

Local Government and Transport Committee Official Report 21 November 2006

Col 4307

Scottish Parliament

Local Government and Transport Committee

Tuesday 21 November 2006

[THE CONVENER *opened the meeting at 14:07*]

Items in Private

The Convener (Bristow Muldoon): The first item on the agenda is consideration of items in private. I propose that we consider items 4 and 5 in private, as both concern draft reports. The first is our draft report on the Prostitution (Public Places) (Scotland) Bill; the second is our draft report to the Finance Committee on the budget process 2007-08. Is it agreed that we will consider those two items in private?

Members *indicated agreement.*

Col 4308

Petitions

Common Good Assets (PE875)

Listed Buildings (Consultation on Disposal) (PE896)

Common Good Land (PE961)

14:08

The Convener: I welcome our first panel of witnesses this afternoon. Andrew Ferguson is from Fife Council but is here to represent the Society of Local Authority Lawyers and Administrators in Scotland. June Murray is employed by North Lanarkshire Council but is also here to represent SOLAR. The committee is currently taking evidence on petitions relating to the common good funds that are held by many local authorities. You will have followed the evidence that has already been given to the committee. You have the opportunity to make some introductory remarks about your position on the common good funds, how local authorities manage them and whether there is any need for the Parliament to change the way in which they are managed. After that, we will move to questions from members of the committee. Do you wish to make an introductory statement?

Andrew Ferguson (Society of Local Authority Lawyers and Administrators in Scotland): Yes —a very brief one.

I am the Andrew Ferguson who is referred to in evidence that you have heard from other witnesses as the author of a book on common good. However, I am here today with my colleague,

June Murray, from North Lanarkshire Council, to give evidence on behalf of SOLAR. We have given the committee a lengthy written submission, so I do not propose to take up your time with introductory comments. We are happy to answer any questions that you have on our written submission.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): Your written submission is very interesting. At paragraph 6.2, you say that

"the existing legal framework provides an adequate device for ensuring that local authorities act properly in relation to their stewardship of common good assets".

You believe that the law covers the situation at the moment. Do you therefore think that we are really talking about the practice of ensuring that councils have proper registers and details of their common good assets?

Andrew Ferguson: Yes. SOLAR's position is that this is not really about the law but about

Col 4309

practice. It is probably very healthy that the petitions have been lodged and that there has been public debate about the situation. Awareness of common good and the issues surrounding it has risen during the past few years. I hope that that will mean that the keeping of registers will improve in local authorities.

As we say in our submission, Executive guidance on best practice, and sharing best practice from the various authorities, might well be the way to improve the situation.

Mike Rumbles: You are arguing not that we should take the legislative route but that councils should follow best practice. Some councils do a very good job of ensuring that everything is maintained and recorded. I am still a little bit surprised to find that some councils do not follow good practice and that they have not been brought into following that good practice by any means. The petitioners are saying that some councils have no idea what they have or do not have. How can councils bring their practices into the 21st century?

Andrew Ferguson: Common good has been seen as something of a black art in the past. It is not taught as part of university law courses, for example, because it is a fairly small topic within local government law, which is in itself not regarded as the most important topic in the teaching of law.

I will not blow my own trumpet about my book, but I hope that Andy Wightman's work and the work of various campaigners will help to highlight the issue to the extent that more joint working takes place. SOLAR certainly tries to spread best practice in areas such as common good across the various authorities in Scotland.

Mike Rumbles: A point in paragraph 6.3 of your submission came to my attention. We talked about the issue with other witnesses—I think that Paul Martin asked about it. You say:

"A middle way might be to abolish the distinction between the common good and general funds of local authorities".

Is that a practical course of action? Should local authorities just have one method of accounting and one type of asset rather than two?

Andrew Ferguson: That is certainly a solution; I am not sure that it would necessarily be a popular solution, particularly with communities that have particular concerns about particular issues. In a way, that solution would have the virtue of simplicity—perhaps it would be too simplistic given that common good is administered in a particular way—in that local authorities could then use all their money throughout their area, however they saw fit.

Col 4310

Perhaps paragraph 6.3 is not very clear, but we go on to say that many of the issues that are bound up with common good are not necessarily to do with buildings in burghs, bearing in mind that only burghs had common good. In other communities, the council doing away with recreational

land or disposing of historic buildings can be a live issue.

14:15

Paul Martin (Glasgow Springburn) (Lab): Should we be considering a more effective means of raising public awareness of the common good fund? Is there a misunderstanding of what the fund is about?

Andrew Ferguson: There have been misunderstandings at all levels of what the fund is and is not about. The level of understanding is being raised organically, as it were, through press campaigns and material that is being produced. I am not sure how we could raise understanding officially.

Paul Martin: Should the fund continue to be managed by councils, or could a trust or some other external organisation be formed to manage it?

Andrew Ferguson: That is another solution, which might find a lot of support among communities and the petitioners. There is a potential drawback in creating another body to administer the fund separately, because local government finances and the common good fund are fairly closely linked. A lot of common good properties, such as theatres and museums, are maintained by local authorities using money from other pockets, rather than wholly from the common good fund. There might be financial difficulties in extricating the common good fund from the way in which it is run at the moment.

Paul Martin: We received evidence that there were opportunities for fraudulent activity, given that some authorities do not have proper records. Do you have anecdotal evidence of concerns about fraud or the lack of proper accounting?

Andrew Ferguson: I certainly do not know of deliberate concealment of the extent of common good assets. What has happened in the past—I hope that the position is now improving—is that ignorance about what is and what is not a common good asset has led to underreporting of such assets.

Paul Martin: Do you accept that we probably do not know how much underreporting there is, given how the current regime operates? Do you think that we have in place a robust system of recording, to the extent that it would be very

Col 4311

difficult for fraudulent activity to take place, or is there massive room for improvement?

Andrew Ferguson: I do not know that there is massive room for improvement. Certainly improvements could be made in relation to establishing what is and is not common good. Producing guidance on best practice might be a way forward. It is all about resources. If we were to put in a lot of resources, we could probably get a much fuller picture of common good assets throughout the former burghs in Scotland. The area has been rather underresourced.

Paul Martin: Every council department has to abide by a set of reporting arrangements and audits are carried out to ensure that information on assets is provided, which requires resources. As a former councillor, I recall discussions about various council departments, which were required to report their assets. Given that resources are provided for that, why not provide them for reporting on the common good fund, which it has been suggested represents £1.8 billion throughout Scotland?

Andrew Ferguson: I take your point. I hope that resources are provided so that it is possible to account for everything that a council owns, including the common good fund. However, sometimes common good assets are not accounted for as such; they are counted up somewhere else.

Ms Maureen Watt (North East Scotland) (SNP): Paragraph 2 at the top of page 3 of SOLAR's submission is obviously written in legalese. I ask you to explain what it means. Is it the case that the local authority has to go to the Court of Session to dispose of common good land? If so, that has not always happened, has it? If matters had been dealt with properly, conflicts with the community would not have arisen.

Andrew Ferguson: I was going to apologise for the legalese, but I see that you are actually referring to a quote from the statute, so it is not my fault.

Ms Watt: You are not to blame.

Andrew Ferguson: Without going into legalese and without going on too much, the authority of the court is required for the disposal of only certain common good land. Essentially, that is common good land that either has a recreational use—perhaps a park in the middle of a town—or has been gifted to the town under specific conditions. A lot of 19th century philanthropists, for example, gifted museums, libraries and so on, but made conditions that they were to be held for the common good of the people of the burgh. There is a third sub-class of old town halls and so on.

Col 4312

As the disposal of only certain common good property requires the court's consent, the council is at liberty to dispose of other common good property. The tricky issue is often which bit of common good a particular property falls into. Often, a local community feels that land that is to be sold has some recreational purpose and that the council should therefore get the consent of the court before it is disposed of.

Ms Watt: In your research, did you find that councils went to the Court of Session, or did they try to sell off the common good land without doing so? Were they unaware of the law that meant that, in some circumstances, they have to go to the Court of Session?

Andrew Ferguson: I think that authorities have been aware of the law. In some circumstances they have adopted a cautious approach: because they did not know whether they had to go to court, it was easier to cover themselves by doing so. I know from the recent work done by some of the people with an interest in the petitions that that does not always happen. It is a tricky question whether to take the matter to court or just to sell the land. If a council sells land without going to court, it lays itself open to accusations that it has not gone through due process.

Ms Watt: Elsewhere in SOLAR's evidence, you state:

"The existing case law is complex, and, to a certain extent, contradictory".

Is that not an argument for having new legislation on the matter?

Andrew Ferguson: Yes. I suppose that law can always be improved on. The difficulty with common good law—and the reason why I got a book out of it—is that there is so much case law. Case law tends not to come to a concrete solution one way or another. There tends to be a string of case law that leads you in one direction but does not cover all eventualities, whereas legislation tends to attempt to clear up every eventuality. The law could certainly be improved, but I am not sure whether it would improve matters that much.

Michael McMahon (Hamilton North and Bellshill) (Lab): I certainly do not want to put you in a Donald Rumsfeld scenario, but in asking questions about the matter, we have found an element of things that we do not know that we know, and things that we know that we do not know. Does the figure of £1.8 billion—the gap between what are perceived as common good assets and the actual value of assets held in common good funds—stack up, given your knowledge of the situation?

Andrew Ferguson: The short answer is that I do not know. Until we have a full inventory of all

Col 4313

common good assets throughout Scotland, which will require a process of establishing what assets may once have been common good but which have now been disposed of, I cannot be sure. With respect, that question is really for Andy Wightman, as he could answer it more fully than we can.

Michael McMahon: Do we need legislation to get a clear picture of the true valuation of the missing common good assets in Scotland?

Andrew Ferguson: I do not think so. What is needed is for people to set aside time to go through

the existing common good assets throughout the country and to come to a conclusion. Some local authorities are attempting to carry out that process, in response to pressure from campaigners. However, I am afraid that the process is lengthy.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I am having some difficulty, probably as a result of my failings, in ascertaining exactly what your position is. Paragraph 3.3 of your submission states:

"SOLAR recognises that a proper record of all common good assets should be kept by local authorities."

Is that what you advocate?

Andrew Ferguson: Yes.

Fergus Ewing: Should those assets not therefore be in a register?

Andrew Ferguson: Absolutely.

Fergus Ewing: You go on to say that the task may not be "straightforward", but I do not know of many tasks for government that are straightforward, so that does not seem to me to be anything other than a rueful reflection. You agree that there should be a register.

I want to move on to your suggestions, in which I am interested, especially given that you appear to be the legal authority on the issue. In paragraph 6.3, you raise the interesting point that one approach to regulation or legislation might be to

"abolish the distinction between the common good and general funds of local authorities, but to impose extra obligations on local authorities for properties that have historic or recreational significance—whether or not these exist within former burghs."

I want to follow the logic of that suggestion.

If an obligation is to be imposed on local authorities to keep a register of common good assets, the question arises whether there is a register of the other assets that they own. If there should be a register of common good assets, there should be a register of all the assets, which could include as a subset the common good assets. Would you support that as a recommendation for how to proceed, either by law reform or perhaps simply by asking the Scottish

Col 4314

Executive to ensure that, as a matter of practice, local authorities, within a reasonable time period, provide a full register of all the assets that they own, within which common good assets are specifically identified?

I am sorry to spring that question on you, but it seems common sense that we would not want a partial register simply of common good assets, important though they may be, especially for historical reasons. The public will also want to know what other assets local authorities own. Rather than have one rule for common good assets, it would make sense to have a comprehensive financial reckoning, so that people could see the balance sheet of each local authority in Scotland.

Andrew Ferguson: As I understand it, there is such an asset register, as that is part of councils' overall requirements to account to Audit Scotland for their financial affairs. The difficulty is that it is unclear—certainly, there is some doubt about this—whether the common good assets in local authority asset registers represent the whole story or whether other assets that are reflected as being held elsewhere, such as by a community services department, are actually common good assets.

I am not sure whether that answers the question fully.

14:30

Fergus Ewing: It does not quite. Are you saying that, in your understanding, a record already

exists of all properties that are owned by a local authority but that such a record might not accurately identify common good assets?

Andrew Ferguson: That is my understanding. There is a record of a council's assets and that record will state which assets the local authority thinks it holds as common good assets. However, Andy Wightman said that some authorities reported to him that they do not hold any common good assets. That may or may not be the case, but whether those authorities' records are correct is a matter of some debate. Other authorities may have extensive records of common good assets, but some would argue that those records are not extensive enough and that other assets that are reflected elsewhere on the council's books should be recorded as common good assets.

Fergus Ewing: Officials from Audit Scotland are due to give evidence next—in fact, they are sitting behind you. Perhaps they will be able to help us further.

You believe that each local authority has a record of the assets that it holds. I am not aware of the existence of such documents, but perhaps I am simply ignorant of the matter. Is there a record

Col 4315

that the public can consult that shows what assets a local authority has? If such a record exists, it has not been given much publicity despite the fact that many people, especially during local elections, would be pretty interested to know what their council owns and what it does, or does not do, with that property.

Andrew Ferguson: I would not want to mislead people about how detailed different authorities' asset registers might be. The information might be quite hard to extract. For example, I know that some of the information for my authority might be held in a 1960s-era Ordnance Survey plan, which may not be terribly easy to send by e-mail. My understanding is that the information is held, but it may not be held as a single entity in the form of one great register. I hope that the Audit Scotland officials who are behind me—in the geographical sense, at least—will be able to help you with that.

Fergus Ewing: I think that we are making progress. From your description, local authorities seem to hold information of what they own but that information may not be particularly accessible because, understandably, it is held in formats such as a OS map rather than as a simple list or register. If local authorities should have a register that is available for public inspection, it would be unreasonable to expect the register to include every tiny nook and cranny, but it should include the local authority's major assets—land and assets other than land, to which the SOLAR submission says different legal criteria sometimes apply. Would it be reasonable for the committee's inquiry to suggest that local authorities should keep an asset register, which should include the main properties that authorities own and, shown separately, the common good assets that they hold?

Andrew Ferguson: Yes, I think so.

David McLetchie (Edinburgh Pentlands) (Con): I am interested in paragraph 1.3 of SOLAR's written submission, which states:

"common good funds are owned outright by local authorities. However, ... they are subject to special rules."

Does that mean that local authorities do not hold common good funds as trustees who are subject to defined trust purposes? I am trying to get a handle on what exactly the purposes are for which common good funds are held.

Andrew Ferguson: I am fairly clear about that. Local authorities hold some assets in trust—in the past, burghs and so on were gifted things in trust—but one of the leading cases on common good makes it clear that common good is a separate fund that was both administered and owned by the burgh. My understanding is that local authorities are tasked with coming to decisions about how they expend common good

Col 4316

funds in essentially the same way as they come to decisions about spending the rest of their

budgets. The only difference is that special rules apply to the expenditure of common good funds.

David McLetchie: So, the fund is not trust property and there are no trust purposes, but it is subject to special rules. You identified the special rule in subsection (2) of section 222 of the Local Government (Scotland) Act 1973, which talks about having regard to

"the interests of the inhabitants of the area to which the common good formerly related."

Is there any other special rule that defines the purpose for which the common good fund is held?

Andrew Ferguson: Not that I am aware of. There tends to be much custom and practice, even now, governing the way in which common good funds are spent in former burghs. However, my understanding is that there is nothing in statute, other than the subsection to which you just referred.

David McLetchie: So, the only limitation or restriction on the purpose for which the money can be spent is a geographical one—the fund can be spent only for the good of Hawick, Gala, Kelso, or wherever. Is that right?

Andrew Ferguson: Essentially, that is right. Nevertheless, the subsection could be interpreted slightly more widely—for example, the fund should not be spent in a way that has no regard to the interests of the inhabitants of a burgh. However, I am not sure how money could be spent in a burgh in a way that had no regard to its inhabitants.

David McLetchie: That leads on to my next question. What does "having regard to" mean in this context? Does it mean that any money that is determined as having been held in the common good fund of a former burgh must be spent exclusively for the benefit of the people who reside within that geographical area, or is it sufficient for the local authority to say, "We are having regard to them—we think that this may suit them, and it may suit others," and just spend the money anyway?

Andrew Ferguson: That is a good question. There are general administrative law cases about what it means for an authority to have regard to matters to which it ought to have regard. My understanding is that it means that common good money must be spent in some way that benefits the residents of the former burgh. There is probably an argument—although it would be a brave authority that would use it—that the money could be spent outwith the burgh if what it was going to be spent on was going to benefit the residents of the burgh not solely, but especially. I am thinking of, for example, a swimming pool on

Col 4317

the outskirts of a burgh that served both the burgh and a neighbouring village.

David McLetchie: So, as long as the purpose provided some benefit to the residents of the former burgh, it would not have to be something of exclusive benefit to them. The fund could be expended for the benefit of them and others within the local authority area.

Andrew Ferguson: Yes. I think that an argument could be made for that.

David McLetchie: It was suggested in previous evidence that greater flexibility is given to local authorities with regard to the purposes for which common good funds can be spent than is provided for under the statutory provisions concerning the powers of local authorities. I was not entirely sure about that. I understood it to be the case that when Parliament was amending the legislation with the Local Government in Scotland Bill, we discussed powers of general competence for local authorities. I have a hazy recollection that, even prior to that, the 1973 act gave a general power to councils to expend money—perhaps a certain proportion of the local rates—for purposes that were beneficial to the community. I recall some such broad statement of a local authority's powers. How do the statutory powers—including the broadly expressed statutory powers—concerning what local authorities can spend money on differ from the flexibility that is provided in respect of common good funds?

Andrew Ferguson: Section 83 of the 1973 act contained a general power to spend money, although it was restricted by case law, particularly in the 1980s. You are right that the Local

Government in Scotland Act 2003 introduced a general power to advance well-being, which says that a local authority can do anything that will advance the well-being of the area or residents. How that interacts with the provision to which I referred, which is specifically about common good, is probably a nice legal question because section 20 of the 2003 act is limited by specific provisions in other acts. It could be argued that, as the way in which section 222 of the 1973 act is worded means that a council can spend the money only in such a way that it has regard to the interests of the burgh residents, section 20 of the 2003 act does not make much difference to how a council interprets that provision. As I say, two lawyers could probably discuss that question deep into the night.

David McLetchie: I will try not to do that. What you describe is the essence of the matter—the whole purpose of having a separate register and the safeguards that the petitioners want, rests on the premise that there is somehow a set of purposes that are applicable to those assets that do not apply to the generality of assets and

Col 4318

revenues of a local authority. If there is no such distinction, we begin to wonder what the point is of the register. However, if there is a distinction, it is clearly important that there should be a register and safeguards.

Do you accept that we need to resolve that fundamental question? Depending on the answer, we will know whether we need to have a detailed audit and record of the common good fund or whether we can regard it generally, with the general admonition of section 222 of the 1973 act to guide us when a geographical element is involved.

Andrew Ferguson: Although section 20 of the 2003 act has a strange impact on the appropriation of local authority and common good assets that I will not go into detail about, it does not affect the special rules that apply to common good generally or the overall legislative cushion that exists for common good assets but not for others.

Tommy Sheridan (Glasgow) (Sol): Some of my questions piggy-back on what Michael McMahon asked about before. I asked Andy Wightman last week what the estimate of £1 billion to £1.8 billion was based on. I am sorry that I do not have the detailed response in front of me, but I am pretty sure that he said that it was based on the asset estimation pre-1975 that was conducted by local authorities before reorganisation and was then multiplied. That is where Andy Wightman lost most committee members because I think that he said that it was a multiple of 10 and people asked why it was not 20 or five, for example. The figure of £1 billion to £1.8 billion is being bandied about and I suppose that Andy Wightman is the most authoritative person on such matters, but do you think that the figure is based in reality? David McLetchie spoke about what is important and the communities of Scotland want to know whether this is an important question. If it is, its importance has to be attached to the value of the common good funds and assets. If the figure is only a few thousand, most people will not care, but if the value is more than £1 billion, people will want to have a register.

14:45

Andrew Ferguson: I heard you ask that question. I take my hat off to Andy Wightman for having investigated the position pre-1975 and the asset registers that existed at that time. The difficulty may be to do with whether apples are being compared with pears. Andy Wightman may have compared the information from the pre-1975 asset registers with the information that he got back from the present local authorities, which is obviously contradictory and probably seriously underreports what common good assets exist.

Col 4319

Equally, it may well be the case that some of the assets in question have been disposed of quite properly, that some form of capital return has been received and that the money is sitting in a common good fund or has been spent on works for the public good.

I am not sure about the figure of £1.8 billion. I cannot contradict it because I have not researched the matter in as much detail as Andy Wightman has. I agree with him that it is imperative that we

conclude a register of what we have now. Once we have a proper picture of what we have now and we compare it with what we seem to have had before 1975, we can establish the extent of the problem—if a problem exists.

Tommy Sheridan: Like you, I pay tribute to the fantastic work that Andy Wightman has done. I suppose that I am trying to give it even more authority than it has had hitherto. With that in mind, I want to ask you about paragraph 3.3 of your written evidence, in which you state:

"At local government reorganisation in 1975, many burgh councils spent as much as possible of their common good funds so that the new district councils would not have access to them. Similarly, many common good assets were misleadingly attributed to other departments of burgh councils rather than them being properly recognised".

The fact that you make such a statement about what happened to common good funds implies that you have records from which such a view can be derived. Unless there are quite comprehensive records, how could the statement that you make possibly have foundation in fact?

Andrew Ferguson: That statement is not based on extensive research, even of my own authority's previous records. However, there is strong anecdotal evidence from people who were around at the time of local government reorganisation that some burghs just did not trust the new district councils with their common good funds, so they spent them. I am not suggesting for a moment that they misspent them; I am suggesting that they spent them on works for the public good rather than hand them over to the new district councils, which in most cases covered larger areas than the original burghs.

Tommy Sheridan: Your answer probably raises more questions than it answers because if the evidence is anecdotal, that makes it difficult for the committee to get a handle on the position throughout Scotland. I had hoped that you would tell me that you could make such a statement because good records were kept pre-1975. However, it appears—if I am not misrepresenting you—that you are saying that the statement in your submission is based on anecdotal evidence. Is that fair?

Col 4320

Andrew Ferguson: What our submission says about the spending of burgh funds is based on anecdotal evidence. Paradoxically, the records that local authorities are producing as records of the common good property that they now hold are often directly derived from the records that the former burghs held, even though it is clear that the former burghs did not always record common good property as being common good property.

The point that I was trying to make in my written evidence is that local communities' concerns about underreporting of common good assets were part of a continuum of concerns that local communities had about what burghs and cooncillors were doing, not just in the past century but in the two centuries before that. That becomes clear from a study of the case law. Locals have always reacted vigorously against what they see as proposed misuses of common good assets.

Tommy Sheridan: For the committee to reach the decision that a lot of resources should be spent on new law, if required, to analyse what is available, it must be convinced that that is worth while. If we are to take resources from swimming pools and play parks to record common good assets, we must be convinced of that. Do you have any other evidence that would indicate to us that it would definitely be worth while?

Andrew Ferguson: That is a difficult question to answer, because it comes down to priorities. Should we spend the limited resources that Scotland has on producing a register of common good assets or should we spend them on other things that are considered worthy? I cannot help you on that issue.

The Convener: That brings us to the end of questions. I thank Andrew Ferguson and June Murray for their evidence.

I welcome our second panel of witnesses. Representing Audit Scotland at today's meeting are Caroline Gardner, who is the deputy auditor general; Fiona Kordiak, who is the director of audit

services for local government; and Gordon Smail, who is the portfolio manager for local government.

You have listened to the evidence that we have already taken this afternoon and will have looked at some of the evidence that we have taken previously on the three petitions, so I am sure that you know the broad subject area that we want you to cover. You have the opportunity to make some introductory remarks about the petitions and to comment on behalf of Audit Scotland on whether we should change the way in which common good funds are managed and, if so, how. After that, we will move to questions and answers.

Caroline Gardner (Audit Scotland): I will add briefly to what our submission says, rather than repeating that. The submission sets out the way in

Col 4321

which common good assets and funds are audited at the moment, in line with both the accounting standards that are required and our code of audit practice. They come to our attention in two main ways. The first is through the planned audit work that is done every year in every council, as the submission outlines. As the director of audit services for our in-house audit work, covering about 20 of the 32 councils, Fiona Kordiak is the expert on that. Secondly, we receive a volume of correspondence from members of the public who have concerns about common good issues. We always investigate those concerns as they are raised, both as a service to members of the public and to ensure that we do not miss important issues in our planned audit work. Gordon Smail, who is on my left, deals with that work in relation to local government.

As we say in our submission, this is a difficult balancing act. We are always keen to avoid placing unnecessary burdens on councils either in the audit fees that we charge for our work or in their requirement to respond to our questions. On the other hand, people throughout Scotland are seriously concerned about this issue and, in that context, we will do our best to answer any questions that you might have about where audit fits into all this.

The Convener: I imagine that questions about whether a local authority has correctly identified an asset as a common good asset are raised with you mainly when the authority decides to dispose of it. Do you think that there is much of a problem with local authorities incorrectly identifying common good assets as general fund assets?

Caroline Gardner: I will ask Gordon Smail to respond in a moment. The context of your question is closely related to the committee's earlier discussion with our colleagues from SOLAR. In general, there is still room for improvement in the way that councils record assets. All councils have an assets register and are required to account properly for all the common good and statutory assets that they hold. However, that is a relatively new innovation. Capital accounting was introduced only in the 1990s and the best-value audits that we are carrying out in each Scottish council show that the information that is available is still improving. Indeed, that theme recurs in our overview reports that we have discussed before. Some councils are recording these assets very well, but some have a way to go in ensuring that their records are complete and that they are filling in the history of those assets.

Gordon Smail (Audit Scotland): Caroline Gardner's response more or less covers the matter, but I might be able to emphasise one or two points.

Col 4322

We often receive correspondence from people who have carried out local research into a matter and who, occasionally, will question whether an asset is a common good or general fund asset. We have found that, if the matter is looked into and the asset is discovered to be in the common good, the councils are quite often happy to accept that. In other words, as individual issues come up, they are addressed. However, we also need to keep in mind the general issue of asset management.

The Convener: How many times a year would such questions be raised with you?

Gordon Smail: Over the year, Audit Scotland probably receives about 250 pieces of

correspondence—or complaints, if that is how you wish to describe them. Common good funds or common good-related issues are certainly a recurring theme; in a particular year, five or 10 such issues might be raised with us.

The Convener: What range of asset value would be covered by those questions? Would they involve fairly significant asset values?

Gordon Small: The questions cover the whole range of assets. However, more recent correspondence that we have received has focused on lower level questions such as whether the rental income for a particular property is due to the common good fund or the general fund. In the context of councils' overall finances, the amounts in question tend to be relatively low.

Mike Rumbles: Given that local authorities are obliged to account properly to Audit Scotland for all the funds and assets that they hold, I, as a layman, cannot understand why they have not made a full inventory of what they own and why Audit Scotland has not fully audited that inventory.

Caroline Gardner: You are quite right to say that councils are duty-bound to account for those assets—and, indeed, they recognise that duty. However, accounting procedures have changed significantly over the past 10 to 15 years. Andrew Ferguson said that information on some parts of Fife is still recorded on a large map and I recall that, when I started my training just 20 years ago, the property terrier was a long drawer of cards on which the various buildings and assets that the council held were recorded. It was not easy to update—or even, with the amount and range of transactions that were going on, to be sure that it was complete.

15:00

I am not making excuses, and I do not think that councils would make excuses either, but expectations have changed in that period, particularly with the introduction of capital

Col 4323

accounting around 10 years ago. Both the revenue accounts and balance sheets of councils must now record the value of the assets that are held, including common good assets, and councils are much more focused on recording those values. We are conscious of the history of the assets that we are talking about, particularly land and property assets, which may have existed for centuries, but records are not always complete or up to the standards that we would expect for transactions that have been completed more recently.

Councils are accountable for what they do not to Audit Scotland but to the people of Scotland. We simply provide assurances about how councils do their accounting. Audit work is always risk based. It would not be possible or appropriate for us to consider every single council asset and transaction. The planning process is intended to identify the most significant and the most risk-associated areas. That is why the correspondence route that Gordon Small described is so important in ensuring that even if an asset's value is not necessarily material, that asset will be picked up if it is of genuine concern to local people and we can therefore follow issues through and secure improvements in the way in which records are held so that councils can account for them in the future.

Mike Rumbles: Your written submission states:

"The Code of Practice on Local Authority Accounting in the United Kingdom does not require councils to report full common good accounts".

There is nothing to say that councils should report full common good accounts and then have them audited by Audit Scotland.

Caroline Gardner: To clarify the point that we made, councils are not required to have specific, separate accounts for common good assets. Many councils still have such accounts; if a council does not have such an account, it is required to account for those assets in its general financial statements.

Mike Rumbles: I want to get things right. As far as you are concerned, there is no missing £1.8 billion or whatever. The assets exist and there is a legal responsibility on local authorities to have

them properly accounted for. Is Audit Scotland, which must audit the accounts, saying to us that there is no missing sum of money?

Caroline Gardner: We would certainly say that there is no missing sum of money. However, it may be unclear whether certain common good assets are properly part of the common good fund or part of the council's wider assets.

Mike Rumbles: So we can be confident that the assets that all 32 councils in Scotland hold are properly accounted for, but there is doubt about whether certain assets should be in general accounts or common good accounts. That is the main issue. Are you also saying that there is no

Col 4324

obligation under the code of practice on local authority accounting to keep full accounts?

Caroline Gardner: I will deal with that in two stages. First, we think that it is unlikely that significant common good assets are missing from councils' overall accounts. However, it may be that not all those assets have come under the common good fund classification. As Gordon Smail said, such assets are increasingly being picked up in response to specific queries and as a result of the general improvement in councils' asset management and the quality of asset registers. That is not to say that the records are complete; the records and the process may still be incomplete, but things are moving in the right direction.

Secondly, councils are not required to have a separate common good fund account. Some councils have such accounts; if a council does not have such an account, assets will fall within its broader asset accounts.

Mike Rumbles: It seems to me from the evidence that the records are all over the place. We have heard that there is not one register. The information could be marked on Ordnance Survey maps or held elsewhere. I would have thought that over the years Audit Scotland would have considered what was happening and would have clearly pointed out to councils that it was not good. This is the 21st century. The citizens of Scotland need to know what assets are held by the people whom they have elected to represent them. It seems odd to me that a committee of the Scottish Parliament should have to consider the issue; rather, it should have been considered a long time ago, and Audit Scotland could have been a driving force in ensuring that that happened. Is that unfair criticism?

Caroline Gardner: I think that it is a fair point, and I think that we have played that role. For example, in the past five years there has been an increasing focus on asset management in the overview reports that the Accounts Commission publishes, which look across audits of councils in Scotland. In our best-value audits, we look closely at the ways in which councils use the range of assets that they hold—including common good assets—to serve the people who live in their area. The improvement in the completeness and accessibility of the records that we are discussing is partly, although not wholly, a response to those comments from auditors.

Mike Rumbles: Should we expect the 32 local authorities in Scotland to use best practice to produce records that are as complete as possible? The best councils produce good records, but the worst—I will not name them—are not up to scratch. Should they all operate to the same high standard?

Col 4325

Caroline Gardner: They certainly should. Local auditors recommend that year on year and they track the improvements. In addition, we undertake national reporting in our overview report.

Mike Rumbles: From what I have heard, I do not think that new legislation is necessary. However, I feel strongly that there is something fundamentally wrong in the system. The 32 local authorities hold records that are, according to some people, incomplete and which do not reflect best practice. It is up to those who run the councils to get their act together, and those who audit their accounts must ensure that they do that.

Paul Martin: There is concern about the resources that are required to keep registers. Local

authorities acquired responsibility for doing so in the mid-1990s, but some of them have not been keeping such records. Have the resources that are required to keep them increased because of the inaction?

Caroline Gardner: It is not true to say that some councils have not done anything in that period. There are two issues about the records that are available. The first is their completeness. Following the reorganisation of local authorities in 1974 and again in 1995, it was a significant job to pull together all the records from the predecessor councils. Many assets go back a long way, and might not have been transferred within the previous hundred years.

The second issue is accessibility. When records were held in paper form, such as on maps in drawers, it was difficult to pull them together into a complete picture of what the council held. The councils that have got to grips with the information made an early start on using new technology to pull the information together, to make it more accessible and to identify and fill the gaps that existed.

Paul Martin: If I had been the chief executive of a council in 1995 and I had approached you and said, "It will be difficult for me to produce my latest set of accounts, because it is difficult for me to access a number of documents. Do you mind if I don't submit my annual accounts?", would you have accepted that?

Caroline Gardner: Absolutely not. It might be useful to ask Fiona Kordiak to talk about—

Paul Martin: You would have found that unacceptable, because it is important that public funds are stewarded effectively. Why have we accepted a different set of rules for the common good fund, which stands at—in the estimate that no one has contested—£1.8 billion? Why do we treat it differently? The money comes from public funds.

Col 4326

Caroline Gardner: It is not treated differently. It is part of the overall set of assets for which councils are responsible. No chief executive or director of finance has said, "We do not know what assets we hold." The issue is the completeness of the information.

It might be useful to ask Fiona Kordiak to talk about the ways in which a specific council has addressed the matter.

Paul Martin: Sorry, Caroline, but before you bring Fiona in, can I ask another question on that point? You are saying that we have to look at the completeness of the information, but would you have accepted that in the mainstream budget? If somebody said to you, "We're not sure about the education budget," you would tell them to go and find out. In many cases, Audit Scotland has been robust in accessing information on departmental budgets, some of which has been historical and in paper form. Why treat the common good fund any differently?

Caroline Gardner: The point that I am clearly not making very well is that we do not treat the common good fund any differently. The requirement to account for assets was introduced in the mid-1990s, at which time all assets—common good and non-common good assets—were treated in the same way. There were issues—which remain in some councils—about the completeness of the data. However, auditors do not say that that is good enough; they work through a process of getting decent estimates that can be used for accounting purposes and agreeing improvements in the way in which the asset register information is held in future. It might be useful for Fiona Kordiak to talk you thorough how that is done in practice.

Fiona Kordiak (Audit Scotland): As Caroline said, every year we sign off that a council's financial statements present fairly its financial position, which includes the value of its fixed assets. However, we do not attach a separate audit opinion to the common good account within those financial statements; we sign off and review the council's stewardship of the assets under its control as a whole. We want to satisfy ourselves that the assets that are included in the financial statements are not materially misstated, which is to say that all of the material assets are in there and they are not materially misvalued, in accordance with the accounting rules. However, we recognise that we do not do extensive work to establish whether those assets belong to the common good fund or the general fund of the council. We do some work in that respect, but not a

huge amount of detailed work.

If we were not satisfied by a council's records that the value of the assets that were included in its accounts was not materially misstated, we

Col 4327

would qualify our opinion on the financial statements. If a chief executive said that they could not produce records to support the value of assets, that would not be acceptable. However, we cannot give categorical assurance that those assets have all been accurately split between the common good fund and the general fund.

When we are looking at the management of assets in a council, we tend not to distinguish between whether they are held in the common good fund or by any specific department of the council. We tend to scoop all of the assets and look at a council's overall arrangements for accounting for them. We have made a number of recommendations to various councils over the years about the completeness of their asset registers, their procedures for keeping them up to date—for example, ensuring that disposals are timeously removed from asset registers—and the issue of whether the correct basis of valuation has been used.

With regard to the value that Mr Wightman has attached to common good assets that he thinks might be missing, it is important to bear in mind that there are specific rules about how various types of assets that are held by local authorities are valued. Some assets, such as community assets—which can be things such as parks—are valued at historic cost which, in some cases, will be nil. I am not sure what valuation method Mr Wightman has used to come up with the overall figure.

We try to make the audit a bit wider than simply accounting for the assets and ensuring that we get the correct figure in the balance sheet. We try to ensure that authorities are planning for the best-value use of those assets and for their maintenance and are linking that to their long-term financial planning. Councils can improve their processes by implementing better asset management planning, which has been raised in the overview report, and by clearly linking ownership, condition of assets and planning for maintenance expenditure. That is one method that should flush out missing assets. For example, if you are spending money on maintaining an asset, you should ensure that you own that asset and are accounting for it.

Paul Martin: You say that you have tried to work with the councils over the period and that some of them are complying and have modernised their approach. However, a significant period of time has passed—it must be something like 10 or 11 years—and, if the councils were going to modernise their reporting systems, they would have done so by now. Given that they comply with many legislative requirements, such as providing a budget and following various reporting mechanisms, does that make the argument that

Col 4328

we should be legislating in this area if councils are not willing to comply? Would that give you a more effective lever for dealing with councils that say they are not going to comply with the requirements?

15:15

Fiona Kordiak: In my experience, since the new arrangements were put in place, most councils have made incremental improvements in accounting for their assets. Further, there is a cost to be incurred in complying with all regulations and accounting requirements and each council has to strike a balance, bearing in mind the cost of providing full and absolutely accurate information and the knowledge that that money might be better spent on direct front-line services. They have to take almost a risk-based approach to ensure that they get financial statements and account for the stewardship of their assets on a materiality basis. They strike a balance between cost and the accurate recording of information. We also make a decision based on whether we think that the financial results and assets of the council are materially misstated when we do our audit. Obviously, it is not practical for us to audit every transaction and asset of the council.

Overall, we are satisfied that we have sufficient levers to make recommendations to councils around asset management, linked to the wider best-value agenda and the efficient government agenda, rather than simply considering common good assets in isolation.

Caroline Gardner: Two new drivers will help to improve the situation alongside the situation that Fiona Kordiak has described. The first is the duty of public performance reporting under the Local Government in Scotland Act 2003, which has resulted in councils increasingly giving a wider account of how they are using all of their assets and funds for the good of their communities. The second is the Freedom Of Information (Scotland) Act 2002, which I think is the basis for the information that Mr Wightman has used for his estimate. It provides a means by which members of the community in areas in which there are questions about assets are able to get more information directly, which they can then use to ask questions of the council and, if necessary, of us.

Ms Watt: Much of the questioning so far has been to do with material assets, but I want to ask about liquid assets, which is to say, the monetary common good funds that some councils have. Are there guidelines in relation to spending those liquid assets?

Gordon Smail: Some of the guidelines were touched on in the previous evidence session.

Col 4329

However, we are not lawyers, so we cannot give that type of view.

The main issue is to do with the area in which the money is spent and the need to ensure that it is spent to the benefit of the inhabitants of that area, particularly in relation to specific parts of councils that have monetary common good funds.

The people who put together the rules for local authority accounting are planning to do a piece of work to add to what is known about common good assets and to set out guidance for councils on accounting for common good assets and operating common good funds. That will help councils to clarify areas about which there are doubts. Given the interest in common good funds, councils might be reluctant to spend the money, because they are concerned that, without that clarity, they might overstep the mark in terms of what they are allowed to do with common good funds. The guidance will help councils in that regard.

Ms Watt: Are you saying that the guidelines for the management of the liquid funds are not as stringent as those for the management of the assets, which have got to be managed in the same way as the rest of the council's assets?

Gordon Smail: Whether we are talking about the cash in the fund or the other assets in it—including land, buildings and moveable property—the same test applies across the piece. I do not think that there is any differentiation between cash and other types of asset.

Ms Watt: I recall that, some years ago, a council that provided free or subsidised lunches for its councillors was hauled over the coals—by you, I presume—for paying for that out of the normal assets. It switched the budget for that so that it came out of the common good fund. If you are saying that the same rules should apply to common good funds as to other council funds, that would not wash any more.

Caroline Gardner: I will have a go at answering that, and Gordon Smail can always add something later, as the expert. I think that Andrew Ferguson referred to the changing position. The 2003 act introduced a more general power to advance well-being, which gives councils more flexibility than before over how they spend all the assets and income that are available to them. Access to the chest, as it were, has been relaxed, so that it can now be granted for anything that will advance the well-being of an area and the people who live there.

In the past, there were more stringent constraints on what councils could do with the funds from non-common good funds, and there were many interesting test cases, which I suspect Fiona Kordiak and Gordon Smail know more about than I do. They have tested the fine interpretation

Col 4330

of what councils can and cannot do within their constraints. The situation is now different, because

of the broad power to advance well-being, which was designed specifically to give councils more flexibility in how they respond to the needs of their areas.

Fergus Ewing: Does Audit Scotland believe that each council should hold a register of common good assets?

Caroline Gardner: The question is a wider one. It is important that councils account clearly for all the assets that they hold. There are good reasons for identifying significant common good fund assets, given the way in which they came into the council's ownership.

Fergus Ewing: So there should be a register of all assets and, within that, significant common good assets should be identified.

Caroline Gardner: Yes.

Fergus Ewing: Paragraph 9 of your written submission informs us:

"the Local Authority (Scotland) Accounts Advisory Committee which, with the Chartered Institute of Public Finance and Accountancy (CIPFA), sets out proper accounting practice for local authorities has decided to undertake a review with the intention of producing guidance on the operation of and accounting for common good in Scotland."

What is the Local Authority (Scotland) Accounts Advisory Committee recommending should be done with regard to accounting for common good? In particular, is it recommending that each council should provide a register of common good assets that will be available to the public?

Caroline Gardner: It is too soon for us to know what the review will recommend. However, each council already requires to have a register of its assets, including common good assets, in order to produce its financial statements each year. In effect, that register is available to the public through a couple of mechanisms. One is the right that any local government elector has to inspect the accounts and underlying records that councils maintain. The second is the Freedom of Information (Scotland) Act 2002. As we discussed earlier, there is a question about the extent to which those records are fully complete and accessible, but they are required to be in place as part of the council's accounting requirements, which are audited annually.

Fergus Ewing: You say that it would be open to the public to inspect a council's accounts in order to compile some sort of record of assets. I suggest that, frankly, that is a little bit of fiction. I do not know anybody who does that and it is not reasonable to ask someone to do that. That seems to dodge the basic question, which is whether a publicly promulgated register of assets

Col 4331

should exist. If the answer is yes, that is not available at the moment—the reality is that no publicly promulgated and communicated register of common good assets exists in any council in Scotland.

Caroline Gardner: It is certainly true that asset registers are not commonly promulgated, but each council must have one to produce its accounting statement each year. I was not suggesting that that is fully satisfactory; I was just pointing out that the public have access to those registers through the mechanisms of the accounts inspection and the 2002 act. The committee may think that a further step is worth taking.

Fergus Ewing: Do you agree that one simple mechanism that would not necessarily require legislation would be for the Executive to tell each council to provide the public with a list of all the major assets that it holds within 30 days, and to show in that list which are common good assets and, if the information is readily available without incurring massive cost, who the kind and generous benefactors of the common good assets were? Does anything prevent the Executive from doing that? Would that not be desirable in the run-up to local elections, when the public are interested in what will be done with the property that is owned on their behalf?

Caroline Gardner: I can think of nothing that would prevent the Executive from making that change. Such a change would be in line with what is required of councils under public performance reporting and the general thrust of freedom of information. The question is what would be the best way of doing that to achieve the most benefit at the minimum cost.

Fergus Ewing: Now that I have made that suggestion, which you said is practical, will Audit Scotland endorse it?

Caroline Gardner: The general thrust of all the work that we do in auditing councils and other public bodies is to increase transparency and accountability. The question is always how that is done without incurring disproportionate cost and while getting the main benefit to the people who fund services and rely on them in their daily lives. I would like to think a bit more about the best mechanism, but the principle is very much in line with our general thrust for local government reporting.

Fergus Ewing: I understood that answer, although I had to make a bit of mental effort to do so. I kindly suggest that it is sometimes difficult to understand exactly what Audit Scotland recommends, simply because of the way in which language is used in the audit process. That is perhaps just a gratuitous reflection.

Col 4332

Common good funds must have arisen because of the huge generosity of individuals who decided to leave their property to their local burgh or county. If we want to rekindle that spirit of local philanthropy, we must tell people now about the assets that each local authority has, preferably while paying due tribute to people who gave generously in the past. If the Executive took up the suggestion that you have sidestepped, it might help to rekindle civic pride and generosity as well as trust and transparency in local government.

Caroline Gardner: I am sorry if our recommendations are not always clear. The point that I was trying to make is that transparency is an important part of accountability and Audit Scotland tries to promote it in all its work. We fully support putting more information about local authority assets in the public domain. How best to do that probably deserves a bit more thought.

Fergus Ewing: Will you come back to us about how that can be done? Like other members, I think that legislation is a bit of an Exocet. Much could be done if the Executive and Audit Scotland just asked councils to deliver a clear record of what they own.

Caroline Gardner: We can certainly come back to you on that.

Fergus Ewing: Thank you very much.

15:30

Mike Rumbles: I am absolutely with Fergus Ewing on that line of questioning. As a result of Fergus's questions, I am actually more confused now. In the evidence that we have received, people have called for legislation, but they have basically seemed to be saying that the assets are not in good order and that we do not know what they are. I do not want to put words into members' mouths, but Fergus Ewing was probably right that the view among committee members is that we need a straightforward system in which all councils have a register of their assets within which is a list of common good assets. That should be public knowledge. There surely cannot be any great mystery about that. However, in response to Fergus Ewing, Caroline Gardner said that councils already have a legal requirement to keep such a register for their accounts. I am now at a bit of a loss as to where that takes us. If councils already have a legal requirement to keep a register, excuse me, but what is the issue?

Caroline Gardner: Some of the difficulty arises in relation to common good funds in their own right rather than in the context of the wide range of assets that councils hold. The overall value of council assets in Scotland is about £20 billion. The assets range from huge ones, such as schools and large leisure centres, to small pockets of land,

Col 4333

and have been acquired over hundreds of years. Councils are required to keep records of all those assets for the purposes of producing their accounting statements each year.

Mike Rumbles: Do they have them?

Caroline Gardner: They have the records, but there are the caveats that I mentioned about completeness in some cases and accessibility. Improvements are being made to both those aspects of the registers year on year through the audit process that Fiona Kordiak described. The information exists. Many of the disputes that underlie the petitions are about the classification of assets as common good fund assets or not rather than about whether the council is recording them and accounting for them properly in general terms. That may be where some of the confusion arises.

Mike Rumbles: So, in lay terms—I keep emphasising that I am a lay person—you are telling us that everything is fully accounted for. Audit Scotland has checked and says that the councils are operating correctly, that they have a register of assets, as they are legally required to have, and that a subset of those assets is the common good assets, which are also registered. For a start, you are telling us that there is no missing money and no requirement for a new register, because councils already have one. Is that right?

Caroline Gardner: Yes, although there is a risk of oversimplifying the broad question. I am sorry to complicate the issue—I do that not because I am an accountant or auditor, but because the issue is complicated. Each council must have a record of the assets that it holds to produce its financial statements each year. The auditors audit the existence of those records, but they do not audit the accuracy and completeness of every single record on the asset register. An asset register is in place for each council, but no auditor in any circumstances could say that a register contains no errors at all. The auditors say that the registers do not contain material errors and that they cover the most important points and give a true and fair picture of the assets that the councils hold, but there may be gaps, omissions or errors in individual records that do not affect the overall statement of accounts.

Mike Rumbles: Has Audit Scotland ever audited any council's common good fund?

Caroline Gardner: Yes. The audit of each council looks at the overall arrangements that are in place for asset management, but we follow up concerns that members of the public raise with us through the audit process. As Gordon Smail said, we receive typically five or 10 such queries every year. We examine not only the individual issue

Col 4334

that the query raises but the council's overall arrangements for common good assets.

Mike Rumbles: I am sorry to labour the point, but I am with Fergus Ewing in being at a loss as to what you are recommending. Are you recommending that we should change anything?

Caroline Gardner: We feel that the overall accounting arrangements for common good assets are adequate, given the scale of those assets relative to everything else that local government does. We are talking in a context in which there is a lot of focus on the burden that audit and inspection place on councils. I would be reluctant to recommend an increase in either the audit requirements or the accounting and record-keeping requirements on councils without more evidence than we currently have that there is a problem. However, I accept fully that transparency on the issue is important to local communities throughout Scotland. Transparency is improving, with public performance reporting and freedom of information. Personally, I am not persuaded that there is a case for adding a whole new requirement to publish the asset register, when it is already in the public domain through those two mechanisms. That is a question of policy and is for the committee and the Executive rather than for Audit Scotland and the Accounts Commission.

The Convener: That brings us to the end of our questions. I thank Caroline Gardner, Gordon Smail and Fiona Kordiak for their evidence. We appreciate that the audit and accounting issues are complex, and I am sure that there was no intention on your behalf to overcomplicate the issues.

Col 4335

Subordinate Legislation

Closures Guidance (Railway Services in Scotland and England) Order 2006 (SI 2006/2837)

Regional Transport Strategies (Health Boards) (Scotland) Order 2006 (SSI 2006/528)

15:36

The Convener: Agenda item 3 is consideration of two items of subordinate legislation. No members have raised points on the orders and no motions to annul have been lodged. Do members agree that we have nothing to report on the orders?

Members *indicated agreement.*

Col 4336

The Convener: We will now move into private.

15:37

Meeting continued in private until 17:17.