Infrastructure and Capital Investment Committee

1st Report, 2014 (Session 4)

The Procurement Reform (Scotland) Bill

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Infrastructure and Capital Investment Committee

1st Report, 2014 (Session 4)

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Infrastructure and Capital Investment Committee

Remit and membership

Remit:

To consider and report on infrastructure, capital investment, transport, housing, and other matters falling within the responsibility of the Cabinet Secretary for Investment and Cities apart from those covered by the remit of the Local Government and Regeneration Committee.

Membership:

Jim Eadie
Mary Fee
Mark Griffin
Adam Ingram (Deputy Convener)
Alex Johnstone
Gordon MacDonald
Maureen Watt (Convener)

Committee Clerking Team:

Clerk to the Committee
Steve Farrell

Senior Assistant Clerk
Ruth McGill

Assistant Clerk
Kelly Forbes

Committee Assistant
Myra Leckie
Summary of recommendations

- A 2013 Cabinet Office procurement policy note\(^1\) states in its summary of key changes that new directives are expected to include “improved rules on social and environmental factors”. It is not clear to the Committee how these will sit with the Bill’s provisions. **The Scottish Government is asked to provide further clarification on how it expects the Bill to sit with the expected “improved rules on social and environmental factors” aspect of the new directives.** (paragraph 25)

- The Committee recognises that it is important that the Bill should be compatible with existing EU legislation and be flexible enough to support upcoming European reform in the area of procurement. **In order to retain flexibility, the Bill contains enabling powers to either make regulations or issue guidance subsequent to the passing of the Bill.** However, the Committee considers that the extent of these enabling powers has placed limits on the scope of the Committee’s scrutiny. It has considered the powers carefully and comments at the relevant sections of the report, seeking further information where necessary. (paragraph 26)

- On balance the Committee is supportive of the drive for procurement reform in Scotland at this time and will monitor how the Bill sits with upcoming directives and how the Scottish Government responds to the requirement to transpose them. (paragraph 28)

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\(^1\) Cabinet Office Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules Information Note 05/13 25 July 2013
• Given the concerns heard on the lack of provision contained in the Bill on this matter [smaller lots], the Committee asks the Scottish Government to provide clarification on its approach to consulting on the implementation of the upcoming European procurement directive in Scotland and whether, for example, it might examine using this to provide opportunities for contracts to be divided into smaller lots where this is both feasible and appropriate. (paragraph 31)

• The Committee recognises the argument for consistency in the application of procurement law in respect of utilities and that, should Scottish Water be brought within the scope of the Bill it would be a complex undertaking to draft provisions that would sit with European utilities legislation. However, the Committee seeks the view of the Scottish Government in response to the argument that there is benefit to bringing Scottish Water into the scope of the Bill, where its smaller contracts could be subject to provisions such as the sustainable procurement duty and procurement strategies. (paragraph 39)

• During informal discussions with the third sector it was brought to the Committee’s attention that arm’s-length external organisations (ALEOs) are not specifically covered by the provisions in the Bill. The Cabinet Secretary clarified that “whether an ALEO will be subject to the bill’s provisions will depend on the ALEO’s status. An ALEO that to all intents and purposes is a public body is likely to be covered, but an ALEO that is an institutionalised public-private partnership might not be covered”. The Committee asks the Scottish Government to consider how it might ensure that all ALEOs are covered by the Bill’s provisions. (paragraph 40)

• The Committee [therefore] welcomes the power at section 3(3) that allows the Scottish Government to amend the threshold amounts via order subject to affirmative procedure and supports the inclusion of this power in order that the Government might react to experience. (paragraph 46)

• The Committee welcomes the clarification that the section 5 provision will provide. (paragraph 48)

• The Committee considers the balance of the powers at sections 8 and 9 to be an important issue for the successful implementation of the sustainable procurement duty. The Committee therefore requests that the Scottish Government provides further information on how a contracting authority might balance these two provisions, indicating how it might address the matter in guidance for contracting authorities. (paragraph 53)

• The Committee considers that many of the points raised on the extent of the sustainable procurement duty are linked to the need to balance the provisions of the Bill with appropriate guidance that has a statutory weight. The Committee seeks the assurance of the Scottish Government that the statutory guidance to be published on procurement strategies and annual...
procurement reports will be extensive and robust enough to impose the kind of cultural change sought by stakeholders. The Committee also seeks clarification of whether guidance will be published in relation to the sustainable procurement duty itself. (paragraph 61)

- The Committee is reassured that the proposed duty at section 9 is supported by a level of accountability and reporting imposed on contracting authorities by sections 11 and 14 of the Bill. However, the Committee seeks a statement from the Scottish Government on how it might use procurement strategies and annual reports to assess the success of the application of the duty and ensure that the requirement only to “consider” sustainable procurement does not result in these important issues being circumvented or downgraded in importance. (paragraph 67)

- The Committee considers that there is a possible case for a definition of micro-business to be included in the Bill and reference to micro-business to be added to section 9. This would help to ensure that they are incorporated into procurement decisions and the procurement strategies and annual reports of contracting authorities. The FSB has also suggested to the Committee that annual reports should contain a breakdown of spending with micro, small, medium and large businesses. The Committee asks the Scottish Government to comment on these proposals in advance of Stage 2 consideration. (paragraph 77)

- The Committee understands that the Scottish Government has used its supported business framework to try to raise awareness of their importance. The Cabinet Secretary also advised the Committee that the definition of supported businesses may be widened by the future directive. It is, however, clear that considerations should be built early into the procurement process in order for opportunities to engage with supported businesses to be prioritised. The Committee therefore considers that the Bill should place a requirement on contracting authorities to include in their annual reports how they have engaged with supported businesses and used the supported businesses framework within each reporting year. (paragraph 82)

- The Committee also invites the Scottish Government to respond to the proposal that a social enterprises/supported businesses element should be included in the Bill’s community benefit requirements. (paragraph 83)

- The Committee supports the provision on procurement strategies and asks the Scottish Government to clarify how they could be used to provide, in general terms, advance notice of contracts. (paragraph 86)

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3 FSB Scotland Written Submission, Page 5
The Committee considers that the success of the Bill’s provisions on sustainable procurement and community benefit lie to a considerable extent with contracting authority investment in the production of a procurement strategy and annual procurement report which place emphasis on these matters. The Committee seeks the Scottish Government’s assurance that both the strategies and reports will be monitored effectively and that any deficiencies will be addressed. (paragraph 92)

The Committee also invites the Scottish Government for its comments on the role of the Accounts Commission and the Auditor General for Scotland in monitoring the performance of contracting authorities via their procurement strategies and procurement annual reports. (paragraph 93)

The Committee welcomes the provision at section 16(4) that “contracting authorities must have regard to any guidance issued under this section” and requests that any available detail on the nature of this guidance be provided to the Committee as soon as possible. (paragraph 94)

The Committee considers this provision (section 18) essential to improving access and transparency and welcomes the benefits it will bring for a range of organisations across Scotland. (paragraph 97)

The Committee recognises that the community benefit requirement is mandatory for contracts above the £4m threshold but seeks information from the Scottish Government in relation to how the inclusion of a community benefit requirement will be encouraged in contracts of a lower value. (paragraph 105)

The Committee supports the section 20(5) provision and its potential to react to the experience of the application of the community benefit requirements. (paragraph 107)

The Committee considers that section 14(2) of the Bill on annual procurement reports must specify that contracts that include community benefit requirements should be reported upon and detail of the community benefits achieved should be provided. The Committee considers that monitoring of this type of contract is of substantial importance that is unlikely to lessen and, as such, a provision requiring this to be undertaken should be included on the face of the Bill. (paragraph 112)

The Committee understands the balance which is intended to be struck between legislation and guidance. However, as drafted, the success of the community benefit requirements rests to a great extent with the guidance and the Committee therefore requests further information on this guidance as soon as possible. (paragraph 117)

The Committee notes the Scottish Government’s position on the living wage. However, given the extent to which the encouragement of its
payment will rest within the guidance to be published under section 24 of the Bill, the Committee requests further information on how it intends to address this matter in draft guidance. (paragraph 127)

- The Committee notes that the approach to be taken by the Bill to eliminate the practice of blacklisting via regulations will support the existing guidance and welcomes the Scottish Government's ongoing dialogue with the trade unions on this matter. (paragraph 130)

- Dave Watson of Unison has suggested that the Bill might be used to address aggressive tax avoidance rather than simply tax evasion. The Committee asks the Scottish Government to provide information on whether it has considered adding provisions at section 23 that might address this issue. (paragraph 132)

- The Committee notes that section 27 will encourage transparency and supports this provision as drafted. (paragraph 136)

- The Committee welcomes the commitment by the Scottish Government to pursue opportunities to drive greener public procurement, and to expand the market for recycled and recyclable materials and, therefore, supports the provision as drafted. (paragraph 153)

- Given that research is ongoing and comparatively little information is presently available regarding the potential impacts of the Bill, the Committee welcomes the Cabinet Secretary's undertaking to involve the Committee in this work as it progresses. (paragraph 154)

- The Committee acknowledges and supports the establishment of a remedies regime under the Bill that is proportionate to the lower thresholds. However, given the evidence heard in relation to remedies, the Committee also supports the establishment of a tribunal or ombudsman and asks the Scottish Government to keep it informed of developments in this policy area. (paragraph 164)

- The Committee accepts the argument put forward by the Cabinet Secretary in relation to general provision on FOI matters and welcomes the Cabinet Secretary's undertaking to communicate with the Scottish Information Commissioner on the matters raised in relation to the drafting of sections 28 and 29 of the Bill. The Committee seeks information on these discussions before the conclusion of the Parliamentary scrutiny of the Bill. (paragraph 168)

- The Committee believes that through the implementation of the Bill and its guidance a great deal could be achieved. However, given the crucial nature of skills development to the success of the Bill's provisions, the Committee invites the Scottish Government to consider and respond to the recommendation that the training and development of staff is included

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as a requirement in the procurement strategy and annual procurement report guidance provision at section 16 of the Bill. (paragraph 174)

- The Committee also seeks clarification in respect of awareness-raising and support particularly for third sector organisations and SMEs to assist them to bid for public contracts. (paragraph 175)

- The Cabinet Secretary has informed the Committee that the Scottish Government intends to lodge an amendment to the Bill at Stage 2 to exempt health and social care contracts from the provisions in the Bill that relate to advertising and competition, whilst at the same time ensuring that, where possible, the provisions in the Bill continue to apply. The Committee welcomes this commitment. (paragraph 184)

- The Committee also asks the Scottish Government to consider how it might address the issues raised by CCPS and others relating to consultation and the continuity and standard of care, possibly via the procurement strategy provisions at section 11(5) of the Bill. (paragraph 185)

- The Committee is aware that the upcoming directives are expected to introduce a light-touch regime for social care and health services and asks the Government for clarification on how its legislative approach to these services is expected to sit with EU law. (paragraph 186)

- The Committee has received assurances from the Cabinet Secretary that the particular circumstances faced by universities and colleges are being addressed in current discussions and the Committee welcomes this commitment. The Committee asks for an update on any impact on the Bill’s provisions in advance of its Stage 2 consideration. (paragraph 189)

- The Committee considers that legislation is required to improve the situation of those attempting to access public contracts and that the Bill establishes a national procurement framework for Scotland that will improve consistency and transparency. The Committee therefore recommends that the Parliament agrees the general principles of the Bill. (paragraph 208)
INTRODUCTION

Parliamentary Scrutiny

1. The Procurement Reform (Scotland) Bill (“the Bill”) was introduced to the Scottish Parliament on 3 October 2013 by Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (“the Cabinet Secretary”).

2. The Parliamentary Bureau designated the Infrastructure and Capital Investment (ICI) Committee the lead Committee for the Bill and no committee was designated as a secondary committee. The lead committee is required, under Rule 9.4.1 of the Parliament’s Standing Orders, to report to the Parliament on the general principles of the Bill.

3. The Delegated Powers and Law Reform Committee and the Finance Committee considered respectively the delegated powers in the Bill and its Financial Memorandum. The Local Government and Regeneration Committee considered the Bill within the context of its work programme and reported its conclusions to the ICI Committee via memorandum.

4. The ICI Committee agreed its approach to evidence taking at its meeting of 9 October 2013. The Committee issued a call for evidence on 11 October 2013 and received 61 responses.

5. The Committee undertook three fact-finding visits to—

   • Inverness Campus (11 November 2013)
   • Greater Glasgow and Clyde Health Board (19 November 2013)
   • Glasgow Council for the Voluntary Sector (GCVS) and a range of stakeholders (19 November 2013)
   • Tayside Procurement Consortium (2 December 2013)

6. On 23 September 2013, a delegation of MSPs, including the Committee Convener, Maureen Watt MSP and its EU Reporter, Jim Eadie MSP, conducted a series of meetings in Brussels on the new Public Procurement Directives, their potential impact on Scotland, and how they would interact with the Bill.

7. The Committee held an informal evening event with approximately 25 business organisations, including social enterprises, on 26 November 2013, to discuss the Bill’s provisions in advance of its evidence-taking with the Cabinet Secretary on 11 December 2013.

8. The Committee took oral evidence at five meetings. The Official Reports of those meetings are available at Annex B.

9. The Committee would like to thank all of those individuals and organisations who provided evidence in writing, at Committee meetings and during informal discussions.
Purpose of the Bill

10. The stated purpose of the Bill\(^7\) is to establish a national legislative framework for public procurement that supports Scotland’s economic growth by delivering social and environmental benefits, supporting innovation and promoting public procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business-friendly.

11. The Bill places a small number of general duties on contracting authorities in relation to how they conduct procurements and provides specific duties aimed at promoting good practice. The Policy Memorandum states that “These measures should help encourage local action within organisations with the aim of building procurement capability and capacity and maximising public procurement’s contributions to wider socio-economic and environmental policy objectives.”\(^8\)

12. The Policy Memorandum also sets out the intention that the Bill will be “combined with guidance and training for the public sector and businesses to maximise the benefits available from procurement spending”.\(^9\)

General responses to the Bill proposals

13. There was broad agreement that the Bill was an important step in improving access to public contracts for a wide range of stakeholders. The provisions in the Bill to increase transparency and consistency were particularly well received from a wide range of respondents to the Committee’s call for evidence.

14. The Local Government and Regeneration Committee commended the Bill’s general approach, believing that it is “an important step towards continuous improvement in strategic approaches to procurement taken by contracting authorities”.\(^10\)

15. The Federation of Small Businesses Scotland (FSB) shared this view and considered that—

“The Bill is unlikely to solve all small business’ difficulties with procurement but it could be an important step in changing how we view procurement in Scotland, recognising that public spending decisions can affect a number of other policy objectives and expecting our public bodies (‘buyers’) to consider this in a more strategic fashion.”\(^11\)

16. The Scottish Building Federation saw the Bill as “an important contribution towards the objective of reducing the administrative and financial burden on industry of participating in public sector procurement – and delivering public

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\(^7\) Procurement Reform (Scotland) Bill, Policy Memorandum, Page 1, Paragraph 3
\(^8\) Procurement Reform (Scotland) Bill, Policy Memorandum, Page 1, Paragraph 3
\(^9\) Procurement Reform (Scotland) Bill, Policy Memorandum, Page 1, Paragraph 4
\(^10\) Local Government and Regeneration Committee, Committee Memorandum on the Implications of the Procurement Reform (Scotland) Bill for Public Services and Community Regeneration, page 4, paragraph 17
\(^11\) Federation of Small Businesses Scotland, written submission, page 1, paragraph 4
procurement outcomes that are more sustainable from the perspective of all concerned".\textsuperscript{12}

17. Dave Watson of Unison considered that—

"In broad terms, the bill is fine, but generally it is too timid. It reflects a risk-averse approach to procurement. It focuses essentially on housekeeping—on tidying up systems—rather than on the wider benefits that we could get from the £9 billion to £11 billion of procurement."\textsuperscript{13}

18. The STUC "found the bill slightly disappointing when measured against the early aspirations for what was then described as a sustainable procurement bill".\textsuperscript{14}

19. Many of the arguments for increasing the powers contained in the Bill were marshalled in the Civil Society Organisation in Scotland written submission\textsuperscript{15}, which the Committee highlighted to the Cabinet Secretary when she gave evidence. Correspondence from the Cabinet Secretary responding to the points raised by the submission is attached at Annex G. Issues discussed in these documents are addressed under the relevant headings of this report.

Guidance

20. The Committee notes that extensive guidance already exists and that the Bill forms part of a range of Scottish Government-led initiatives designed to improve public procurement in Scotland.\textsuperscript{16} When the Committee explored whether there was a requirement to legislate in this policy area the Cabinet Secretary set out her view in evidence that—

"We have produced guidance, but whether it is always followed is an issue. The bill will give statutory underpinning to guidance that the Government issues, so public authorities will have to have regard to it."\textsuperscript{17}

21. The extent of the statutory guidance created by the Bill and how it supports the Bill's provisions is explored within this report. The Cabinet Secretary stated in evidence that she was content "to share drafts of the guidance with the Committee at the appropriate time"\textsuperscript{18}. The Cabinet Secretary also indicated that she was content to "involve the Committee fully"\textsuperscript{19} in the process relating to the regulations and guidance made under the Bill.

\textsuperscript{12} Scottish Building Federation, written submission, page 1, paragraph 4
\textsuperscript{13} Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 4 December, Col 2297
\textsuperscript{14} Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 4 December, Col 2297
\textsuperscript{15} Civil Society Organisation in Scotland, Combined Written Submission
\textsuperscript{16} Procurement Reform (Scotland) Bill, Policy Memorandum, Page 8, Paragraph 40
\textsuperscript{17} Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 11 December, Col 2345
\textsuperscript{18} Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 11 December, Col 2345
\textsuperscript{19} Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 11 December, Col 2345
22. The Committee welcomes the Cabinet Secretary’s undertaking to share drafts of guidance with the Committee at the appropriate time. The Committee also requests any further general information on the form, nature and content of proposed statutory guidance, over and above that provided in the Bill and its supporting documents, is provided to the Committee at the earliest opportunity. Where possible, this information should be provided prior to the conclusion of the Parliamentary scrutiny of the Bill.

EUROPEAN CONTEXT

23. Whilst the Bill does not transpose European legislation, scrutiny of the Bill was conducted within the context of European legislation, particularly the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1), and subsequent revisions, the last of which was an amending and consolidating instrument in 2012 (“the Regulations”) which transposes EU Directives 2004/18/EC1 and 2007/66/EC into Scots law. New European directives concerning procurement and the utilities regime are expected to be approved by the European Parliament early in 2014 and to be transposed into Scots law within two years of that final agreement.

24. In giving evidence to the Committee, Scottish Government officials outlined how the Bill is “putting pieces of a jigsaw together where there is existing provision in EU law” and “overlaying other provisions where there is no existing provision in EU law”. The Bill, where necessary, reflects EU law, such as at section 8, where general duties reflect EU principles regarding equal treatment, transparency, non-discrimination and proportionality. Officials also explained that the sustainable procurement duty at section 9 does not have an equivalent in EU regulations but the Bill applies it to all procurements above its new, lower thresholds.

25. A 2013 Cabinet Office procurement policy note states in its summary of key changes that new directives are expected to include “improved rules on social and environmental factors”. It is not clear to the Committee how these will sit with the Bill’s provisions. The Scottish Government is asked to provide further clarification on how it expects the Bill to sit with the expected “improved rules on social and environmental factors” aspect of the new directives.

26. The Committee recognises that it is important that the Bill should be compatible with existing EU legislation and be flexible enough to support upcoming European reform in the area of procurement. In order to retain flexibility, the Bill contains enabling powers to either make regulations or issue guidance subsequent to the passing of the Bill. However, the Committee considers that the extent of these enabling powers has placed limits on the scope of the Committee’s scrutiny. It has considered the powers...

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20 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November, Col 2071
21 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November, Col 2071
22 Cabinet Office Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules Information Note 05/13 25 July 2013
carefully and comments at the relevant sections of the report, seeking further information where necessary.

27. The Faculty of Advocates drew the Committee’s attention to the timing of this Bill in respect of imminent European directives.23 The Committee noted the Cabinet Secretary’s comment that—

“There is still a degree of uncertainty in the discussions around the directive but, on the basis of the discussions thus far, we are fairly confident that the bill, as currently drafted, is consistent with EU law and sufficiently flexible to ensure that it remains consistent as the final shape of the new EU directive becomes clear.”24

28. On balance the Committee is supportive of the drive for procurement reform in Scotland at this time and will monitor how the Bill sits with upcoming directives and how the Scottish Government responds to the requirement to transpose them.

29. Some witnesses were concerned that the Bill does not respond to the concerns of SMEs by including a requirement to split contracts into smaller lots.25 This was also supported during informal discussions with the third sector in November 2013. Intend Business Development Ltd suggested that “it’s difficult to make this mandatory for all tenders but [it] may be possible to ask for lots for all tenders where Scotland-wide scope is involved.”26 The Committee, however, heard from the Scottish Futures Trust of a waste treatment works contract in Amsterdam that took this approach and ran over budget “because the interfaces could not be managed”.27 The Committee is aware of the dilemma of weighing up the costs of breaking down contracts into smaller lots against the cost benefits gained by larger bundles.

30. The Committee’s understanding is that the division of contracts into smaller lots will be taken forward in upcoming European directive reform. The Committee has therefore not pursued this policy area within its consideration of the Bill, although it recognises that it will apply only to the contracts above EU thresholds. A Cabinet Office policy note28 issued on the three expected directives (a revised public sector directive, a revised utilities sector directive, and a new directive containing procedural rules for the award of concessions contracts) states that—

23 Faculty of Advocates, Written Submission, Page 4, Conclusion
26 Intend Business Development Ltd, Page 2
27 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2013, col 2102
28 Cabinet Office Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules Information Note 05/13 25 July 2013
• Buyers will be encouraged to break contracts into lots to facilitate SME participation, but there is discretion not to do so where appropriate.\(^{29}\)

• Member States may render it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law.\(^{30}\)

31. **Given the concerns heard on the lack of provision contained in the Bill on this matter, the Committee asks the Scottish Government to provide clarification on its approach to consulting on the implementation of the upcoming European procurement directive in Scotland and whether, for example, it might examine using this to provide opportunities for contracts to be divided into smaller lots where this is both feasible and appropriate.**

**PART 1: KEY CONCEPTS AND APPLICATION**

**Contracting authorities**

32. The Bill sets out to achieve consistency between its provisions and those contained in the Public Contracts (Scotland) Regulations 2012 (“the Regulations”) which transpose European law into domestic legislation. The Bill therefore follows the definitions and terms of public authorities to which the Regulations apply. Schedule 1 to the Bill lists bodies that are subject to the provisions of the Bill based on those that are subject to the Regulations.

33. In addition to this, the Bill at section 1(1)(b) contains provision for any other person who is a contracting authority for the purposes of the Regulations to be covered by the Bill. This allows bodies who are contracting authorities by virtue of regulation 3(1)(bb) of the Regulations to be included. Registered social landlords and universities, whilst not specifically mentioned in schedule 1 to the Bill are covered by the provisions of the Bill because they meet the test at 3(1)(bb) of the Regulations.

34. As drafted, the Bill does not include Scottish Water as a contracting authority to be covered by its provisions. The Scottish Government’s Bill team clarified that utilities companies such as Scottish Water are subject to a separate European procurement regime under the utilities directive.\(^{31}\) The Bill team outlined that—

> utilities are subject to a lighter-touch European regime specifically because they are regarded as being subject to a degree of commercial pressure. If we brought utilities within the scope of the bill generally, there could be

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\(^{29}\) Cabinet Office Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules, Information Note 05/13, Annex A (xiv)

\(^{30}\) Cabinet Office Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules, Information Note 05/13, Annex B

\(^{31}\) Directive 2004/17/EC
adverse consequences for a number of other utility entities such as, for example, public sector operated port and harbour authorities.”

35. In addition, the Cabinet Secretary highlighted in evidence that, if the Scottish Government was to bring Scottish Water within the ambit of the contract thresholds in the Bill, Scottish Water would still not be subject to the Bill’s provisions on its higher value contracts.

36. However, the Committee heard from a number of individuals and organisations that Scottish Water should be governed by the provisions of the Bill. Dave Watson of Unison stated that—

“the utilities directive is fine, but the bill is seeking to establish a number of general and specific duties right across the public sector. Scottish Water is clearly part of that. It is a big purchaser; its capital programme is worth £500 million a year, so it is very important for industry. The specific duty should apply to Scottish Water and other public corporations on the same lines.”

37. During informal discussions with businesses, a number of organisations questioned why Scottish Water was not included as a contracting authority under the Bill. Professor Cuthbert stated, “I appreciate the technical difficulties in covering utilities, but it would be very desirable if the general duty of sustainable procurement was laid on Scottish Water and it had to produce an annual procurement strategy.”

38. The Committee took the opportunity to raise with Scottish Water the Bill’s provisions on sustainable procurement, community benefit and the production of reports and strategies during a separate evidence-taking session. Douglas Millican of Scottish Water considered that—

“Without looking at a checklist of every dimension, I can say in broad terms that we are doing those things. We continually look to evolve our procurement. [...] we have been recognised as having a world-class approach to procurement.”

39. The Committee recognises the argument for consistency in the application of procurement law in respect of utilities and that, should Scottish Water be brought within the scope of the Bill it would be a complex undertaking to draft provisions that would sit with European utilities legislation. However, the Committee seeks the view of the Scottish Government in response to the

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32 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2014, Col 2068
34 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 4 December 2013, Col 2298
35 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2013, Col 2095
argument that there is benefit to bringing Scottish Water into the scope of the Bill, where its smaller contracts could be subject to provisions such as the sustainable procurement duty and procurement strategies.

40. During informal discussions with the third sector it was brought to the Committee’s attention that arm’s-length external organisations (ALEOs) are not specifically covered by the provisions in the Bill. The Cabinet Secretary clarified that “whether an ALEO will be subject to the Bill’s provisions will depend on the ALEO’s status. An ALEO that to all intents and purposes is a public body is likely to be covered, but an ALEO that is an institutionalised public-private partnership might not be covered.”

The Committee asks the Scottish Government to consider how it might ensure that all ALEOs are covered by the Bill’s provisions.

Regulated procurements and contracts

41. The Bill sets out that its provisions will cover both the seeking of tenders and the award of regulated contracts by a contracting authority. The regulated contracts defined by the Bill are those public contracts where the estimated value is equal to or greater than £50,000, or for public works contracts, £2m. By doing this the Bill brings lower value contracts within a legislative framework. The Scottish Government chose the level of threshold by using an approximate 50% calculation of the Regulations threshold. The Policy Memorandum states that this was a case of striking a balance between having an impact on contracts below current thresholds and not being so low that it would “have a disproportionate impact on low-value procurements.” The higher threshold for works was an acknowledgement of the higher value of this type of contract.

42. Many of the Bill’s provisions only apply to those contracts between its new thresholds and the lower thresholds provided in the European legislation, so for supplies or services contracts, certain provisions in the Bill will only apply to contracts between £50,000 and £113,057 (or £173,934 for local authorities). For all contracts above this value (£113,057 or £173,934 for local authorities), only the EU regulations apply. However, for these provisions, there is generally an equivalent (or similar) provision in the EU regulations.

43. Mixed evidence was received in relation to the threshold amounts but the lowering of the thresholds was broadly supported in evidence. However, concerns were raised in respect of the public works threshold amount. The Specialist Engineering Contractors’ (SEC) Group Scotland considered that the works threshold should be lowered, perhaps to £50,000.

“The threshold for public works contracts is £2,000,000, whereas the threshold for all other types of contract is £50,000. The difference between

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39 Procurement Reform (Scotland) Bill, Policy Memorandum, paragraph 56
40 Procurement Reform (Scotland) Bill, Policy Memorandum, paragraph 56
41 Procurement Reform (Scotland) Bill, Policy Memorandum, paragraph 57
42 SEC Group Scotland, Written Submission, paragraph 5
the two is striking. There are, of course, significant differences between the thresholds for works and services contracts in terms of the 2012 Regulations. However, maintaining such a sizeable distinction raises a question about the regulation of works contracts worth less than £2,000,000 but which involve substantial public expenditure. There is “a big difference between £50,000 and £2 million for works with a number of fairly large works contracts up to £2 million not covered by the Bill.”

44. Some witnesses pointed out that, for public contracts other than public works, if a contract of £50,000 was awarded over a period of up to four years, the yearly value of the contract could be as little as £12,500. The Committee is clear that this is the policy intention, having put this to the Cabinet Secretary and heard that the Scottish Government will keep the matter under review.

45. In advance of the operation of the threshold amounts it was difficult for the Committee to reach a view based on evidence. The Committee supports the approach taken by the Scottish Government to balance the threshold amounts with proportionality. Overall, the Committee agrees with the FSB that, “on balance £50k for supplies and services seems right”. Similarly, the Committee is content with the threshold for public works contracts, as drafted. However it welcomes the Cabinet Secretary’s undertaking to—

“keep the matter under review to see what its impact is and ensure that we respond to any real-life concerns that might arise when the bill comes into force. The bill can amend the threshold through subordinate legislation and we would be able to make such amendments quite quickly if evidence emerged that such a move was required.”

46. The Committee therefore welcomes the power at section 3(3) that allows the Scottish Government to amend the threshold amounts via order subject to affirmative procedure and supports the inclusion of this power in order that the Government might react to experience.

Section 5 Estimated value of contract

47. Section 5 provides that, when a contracting authority is calculating contract values, the relevant amount is the sum that it expects to pay and which is an estimate of the amount as opposed to the actual sum, excluding any VAT. The Scottish Ministers have the power to make further provision on how the estimated value of a contract is to be determined. This issue was highlighted by the Faculty of Advocates as “one that has had to be considered by the court”. The Faculty considers that—

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43 Faculty of Advocates, Written Submission, page 2
45 FSB, Written Submission, Page 4, paragraph 1
“Further statutory specification of the methods to be used will be welcome, subject to seeing the precise terms of any regulations to be made under the new legislation.”\textsuperscript{47}

48. The Committee welcomes the clarification that the section 5 provision will provide.

PART 2 – GENERAL DUTIES AND PROCUREMENT STRATEGIES

Section 8 General duties

49. The Bill sets out at section 8 a provision that a contracting authority must, in carrying out a regulated procurement, treat relevant economic operators equally and without discrimination and act in a transparent and proportionate manner. This section reflects existing provisions in the Regulations. This provision applies to those contracts falling below EU thresholds that are equal to or greater than £50,000 or £2m for public works contracts.

50. This section also states that a contracting authority must comply with the sustainable procurement duty set out at section 9. The Bill at section 8(3) states that a contracting authority must not do anything under the sustainable procurement duty that conflicts with the general duty at section 8(1).

51. The Committee examined the challenge of meeting the general duty whilst pursuing the sustainable procurement duty. Evidence from Scottish Government officials asserted that community benefit clauses with a similar balance to be struck with the general duty have been in use since 2008 and that extensive guidance exists.\textsuperscript{48}

52. The Committee also heard of the level of judgement involved in procurement officials assessing how the general duties sit with the sustainable procurement duty in the Bill and the importance of guidance on the operation of the duties.\textsuperscript{49}

53. The Committee considers the balance of the powers at sections 8 and 9 to be an important issue for the successful implementation of the sustainable procurement duty. The Committee therefore requests that the Scottish Government provides further information on how a contracting authority might balance these two provisions, indicating how it might address the matter in guidance for contracting authorities.

Section 9 Sustainable procurement duty

54. This provision sets out that a contracting authority before carrying out a regulated procurement must “consider” how in conducting the process it can improve the economic, social and environmental wellbeing of the authority’s area, facilitate the involvement of SMEs, third sector bodies and supported businesses in the process and promote innovation. The section also sets out that,

\textsuperscript{47} Faculty of Advocates, Written Submission, page 3
\textsuperscript{48} Infrastructure and Capital Investment Committee, \textit{Official Report}, 6 November 2013, Col 2072
in carrying out the procurement, the authority has a duty to act with a view to securing improvement to the economic, social and environmental wellbeing of an authority’s area.

55. The importance of improving access to public procurement contracts for SMEs, the third sector and supported businesses was made clear to the Committee throughout evidence taking. Insofar as the sustainable procurement duty builds in consideration of how to facilitate their involvement in the process, the policy objectives of the Bill depend to a great extent on this duty.

56. The duty has been welcomed in evidence. Any criticism made has centred either on the duty not being onerous enough or not sufficiently extended to cover specific policy areas. For example, Professor Cuthbert stated "The bill’s intentions are good, but the sustainable procurement duty in particular is defined in such nebulous terms that it is unlikely to achieve much in itself".50

57. Two of the ten Civil Society Organisation in Scotland priorities for the Bill concerned the sustainable procurement duty. Firstly it called for a statement of intent "to embed sustainable and ethical considerations at the heart of the procurement process".51 The Scottish Government has responded that "sustainability is at the heart of Scotland’s public procurement reform programme and this is reflected through the aim of the Bill."52 Secondly, Civil Society Organisation in Scotland considers that "to provide clarity and focus for the use of the term "sustainable procurement", the Bill must include reference to the established definition of sustainable development" which is "living within environmental limits, ensuring a strong, healthy and just society, achieving a sustainable economy, promoting good governance and using sound science responsibly".53 The Scottish Government considers that, despite the concerns expressed, this "is addressed through the proposed sustainable procurement duty".54

58. Exploration of the Bill during oral evidence-taking from Scottish Council for Voluntary Organisations (SCVO), Scottish Fair Trade Forum, Stop Climate Chaos Scotland and the Equality and Human Rights Commission, and a separate panel of the Scottish Trade Unions Congress (STUC), Unison Scotland and Unite, led to the conclusion that in order for a sustainable procurement duty to be implemented, cultural change has to take place and should be led from the top.55 The BMA was so concerned about this issue that it proposed a "sustainable procurement charter" in its written submission.56

Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2013, Col 2088
Civil Society Organisation in Scotland, Combined Submission, page 1
Cabinet Secretary correspondence, 31 December 2013
Civil Society Organisation in Scotland, Combined Submission, page 1
Civil Society Organisation in Scotland, Combined Submission, page 1
Cabinet Secretary correspondence, 31 December 2013
Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 4 December 2013, col 2282, 2302, 2303
British Medical Association, Written Submission, page 1
59. SCVO raised the importance of leadership\textsuperscript{58} and Martin Rhodes of Fair Trade Scotland stated—

“Our experience of talking to and working with local authorities, universities, schools and colleges suggests that if the people who are at a high level in, for example, a local authority or a university administration and who have the political leadership to tell people what they want them to do, produce a clear and public policy statement, procurement officers will sit down and look at the guidance and gain the confidence to do what they need to do.” \textsuperscript{59}

60. Supporting this, Chris Oswald of the Equality and Human Rights Commission made the point that although “training certainly helps (…) we come back to the issue of reporting. Reporting the positive outcomes that you have had encourages other people around you to change their practices”. \textsuperscript{60}

61. The Committee considers that many of the points raised on the extent of the sustainable procurement duty are linked to the need to balance the provisions of the Bill with appropriate guidance that has a statutory weight. The Committee seeks the assurance of the Scottish Government that the statutory guidance to be published on procurement strategies and annual procurement reports will be extensive and robust enough to impose the kind of cultural change sought by stakeholders. The Committee also seeks clarification of whether guidance will be published in relation to the sustainable procurement duty itself.

62. A separate area of concern related to the use of the term “consider” at section 9(1)(a), in terms of how contracting authorities should apply the sustainable procurement duty. The Faculty of Advocates noted that “this is, in essence, a duty to consider. We suggest that this might have benefits as an aspirational provision to give encouragement to contracting authorities, but that it is unlikely to be effective in any meaningful, enforceable sense”. \textsuperscript{61}

63. The Committee weighed up this evidence with the flexibility that is required from the provision and section 8(2) of the Bill that provides that a “contracting authority must also comply with the sustainable procurement duty”. The Committee noted that section 9 is further supported by the procurement strategy requirement at section 11(5)(a)(iii) for authorities to set out how they intend to ensure that regulated procurements will comply with the duties set out in section 8, including the sustainable procurement duty. Section 14(2)(b) states that a contracting authority must in its report review whether its regulated procurements complied with its procurement strategy. Where they did not, section 14(2)(c) states that the contracting authority must provide a statement on how it intends to ensure that future regulated procurements do comply.

\textsuperscript{58} Scottish Parliament Infrastructure and Capital Investment Committee, \textit{Official Report}, 4 December 2013, Col 2282
\textsuperscript{60} Scottish Parliament Infrastructure and Capital Investment Committee, \textit{Official Report}, 4 December 2013, Col 2288
\textsuperscript{61} Faculty of Advocates, Written Submission, Page 3
64. The sustainable procurement duty also represents a requirement to consider at an early stage how a contracting authority procures goods and services, the importance of which was highlighted often to the Committee throughout evidence taking.

65. Duncan Osler, MacRoberts LLP, highlighted the findings of the “Review of Scottish public sector procurement in construction” where it “specifically mentions the importance of design-led procurement and early thinking”—

“The cost of good design thinking relative to outturn construction spend is relatively small, and the earlier the client body thinks about what it wants to procure, the social approach and the various other impacts, the more procuring officers will be helped in achieving a clean procurement. Such an approach would also comply with the provision in section 9(2) of the bill that the contracting authority should consider only “matters that are relevant” to what is being procured. That is obviously essential and a matter of good governance.”

66. The Cabinet Secretary also emphasised that “placing a duty on contracting authorities to consider how they will promote innovation before they carry out a procurement exercise is an important step forward that should not be underestimated.”

67. The Committee is reassured that the proposed duty at section 9 is supported by a level of accountability and reporting imposed on contracting authorities by sections 11 and 14 of the Bill. However, the Committee seeks a statement from the Scottish Government on how it might use procurement strategies and annual reports to assess the success of the application of the duty and ensure that the requirement only to “consider” sustainable procurement does not result in these important issues being circumvented or downgraded in importance.

68. Oral and written evidence expressed disappointment in the lack of commitment to carbon emissions targets and environmental considerations within the sustainable procurement duty. The Civil Society Organisation in Scotland’s submission stated that the Bill “should require procurement of certain quantities of goods and services meeting specified emissions standards”. Tom Ballantine of Climate Chaos Scotland called for the sustainable procurement duty to include a similar provision to that at section 31 of the Bill on recycled or recyclable goods—

“Putting a similar duty on suppliers and procurers with regard to goods that are procured and the emissions that are attributable to them would achieve

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62 http://www.scotland.gov.uk/Publications/2013/10/2688
63 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2013, Col 2101
64 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2013, Col 2101
65 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 4 December 2013, Col 2349
66 Civil Society Organisation in Scotland, Combined Submission, page 1
a similar end and would beef up the importance of meeting the environmental target.”

69. The recognition of fair trade was called for by a wide range of stakeholders including the University of Edinburgh, Nourish Scotland, the Scottish Fair Trade Forum, the STUC and the Civil Society Organisation in Scotland. The latter considered that “the Bill should empower procurers to prioritise fairly-traded products wherever these are available, especially when no locally-sourced alternatives exist”.

70. The Fair Trade Forum suggested that a requirement to include fair trade as a part of a contracting authority’s procurement strategy, as a component of sustainable procurement, would ensure it is built into procurement decisions. The Forum was concerned that the duty at section 9 is built on a contracting authority’s considerations of its own “area” and will exclude fair trade from sustainable procurement decisions.

71. The Committee was particularly interested in Scotland Excel’s written evidence where it highlighted its own sustainable procurement strategy, which includes the promotion of the living wage and fairly traded goods.

72. Correspondence from the Cabinet Secretary to the Committee in response to this point states that—

“The sustainable procurement duty should help encourage authorities to buy fairly traded goods where they are available. A range of further work needs to be undertaken to progress the uptake of fair and ethical trade. The Scottish Government has agreed to work with the Scottish Fair Trade Forum to achieve this.”

73. The sustainable procurement duty was welcomed by the SMEs that the Committee either spoke to informally or received written evidence from. The Orkney Construction Training Group summed up many views—

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67 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 4 December 2013, Col 2281
68 Civil Society Organisation in Scotland, Combined Submission, Page 3
69 Scotland Excel, Written Submission, Page 2
70 Cabinet Secretary correspondence, 31 December 2013
“Accessibility to public contracts for SME sized organisations as principal contractor (as opposed to sub-contractor) is the key to maximising the economic wellbeing within each respective county across Scotland. We are the organisations who employ local people; we are the organisations who provide opportunity for people at a local level; we are the organisations who provide apprenticeship and other work based training opportunities to local people, and so it goes without saying that if our size of organisation can be enabled to access contract work then the economic wellbeing of communities throughout Scotland will be substantially improved and sustained.”

74. The FSB stated—

“Many public sector bodies profess their support for sustainable procurement including involvement of SMEs. In our view, many organisations still have some considerable way to go in moving from high-level, warm words and showcase projects to embedding these priorities in routine procurement practices. The sustainable procurement duty, with strategy and reporting on how this is being achieved, could help buyers focus more clearly on their priorities and how these will be achieved.”

75. The Aberlour Childcare Trust (and others during informal evidence) mentioned the incidence of third sector organisations being required to return to contracting authorities “savings generated in the delivery” of a contract. The Committee raised this point with the Cabinet Secretary and was assured by her response and that of supporting officials that this contravened current guidance and that the Bill’s statutory guidance would help to prevent similar processes in future.

76. Section 9(3) defines an SME as a business with not more than 250 employees. Some evidence suggests that this does not address the different needs of micro-businesses. The Professional Publishers Association Scotland considers that—

“An organisation with 250 employees will have boundless resources that an organisation with 10-40 employees could not possibly hope for. This statement therefore only pays lip-service to what the majority consider as an SME and could be construed as anti-competitive.”

77. The Committee considers that there is a possible case for a definition of micro-business to be included in the Bill and reference to micro-business to be added to section 9. This would help to ensure that they are incorporated into procurement decisions and the procurement strategies and annual reports of contracting authorities. The FSB has also suggested to the Committee that annual reports should contain a breakdown of spending with micro, small, medium and large businesses. The Committee asks the Scottish

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71 Orkney Construction Training Group, Written Submission, Page 2
72 FSB Scotland Written Submission, Page 4
73 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 11 December 2013, Col 2344
74 Professional Publishers Association Scotland, Written Submission, Page 1
75 FSB Scotland Written Submission, Page 5
Government to comment on these proposals in advance of Stage 2 consideration.

Section 10 Supported businesses

78. This section was inserted to make an exception to the requirement at section 8(1) to treat all bidders equally and without discrimination. It allows a bidder who does not meet the definition of a supported business to be precluded from participating in a competition on that basis alone. The Explanatory Notes clarify that this does not mean that a contract can be awarded directly to a supported business without competition but rather that the competition will be amongst supported businesses only.

79. The Scottish Government considers that, “This opportunity allows us to refresh guidance and draw to purchasers’ attention opportunities such as the use of supported businesses.”

80. The Committee heard in evidence a range of concerns in relation to the circumstances of supported businesses. Duncan Skinner of Glencraft informed the Committee that its contracts would not come within the parameters of the Bill because they generally fall below the £50,000 threshold. However, he considered that the products that Glencraft supply would be “wrapped up in a single procurement from a larger company, and companies such as mine do not get the chance to participate in those larger contracts”. One solution might be that “there could be a percentage of the value of any single one-stop shop procurement contract that has to deliver not only community benefits but a certain amount of business with social enterprises in the bid”.

81. Written evidence from the STUC suggested that the Bill should require every public authority to have at least one contract with a supported business. The Committee was made aware that this was not supported in the consultation on the Bill. However, the concern for the Committee is whether the provision at section 10 will ensure that supported businesses are given consideration in procurement exercises and whether it will assist them to compete.

82. The Committee understands that the Scottish Government has used its supported business framework to try to raise awareness of their importance. The Cabinet Secretary also advised the Committee that the definition of supported businesses may be widened by the future directive. It is, however, clear that considerations should be built early into the procurement process in

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76 Procurement Reform (Scotland) Bill, Explanatory Notes, Page 5, Paragraph 22
77 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2013 Col 2086
79 STUC, Written Submission, page 3
order for opportunities to engage with supported businesses to be prioritised. The Committee therefore considers that the Bill should place a requirement on contracting authorities to include in their annual reports how they have engaged with supported businesses and used the supported businesses framework within each reporting year.

83. The Committee also invites the Scottish Government to respond to the proposal that a social enterprises/supported businesses element should be included in the Bill’s community benefit requirements.

Section 11 Procurement strategy and Section 14 Annual procurement reports

84. The Committee received a considerable level of oral and written evidence to support the Bill’s provision for certain contracting authorities to produce a procurement strategy.\(^{83}\) It was supported for a number of reasons, but primarily for the opportunity it offers to improve accountability, transparency and the measurement of performance.

85. Specific areas where the procurement strategy would support the Bill’s objectives have been addressed at relevant sections of this report. In addition, during informal sessions SMEs and third sector organisations highlighted the importance of advance notice of contracts in order that they had the capacity to respond and this was supported by Social Enterprise Scotland.\(^{84}\) The Institution of Civil Engineers (ICE) also stated that it saw "merit in the development of procurement strategies and would argue that there needs to be greater visibility of anticipated workloads and procurement needs in order for industry to prepare appropriately and efficiently." \(^{85}\)

86. The Committee supports the provision on procurement strategies and asks the Scottish Government to clarify how they could be used to provide, in general terms, advance notice of contracts.

87. As drafted, the Bill’s procurement strategy provision underpins the sustainable procurement duty and the community benefit requirement. The Committee also notes the duty at section 13 for contracting authorities to comply with the strategy.

88. In addition to producing a strategy, a contracting authority must report on its procurement activity, including how it has met the targets in its strategy. The Committee heard in evidence the importance of monitoring procurement activity, and the production of reports is clearly a factor in being able to achieve improvements. It is also important that, should a strategy of a contracting authority itself fall below an acceptable level, the situation is addressed.

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\(^{85}\) ICE Written Submission, Page 2
89. In its scrutiny, the Committee has balanced the reservations it heard regarding the extent of the Bill’s provisions in relation to sustainable procurement and community benefit with the requirement to produce a procurement strategy and report.

90. The Committee noted Dr Jim Cuthbert’s comment that—

“The strategies are going to be published, but we cannot really look to the public to do a detailed scrutiny of them that will make sure that they hang together and are meaningful. The public sector will have to put substantial resource into picking up those strategies on some sort of a rolling programme and making sure that they go beyond just being mere tick-box exercises, or they will end up being largely meaningless.”

91. The Accounts Commission and Auditor General for Scotland stated in written evidence that they “will take the proposals in the Bill into account in framing Audit Scotland’s future audit work. It is likely that, in due course, auditors of individual public bodies will wish to consider, and may report on, the readiness of public bodies to respond to new requirements and associated risks”.

92. The Committee considers that the success of the Bill’s provisions on sustainable procurement and community benefit lie to a considerable extent with contracting authority investment in the production of a procurement strategy and annual procurement report which place emphasis on these matters. The Committee seeks the Scottish Government’s assurance that both the strategies and reports will be monitored effectively and that any deficiencies will be addressed.

93. The Committee also invites the Scottish Government for its comments on the role of the Accounts Commission and the Auditor General for Scotland in monitoring the performance of contracting authorities via their procurement strategies and procurement annual reports.

94. The Committee welcomes the provision at section 16(4) that “contracting authorities must have regard to any guidance issued under this section” and requests that any available detail on the nature of this guidance be provided to the Committee as soon as possible.

**PART 3 SPECIFIC DUTIES**

**Section 18 Publication of contract notices and award notices**

95. The Bill provides that contracting authorities must publish regulated contracts on the Public Contracts website. This duty to use the single portal was welcomed extensively. For example, the Faculty of Advocates felt that it would—

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87 Accounts Commission and Auditor General for Scotland, Written Submission, paragraph 5
“ensure consistency of practice and assist in making the procurement process more transparent”.  

96. The Committee also heard similar support for the use of a single portal during informal discussions with the third sector and SMEs. The Committee noted that the Policy Memorandum states “despite the success to date of the PCS (Public Contracts Scotland) and the high number of suppliers that have registered with the service, there are still large disparities in the use of PCS across contracting authorities”. It therefore considered the provision essential to improve access and transparency for a number of suppliers across Scotland.

97. **The Committee considers this provision essential to improving access and transparency and welcomes the benefits it will bring for a range of organisations across Scotland.**

 Sections 19-21 Community benefit requirements etc

98. The Bill defines a community benefit requirement as a contractual requirement imposed by a contracting authority either relating to training and recruitment and the availability of sub-contracting opportunities or which is otherwise intended to improve the economic, social or environmental wellbeing of the authority’s area in a way additional to the main purpose of the contract in which the requirement is included.

99. Where the estimated value of the contract is greater than £4m, section 20 requires that, before carrying out a procurement, the authority must consider whether to impose community benefit requirements. The contract notice must include a summary of the community benefit requirements (and a statement of benefits it considers will be derived from them) or, where it does not intend to include any such requirements, a statement of reasons for not including a requirement. The figure of £4m can be amended by order made by Scottish Ministers.

100. The community benefit requirements were broadly welcomed in evidence by business organisations, the third sector, public authorities and individuals. The Equality and Human Rights Commission “views community benefit requirements as having an important role to play in achieving sustainable outcomes for equality groups”.

101. Scottish Government officials explained that the threshold of £4m was decided upon to reflect the EU Works threshold and those who gave evidence or responded to the Committee were generally content with this figure although there was some opposition. For example, Dave Watson of Unison felt that the £4m threshold was too high considering that “there are other large contracts for which we would want to lever in community benefits, particularly for the local

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88 Faculty of Advocates, Written Submission, page 3
89 Equality and Human Rights Commission, written submission, page 2, paragraph 3
90 Scottish Parliament Infrastructure and Capital Investment Committee, *Official Report, 6 November/11 December 2013*
community”. Other concerns were expressed in relation to the approach taken to smaller contracts. Chris Oswald stated—

“I am slightly anxious about lighter-touch approaches below certain thresholds because we need to focus not on the value of the contract but on its utility and purpose.”

102. This was in line with evidence from Aberlour Childcare Trust that community benefit should be triggered by contract type instead of value.

103. The Cabinet Secretary clarified the Scottish Government’s policy position when she stated—

“We must take great care in making it clear that the bill is not saying that there should not be community benefit clauses in contracts of less than £4 million; it is simply mandating for contracts at or above that level. We should encourage appropriate community benefit clauses in all public contracts where those are proportionate and appropriate.”

104. The Committee raised with the Cabinet Secretary the idea that community benefit requirements could be determined on the basis of the nature of the contract rather than its value. She responded that it was possible to take that approach but that in her view the Scottish Government—

“might end up having fewer contracts covered than would be covered by putting a financial threshold in place. There are arguments for and against all the approaches that we could take to mandating a particular approach to community benefits. We have opted for a particular financial threshold and I have given you the reasons for that. However, I stress that that does not mean that contracts whose value is below that threshold should never have community benefit clauses in them.

“There are different ways that we could go with the nature of the contract. Some witnesses have suggested that the threshold could be set at contracts that are a certain proportion of the public authority’s overall budget, but I am not convinced that that would be a sensible approach to take.”

105. The Committee recognises that the community benefit requirement is mandatory for contracts above the £4m threshold but seeks information from the Scottish Government in relation to how the inclusion of a community benefit requirement will be encouraged in contracts of a lower value.

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93 Aberlour Childcare Trust, Written Submission, page 2
106. The Committee is reassured by the power at section 20(5) which allows the Scottish Government to change the community benefit requirements threshold amount by order. The Committee notes the Scottish Government correspondence to the Delegated Powers and Law Reform Committee in relation to this power in which it clarifies that “changes might be more substantive than simple adjustments relating to changes in the value of money over time. Experience of application of the requirements on community benefits might mean that more substantive changes are required. It is not anticipated that the thresholds will need to be amended frequently. However, given that substantive changes to the threshold could have significant consequences, the Scottish Government believes it is appropriate for exercise of the power to be subject to the affirmative procedure.”

107. **The Committee supports the section 20(5) provision and its potential to react to the experience of the application of the community benefit requirements.**

108. The Committee also heard concerns that the community benefit requirements provision would stimulate a formulaic response that would not allow for proper assessment of community benefit. Susan Love of the FSB stated—

“Our worry is that if CBC’s start to be slapped on every project the buying bodies will take less time over constructing them and will end up simply using a formula and saying, “We will have 10 of that kind of apprentice, 10 of that kind and 10 of that kind.

“The difficulty with that is that, if there is no flexibility around the outcome that an organisation is looking for from the CBC, it will put up a barrier to a lot of local small businesses that can deliver the benefit that it is looking for. They may have a good record on local training and use local apprentices, but they might not be able to take on 10 of a specific kind of apprentice.”

109. The FSB and others, including those who participated in the Committee’s informal discussions, considered that it was essential to monitor the contract post-award to establish what had been delivered under the community benefit requirement. For example, as the FSB put it—

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“Is a larger business hiring 10 apprentices who are then sacked at the end of the 18-month project a better outcome than having a number of small local businesses involved that employ one or two local apprentices each who will still have a job at the end of their four-year apprenticeship?”  

110. Duncan Osler highlighted in evidence that the procurement strategy “specifically includes a component on community benefit, but the report does not say that it must be reported on subsequently”.

111. The Construction Industry Training Board Scotland considers that in addition to including the expected benefits of the community benefit requirements in the contract award notice “reporting of benefits should also be a condition of the contract and it is unclear if contracting authorities will be required to do this.”

112. The Committee considers that section 14(2) of the Bill on annual procurement reports must specify that contracts that include community benefit requirements should be reported upon and detail of the community benefits achieved should be provided. The Committee considers that monitoring of this type of contract is of substantial importance that is unlikely to lessen and, as such, a provision requiring this to be undertaken should be included on the face of the Bill.

113. Section 21 of the Bill gives the Scottish Ministers a power to issue guidance on the use of community benefit requirements. It indicates areas which may be covered, including consultation, information to be contained in the contract and award notices and the circumstances in which community benefit requirements would or would not be appropriate. Section 21(3) provides that contracting authorities must have regard to any guidance issued.

114. Susan Torrance of the SFHA highlighted that—

“Providing apprenticeships and employment to local folk is at the core of what our members do. However, the confidence to do that and understand how that engages with EU treaty obligations is the biggest concern. Our members saw the bill as an opportunity to specify things in greater detail and give greater clarity and confidence so that they could then incorporate community benefit clauses, because that is what they would like to do.”

115. CITB Scotland—

“welcomes the inclusion of community benefit requirements relating to training and recruitment within public sector contracts. The Bill will make it a requirement for contracting authorities to consider the inclusion of community benefit provisions for contracts over £4m. Contracting
authorities will need to state reasons for not including community benefits as part of the procurement. CITB would argue that the Scottish Government should use this legislation to provide strong encouragement to the public sector to provide training opportunities in all contracts over the value threshold if appropriate.”

116. The Committee has also heard of a need for flexibility, however, with George Eckton of COSLA stating—

“I think that council leaders hugely welcome community benefit clauses. However, I think that their main concern was that the wording of the bill should not onerously prescribe what they do and that they should be able to reflect local circumstances.”

117. The Committee understands the balance which is intended to be struck between legislation and guidance. However, as drafted, the success of the community benefit requirements rests to a great extent with the guidance and the Committee therefore requests further information on this guidance as soon as possible.

Section 22-24 Exclusion of economic operators and selection of tenderers

118. Section 22 sets out a regulation-making power allowing Scottish Ministers to require contracting authorities to exclude economic operators from a regulated procurement process where convicted of a criminal offence. It allows regulations to cover matters such as evidence and exceptions.

119. Section 23 provides a power for the Scottish Ministers to make regulations about the selection of economic operators to take part in a procurement process. It allows these regulations to cover minimum standard requirements (such as financial standing, technical ability or other characteristic), criteria which can be used to exclude or include tenderers and the procedure to be followed when determining whether or not to include an economic operator.

120. Section 23(3) sets out examples of criteria that may be specified in the regulations, including conviction of an offence, failure to pay tax, an act of misconduct, distorting competition, lack of a necessary licence, non-membership of regulatory body where required, financial difficulty such as insolvency, or administration and where performance in relation to another regulated procurement was not satisfactory.

121. In addition to these regulation-making powers, the Bill gives the power to Scottish Ministers to issue guidance about the selection of economic operators which contracting authorities must have regard to. The Scottish Government considers that it may address workforce related issues such as those raised by

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103 CITB, Written Submission, Page1
104 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 13 November 2013, Col 2151
the Civil Society Organisation in Scotland on employment standards and the living wage via this guidance.\(^{105}\)

122. The Committee received considerable evidence stating that the Bill should ensure that public contracts must include a requirement to pay the living wage. The STUC was concerned that the living wage “is not mentioned in the bill or in any of the supporting documents.”\(^{106}\)

123. European law was a significant component of the Committee’s consideration of this issue. Correspondence from the European Commission to the Scottish Government\(^ {107}\) indicates that such a provision would be likely to conflict with the Posting of Workers Directive in that a living wage set at a higher level than the UK’s minimum wage is unlikely to meet the requirements of the directive. The Scottish Government takes the view that it is unable to include a mandatory requirement in the Bill on the living wage due to the position of the Commission. However, the Cabinet Secretary stated in correspondence—

> “Whilst we cannot make payment of the living wage a requirement in contracts, we do want to encourage good practice by employers and have looked at ways in which we can take a range of workforce related matters into account in the procurement process. So the Bill proposes that the Scottish Government should have the power to issue statutory guidance on workforce matters in procurement, including remuneration.”\(^ {108}\)

124. Dave Watson of Unison considered that—

> “The key legal issue is that for the living wage to be lawful in procurement it has to be linked to the performance of the contract.”\(^ {109}\)

125. He further developed this point in evidence stating that “it will all boil down to a potential challenge under the posted workers directive”.\(^ {110}\) He concluded that “If you really want to bottom out the theoretical legal challenges, our counsel opinion has shown how that can be achieved through a small amendment to the bill. Frankly, though, the chances of a legal challenge are absolutely minimal.”\(^ {111}\)

126. The Committee noted the criticism of the approach taken by the Scottish Government from a number of witnesses, including how the question on the living wage was asked of the European Commission. Whilst this evidence has highlighted serious considerations concerning EU law, the Committee noted the

\(^{105}\) Cabinet Secretary Correspondence, 31 December 2013  
\(^{107}\) European Commission correspondence, Commissioner Michel Barnier, 7 May 2012, Page 2, Paragraph 2  
\(^{108}\) Cabinet Secretary Correspondence, 31 December 2013  
current position of the Commission “that requirements regarding the level of wage payable to posted workers may not go beyond the mandatory rules for minimum protection provided for by the [Posting of Workers] Directive”\textsuperscript{112} and that consequently “A “living wage” set at a higher level than the UK’s minimum wage is unlikely to meet this requirement”\textsuperscript{113}.

The Committee notes the Scottish Government’s position on the living wage. However, given the extent to which the encouragement of its payment will rest within the guidance to be published under section 24 of the Bill, the Committee requests further information on how it intends to address this matter in draft guidance.

Blacklisting

128. Also relating to the section 23 and 24 provisions, the Committee took evidence on the issue of blacklisting and how the Bill might assist to eliminate the practice. Scottish Government officials explained that the provisions on the exclusion of bidders and resulting guidance offered a clear opportunity to address this issue. However, the Committee was concerned that the unions and others, such as the Civil Society Organisation in Scotland, were not fully reassured that the Bill would strengthen newly-published guidance on blacklisting.

129. The Cabinet Secretary extended the assurance that—

“The on-going dialogue with the trade unions is important. We want to continue to talk to them to make it absolutely clear that anything that we can do to banish blacklisting will be done. The bill and the regulations that can be made under it will make it possible to exclude a company from public contracts when there is evidence that it has been engaged in blacklisting and has not taken appropriate remedial action to put its house in order.”\textsuperscript{114}

130. The Committee notes that the approach to be taken by the Bill to eliminate the practice of blacklisting via regulations will support the existing guidance and welcomes the Scottish Government’s ongoing dialogue with the trade unions on this matter.

Tax avoidance/tax evasion

131. Section 23(3)(b)(i) of the Bill indicates that the regulations may include provision that, where an economic operator has failed to comply with an obligation to pay tax, the operator may not take part in a procurement exercise. Evidence from the Civil Society Organisation in Scotland, Unison and the

\textsuperscript{112} European Commission correspondence, Commissioner Michel Barnier, 7 May 2012, Page 2, Paragraph 2
\textsuperscript{113} European Commission correspondence, Commissioner Michel Barnier, 7 May 2012, Page 2, Paragraph 2
Ethical Consumer Research Association puts forward the assertion that the Bill should take this a step further and address “tax dodging and tax avoidance”.  

132. Dave Watson of Unison has suggested that the Bill might be used to address aggressive tax avoidance rather than simply tax evasion. The Committee asks the Scottish Government to provide information on whether it has considered adding provisions at section 23 that might address this issue.

Section 27 Giving of reasons to unsuccessful applicants.

133. This section imposes a duty on the contracting authority to inform economic operators of the reason for their exclusion from a procurement process. It also imposes a duty to inform unsuccessful tenderers of its decision, setting out the details of the successful tenderer, the criteria used to award the contract and the scoring against the criteria of the successful and unsuccessful tenderers.

134. The Faculty of Advocates considers that—

“The requirement for a contracting authority to notify disappointed tenderers of the outcome of the procurement exercise will [also] ensure greater transparency.”

135. ICE considers that it “should be good for future business development opportunities”.

136. The Committee notes that section 27 will encourage transparency and supports this provision as drafted.

Section 31 Amendment of Climate Change (Scotland) Act 2009

137. Section 31 of the Bill inserts a new section 82A in the Climate Change (Scotland) Act 2009. That new section provides a power for the Scottish Ministers to require specified contracting authorities to ensure that a certain proportion of things procured comprise of or include recycled material or material that is designed to be recycled.

138. The Scottish Government believes that the Bill provides an opportunity to stimulate demand for certain products that can be, are, (or are designed to be) repaired, reused, refurbished, remanufactured or recycled. It is anticipated that the Bill would not only stimulate demand for these products, but would also drive innovation and supply, and thereby benefit Scottish companies and the Scottish economy.
139. The new section 82A would complement section 82 which states that the Scottish Ministers may, by regulations, require that things procured or constructed comprise of or include or contain a certain proportion of recyclate. The Bill would create a power to make regulations to introduce similar requirements in relation to remanufactured or reused goods or goods intended for repair, reuse, refurbishment or remanufacture.121

140. In both written and oral evidence, stakeholders were generally welcoming of the amendment to the 2009 Act, and saw it as a positive step.

141. However some stakeholders expressed reservations, which tended to fall into two categories. Some organisations felt that section 31 of the Bill doesn’t go far enough, and misses opportunities to link in more strongly with the 2009 Act and to play a part in meeting the Scottish Government’s own emissions targets. Other organisations raised concerns that the amendment may have a detrimental impact upon flexibility and project costs, and that implementation should be undertaken in a way which is mindful of the limits of individual contracts.

142. The Civil Society Organisation in Scotland submission argued that public procurement processes should be tied into meeting the 2009 Act targets as an outcome of the Procurement Reform (Scotland) Bill.

In its written submission, the RSPB expressed concerns around the compatibility of the Bill with public duties under the 2009 Act, noting that the Act already sets the overall goals for public bodies to reduce greenhouse gas emissions and adapt to climate change, and emphasised that that the Bill must –

“set duties, goals and objectives which fit within and enhance the delivery of the Public Bodies Climate Change Duty, whilst reducing Scotland’s overall environmental footprint.”122

143. The Cabinet Secretary considered that--

“It is also important to try to avoid undue duplication, which might add to the confusion and complexity. The Climate Change (Scotland) Act 2009, for example, already places public bodies under a number of sustainability duties, and it would not necessarily be particularly helpful to replicate those in the Procurement Reform (Scotland) Bill.”123

144. This view was subsequently repeated in correspondence to the Committee from the Cabinet Secretary.

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122 Royal Society for the Protection of Birds. Written submission, page 5, paragraph 2.
Public sector procurement of ‘green products’

145. Stuart Greig, Head of Zero Waste Policy at the Scottish Government, considered that the market for ‘green products’ in Scotland requires development, especially in light of emerging megatrends, such as resource scarcity and climate change.\(^{124}\)

146. The Committee suggested that the potential environmental impact of the Bill and what it could do to stimulate growth was not yet known. Mr Greig responded that—

“The bill will provide the enabling power for us to consider what the regulations would look like and where the key market opportunities are. Once we have that information, we can have a full business and regulatory impact assessment and understand where the key market opportunities are. The bill gives us a roadmap to start to move into the area.”\(^{125}\)

147. The Cabinet Secretary explained that—

“Although the power in section 31 is a really important power to have in the bill we need to ensure that we use it properly and that we do all the lead-up work in close discussion and liaison with industry and the public sector. We will continue to do a lot of work on that, and I will be happy to hear the committee’s views and involve the committee in that work as we progress.”\(^{126}\)

148. In written evidence, the Sustainable Scotland Network raised concerns that the focus on recycling and recyclables does not ‘move anything on’, and may in fact create new restrictions. It states that—

“…there is a danger that the Bill inadvertently moves us backwards due to its focus on recycling/recycled products, when we should be encouraging the public sector to move up the waste hierarchy, particularly in the current economic climate, i.e. Reduce demand, Reuse what is purchased, Recycle what cannot be reused, Recover energy from what cannot be recycled. Scotland is a Circular Economy 100 member and the Bill should be supporting a transition to a low carbon, circular economy, rather than continuing to focus on recycling.”\(^{127}\)

149. Sylvia Gray of the Sustainable Scotland Network reiterated this point during oral evidence and a number of witnesses also advocated the circular economy approach, and the minimisation of waste. Karen Bowman of the University of


\(^{127}\) Sustainable Scotland Network. Written submission, page 5, paragraph 2.
Edinburgh illustrated the University’s approach to reuse and waste reduction, and advocated the use of the UN’s Marrakech Approach.\footnote{Edinburgh illustrated the University’s approach to reuse and waste reduction, and advocated the use of the UN’s Marrakech Approach.}{128}

150. Several organisations suggested in written evidence that the Bill should require suppliers to the public sector to publish annual assessments of carbon emissions as a result of their business and provide information on the ‘cradle to grave’ carbon impact of the goods or services supplied. They also suggested that a proportion of procured goods and/or services should conform to ‘specified emissions standards’.\footnote{Several organisations suggested in written evidence that the Bill should require suppliers to the public sector to publish annual assessments of carbon emissions as a result of their business and provide information on the ‘cradle to grave’ carbon impact of the goods or services supplied.}{129}

151. The Committee heard from Tom Ballantine of Stop Climate Chaos Scotland, who made similar points during evidence. He also added that—

“much will come down to the framing of the guidance, the training that is to be offered and procurers being confident that, if they do the environmentally good thing, no one will come down on them like a ton of bricks telling them that they should have looked at the cost first.”\footnote{The Committee heard from Tom Ballantine of Stop Climate Chaos Scotland, who made similar points during evidence. He also added that—\``much will come down to the framing of the guidance, the training that is to be offered and procurers being confident that, if they do the environmentally good thing, no one will come down on them like a ton of bricks telling them that they should have looked at the cost first.\''}{130}

152. However, those who gave written and oral evidence were keen to emphasise that regulations should not be too prescriptive, and should consider the life-time impact of goods and services, as per the Marrakech Approach, and should be flexible to suit the scale of specific projects.

153. The Committee welcomes the commitment by the Scottish Government to pursue opportunities to drive greener public procurement, and to expand the market for recycled and recyclable materials and, therefore, supports the provision as drafted.

154. Given that research is ongoing and comparatively little information is presently available regarding the potential impacts of the Bill, the Committee welcomes the Cabinet Secretary’s undertaking to involve the Committee in this work as it progresses.

PART 4 – REMEDIES

155. This part of the Bill provides a supplier with a right of recourse to the courts where it believes it has suffered or risks suffering loss or damage as a consequence of an action or non-action or a decision by a contracting authority as part of a regulated procurement.

156. Evidence received welcomed the remedies, with Duncan Osler stating that—

\footnote{Civil Society Organisation in Scotland, Written submission, page 1 – 2, paragraph 6.}{129}

\footnote{Scottish Parliament Infrastructure and Capital Investment Committee. \textit{Official Report, 4 December 2013, Col 2281}.}{130}
“Without the provisions, the regime could be disregarded with relative impunity and contractors would not necessarily have confidence in it.”131

157. However, he also articulated the concerns that the Committee heard during its informal evidence-taking when he explained that “it is worth noting that, even with a fully regulated procurement, it is an expensive business for bidders to undertake litigation, as it is a difficult and problematic thing to do”.132 This view was repeated in oral evidence from the FSB and the Scottish Chambers of Commerce133.

158. The Committee received written and oral evidence to support the establishment of a procurement ombudsman and/or a tribunal rather than the Bill simply relying on right of recourse to the courts.

159. Colin Sinclair of NHS National Procurement highlighted that the option for SMEs to use court action if they are unhappy might put them off “which would inhibit their ability to get involved. What we had hoped for was a kind of ombudsman approach, and support for SMEs to get better access to contracts and to be able to win contracts”.134

160. The British Healthcare Trades Association extended the argument, stating—

“we would welcome the Committee investigating whether there is a potential role for a Scottish Procurement Ombudsman in respect of monitoring strategies and annual reports and with regard to complaints.”135

161. Maclay, Murray and Spens stated—

“We believe there are strong arguments to support the creation of a specialist procurement tribunal which could hear complaints from aggrieved tenderers quickly and, compared to the civil courts, much more cheaply. Under the current system, the costs involved in challenging a procurement procedure in court is often prohibitive.”136

162. The Specialist Engineering Contractors’ (SEC) Group Scotland considered that—

“traditional procurement mindsets could hinder implementation of this legislation; therefore there is a need to have in place a “driver” to monitor and challenge non-complying practices on an on-going basis; many “economic operators” will be small businesses; they will not have the

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131 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2013, Col 2111
132 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 6 November 2013, Col 2111
133 Scottish Parliament Infrastructure and Capital Investment Committee, Official Report, 27 November 2013, Col 2232,2233
135 British Healthcare Trades Association, Written Submission, Page 2
136 Maclay, Murray and Spens, Written Submission, Paragraph 8.3
financial means to bring a court claim which will then enable an errant authority to continue with its non-compliance."\textsuperscript{137}

“We are strongly of the view that the Bill should establish an Office of Public Procurement Regulator (or Ombudsman) to help in enforcing the Bill’s provisions.”\textsuperscript{138}

163. The Cabinet Secretary made clear in evidence that the Scottish Government has not ruled out the establishment of an ombudsman. The Government will consider the issue when the new Directive is adopted and the 2012 Regulations are replaced. The Government recognises that other EU member states have established procurement tribunals as part of their implementation of directive remedies and the Government will take into account evidence heard on the Bill when considering the matter further.\textsuperscript{139}

164. The Committee acknowledges and supports the establishment of a remedies regime under the Bill that is proportionate to the lower thresholds. However, given the evidence heard in relation to remedies, the Committee also supports the establishment of a tribunal or ombudsman and asks the Scottish Government to keep it informed of developments in this policy area.

**Freedom of Information**

165. The Committee’s attention was drawn to the possibility of Freedom of Information issues arising in relation to the award of public contracts to be dealt with by the provisions of the Bill.

166. However, the Cabinet Secretary was unequivocal in her response to the Committee’s questioning, stating that—

“If there is a case for further extension of the regime to companies that contract with public authorities, the way to provide for that is through the provisions of the FOI legislation. It would be inappropriate and clumsy to try to do it through the Procurement Reform (Scotland) Bill when a mechanism for it exists elsewhere.”\textsuperscript{140}

167. Evidence from the Scottish Information Commissioner (“the Commissioner”) highlighted her recommendation that “consideration is given to bringing these provisions (in sections 28 and 29) more into line with the existing provisions in FOISA [Freedom of Information (Scotland) Act 2002] and the EIRs [Environmental Information (Scotland) Regulations 2004].” The Committee raised this point with the Cabinet Secretary who stated that she was happy to discuss these concerns with the Commissioner. The Cabinet Secretary added

\textsuperscript{137}SEC Group Scotland, Written Submission, Paragraph 13
\textsuperscript{138}SEC Group Scotland, Written Submission, Paragraph 13
that “If there are any amendments that we can make at the next stage of the bill to address those concerns, we will be happy to consider them.”

168. The Committee accepts the argument put forward by the Cabinet Secretary in relation to general provision on FOI matters and welcomes the Cabinet Secretary’s undertaking to communicate with the Scottish Information Commissioner on the matters raised in relation to the drafting of sections 28 and 29 of the Bill. The Committee seeks information on these discussions before the conclusion of the Parliamentary scrutiny of the Bill.

Skills/training and cultural change

169. The Committee heard how training of procurement professionals is seen as the key to bringing the provisions of the Bill into force and that the provisions will not be used effectively unless procurement professionals are given greater support. The Committee notes that reference is made to training in the Bill’s Policy Memorandum.

170. The Accounts Commission and Auditor General for Scotland stated—

“Public bodies need to have professionally qualified people, effective systems and adequate resources to provide the procurement capability to achieve good results.”

171. They added that—

“Public bodies will be required to demonstrate how their procurement will promote or improve the economic, social and environmental wellbeing of their areas. This and other aspects will require fresh thinking and may require training in new approaches to managing procurement.”

172. The British Healthcare Trades Association emphasised the need for cultural as well as legislative change, asserting that “Generally we would like to see an obligation on public bodies to make sure their procurements staff are properly trained.”

173. Karen Bowman, University of Edinburgh, felt that the Bill “has missed an opportunity to place an obligation on public bodies to ensure that their procurement people are trained”. European legislation was important in this context, in that evidence suggested that a fear of breaching European rules lead to over-caution in procurement practices.
174. The Committee heard that there are different standards in procurement practices across Scotland and the Committee supports the intention of the Bill to improve consistency between contracting authorities. It is important to the stakeholders engaged in the Committee’s consideration of the Bill that the opportunity to effect change in procurement is not held back by lack of training and expertise. The Committee believes that through the implementation of the Bill and its guidance a great deal could be achieved. However, given the crucial nature of skills development to the success of the Bill’s provisions, the Committee invites the Scottish Government to consider and respond to the recommendation that the training and development of staff is included as a requirement in the procurement strategy and annual procurement report guidance provision at section 16 of the Bill.

175. The Committee also seeks clarification in respect of awareness-raising and support, particularly for third sector organisations and SMEs to assist them to bid for public contracts.

EXEMPTIONS SOUGHT TO BILL PROVISIONS

Health and social care services

176. The Committee was alerted to issues relating to the procurement of health and social Care services by correspondence from the Health and Sport Committee Convener\(^\text{146}\), written evidence from the Coalition of Care and Support Providers Scotland (CCPS)\(^\text{147}\), a memorandum from the Local Government and Regeneration Committee (at Annex E) and the Finance Committee’s correspondence on the Bill (at Annex E).

177. The Health and Sport Committee through a range of recent inquiries has received and heard evidence from a range of stakeholders on problems they had experienced in relation to health and social care procurement. The Convener to the Committee assisted the ICI Committee’s scrutiny of the Bill by attending its evidence session with the Cabinet Secretary on 11 December 2013.

178. The ICI Committee took oral evidence from the CCPS on 27 November 2013 in order that it might examine thoroughly the implications of the Bill for the health and social care sector.

179. Written and oral evidence from CCPS established that it wishes to see the Bill—

- exempting contracts for care and support from any standard requirement to advertise and compete (through sections 4 and 8);
- introducing both a sustainable procurement duty and a requirement on contracting authorities to produce a procurement strategy (both provisions to be suitably amended to reflect specific concerns relating to care and support) (sections 9 and 11); and

\(^{146}\) Health and Sport Committee correspondence, 5 November 2013
\(^{147}\) CCPS Written Submission
making provision for guidance to be issued on matters relating to the workforce performing public contracts (section 24).

180. Submissions from Aberlour Childcare Trust, Marie Curie Cancer Care, SAMH and unions (and others) supported the exemption of health and social care contracts from the Bill. Marie Curie Cancer Care cited its—

“extensive experience to show that procurement is not always the most desirable route. Partnership approaches to the delivery of services have proven to result in positive outcomes for individuals. As such we would hope that where other models have been proven to work that they are allowed to continue.”

181. It supported the CCPS view that “public bodies should be required to consider the best mechanism for procuring care, and always engage with the service users to ensure their needs are being met”. The Committee also heard the importance of local and community knowledge and expertise in commissioning services.

182. In response to Committee questioning the Cabinet Secretary clarified that—

“there are special issues that mean that it would not be appropriate to require competitive tendering for health and social care contracts. However, when an authority chooses to hold a competition for such services, it is important that some provisions in the bill would continue to apply. It is also important that an authority’s procurement strategy—[...]—and its contracts register cover health and social care contracts.”

183. Subsequent correspondence from the Cabinet Secretary enforces this viewpoint.

184. The Cabinet Secretary has informed the Committee that the Scottish Government intends to lodge an amendment to the Bill at Stage 2 to exempt health and social care contracts from the provisions in the Bill that relate to advertising and competition, whilst at the same time ensuring that, where possible, the provisions in the Bill continue to apply. The Committee welcomes this commitment.

185. The Committee also asks the Scottish Government to consider how it might address the issues raised by CCPS and others relating to consultation and the continuity and standard of care, possibly via the procurement strategy provisions at section 11(5) of the Bill.

186. The Committee is aware that the upcoming directives are expected to introduce a light-touch regime for social care and health services and

148 Marie Curie Cancer Care, Written Evidence, paragraph 8
149 Marie Curie Cancer Care/CCPS Written Evidence
151 Cabinet Secretary correspondence, 31 December 2013
asks the Government for clarification on how its legislative approach to these services is expected to sit with EU law.

Higher education/research

187. The Committee heard evidence from Advanced Procurement for Universities and Colleges (APUC) and the University of Edinburgh that the Bill or implementing regulations should “clearly exclude contracts for goods, services or small works for the purposes of academic research to avoid unintended consequences, for the University’s staff or its research income, and for all Scottish universities, as stated by APUC, to avoid having to meet new compliance risks at much lower values than at competitor HEIs in the rest of the UK and in the EU.” This was described to the Committee as a risk to growth in research funding and a constraint on innovation.

188. There was also a difficulty in separating out procurement for research from that for teaching where many institutions share goods/services and works between the two. Evidence indicated that exemptions should apply to HEIs and that the new directives could offer more flexible options for the sector.

189. The Committee has received assurances from the Cabinet Secretary that the particular circumstances faced by universities and colleges are being addressed in current discussions and the Committee welcomes this commitment. The Committee asks for an update on any impact on the Bill’s provisions in advance of its Stage 2 consideration.

Delegated Powers and Law Reform Committee scrutiny

190. Under Rule 9.6.2 of Standing Orders, where a Bill contains provisions conferring powers to make subordinate legislation, the Delegated Powers and Law Reform (DPLR) Committee must consider and report to the lead committee on those provisions.

191. The DPLR Committee report is attached at Annex D.

192. The Committee noted the points raised by the Committee in respect of the powers at section 1(2) and (3) and section 7(1) of the Bill. The Committee notes the Scottish Government’s response in respect of these powers.

193. The Committee notes that the Scottish Government has agreed to bring forward an amendment to address the issue raised by the DPLR Committee in relation to the power at section 10(4) of the Bill and will examine this amendment as part of its Stage 2 considerations.

194. Whilst the DPLR Committee accepts the power at section 11(5)(d) in principle, the ICI Committee notes that, given its extent, the DPLR Committee considered that it should be subject to affirmative procedure. The Committee notes the Scottish Government’s response in respect of these powers.

152 University of Edinburgh, Written Submission, page 2
153 University of Edinburgh, Written Submission, page 2
195. The Committee notes that the DPLR Committee recommends that guidance provided for at sections 16, 21 and 24 should be published on issue and supports this recommendation.

Finance Committee scrutiny

196. The Finance Committee issued a call for written evidence on the Financial Memorandum (FM) on 16 October 2013. Seventeen responses were received from organisations representing procurement interests within local authorities, the NHS, the further and higher education sector and the social housing sector. The Finance Committee heard concerns about the Bill from local government, higher education and the Scottish Federation of Housing Associations.

197. Correspondence from the Finance Committee is at Annex E. The ICI Committee noted that the area of potential impacts of research-related procurement raised by the higher education sector has been addressed in this report and by the Scottish Government in its correspondence with the Committee.

198. In relation to the concerns relating to the burdens placed on contracting authorities and thereby local authorities by the provisions of the Bill, the ICI Committee notes the response from the Scottish Government that “Ministers will have the flexibility to adapt their approach quite quickly, either by changing the substance of what public bodies are asked to do or by varying the thresholds at which the requirements apply.”

199. The ICI Committee questioned the Cabinet Secretary in relation to the “uncertainty about staff costs beyond 2016-17” highlighted by the Finance Committee and accepts her position that assessment of necessary staff provision will be required to be carried out nearer the time.

Local Government and Regeneration Committee scrutiny

200. The Local Government and Regeneration (LGR) Committee considered the Bill’s implications for public services and community regeneration. The LGR Committee considers “that the introduction of this Bill is both welcome and timely.”

201. The Committee noted the LGR Committee evidence in relation to the provision of health and social care services, which it incorporated into its own evidence taking on 27 November 2013. The points it highlighted in respect of community planning, were put to the Cabinet Secretary by the ICI Committee during evidence taking on 11 December 2013. The Committee was reassured

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154 Finance Committee correspondence, Annex E
156 Local Government and Regeneration Committee Memorandum, Page 11, Paragraph 16
157 Local Government and Regeneration Committee Memorandum, Page 11, Paragraph 50
that “bill is aligned with the forthcoming community empowerment and renewal bill and the approach to community planning partnerships.”

202. The Committee welcomes the LGR Committee’s evidence and would welcome any relevant update on post-legislative work undertaken by the LGR Committee.

**Policy and Financial Memoranda**

203. The lead Committee is required under Rule 9.6.3 of Standing Orders to report on the Policy Memorandum which accompanies the Bill. The Committee considers that the Policy Memorandum provides adequate detail on the policy intention behind the provisions in the Bill and that it explains the alternative approaches that were considered and why the approach taken in the Bill was adopted.

204. As part of this scrutiny, the Committee examined the consultation taken on the policy objectives of the Bill. The Committee explored the approach taken by the Scottish Government with a range of witnesses and is content that the Scottish Government has undertaken extensive consultation in a range of formats, including the establishment of stakeholder working groups.

205. Rule 9.6.3 also requires the lead Committee to consider and report on the Bill’s Financial Memorandum. Following examination of the issues brought to its attention by the Finance Committee, the Committee is content with the Financial Memorandum as drafted.

**General principles**

206. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill. In doing so, the Infrastructure and Capital Investment Committee has taken into consideration evidence from a wide range of groups and stakeholders.

207. The Committee considers that the Bill’s provisions at section 9 (sustainable procurement duty), sections 17 and 18 (publication of contracts), section 19 (community benefit requirements), sections 23 and 24 (selection of tenderers) and the duties at section 27 (information for unsuccessful participants) are important steps forward in addressing barriers to those bidding for public contracts.

208. The Committee considers that legislation is required to improve the situation of those attempting to access public contracts and that the Bill establishes a national procurement framework for Scotland that will improve consistency and transparency. The Committee therefore recommends that the Parliament agrees the general principles of the Bill.
ANNEXE A: EXTRACTS FROM THE MINUTES OF THE INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

19th Meeting, 2013 (Session 4) Wednesday 9 October 2013

Procurement Reform (Scotland) Bill (in private): The Committee considered and agreed its approach to the scrutiny of the Bill at Stage 1

21st Meeting, 2013 (Session 4) Wednesday 6 November 2013

Procurement Reform (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Stuart Greig, Head of Zero Waste Policy, Alastair Merrill, Director of Procurement, Paul McNulty, Head of Procurement Policy and Development, and Mark Richards, Solicitor, Branch Head of Commercial and Business Services, Scottish Government;

Dr Jim Cuthbert and Margaret Cuthbert;

Duncan Osler, Partner, MacRoberts LLP;

Christa Reekie, Commercial Director, and Barry White, Chief Executive, Scottish Futures Trust.

22nd Meeting, 2013 (Session 4) Wednesday 13 November 2013

Procurement Reform (Scotland) Bill: The Committee took evidence in a round table discussion on the Bill at Stage 1 from—

Karen Bowman, Director of Procurement, University of Edinburgh;

Dorothy Cowie, Director, Scotland Excel;

George Eckton, Chief Officer, Development, Economy and Sustainability Team, COSLA;

Sylvia Gray, Sustainability and Energy Officer, East Dunbartonshire Council, Sustainable Scotland Network;

Colin Sinclair, National Director, NHS National Procurement Scotland;

Susan Torrance, Policy Manager, Scottish Federation of Housing Associations;

Angus Warren, Chief Executive, Advanced Procurement for Universities and Colleges
24th Meeting, 2013 (Session 4) Wednesday 27 November 2013

**Procurement Reform (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Anthony Rush, Infrastructure and Environment Group, CBI Scotland;
Susan Love, Policy Manager for Scotland, Federation of Small Businesses;
Garry Clark, Head of Policy and Public Affairs, Scottish Chambers of Commerce;
Pauline Graham, Vice Chair, Social Enterprise Scotland;
Annie Gunner-Logan, Director, Coalition of Care and Support Providers Scotland;
Niall McShannon, Managing Director, Clydesdale Community Initiatives;
Duncan Skinner, Chair, GlenCraft.

25th Meeting, 2013 (Session 4) Wednesday 4 December 2013

**Procurement Reform (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Tom Ballantine, Chair, Stop Climate Chaos;
John Downie, Head of Public Affairs, Scottish Council of Voluntary Organisations;
Chris Oswald, Head of Policy and Communications, Equality and Human Rights Commission;
Martin Rhodes, Director, Scottish Fair Trade Forum;
Stephen Boyd, Assistant Secretary, Scottish Trades Union Congress;
Mike Emmott, Employee Relations Adviser, Chartered Institute of Personnel and Development;
Pat Rafferty, Petition PE1481 representative, Unite;
Dave Watson, Scottish Organiser, Unison Scotland.

**Procurement Reform (Scotland) Bill:** The Committee considered the evidence heard on the Bill at Stage 1.
26th Meeting, 2013 (Session 4) Wednesday 11 December 2013

**Procurement Reform (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Nicola Sturgeon, Cabinet Secretary for Infrastructure, Investment and Cities, and Paul McNulty, Head of Procurement Policy and Development, Scottish Government.

**Procurement Reform (Scotland) Bill (in private):** The Committee considered the evidence heard on the Bill at Stage 1.

2nd Meeting, 2014 (Session 4) Wednesday 22 January 2014

**Procurement Reform (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report and agreed to consider a revised draft at its next meeting.

3rd Meeting, 2014 (Session 4) Wednesday 29 January 2014

**Procurement Reform (Scotland) Bill (in private):** The Committee considered and agreed a revised draft Stage 1 report.
ANNEXE B: EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

21st Meeting, 2013 (Session 4) Wednesday 6 November 2013
Oral Evidence

22nd Meeting, 2013 (Session 4) Wednesday 13 November 2013
Written Evidence
Advanced Procurement for Universities and Colleges
Oral Evidence

24th Meeting, 2013 (Session 4) Wednesday 27 November 2013
Written Evidence
Coalition of Care and Support Providers Scotland
Federation of Small Businesses Scotland
Oral Evidence

25th Meeting, 2013 (Session 4) Wednesday 4 December 2013
Written Evidence
Equality and Human Rights Commission
Scottish Fair Trade Forum
Scottish Council of Voluntary Organisations
Unison
Scottish Trades Union Congress
Oral Evidence

26th Meeting, 2013 (Session 4) Wednesday 11 December 2013
Oral Evidence
ANNEXE C: OTHER WRITTEN EVIDENCE

Aberlour Childcare Trust (150KB pdf)
Advanced Procurement for Universities and Colleges (201KB pdf)
Barnardo's Scotland (206KB pdf)
Birlinn Ltd (200KB pdf)
British Healthcare Trades Association (113KB pdf)
British Medical Association (80KB pdf)
Campaign for Freedom of Information in Scotland (22KB pdf)
Civil Society Organisation in Scotland - Combined Submission (79KB pdf)
Coalition of Care and Support Providers (185KB pdf)
Construction Industry Training Board Scotland (134KB pdf)
Ethical Consumer Research Association (7KB pdf)
Equality and Human Rights Commission (140KB pdf)
Faculty of Advocates (79KB pdf)
Federation of Small Businesses - Scotland (462KB pdf)
Sue Gordon (individual) (64KB pdf)
Health and Social Care Alliance (330KB pdf)
Highland Council (65KB pdf)
Indez Ltd (23KB pdf)
Institution of Civil Engineers (205 KB pdf)
Intend Business Development (85KB pdf)
LinkLiving Ltd (174KB pdf)
Marie Curie Cancer Care (208KB pdf)
Maclay, Murray and Spens (98KB pdf)
MacPherson, Ewan (157KB pdf)
North Ayrshire Council (141KB pdf)
Nourish Scotland Combined Submission (240KB pdf)
Angela Oakley (individual) (13KB pdf)
Orkney Construction Training Group (156KB pdf)
Project Management Institute (136KB pdf)
Glenn Power (individual) (225KB pdf)
Professional Publishers Association (145KB pdf)
Publishing Scotland (100KB pdf)
Renfrewshire Council (162KB pdf)
Royal Society for Protection of Birds (RSPB) (184KB pdf)
Scottish Ambulance Service (143KB pdf)
SAMH (217KB pdf)
Scotland Excel (161KB pdf)
Scottish Building Federation (222KB pdf)
Scottish Catholic International Aid Fund (214KB pdf)
Scottish Children’s Services Coalition (260KB pdf)
Scottish Contractors Group (177KB pdf)
Scottish Council for Development and Industry (181KB pdf)
Scottish Council for Voluntary Organisations (203KB pdf)
Scottish Fair Trade Forum (209KB pdf)
Scottish Federation of Housing Associations (216KB pdf)
Scottish Human Rights Commission (265KB pdf)
Scottish Information Commissioner - Rosemary Agnew (69KB pdf)
Scottish Local Government Procurement Forum (128KB pdf)
Scottish Trades Union Congress (87KB pdf)
SEC Group Scotland (211KB pdf)
SELECT (150KB pdf)
South Ayrshire Council (195KB pdf)
South Lanarkshire Council (76KB pdf)
Strathclyde Partnership for Transport (150KB pdf)
Sustainable Scotland Network (293KB pdf)
The Accounts Commission and Auditor General for Scotland (169KB pdf)
The Scottish Property Federation (73KB pdf)
The University of Edinburgh (412KB pdf)
Transform Scotland (79KB pdf)
UNISON (156KB pdf)
Voluntary Action Scotland (201KB pdf)
West Dunbartonshire Council (74KB pdf)

Supplementary Written Evidence—

Supplementary evidence from Bill team following 6 November evidence (142KB pdf)
Annexe to Bill team supplementary evidence (389KB pdf)
Supplementary written evidence from APUC following 13 November evidence (222KB pdf)
ANNEXE D: REPORT FROM THE DELEGATED POWERS AND LAW REFORM COMMITTEE

The Delegated Powers and Law Reform Committee report on the Procurement Reform (Scotland) Bill can be found on the Scottish Parliament’s website through the following link—

64th Report, 2013 (Session 4): Procurement Reform (Scotland) Bill
ANNEXE E: CORRESPONDENCE FROM OTHER COMMITTEES

Finance Committee correspondence on the Procurement Reform (Scotland) Bill can be found at the following webpage—

http://www.scottish.parliament.uk/S4_InfrastructureandCapitalInvestmentCommittee/Finance_Committee_Letter.pdf

Health and Sport Committee correspondence on the Procurement Reform (Scotland) Bill can be found at the following webpage—

http://www.scottish.parliament.uk/S4_InfrastructureandCapitalInvestmentCommittee/13.11.05_DM_to_Maureen_Watt.pdf

A memorandum from the Local Government and Regeneration Committee on the Procurement Reform (Scotland) Bill can be found at the following webpage—

http://www.scottish.parliament.uk/S4_InfrastructureandCapitalInvestmentCommittee/LGR_Memo.pdf
ANNEXE F: COPY OF CORRESPONDENCE FROM COMMISSIONER MICHEL BARNIER, EUROPEAN COMMISSION TO THE SCOTTISH GOVERNMENT ON LIVING WAGE ISSUES

A copy of the correspondence from Commissioner Barnier to the Scottish Government on living wage issues can be found at the following webpage—

http://www.scottish.parliament.uk/S4_InfrastructureandCapitalInvestmentCommittee/Letter_from_Commissioner_Michel_Barnier.pdf
ANNEXE G: SCOTTISH GOVERNMENT RESPONSE JANUARY 2014

Scottish Government correspondence addressing issues raised in evidence taking on 11 December 2013, including the ten points raised by the Civil Society Organisation in Scotland’s written submission can be found at the following webpage—

http://www.scottish.parliament.uk/S4_InfrastructureandCapitalInvestmentCommittee/Procurement_Reform_Scotland_Bill_-_letter_to_Convener_31_12_13.pdf
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