and to have the vision thing about where elections should be in five, 10 or whatever number of years' time. At the moment, they have no mechanism to develop and articulate their view. We welcome the development of the EMB's policy role.

The Convener: I am interested that your submission refers to "extending the EMB's powers". You could have left it at that, so why did you feel it necessary to emphasise extending the powers "in the near future"? What right do you have to create the expectation that we can extend the EMB's powers to cover European and UK elections? Have informal or formal discussions with UK ministers and officials given you the expectation that we will be able to proceed with that quickly?

12:00

John McCormick: In their initial welcome to the proposal when it was announced, which was before the UK general election, the UK and Scottish Governments felt that it was right to put

the EMB on a statutory basis. It was not a matter of political contention; there seemed to be broad consensus. Additionally, the forthcoming Scotland bill will bring Scottish Parliament elections under the administration of the Scottish Parliament. That is what is behind it.

The Convener: Perhaps I am overegging the pudding, but you said in your submission:

"we hope that this Bill will provide a robust framework for extending the EMB's powers to these other elections".

You could have left it at that, but you added the words "in the near future". You are exciting my expectation that some discussion has taken place online or offline with officials or ministers. Has that happened?

John McCormick: We have made representations about it to the new UK Government—to the Scotland Office. In the House of Commons last week, Ann McKechnie MP asked specific questions about it. The Parliamentary Under Secretary of State for Political and Constitutional Reform, Mark Harper, said that there were no plans yet to extend the EMB's powers, but that he would keep the matter under review. We will continue to make the case that the electoral management board is strengthened if it has responsibility for all elections in Scotland. At the moment, there does not seem to be any movement, but we would like to see some.

The Convener: So there have been no meetings on the matter with ministers or officials.

John McCormick: In a formal meeting with the Secretary of State for Scotland, we outlined why we felt that extending the EMB's powers would be advantageous all round.

The Convener: And what was his response?

John McCormick: He reminded us, as the minister did, that it was the responsibility of the Cabinet Office and, as he said in the House this week, he had no responsibility for the matter. It is with the Cabinet Office, which said that it would keep the matter under review.

Alasdair Morgan: I come back to the question that you probably heard me ask the previous panel, which was about your recommendation in evidence that the five members of the board who can be deputy returning officers or returning officers should only be returning officers. You will have heard the returning officers say that they did not agree with that. Will you expand on their comments on your comments?

Andy O'Neill: That was one of our recommendations in the 2008 report and Mr Gould also talked about it in his independent report in 2007. We are looking for clarity of responsibility and accountability for various roles. We see the

ROs and the EROs as being responsible and accountable for their respective duties. We recognise that depute returning officers have a great wealth of experience, which is why we recommended that they should be advisers to the board, but they should not be responsible to it as full members. In our view, if they are members, it means that they are involved in something for which they are not accountable to the courts. That is why we want to ensure that the ROs and the EROs are taking a full part in discussions about the EMB.

Alasdair Morgan: But surely the returning officers are responsible to the courts for the conduct of the election only in their own area. The fact that they serve on a separate board that covers all Scotland makes no difference to their legal responsibility in their own area. If it is your argument that it is important that they are legally responsible for their own area, surely you would have to have all the returning officers on the board.

Andy O'Neill: We said in 2008 that we wanted some connection between the EMB group of 10 people and the rest of the 32 returning officers and 15 electoral registration officers. The EMB will discuss policy that will impact on the actions of returning officers and the administration of elections in local areas. We see it as vital that the returning officers, who are accountable for electoral administration, are involved in those discussions.

Alasdair Morgan: I must admit that I am not convinced. I am sure that we could go through local authorities and find various instances where groups get together and have some responsibility yet the people sitting on them are not the people who have the ultimate legal responsibility for decision making back at their own ranch. However, let us leave the point for now.

You said in your evidence that you felt that it was okay that the Scottish ministers should appoint the convener, provided that that was done under the Nolan principles, but the bill also says that the convener is to appoint the other members. I will leave aside how else it could be done, which is maybe a difficulty, and I know that these are all going to be professionals dealing with largely technical matters, but is that not a bit cosy? The ministers appoint the convener and the convener appoints everyone else. I know that the First Minister does that in the Cabinet, but I do not know whether there are many other similar examples.

John McCormick: Our view was that this is an electoral community. I think, as you saw from Mary Pitcaithly and Tom Aitchison, that it works very well on a consensual model. We felt that the convener, who would by then be *primus inter*

pares, could exercise the power to assemble a range of talents around the table to ensure that rural and urban areas are represented; that there are people with different experiences and backgrounds; and that future conveners can be brought on. There are many ways of doing it, but we felt that that is an acceptable way of building up the strength of the board and having the right experience of different parts of Scotland around the same table.

Alasdair Morgan: That approach sounds as if it will work okay when everyone is singing from the same hymn sheet but, when we put something in legislation, we have to think about what happens when things go pear shaped. Should dissension or different camps emerge within the family of returning officers, such an approach might be an issue and there would be no checks on it.

John McCormick: That is a fair point. We have said from the outset that we see the electoral management board as formally being the 32 returning officers and the 15 electoral registration officers, with the smaller group running it from day to day. It is important that there is an annual general meeting and that the group comes together as a professional group.

On the earlier point about the DROs, it is a fine point and we would not go to the wall on it as a matter of principle. The Scottish Government's representative and Andy O'Neill sit on the interim management board as advisers. We would not seek to have a formal role because of where accountability lies, but I do not think that there is any sense in the way that the interim board works that the Electoral Commission representative or the Scottish Government representative is not listened to because they do not have formal accountability. In that case, we would see the Association of Electoral Administrators being represented as an adviser, so that DRO experience would be round the table. It is simply the fine point of true accountability, and we took the message from the Gould report that the line of accountability or thread of accountability should run through the process.

David McLetchie: Good afternoon. I would like to ask you where voter registration and voter information sit in this revised structure and who bears the funding responsibility for those functions. If I recall correctly from the reports and inquiries that we did back in 2007 and 2008, issues to do with voter registration and a sense that it was not capturing as many people as it should were highlighted in evidence to the committee. There was also an issue with information for voters on where to vote, when to vote, how to vote—either postally or in person at a polling station—and how to understand the electoral system. How do you see the division of

responsibilities between you, the EMB and local authorities for those functions and for funding them?

Andy O'Neill: I think that it is a joint responsibility, as the local returning officers and the local electoral registration officers have powers and duties under various acts to undertake electoral registration drives, to try to make people understand how to fill in ballot papers and to encourage people to participate. The Electoral Commission has a national duty to undertake public awareness campaigns on registration and how to vote—you have seen the things that we do. The EMB's role is to encourage the ROs and the EROs to prosecute those policies and awareness campaigns. We have assisted with that in the recent past. Three years ago, we established a public awareness network of public relations officers and other electoral administrators throughout Scotland. We have handed that on to the interim electoral management board, while still providing support by way of advice from our professional public awareness people. The handover means that the board can encourage its members to undertake those duties.

David McLetchie: Mr McCormick, do you have anything to add?

John McCormick: No. Between the electoral registration officers, the interim electoral management board, the returning officers and us the system works smoothly. There is a great network of experience around there and a lot of consultation and discussion. It all seems to work very well. It is important that that continues to be embedded in the electoral management board structure.

David McLetchie: Is there any evidence to suggest that registration rates are improving as a result of the co-ordinated effort that is being made?

John McCormick: It is too early to say. Earlier this year, we published a major piece of research on electoral registration. It pointed up a number of issues that need to be addressed and showed where the vulnerabilities are in registration, and the sectors. As a result of that research, we know that electoral registration officers, for whom we also set the performance standards, have taken on board some of the issues. They are now looking at vulnerable communities and putting extra effort into that. We know that Glasgow has made a particular effort since the report was published to try to address some of the issues. A lot of activity is taking place within electoral registration.

On the strategic basis, the commission is charged with advising the Government on the progress towards individual electoral registration,

for which the new Government has brought forward the target from 2015 to 2014. We have been advocating that since 2003 and we are glad that it has been taken up. That will be a major change. We hope that it will lead to improvements in both the completeness and the accuracy of the registers.

The Convener: We know that your present role does not cover local government. Does the co-operation extend informally to local government elections? I refer to the exchange of information, assistance and so on. If it does, why do we need to formalise the process? I assume that some cost will be involved in doing that.

John McCormick: In the past two local elections in Scotland, the commission was asked by the then Scottish Executive to give help and support, which we did. We were happy to do that. There is a section in the Political Parties, Elections and Referendums Act 2000, which founded us, that allows us to go beyond our statutory remit and to offer advice in elections. We also gave advice on the conduct of the pilot health board elections, and were glad to do so.

The difficulty in continuing in that way—inconsistency apart—is found in the conclusion of the Gould report. If we have consistency, accountability and a one-stop shop, the voter can see more clearly where accountability and transparency lie. In future local elections, it is possible that the Scottish Parliament may decide not to ask us for help. If so, the experience that we have built up over the past 10 years would not be applied to those elections.

I should mention two specific areas. First, since the passage of the 2000 act, which gave us the powers, we have introduced performance standards. The performance standards for returning officers in relation to local elections would not be covered—we would be barred from applying them unless the bill that is before us was passed.

Secondly, we have introduced a system of international observers and other observers at elections. We would not be allowed to apply that to local elections without the explicit authority of the Parliament and the bill.

Those two specific areas, albeit that they are not major or world shattering, mean that the administration of local elections would be different from that of other elections. That is not in the interest of voters. We want them to see consistency and transparency.

Although the electoral management board would be a strategic body, we think that, post Gould, there is a clear line of accountability to the public for the elections convener. We cannot see anything in future other than that the convener of

the electoral management board would become a public figure who was recognised as being connected to and responsible for the delivery of elections. We would like to see such a role across all elections in Scotland. It would make it easier for people to know that there was a one-stop shop that they could go to. At the moment, they have the commission, but having a person who was embedded in the delivery of the elections would ensure that a voter with a query could take it quickly to the right place. We see that as an advantage.

12:15

John Wilson: On the role of the convener of the electoral management board, Alasdair Morgan raised the issue of legal responsibility. If a direction from the convener or the board to a local returning officer is subject to a legal challenge, who picks up the board's—or indeed the convener's—legal costs? Am I right in assuming that it would be a further cost to the public purse?

John McCormick: That is an interesting question. When we discussed with Mr Morgan the possibility of someone resisting a direction, we suggested that that would raise the issue of breach of a returning officer's official duty. Like our colleagues in the previous evidence session, I do not think that it would ever come to that because of the consensual basis on which elections are run. However, the convener would have a recognised public responsibility to issue a direction and, if it came to it, he or she would carry that responsibility. Is that your view, Andy?

Andy O'Neill: Yes. I presume that if there were a legal challenge to an action that was based partly on a direction from the convener of the electoral management board, the convener and the local returning officer would be co-respondents in the case and there would be a cost to the public purse. The parallel, I suppose, is with the regional returning officer in the European parliamentary elections. As you know, Tom Aitchison, who was the regional returning officer for Scotland at the last election, issued two directions. Had they been subject to legal challenge, he would have been in the dock along with the local returning officer.

John Wilson: In the previous evidence session, we discussed how the electoral management board would deal with complaints from the public, political parties or candidates on the conduct of a local returning officer. How many complaints or issues that were raised with the commission during the 2007 elections or in the Westminster elections earlier this year resulted in communication with local returning officers?

Andy O'Neill: I cannot answer that question offhand. I could send the information to the

committee, but I imagine that the number would be very small.

John Wilson: I am just curious about the processing of complaints either by the commission or, in future, by the board. Of course, it might not be appropriate for the commission to comment on whether local returning officers had received complaints from the public about their participation, or their wish to participate, in the election process. We can raise that question later.

With regard to the conduct of elections, I believe that Mr O'Neill said that there was 97 per cent confidence in the result of the 2007 elections and 64—or perhaps 62—per cent confidence in the 2010 elections. I have to say that I am not sure whether that indicates confidence in the process or the actual result.

John McCormick: I should clarify for the record that I made that comment. I was trying to compare and contrast people's confidence in the 2009 European elections and their confidence in the outcome of the 2010 election. My point was that, when a problem occurs in another place, it seems to come back home to every voter in the country and influence their confidence.

John Wilson: Thank you for that clarification.

The Convener: You said that, bearing in mind the need for impartiality, balance and other such matters, the convener could lay a report before the Scottish Parliament. Could the convener be more accountable to the public, either through Parliament or in some more direct form? We have heard that there would be more openness in the board's workings. In any case, given earlier comments about developing capacity and confidence in future elections, should all that not be part of the public debate?

John McCormick: As we said earlier, we think that that is one of the advantages of the electoral management board. Indeed, Tom Aitchison and Mary Pitcaithly mentioned, for example, website development and the electronic publication of papers, minutes and agendas for meetings to ensure that everyone is aware of the board's business. The annual report that would be laid before Parliament would emphasise where accountability lay, but I hope that it would be very publicly and openly distributed and become a focus for public and voter discussion across the country. The board must be accountable to the Parliament for what it has done, but it should also make its activities over the year as public as possible. As we know from our own experience, people access websites and find them useful; websites present great possibilities that were not there before.

The Convener: According to comments made at the weekend, the commission will—over the

coming months, I believe—consult and carry out work on how to deal with the operation of next year's AV referendum and Scottish elections. When will the results of that work be shared with the public and its representatives, and how can we ensure the public gets put at the heart of the 2011 Scottish parliamentary elections?

John McCormick: When the Parliamentary Voting System and Constituencies Bill was published at Westminster, we issued an extensive statement that set out not only the conditions that should be applied if the referendum were to be held on the same day as the elections for the National Assembly for Wales and the Scottish Parliament, but our concerns in that respect. In summary, we gave the proposal an amber light; we said that it was doable, but that certain concerns had to be addressed if it was to happen smoothly.

When the bill left the House of Commons on 3 November, we said that the various conditions had been addressed in the bill. Those conditions were: that the conduct rules for the referendum be made clear six months in advance; that the planning assumptions be made clear; that the funding for public awareness be made clear and voted on; that the funding for the administration of the election and the referendum be made clear; and that the Scottish Parliament election and the referendum be legally combined to make the processes easier to administer and communication easier from the voter's perspective. We also said that we would look very closely at the bill's passage through the House of Lords to ensure that it was not derailed. If that happens, we will speak out as clearly as we did last week, when the bill left the House of Commons. We are closely monitoring the situation but, as I say, all our points have been addressed.

The Convener: I suppose that my point is that, when the electoral management board is set up, we, too, should be included in the elections community—as bad neighbours, perhaps, but included nevertheless. Although the commission, the board, the profession and indeed the Parliament have been carrying out work, the process has not been open and accessible. How do we avoid the proposed board taking a similar approach and simply saying to the public, “We’re the experts here, we know all the issues, and this is what we’re going to do”? Everyone who has given evidence this morning has discussed these matters, but the fact is that there has been no real openness. I cannot, for example, go on a website and confirm when certain meetings took place. We in the Parliament are complicit in all this—the Presiding Officer, the Deputy First Minister, the First Minister and all sorts of people have been discussing the issue, but there simply has been no openness or transparency. How do we build a

board around the elections community without continually repeating those mistakes?

John McCormick: That is a salutary reminder that the commission's work is not making the right impact or being as open or as transparent as it should be. All our work is published on our website. Sometimes our statements do not receive the sort of broadcast coverage and front-page headlines that we would like, but we have been working very hard to encourage public debate about issues that we have raised, including the referendum. As I say, you have given me a salutary reminder that we in the commission have to work harder to make our views better and more widely known, and we would certainly want the electoral management board, on which Andy O'Neill sits, to make its work public. To some extent, communicating things more widely is within our gift; to some extent, it is within the gift of others. However, following your comments, we will do more.

The Convener: I do not want to pursue the matter too far, but I point out that I had to ask three questions before you would confirm that you met David Mundell this morning to discuss these issues. I realise that the issue might well be sensitive, but—

John McCormick: I did not mean to avoid the question, convener.

The Convener: Do you wish to add anything, Mr O'Neill?

Andy O'Neill: I just wanted to point out that, as the bill requires the electoral management board to report annually to Parliament, it will be in your gift to ask the board why it is not being transparent, why it does not have a website and why it has not published this, that or the other. I acknowledge Tom Aitchison's point that it does not have the resources to do these things at the moment but when in October 2009 we looked at the first nine months of the interim board's existence we recommended that they be done. As advisers to the board, we will be encouraging it in that direction when it is formally set up.

The Convener: As members have no other questions, I thank the witnesses for their attendance this morning and their evidence.

Subordinate Legislation

East Dunbartonshire Council Area and Glasgow City Council Area (Princes Gate and Greenacres by Robroyston) Boundaries Alteration Order 2010 (SSI 2010/353)

The Convener: As previously agreed, we move into private for item 5.

12:26

Meeting continued in private until 12:44.

12:26

The Convener: Agenda item 4 is consideration of a negative Scottish statutory instrument. No concerns have been raised on the order and at its meeting on 26 October the Subordinate Legislation Committee agreed that it did not wish to draw anything to the Parliament's attention. Are members content not to make any recommendations on the order?

Members *indicated agreement.*

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