



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Economy, Jobs and Fair Work Committee

**Tuesday 22 November 2016**

**Session 5**



The Scottish Parliament  
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - [www.parliament.scot](http://www.parliament.scot) or by contacting Public Information on 0131 348 5000

---

**Tuesday 22 November 2016**

**CONTENTS**

	<b>Col.</b>
<b>DECISION ON TAKING BUSINESS IN PRIVATE .....</b>	<b>1</b>
<b>ECONOMIC IMPACT OF LEAVING THE EUROPEAN UNION .....</b>	<b>2</b>

---

**ECONOMY, JOBS AND FAIR WORK COMMITTEE**  
**12<sup>th</sup> Meeting 2016, Session 5**

**CONVENER**

\*Gordon Lindhurst (Lothian) (Con)

**DEPUTY CONVENER**

\*John Mason (Glasgow Shettleston) (SNP)

**COMMITTEE MEMBERS**

\*Jackie Baillie (Dumbarton) (Lab)  
\*Ash Denham (Edinburgh Eastern) (SNP)  
\*Liam Kerr (North East Scotland) (Con)  
\*Richard Leonard (Central Scotland) (Lab)  
\*Dean Lockhart (Mid Scotland and Fife) (Con)  
\*Gordon MacDonald (Edinburgh Pentlands) (SNP)  
\*Gillian Martin (Aberdeenshire East) (SNP)  
Gil Paterson (Clydebank and Milngavie) (SNP)  
\*Andy Wightman (Lothian) (Green)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Stephen Boyd (Scottish Trades Union Congress)  
Bartłomiej Kowalczyk (Polish Business Link)  
Dr Donald Macaskill (Scottish Care)  
Gordon McGuinness (Skills Development Scotland)  
Patrick McGuire (Thompsons Solicitors)  
James Porter (Angus Soft Fruits Ltd)  
Shirley Rogers (Scottish Government)  
Professor Robert Wright (University of Strathclyde)

**CLERK TO THE COMMITTEE**

Alison Walker

**LOCATION**

The David Livingstone Room (CR6)



## Scottish Parliament

### Economy, Jobs and Fair Work Committee

Tuesday 22 November 2016

*[The Convener opened the meeting at 09:32]*

### Decision on Taking Business in Private

**The Convener (Gordon Lindhurst):** Good morning and welcome to the 12th meeting of the Economy, Jobs and Fair Work Committee. I have apologies from Gil Paterson. I ask everyone to turn off electronic devices that may interfere with the system, and turn any devices to silent.

Agenda item 1 is a decision on whether to take items 3 and 4 in private. Is that agreed?

**Members** *indicated agreement.*

## Economic Impact of Leaving the European Union

09:33

**The Convener:** I welcome three guests: James Porter of Angus Soft Fruits Ltd; Dr Donald Macaskill, chief executive of Scottish Care; and Shirley Rogers, director for health workforce and strategic change in the Scottish Government. We have a fourth guest who is delayed but I think will be joining us shortly.

Thank you for coming along today. I would like to start with a question from the deputy convener, John Mason.

**John Mason (Glasgow Shettleston) (SNP):** Thank you, and good morning. I will start with a general question for all three witnesses. We are studying the impact of leaving the European Union—that is why you are here, and why we have been out meeting and hearing from different people. Could each of you tell us what impact there has been on your sector, or what impact you anticipate there will be, from leaving the European Union? Dr Macaskill, I ask you to start.

**Dr Donald Macaskill (Scottish Care):** At the moment, there is a degree of unknowability about the situation. We recently carried out an analysis of our membership in Scotland, which covers 97,000 workers in social care, about 88 per cent of care homes and more than 50 per cent of care-at-home hours delivered. We do not have robust data because there are about 700 individual organisations involved, but I will give you a flavour. At our national care home conference on Friday, I spoke to 10 providers which, between them, employ 6,000 individuals the length and breadth of Scotland. The proportion of European nationals—European passport holders—among them ranges between 12.5 and 18 per cent. Our wider analysis suggests that the proportion of European nationals in our care home workforce constitutes, at the low end, about 12.5 per cent and, at the upper end, as much as a quarter—24 to 25 per cent.

In the short term, we are relatively confident that we will be able to encourage to remain those individuals who are domiciled in Scotland and who like living here; they made a decision to come and are contributing significantly to nursing and social care. However, in evidence already submitted to the committee I highlighted that we are already hearing anecdotally that it has been increasingly difficult to recruit from Europe since the Brexit decision. Even though the technicalities and niceties of the process of withdrawal have not been determined, individuals in Europe are already voting with their feet by presuming that a country that has voted—in United Kingdom

terms—not to remain in Europe does not want them as a nurse or as a social carer. In general, we are deeply concerned about the impact.

**John Mason:** I think that some of my colleagues will go into that in more depth. Are the figures that you mention evenly spread geographically around Scotland?

**Dr Macaskill:** A disproportionate number of EU nationals and individuals from further of the EU are employed in rural and remote areas. We are particularly concerned about the impact on those areas. I mentioned a care home that employs 120 individuals, 26 per cent of whom come from outwith the UK and from mainland Europe.

**The Convener:** I greet our fourth guest, who has now arrived: Bartłomiej Kowalczyk, who is the director of Polish Business Link. Thank you for joining us this morning.

The question that has been asked of our witnesses is about what the immediate effects of the decision to leave the EU are. We have just heard from Dr Macaskill, and I want to follow up with a supplementary to him. We will then bring in the other witnesses, who may wish to raise a hand to come in on a point; some may wish to come in on certain questions and others on others.

With regard to Dr Macaskill's last comment, the Office for National Statistics figures for July to September show an increase in the number of European Union workers coming to the United Kingdom. Is that happening elsewhere in the United Kingdom but not in Scotland?

**Dr Macaskill:** Scottish Care produced two reports, which were published last Friday, on the state of nursing and social care. We have a 28 per cent vacancy level in social care; that is about a quarter of social care nurses in Scotland. In the past year, recruitment from continental Europe has doubled. In the past few months, organisations that set up recruitment arms in Europe have found it increasingly difficult to get people across the door because, elsewhere in the United Kingdom, the majority of people have voted to leave the EU.

**The Convener:** From what you know, therefore, the answer to my question is that the increase in numbers coming from the EU in the past three-month period is not carrying over into Scotland.

**Dr Macaskill:** From what I know, and from the data available from our members, we are not seeing an increase in recruitment into social care and into nursing roles in Scotland.

**The Convener:** Thank you. Let us bring in the other witnesses. Who would like to come in next—James Porter?

**James Porter (Angus Soft Fruits Ltd):** Angus Soft Fruits has about 60 per cent of Scottish soft

fruit production and employs about 4,000 seasonal workers from EU countries such as Bulgaria, Romania, Poland and the Baltic states. We are not seeing a problem with recruiting in the short term, although I have heard noises from down south from my counterpart at the National Farmers Union, Ali Capper, that they have serious problems recruiting for next year; maybe it is because their numbers are so much more than ours. I think that the total soft fruit demand for seasonal labour is around 30,000 in the UK, plus the demand for labour for vegetables, so we are looking at a pretty big number and the industry is completely reliant on seasonal labour. There cannot be more than 2 or 3 per cent who are locally employed.

I will answer the question about whether we will struggle to source that labour in the short term. I have spoken to my employees, who are all keen to come back in the short term but are asking a lot of questions. I get asked what will happen. They are very worried about that.

I should declare that I am the chairman of the NFU Scotland horticulture committee. From speaking to friends at the NFUS, who have had a lot of conversations with ministers down south, it seems that there will not be a problem with getting a seasonal workers scheme in place. However, it should not cover only temporary workers. The middle managerial level of nearly all the fruit farms has worked its way up through the ranks and gained experience in that way. My pack house manager started as a picker and has come up through the ranks. It is vital that we are able to continue to source not only seasonal workers but people at the upper levels.

**Shirley Rogers (Scottish Government):** Good morning. There are some common themes. I support the comments on the impact of uncertainty.

I will make three points. One of the major things that we need to be able to ensure for the provision of the national health service in Scotland is the sustainability of its workforce. We have already provided some evidence to the committee, but we can give more detail on the percentages of people in our workforce who come from the member states of the EU and the European Economic Area. The most recent data suggest that, as at 27 October, 1,159 of our medical staff in the NHS in Scotland are non-UK EU or EEA passport holders, which is about 5.8 per cent of our medical workforce. We know that about 4 per cent of our nursing workforce and about 2 per cent of our dentists are non-UK EU passport holders. Therefore, an issue that arises is the replacement of those individuals should they not be allowed to stay and practise.

There are a couple of other issues that are of some relevance. The first concerns how people decide to come and work in the NHS in Scotland. More frequently than not, it is as a result of their having trained here. Scotland has five internationally regarded medical schools and a number of universities that provide high-calibre nursing education and education in allied health professions. There is a good deal of evidence that suggests that where somebody trains is where they stay to practise. People choose to come and make their lives here and, although it is too early for numbers to show a particular direction of travel, we are starting to get some anecdotal evidence from our medical schools that suggests that they are getting fewer inquiries from Europe-based students.

Therefore, the issue is not only the impact on our existing workforce but the impact on our supply pipeline. We have been working hard to increase the numbers of people going into medical school in Scotland to give us the supply pipeline for the future. It is always a mixture of Scotland-domiciled students, rest-of-UK students and international students. The point that Donald Macaskill made about messaging is important. Because we know about that link, we are anxious that we not send a message that, because international students will not be able to live here, they might not choose to come and study here.

The final point that I want to make is that the NHS mission has always been about sustainability and quality, and it would be unfortunate if we found ourselves in a position in which experts in their field found it unattractive to come and live in Scotland.

09:45

**The Convener:** This does not impact on your point about attracting experts, but there is a shortage of places for Scottish students at Scottish universities. Will there be more availability for Scottish students to study in the areas that we are talking about if EU students are not taking up places?

**Shirley Rogers:** There might be more availability. As you know, we have been working hard on access and increasing the number of Scotland-domiciled students. However, the reputation of Scotland's medical schools is predicated on their attracting an international audience. It is also fair to say that Scottish medical schools' financial profiling is such that it is attractive to them to be able to have some international students at the international rate.

We intend to get to—and we have a history of trying to get to—a place where we have the best of the best, so that we can provide the NHS in

Scotland with the best-quality medical and nursing workforce. There is always a balance to be struck and, over the past 10 or 15 years, we have seen increasing numbers from other parts of the world, as well as increasing numbers from Scotland.

The point that I really wanted to make about the risk to us in the context of medical training is that there is no doubt that there is the highest correlation between where someone stays and practises and where they were taught.

**The Convener:** By “international students”, I think that you meant non-EU students, who pay fees, as opposed to EU students, who do not.

**Shirley Rogers:** You are right, but there is a mixture.

**The Convener:** I bring in Mr Kowalczyk.

**Bartłomiej Kowalczyk (Polish Business Link):** I apologise for being late. I want to add my knowledge and expertise as a Pole who has lived in Scotland for 11 years. I represent a business organisation, which is backed up by the British Polish Chamber of Commerce, so I come from a business perspective but, given that I have lived in Edinburgh since 2006, I have some knowledge about how things look from the Polish perspective.

First, the 2011 census showed that 65,000 Poles were living in Scotland. The figure varies, depending on the season, because, as we heard, there are plenty of employers who want to employ seasonal workers. All the Polish people who live in Scotland will be affected by Brexit. When I talk to people directly, I find that they are worried about their future. People who have been living here for many years want to know what their status will be in the country, how their current employers will be able to employ them, and how they will be treated.

From a business perspective, I can say that I had a chat with a number of members from Scotland and elsewhere in the UK, and one of the top three issues was staff problems. Even someone who employs a small number of staff—and Poles tend to employ Poles—will be affected. As UK companies in the building, services and retail industries, they rely on their staff.

The second issue is double taxation and VAT. Currently, when we trade from the UK with other EU members, there is no VAT, depending on the circumstances. Businesses that trade between countries want to know what will happen after Brexit.

Thirdly, the UK is the third biggest export market for Poland. I do not know the figures for Scotland, but some of that trade is with Scotland, so the question is how it will look in future.

**The Convener:** When you talked about taxation, were you talking about income tax?

**Bartłomiej Kowalczyk:** It is about what is agreed when we trade—

**The Convener:** You are thinking about import and export tariffs, for example.

**Bartłomiej Kowalczyk:** Yes.

**The Convener:** I move on to other committee members, who may ask about some of the things that have been spoken about or raise new issues.

**Andy Wightman (Lothian) (Green):** Thank you all for coming along. If we assume that the UK will leave the EU, what are your main priorities for arranging a new system of immigration and work permits for the UK? What are the key ingredients of a good system that would work for you?

**Dr Macaskill:** The system should be flexible, appreciate individuals' skills and realise that, when they move to a new country, people are not the full package. We all change and mould ourselves to the community that we decide to go to.

On Friday we had our awards ceremony, and one of the four nominees for the nurse of the year category was from Poland. When she came to this country a few years ago, she could not speak English. After several years, she has become an indispensable individual who offers high-quality care and compassion to some of the most vulnerable people in her community. She would not now be able to enter the UK because of some of the most recent restrictions to do with language competency that the Home Office has put in place.

Whatever arrangements replace the current arrangements, I hope that they will be oriented around the host country's needs. For my sector in Scotland, the need is for high-quality, caring, compassionate individuals who are prepared to nurse and to care.

**Shirley Rogers:** I will build on the valuable point that Donald Macaskill has made. In the health context, I can illustrate that with the work that we have been doing on the development of healthcare support workers. That involves an educational framework that spreads across health and social care provision. It is designed to give people an opportunity to enter healthcare at a relatively modest level, to be educated and trained and to progress through the various levels.

It would be difficult for us to argue that a shortage in occupationalists or whatever would allow those very junior people to enter that system. It would be difficult for us to use the nurse who Donald Macaskill just used as an illustration in that space, but that is how we are getting a sustainable, high-quality, well-trained healthcare support workforce.

The point about flexibility is important, as is the point about behaviours and the kind of citizen we

want to have in our country, which is not just about educational qualifications. Caring, supporting and wanting to contribute to the community are much more difficult to assess, but that is critical to getting a supply chain for the workforce and, to be frank, getting the kind of people we want to have living in and populating our communities.

My fear is that any system will do what the current system does, which is to assess how useful somebody is to us but not go too much further, whereas we need something that is much rounder and which allows people who want to contribute to the life of our communities in Scotland, and who has the potential to fulfil not just roles in health and social care but roles across our economy, to develop in a more appropriate way. We need something that is nuanced to that, rather than simply requiring, say, six highers and a degree in X, Y and Z, giving that a tick and saying, "Thanks very much."

**James Porter:** I echo what Shirley Rogers and Donald Macaskill said about flexibility and I add to that simplicity and having a non-bureaucratic system. Basically, that means keeping it as simple as possible.

There needs to be clarity on what is skilled and what is unskilled, which is an issue. If someone comes over to pick fruit, we would say that that was an unskilled job but, if you saw what they have to do, you would realise that it is very skilled and that it takes a lot of experience to learn to do it.

I do not want to go back over the managerial side, but a lot of experience is picked up over years of work and that needs to be recognised. We need to have a space for folk who come over to develop into that. We have proposed a seasonal agricultural workers scheme that would be similar to the one that was in place until 2008. That tended to focus on students, but we should not necessarily say that students have to do the work—the scheme needs to be as open as possible.

I did not mention the welcoming aspect that Donald Macaskill and Shirley Rogers talked about, which is important as well. There is a lot of concern among workers about how welcome they will be when they come over; I see that in our sector, too.

**Bartłomiej Kowalczyk:** I add to the conversation the point that the system must be fair to all communities. As an ethnic community, we must understand how we are treated in the country. Fairness is pretty much what most of my country mates expect.

**The Convener:** We will move on to Richard Leonard, who has a specific question. Our guests need not feel obliged to come in on every question

that we put, but anyone who wants add something may do so.

**Richard Leonard (Central Scotland) (Lab):** My question is mainly for James Porter. I will explore a bit what employment model you use as a producer and what you see across the spectrum as the NFUS horticulture group convener. Do you use gangmasters or payroll agencies? How do you go about it?

**James Porter:** Probably about 60 per cent of our employees are returnees. They might have come over originally having been in touch with a friend who had said, "That is an okay place to work. It is not a complete disaster. You can get a job there and they will look after you all right." In my situation, the approach has mainly been through word of mouth.

Originally, we used HOPS, which you might have heard of—it was the workers scheme that was set up with the seasonal agricultural workers scheme. That was one of the providers. We used one or two gangmasters in the past to supply workers from the EU but, once we had got in touch with the workers, we tended to do things ourselves and communicate with them directly. That avoided any issues, as we had direct contact with our workers and knew that they were being treated fairly.

Many soft fruit and vegetable growers still use labour providers, which all have to be registered under the Gangmasters Licensing Authority. There are lots of different models, but a lot of people use their own websites and so on.

**Richard Leonard:** Do you pay the Scottish Agricultural Wages Board rates?

**James Porter:** Yes.

**Richard Leonard:** You comply with that.

I was struck that the very first case under the Gangmasters Licensing Authority legislation was a prosecution against a Scottish strawberry grower. The workers involved were Bulgarian, so they were from an EU accession state. Have there been other prosecutions that you are aware of?

**James Porter:** No. I am not sure which one your example was.

**Richard Leonard:** It was of David Leslie Fruits of Scone.

**James Porter:** How many years ago was that?

**Richard Leonard:** It was in 2010.

**James Porter:** As far as I am aware, I cannot think of another case. If we look at the people who are returning, that is a testament to how well they are being treated.

There is a common misconception that people who come in from the EU are cheap labour. They are subject to exactly the same payment structure and treatment, and they have access to health and safety measures and everything else that anyone from Scotland would have. Our average hourly wage this season was probably just in excess of £8, and the top 10 per cent earned more than £10 per hour, plus holiday pay. Such workers pay tax and national insurance, and we pay employers' NI. It is a common misconception that such people come in and undercut people from Scotland who might otherwise do the job.

**Richard Leonard:** What did you do before 2004?

**Ash Denham (Edinburgh Eastern) (SNP):** That is my question. [*Laughter.*]

**James Porter:** I had some cows. My family—my father is sitting behind me and listening avidly—have been growing soft fruits since I was running about barefoot in berry fields, but the business has grown by 150 per cent in the past 10 years. The core of that growth has been based on bringing in people from eastern Europe.

**The Convener:** Perhaps we can bring in Ash Denham to ask the question again, because I am—with respect—not certain that we got an answer to it.

**Ash Denham:** I will not ask the same question again, but it would be good if you could paint a picture for us. If you were not able to recruit from other EU countries, how would that affect your business?

**James Porter:** There are two ways in which that could go. We could scale right back and try to match production to the available labour or we could move production abroad—there is already a lot of talk down south about doing that. Although the UK is pretty much self-sufficient in fruit from May to September and supermarkets prefer UK-produced fruit to bringing it in from abroad, if we could not source the labour, we would have no choice and we would have to look at bringing in fruit from abroad. Angus Soft Fruits already does that in the off season. When we cannot grow it, we source fruit from Holland, Spain, Morocco, Egypt or South America so that we have a 12-month supply for UK supermarkets. If we could not source fruit here, we would look at moving production abroad somewhere.

**Ash Denham:** I presume that you have tried to source Scottish labour to fill roles but you have been unsuccessful.

**James Porter:** There are always a few local people who come each year to work for us and I have a full-time staff that is predominantly Scottish. However, there are two or three reasons

why the days when we could source enough people locally have gone. First, the work is seasonal. I am pretty sure that, at a meeting of the committee a couple of weeks ago, James Withers mentioned that, when work is seasonal and the hours are unsocial, it is difficult to manage without having people living on the farm. They might have to start at four or five o'clock in the morning and—if it is hot during the day—they are out later in the evening, or the pack house is going later at night. That does not lend itself to having staff who are not living on site.

There has also been significant growth. We do not consider ourselves to be a particularly large set-up, but we have about 250 local people working for us during the season, which is quite a lot. There is not a huge amount of unemployment locally. We do what we can.

I am also a director of Ringlink, which is a machinery ring based in Laurencekirk that has 3,000 members across north-east Scotland. It has an internship scheme in which it is training, I think, 12 people this year, and which takes in local young people between the ages of roughly 16 and 19, although there is not an age-defined area for that. Ringlink puts them through fork-lift truck training and so on and tries to get them into the industry. That is being supported by Aberdeenshire Council, LEADER and the Royal Highland and Agricultural Society of Scotland as well.

Initiatives are going on in agriculture to bring in young local people but, with the best will in the world, we are not going to get 9,000 soft fruit pickers for Scotland emigrating en masse into the countryside. That is just for soft fruit; there is the picking of vegetables as well.

**The Convener:** Have you advertised for Scottish workers in areas where there is unemployment among Scottish people or among people who already live in the country?

**James Porter:** About five or six years ago, we had quite bad storms. I am trying to remember the year—was it 2011 or 2012? We had quite a lot of damage to our polytunnels in the winter. In January, I was not able to get people from abroad, so I went to the local jobcentre. We got about 20 folk out and, two weeks later, we did not have 20. To be fair to them, the work is pretty tough and is not for everyone. However, we have tried and, as I have said, if someone comes and asks for work locally, I will certainly give them a go.

**The Convener:** You talked about 12 people being trained for the whole north-east of Scotland. That does not sound like huge numbers, given the numbers of people you are employing.

**James Porter:** I am not involved in such day-to-day discussions, but I know that our chairman,

Andrew Moir, and our managing director, Graham Bruce, have had regular conversations with the farming minister and various other people in the Government to see whether they can roll out such an approach on a bigger scale. We would welcome any support from the committee on that.

**Dean Lockhart (Mid Scotland and Fife) (Con):**

This discussion is interesting. I will look at the policy dilemma that we face. In Scotland there are 23,000 young people aged between 16 and 19 who are not in work, education or training. What steps could we take to encourage young people who are not actively engaged to relocate and find employment in your sector?

**James Porter:** I would tell anyone who is that age that, because of the Scottish Agricultural Wages Board, we have a wage structure that is second to none. The work is well paid, but it is physically demanding, and not everybody wants to go out and get dirty in a field or in a potato shed.

There are schemes, and the internship scheme at Ringlink has been going for about three years. Most of the people who have gone through it are still working—maybe they are not in agriculture, but most of them are still working in agriculture. The interview process is quite strong as well.

We cannot simply say that those 23,000 people can work. Only a percentage of them will be suited to agriculture and will want to work in it. People have to want to do the work first of all.

The scheme that I mentioned is really well structured. It provides practical training to make people ready to work in the industry, and the industry recognises that.

**Gillian Martin (Aberdeenshire East) (SNP):** I was going to ask a question about the initial impact of recruitment, but that has been well covered, so I will not return to it. Thank you for what you said about that, which certainly answered a lot of my questions.

Mr Kowalczyk, am I correct to say that you represent an awful lot of Polish businesses that have set up in Scotland?

**Bartłomiej Kowalczyk:** Yes—in Scotland as well as in the UK.

**Gillian Martin:** What impact has Brexit already had on start-ups, on people considering going into business and on people thinking about maintaining their business here? Starting up a business involves a massive investment. Can you give me some feedback on that?

**Bartłomiej Kowalczyk:** One of the think tanks in London recently revealed some figures that compare the numbers of people who work for someone else with the numbers who work for themselves. There are 30,000 Polish directors in

the UK—I do not know the Scottish figures—as well as 65,000 Polish self-employed. We are classified as the first ethnic community in the ranking.

There are two cases. In the first case, among the self-employed people, we can easily find people who were forced to be self-employed because of, for example, temporary work. Some of them are still working for other people, using skill sets such as web design or handyman skills, and they can easily combine full-time or part-time working and being self-employed.

When it comes to limited companies that physically set up here, the first thing that attracts them is that it is easy to do business here. It does not matter whether it is in Scotland or in England—it is much easier to do business in the UK than in Poland. In the World Bank ranking, the UK is in fifth or sixth place, if I remember correctly, while Poland is 28th.

**Gillian Martin:** Do you have any figures on how many people are employed by Polish businesses in the UK?

**Bartłomiej Kowalczyk:** We have not done that analysis. It is difficult to find out whether a business is run by Poles because it is a tough question to ask a business owner whether they are Polish or Lithuanian and so on, so it is not easy to get that kind of data. We have data on physical businesses and where the business owner comes from originally, but we do not know the number of employees.

Among our members, we have businesses with up to 50 people in Scotland, so they are small-scale businesses. In England, we have in our portfolio businesses that employ 200 or 300 people.

It makes sense for industries that rely on temporary workers to employ people they know within their community. I am talking about Polish people and others from the central and eastern Europe region. When it comes to more advanced work—for example, when a business owner wants to employ a sales force or people who are really skilled—employers tend to look for Scottish or English employees with a proper education here in Scotland or the UK.

**Gillian Martin:** Thank you.

**The Convener:** Liam, did you want to come in on that?

**Liam Kerr (North East Scotland) (Con):** No. My question is on a different subject.

**The Convener:** Fair enough. In that case, Gordon MacDonald is next.

10:15

**Gordon MacDonald (Edinburgh Pentlands)**

**(SNP):** I have a number of questions on subjects that we have already talked about. There is no doubt that EU nationals have been a valued part of our community for many years. James Porter highlighted the options that are available to the soft fruit sector, but I am keen to understand the situation for the other sectors. We are saying that EU nationals can remain if they have been in the country for more than five years, but I am thinking about workforce planning. Shirley Rogers suggested that we need a supply line in planning for the future. What are your sectors doing to address any potential workforce or skills shortages over the next three to five years? Brexit has not been triggered yet, but we do not know what will happen to people who are already in this country.

**Shirley Rogers:** That is at the heart of my concerns. I will use the example of medics, not because I prioritise them particularly but because theirs is the longest pipeline in terms of time taken for training. To become a general practitioner in Scotland at the quickest possible pace takes five years of medical school, two years of foundation training and another three or four years thereafter, depending on which degree the person takes. We are talking about 10 or 11 years, so triggering a debate that gives us two years makes no nevermind, really. That is a significant concern for us, in terms of the pace. As the convener suggested, we can adjust the number of entries into various parts of our medical training institutions. Nonetheless, whatever we do today will only bear fruit for somebody else to pick in a few years' time, and that is an issue for us.

It is important that the committee remembers—I know that you do—that the people whom we employ are people. They are not just a set of skills that happen to come along and twiddle some things in various places; they are people who have made life choices that include relationships. For example, somebody who arrives from France might marry a Scot, have children who go to Scottish schools and make a life here. Depending on how the eventual deal is framed, the consequences of that can be quite problematic. We have made it clear to the NHS in Scotland that we value the contribution of our entire workforce, wherever it comes from. We do not believe that compassion and the desire to help people are shaped by any national boundary.

More important, we are trying—as far as we are able—to reassure those people who come from the EU that we will work with them to find solutions that fit their families. As you will be aware, some services—some GP practices in rural Scotland, for example—are run by family partnerships and, if one half of the partnership is not allowed to stay,

that will have an implication for the whole partnership. Someone talked earlier about the UK Border Agency's requirements. We hope that, in the drafting of those requirements, consideration will be given to that family dynamic and how we can deal with people who have made their lives here as opposed to those who are just practising here.

In our workforce planning, we have profiles for all our medical specialties that look not just at our existing consultant workforce but at all those who are going through specialty training, and we are developing a similar approach around nursing, which, as you will be aware, is becoming more specialised—we now have advanced nurse practice in a range of different areas. We alluded earlier to matters around healthcare support workers, allied health professionals and so on. The pipeline is not very short for any of those people; it is a question of investing in training that will take a number of years and which, for some of our most specialist consultants, will run to a number of decades. Therefore, the sooner it starts, the better.

**Dr Macaskill:** I echo everything that Shirley Rogers said. From the social care perspective, our concerns are quite severe. Before Brexit, we were already faced with a massive recruitment challenge. In nursing, last year 60 per cent of organisations were struggling to recruit, and our survey that was published last Friday showed that the figure is now 98 per cent. All our member organisations are having difficulty in recruiting in social care at the moment.

With regard to workforce planning—I have shared this point with the Health and Sport Committee—we are struggling to offer social care work, particularly the care of our older citizens, as something that attracts Scots and those who live in our country. We have worked with colleagues in education and other environments consistently and in as co-operative a way as possible to make the care of our most vulnerable something that can attract individuals. The living wage is part of that mechanism, as are developing purposeful terms and conditions and enabling models that encourage individuals to work in rural areas.

A lot is being done, but even if we are to be able to attract the same number of people from Europe as we can at the moment, we will still be faced with a massive staff shortage. A Glasgow academic said a few years ago that, by 2030, every school leaver in Scotland would have to work in social care if we are to continue to offer the same level of care and support as at present. I do not envisage a time when that will happen, but I do envisage a time when individuals will be unable to get out of hospital after treatment for a hip fracture, for example, because there is an

insufficient supply of staff to meet their needs in the community or in care homes. That future is coming fairly quickly.

**Gordon MacDonald:** What makes Scotland an attractive place to do business or attractive for people from Poland to come here and work?

**Bartłomiej Kowalczyk:** People come not only from Poland, and it is cheaper here than it is in London. I am in London regularly and have spoken to a number of people there who say that they consider Scotland as a gateway to London for their business. The attraction of Scotland is pretty obvious.

Perhaps the first attraction relates to income tax. I believe that people can earn up to £12,500 here before beginning to pay tax, whereas the equivalent in Poland is £600 or £700. If someone trades online with all of Europe, for example, the tax position here makes them consider moving to Scotland.

The second attraction is probably the construction industry's need for workers. Construction is the top industry for Polish people doing business in Scotland and the UK. Someone who runs a construction business in Poland can take their business knowledge to Scotland and fill the gaps in the Scottish market by hiring their own countrymen and doing all the dirty work on construction sites. Employment issues are less of a problem for those people in the construction business, because they have access to staff. Once they are established in Scotland, they can build their business.

Mr MacDonald asked what people and companies can do to prepare for Brexit, and we have noticed people outsourcing processes that are suitable for that. Administration or accountancy services, for example, are booming in the EU region and it is cheaper for UK and Scottish companies to outsource to that workforce in Europe. Businesses in those services that employ staff from the local market here can have them do the research, for example, and then it is a no-brainer for the businesses to outsource, where they can, part of their processes to other countries.

**Jackie Baillie (Dumbarton) (Lab):** I will pursue with Donald Macaskill some of the points that he made. Does the Scottish Government consult Scottish Care when it does its workforce planning for nurses and, if so, what form does that consultation take?

**Dr Macaskill:** The quick answer is yes.

We have been involved in the nursing intake review group for the past two or three years: we presented evidence to the group a couple of weeks ago for next year. The process continues.

We called last week for a substantial increase in nursing intake because of the crisis in nursing in social care. As Shirley Rogers said, it takes time for people to go through the system. Even without Brexit, we would have called for a substantial increase in the number of nurses.

However, simply having nurses in place will not be sufficient. This may not be within the committee's remit, but there is a particular challenge with attracting nurses first to work in social care and, secondly, to work with our older citizens. That is a wider societal issue that we need to explore. Why is it that we in Scotland do not—as all the evidence shows—want to work with our older citizens? It is a fantastic and rewarding career. In the report that we published last Friday, "Voices from the Nursing Front Line", 28 nurses describe what a brilliant career one can have in nursing and in supporting people at the end of their lives and in palliative settings. Unfortunately, however, we struggle. As one nurse said to me last Friday, her colleagues think that it is not real nursing. Well, it is real nursing: it is nursing at the most significant points in individual's lives. Regardless of Brexit, we need to do something to increase capacity to support our older citizens.

**Jackie Baillie:** I am curious about the lag that exists in workforce planning. You will recall that five or six years ago there was a cut in the number of nursing training places as well as in the number of medical training places. There is a disjoint in that we know that health and social care will be the increasing opportunity within the economy but we are unable foresee that in workforce planning. Is there a way of approaching planning that is different from the current system, which does not seem to serve us terribly well?

**Dr Macaskill:** There have clearly been failings in the current system: one is that the contribution of social care has not, until recently, been fully included in the process. Health and social care integration and the integration joint boards offer us real potential to work collectively to plan for the workforce that a community needs. We have an opportunity not only to consider what the NHS, the local authority statutory bodies, the voluntary sector or the independent and third sectors need, but to examine and map the community's needs and work together to develop a workforce plan.

Brexit has given rise to a huge uncertainty in the midst of all that. Scottish Care has members that do not know at the moment whether they will be able to recruit from continental Europe in two years. That is deeply unsettling for them as businesses, but it is more profoundly unsettling for individuals who require a sense of continuity and support.

**Jackie Baillie:** I am keen to explore why you cannot recruit locally. I understand that the soft-

fruit industry is site specific, but you have members throughout Scotland. Colleges are now doing health and social care courses for a huge intake of young people. I am curious to know the specific barriers to recruiting locally that you would highlight. Is it just that the work in the sector is viewed, perhaps mistakenly, as being low paid and increasingly hard?

**Dr Macaskill:** I could keep the committee busy for the whole afternoon on that. There are a number of reasons. One is that many of our younger generation struggle to relate emotionally to individuals who are older and may have challenging behaviour. Only over time do people develop the maturity to be able to deal with what are at times harrowing and difficult situations. However, we are working closely with schools, colleges and the Scottish Social Services Council to offer social care as an attractive career choice for individuals.

I mentioned terms and conditions. Undoubtedly, when people can earn £1.50 an hour more by stacking shelves in Asda than they can working in a care home where, however rewarding an experience it might be, they are paid only £8.25 an hour as a basic carer, many will decide to do that, and Asda benefits—as do, I should mention, all other shops that might be involved. I do not want to advertise.

10:30

That is a profound issue—which goes beyond simply planning the workforce—to do with terms and conditions and with the value that we put on care. It is not an accident that some providers find a greater sense of that value among older employees and, sometimes, employees from continental Europe.

**The Convener:** Shirley Rogers will give the Scottish Government position on that.

**Shirley Rogers:** I want to make two comments on the NHS workforce; in the light of the time, I will keep them brief.

First, for the last couple of years we have worked hard with colleagues in the social care sector and with other providers to share the methodology for workforce planning. We use a six-step methodology that is internationally regarded; we did not invent it, but we were quick to use it. It gives the opportunity to take long-term, medium-term and shorter-term views.

The other specific that I want to address is how we look at numbers. There is no doubt that the days of training one for one in most of our specialties are long behind us. People are making lifestyle choices about the manner in which they wish to work, so in some specialties we are almost

at the point of training two people for every one that we need in our workforce. There is a range of ratios. In paediatric specialties, for example, the ratio is 1.6:1. We do that in the knowledge that the majority of the people whom we train will go on to work in those specialties. General practice is another very good example—many people who go into general practice choose to do so less than full time.

**Jackie Baillie:** I am not making a party-political point, but I think that over time the Scottish Government has not been particularly good at workforce planning. We are reaping the whirlwind now because of decisions that were taken five or six years ago that failed to see what was coming—which was the difficult position that we are in now, which Shirley Rogers described. Is it the case that vacancy rates in health and social care are causing huge concern across the board?

**Shirley Rogers:** It is certainly a very challenging set of circumstances. It is also fair to say that we have bigger numbers now than ever before. I would not claim that workforce planning historically has always given us the finest of outcomes, but I make the point that, increasingly, we are trying very hard to workforce plan across the sector, rather than planning in silos.

**The Convener:** I will go back to something that Dr Macaskill said about the wages that are paid. Could a factor in increasing wages be the number of people available to work for lower wages being restricted—for example, by our leaving the EU?

**Dr Macaskill:** I do not want social care to be a low-wage occupation; we should turn that situation around. People who work with people should be rewarded the most. People who work with things—I include money in that, so as not to offend my banking friends—should be rewarded less. On that premise, it is important that we create an economy of care that properly values the contribution of workers. Will we be able to recruit more people from Scotland because we close the door to people coming from continental Europe? My answer is no: there will be the opposite effect.

**The Convener:** My question is whether an increase in wages will attract more people. As long as there is an endless supply of workers who will work for what might be a lower wage, there is no economic imperative—if I can put it that way—to raise wages. I am not saying that that is the only factor, but is it part of the puzzle?

**Dr Macaskill:** Part of the solution to the recruitment crisis in social care would be an increase in baseline salaries and improvement of terms and conditions. That will undoubtedly attract more individuals. We do not have an endless supply of individuals who are willing to work in social care, so we need to attract people from as

wide a pool as possible. In social care and social care nursing, we have discovered that the pool is enriched by the talent, skills and individual contributions of people from Europe and further afield. We can learn a great deal from individuals who come from abroad. If we pay people in social care and health what they are truly worth we will be able to attract more people, from within and outwith Scotland.

**Richard Leonard:** I will pick up on Dr Macaskill's impassioned plea for greater value being placed on people who carry out caring functions. Is the gender profile of the people who provide those caring and nursing services one of the issues?

**Dr Macaskill:** I have said and written elsewhere that most of those who are engaged in care—in particular, social care—are women, who often work part-time and who left school early with minimum qualifications. If it were a male workforce there would have been cries of discrimination 10 or 20 years ago. There are discrimination and bias. Scottish Care perceives an issue of age discrimination at the heart of the way in which we fail to reward those who work in social care.

**The Convener:** What form does that age discrimination take?

**Dr Macaskill:** In Scotland—as elsewhere in the United Kingdom—when you reach the grand old age of 65 something magical happens: you cease to be an adult and you become an “older person”. As an older person, statistically you have fewer moneys allocated to you for care and support. We are engaged in a project that is evidencing the way in which mental health support seems to change dramatically when one reaches the age of 65—the Health and Sport Committee is considering that work this morning. For the past 25 years and despite free personal care for the elderly, the per capita spend on health and social care for our older citizens in Scotland has been proportionately less than in any continental European country.

**The Convener:** I thank all our witnesses for their contributions.

10:38

*Meeting continued in private.*

11:06

*Meeting continued in public.*

**The Convener:** Good morning to the witnesses who have just joined us, and thank you for coming. I welcome Stephen Boyd, who is assistant secretary at the Scottish Trades Union Congress; Gordon McGuinness, who is director of industry

and enterprise networks at Skills Development Scotland; and Patrick McGuire, who is a solicitor advocate at Thompsons Solicitors. Professor Robert Wright, from the University of Strathclyde, is delayed.

I invite Liam Kerr to start the discussion.

**Liam Kerr:** Convener, just before I begin, may I check, as John Mason did earlier, that this process is to enable the committee to understand the impact of Brexit on various aspects of the economy? Is that correct?

**The Convener:** Yes. Our remit is

“To investigate the impact of the decision to leave the EU, in the context of Scotland’s economic strategy, on exports, inwards investment and labour and employment rights”

and so on.

**Liam Kerr:** And the role of the experts is to help the committee to understand things about which members perhaps do not have specialist knowledge.

**The Convener:** It is for them to give evidence on their areas of expertise.

**Liam Kerr:** Thank you.

Mr McGuire, I have a number of questions for you. You provided a paper entitled “The Economic Impact of Leaving the European Union”. The paper is not signed off. Is it something that you prepared yourself?

**Patrick McGuire (Thompsons Solicitors):** I prepared it in conjunction with colleagues in the firm; it is my firm’s position.

**Liam Kerr:** On page 2, in paragraph 8, you said:

“The last 20 years have seen a revolution ... It is no longer lawful to discriminate against workers on the basis of their ... race ... ; to pay women less than men”.

Can you help the committee by telling us when the first race relations act was brought in?

**Patrick McGuire:** You are referring of course to that being prior to our involvement in the European Union. However—

**Liam Kerr:** I am just asking for the date when the act was brought in.

**The Convener:** Mr McGuire, will you answer the question, please?

**Patrick McGuire:** Certainly. 1970.

**Liam Kerr:** Not 1965 or 1968?

**The Convener:** Mr McGuire, the question was directed to you, not to the gentleman who is sitting behind you in the public gallery.

**Patrick McGuire:** Mr Kerr might be correct.

**Liam Kerr:** I am just looking at some of the assertions in your paper, Mr McGuire. When was the Equal Pay Act brought in?

**Patrick McGuire:** I cannot answer that question.

**Liam Kerr:** Forgive me, I thought that you were the expert on employment law here.

**Patrick McGuire:** I am here to address what has occurred as a solicitor in a firm specialising in employment and personal injury law and dealing with trade unions and with how the law has impacted on trade union members over the past 20 years and beyond.

**Liam Kerr:** That is not necessarily what your paper says.

**Patrick McGuire:** I am here principally to talk about the extent to which the law that now exists is underpinned by European law and to look forward and see what happens when the European law underpinning it is removed and when the UK Government and, if appropriate, the Scottish Parliament have the opportunity to change the current laws. The starting point is this: what are the current laws in this country and what are they underpinned by? Almost inevitably, invariably and entirely, that is currently European law. Then, we look to see what happens as a result of Brexit. There is no question about anything there that is in the paper.

**Liam Kerr:** Could we have a look at that? In paragraph 9, you say:

“In fact, the only workers’ rights which are not derived directly from European law relate to the right not to be unfairly dismissed and to be paid the minimum wage.”

Does that statement hold true for the Sex Discrimination Act 1975, as was?

**Patrick McGuire:** The Sex Discrimination Act 1975, as it currently exists in UK law, is underpinned by European law.

**Liam Kerr:** You have said—

**Patrick McGuire:** I think there is some deliberate obfuscating of lines here. There is UK law, and there are UK regulations relating to all these matters. The reasons why they are on the statute book and why they go to the extent to which they do stem from the UK Government’s current requirement to provide effective and dissuasive remedies in terms of European directives. That is the point.

**Liam Kerr:** Does that statement hold true for the Disability Discrimination Act 1995, as was?

**Patrick McGuire:** The UK Government went further in certain legislation, including the Disability Discrimination Act 1995 as was but, of course, that law no longer exists and we have one unified

approach to equalities. That is underpinned by European law. We keep coming back to the same point.

**Liam Kerr:** What about the Public Interest Disclosure Act 1998?

**Patrick McGuire:** The current UK legislation is underpinned by EU law.

**Liam Kerr:** Your statement, with respect, is false.

**The Convener:** It might be helpful, Mr McGuire, if you explain what you mean by “underpinned by European law”.

**Patrick McGuire:** The position applies as much to employment rights as it does to equalities and health and safety. There are various—indeed a large number of—forms of UK legislation, primary and secondary. There are regulations and other statutory instruments, and there is primary legislation—acts of Parliament.

With the exception of the examples that we have highlighted in our paper, as the law stands—aside from unfair dismissal and the national minimum wage—every other piece of legislation is on the statute book because of European Union law and because of the UK Government’s requirement—[*Interruption.*] It is wonderful that you shake your head at me, Mr Kerr, as I say that. It is nice to be invited to the committee and to have someone staring at me and shaking his head at me.

**The Convener:** Mr McGuire, we will try to restrict ourselves to the evidence, rather than political statements. From what you—

**Patrick McGuire:** Convener, there was no—

**The Convener:** No—sorry.

**Gordon MacDonald:** Convener, this is not acceptable.

**John Mason:** Convener, on a point of order—

**Patrick McGuire:** There was no political statement in—

**John Mason:** Point of order.

**Patrick McGuire:** I have been invited here to give evidence. As I have tried to do so to the best of my ability, a colleague of yours has been shaking his head at me.

**The Convener:** Sorry—may I stop you?

**Patrick McGuire:** I do not think that is appropriate.

**The Convener:** I will let the deputy convener come in, as he wants to say something.

**John Mason:** On a point of order. Is it not the case that we should be treating witnesses in a civil

manner? Yes, there should be robust questioning, but it should be done civilly.

**The Convener:** Yes, I certainly accept that. My point in asking what Mr McGuire meant by “underpinned by European law” was to try and clarify his position, which I felt we were perhaps not getting clarified through the questions being asked. I did not mean any disrespect either to him or to any committee member. Perhaps it would help if we tried to keep our questions and our answers a bit more tightly focused, if I can say that, on both sides. We have other witnesses here and other issues that we want to come on to.

Liam Kerr, do you wish to come back on this, and perhaps we will try to focus on specific points? I am sure that the witness will do the same.

11:15

**Liam Kerr:** Mr McGuire, your submission states:

“A ‘Brexit’ Tory government will unquestionably set about reversing these protections. ... They have only been restricted from repeal by the UK’s membership of the European Union.”

Are you able to explain to the committee what the gold plating of legislation might look like?

**Patrick McGuire:** Perhaps I can first explain why I made that assertion. When we look at the changes that have been made by the current UK Government and the coalition Government before it, we see that many of them sailed incredibly close to the wind in terms of European Union law. We have seen the introduction of employment tribunal fees, which has been—and continues to be—challenged in the Supreme Court by Unison, which asserts that that breaches both human rights and European law. We have seen an increase in the unfair dismissal qualifying period to two years, and we have a cap of 12 months on the compensatory award for dismissals. We also have a limiting—frankly, a suffocating—of the two European Court of Justice decisions in relation to holiday pay. As soon as those two judgments came out, the UK Government legislated to change the ability to claim looking forward.

In addition, we have the Trade Union Act 2016 and the removal of employment tribunals’ ability to make recommendations that affect the entire workforce. We also have section 69 of the Enterprise and Regulatory Reform Act 2013—another piece of legislation that many commentators said was in breach of European law in the form of the framework directive. Many complaints about it were made to the European Commission, which were taken seriously by the Commission; however, Brexit has changed that. Then, as recently as last Thursday, it was announced that there is to be an increase in the

small claims threshold from £1,000 to £5,000. On the face of it, the policy is aimed at whiplash cases but, in fact, it applies to all cases including—crucially—work-related cases. That is why, the very next day, the general secretary of Unite, Len McCluskey, pointed out that, if the policy was truly about whiplash, work-related cases could have been excluded from it.

Those are all underhand attacks on workers and workers' rights. A litany of such changes has been made by the UK Government, and it stands to reason that, as soon as the power is entirely in its hands, it will go further. The UK Government believed that it could not go any further than section 69 of the Enterprise and Regulatory Reform Act 2013, but it is as clear as a pikestaff—as the saying goes—what is going to happen as soon as the power is in its hands. The position is similar regarding equalities. It is absolutely plain.

**The Convener:** I am sorry to stop you, Mr McGuire, but I want to let Mr Kerr respond to the numerous points that you have raised.

**Liam Kerr:** I actually asked about the gold plating of legislation. As you have declined to answer that question, the committee will inform itself of what that is. Do you accept that, at some points, the UK Government does gold plate European legislation?

**Patrick McGuire:** Of course, the UK Government has, in the past, gold plated legislation. I have referred on several occasions to the Health and Safety at Work etc Act 1974, which was an act of a Conservative Government. However, the world has changed and the view of the Conservative Government has changed. Gold plating is a myth in the current environment.

Of course, we know what gold plating is and whether it is possible. However, the changes that I have highlighted show that there is no prospect whatever of any gold plating going forward.

**Liam Kerr:** Do you accept that TUPE—the Transfer of Undertakings (Protection of Employment) Regulations—is gold-plated legislation?

**Patrick McGuire:** As it stood, yes. Is it going to change? Yes.

**Liam Kerr:** Was there a consultation on the gold plating of TUPE a number of years ago?

**Patrick McGuire:** If we are talking about concepts, let us talk about the sovereignty of Parliament, which is what I believe the European debate among the Brexit folk was about.

**Liam Kerr:** No, I am not talking about concepts, Mr McGuire. I am just asking you a question.

**Patrick McGuire:** Well, you asked me a question and I am answering it in my own way.

You raised the concept of gold plating and asked me whether there was a consultation on it. Yes, there was. However, I was making a point about the sovereignty of Parliament, which is the whole point of Brexit and what people allegedly voted for. The gold plating that you talk about and the consultation that you mention are utterly irrelevant in the context of the sovereignty of Parliament. When we look at the changes that have been made, it is inevitable that more such changes will come.

**The Convener:** Mr McGuire, I am not sure that I understand what you mean when you say that it is inevitable that more such changes will come. Given that the Prime Minister has said that workers' rights will not be lessened—indeed, there is a consultation on further possible improvements in workers' rights—there is no inevitability about it, is there?

**Patrick McGuire:** The Prime Minister also said that there would be workers' representatives on company boards. That changed rather quickly, did it not?

The Government announced a consultation on Thursday last week that, on the face of it, related to the compensation culture and whiplash claims, and yet it dealt a possible death blow to the trade union movement's ability to prosecute health and safety claims on behalf of its members. What is said publicly and what appears as legislation have been different things throughout the duration of the coalition Government and the current Government, and so it shall continue.

**Gordon MacDonald:** On a point of order, convener. I want to ask whether 20 minutes spent attacking a witness is good use of this committee's time. We are here to ask questions. There are 10 of us on this committee, and we are here to ask questions of the whole panel. I do not think that it is acceptable for one member to take up a vast proportion of the time attacking one witness.

**The Convener:** I am about to move on to Ash Denham, but I will say that a great proportion of the time has been the witness himself giving evidence.

**Ash Denham:** Unfortunately, my question is for the same witness. The submission from Thompsons explained the viewpoint that if the powers return to the UK Government, there may be a deterioration in some of the employment laws, equality laws and so on. It cited some evidence, and personally I do not feel that it is an unreasonable assertion to make. The submission stated that

"There are no rights without the ability to prosecute those rights"

and that some of those powers should come to the Scottish Government, such as employment and equality laws, and control over tribunal processes. What impact would that have?

**Patrick McGuire:** There are two separate issues. One is the black-letter law. I can explain in more detail but, for the reasons that I have set out, I think that there is a strong case to be made—or, at the very least, a debate to be had—as to where those powers should vest. That is because the situation has raised an incredibly important and previously unthought-of constitutional issue.

When the original Scotland Bill was drafted, and at each subsequent extension of the act, no one thought for a second that any real power in relation to employment law, health and safety law or equalities would be vested anywhere other than Europe. Accordingly, the vote to exit has completely changed the relative legislative balance in power between the two Parliaments.

Effectively, against that analysis, the Westminster Parliament has been handed powers that no one previously thought that it had or would have, and in previous votes and discussions on the constitutional settlement it was always thought that those powers were vested only in Europe. There is, therefore, a very serious constitutional issue here, which the two Governments—and perhaps the two Parliaments—have to take seriously. They need to take a view on what it means for where those powers should lie in relation to the devolved settlement.

That is the black-letter law. Something that is perhaps equally fundamental but far easier to achieve—because that involves a political discussion and perhaps more—is the administration principally of the employment tribunals. We know that, on occasion, a right is utterly irrelevant if there is no means by which to prosecute that right, or if the ability to prosecute that right is effectively removed.

**Ash Denham:** Can you give us an example of that?

**Patrick McGuire:** There is no better example than the introduction of employment tribunal fees—punitive £1,200 fees for an ordinary member of the public to take a claim forward. What was the purpose behind that legislation? It was to utterly reduce the number of claims being taken forward. Was it effective? Absolutely. In one year the number of claims that were taken forward reduced by 70 per cent—job done, as far as the Tories were concerned. That shows just how important the procedural aspect is to rights.

We are having this debate at a crucial time, when the Scottish Parliament is being handed certain powers in relation to the administration of employment tribunals. That is still being

discussed. There is a draft order in council, and thank goodness it is only a draft, because the powers that it hands to the Scottish Parliament—crucially, it is the Scottish Parliament—are not enough. It hands over powers in relation to employment tribunal fees, but that is pretty much it. None of the other important procedural powers that the Scottish Parliament would want to have, and should have, at this juncture given Brexit, is being handed to the Scottish Parliament. It is therefore imperative that the Scottish Government redoubles its efforts to beef up—or, if you will, pump steroids into—the order in council and get the Scottish Parliament as many powers as possible over the administration.

**The Convener:** Perhaps we can move on to some other issues and bring in the other witnesses. I bring in Gillian Martin.

**Gillian Martin:** My questions are for Gordon McGuinness. We have heard not just today but over the past few weeks the concerns that various sectors have about recruitment issues as a result of Brexit. This morning, we heard about the care sector, the nursing sector and the soft fruit sector. I want to ask about your forward planning given that we might have some significant skills gaps. We had someone in earlier who talked about Polish businesses, and he mentioned construction an awful lot. How have such conversations impacted on your forward planning in your role?

**Gordon McGuinness (Skills Development Scotland):** Thank you for the question, Gillian. We are working through our industry leadership groups to try to assess the scale. Some data is available through the labour force survey that indicates the scale of European Union migrants within the workforce. In areas such as hospitality and food and drink manufacturing, that is significant. Through the industry leadership groups and the skills groups, we are doing more detailed analysis of that. It is unclear at present what the impact will be on the ability of EU migrants to stay here, but there is more work to be done. The Educational Institute of Scotland has done some interesting work with the universities sector. It is calling on the universities to deliver support, advice and guidance jointly with other organisations.

There will probably be three strands to the work that we will do. We need to think about how we can help companies to retain existing European staff. You are right to say that, in areas such as agriculture, there are significant challenges. The Agriculture and Horticulture Development Board flagged up the scale of that in its September publication. That is obviously a challenge, because much of what the Conservative UK Government has looked at in terms of future immigration policies has been based on skills. A

lot of agricultural work is seasonal and is lower skilled and more manual.

Previously, the UK Government had different strands or tiers but, because of the access to European Union residents, they were removed. There will need to be a rethink at the UK or Scottish Government level about immigration policy in relation to those activities. All too often, everything is entwined into one issue. We need to set out different structures for skilled and non-skilled workers from the EU and elsewhere, and to think about different policy lines within that.

Looking ahead, I can see that there are challenges. The UK Government is looking at introducing a skills levy for immigration from April next year, but I know from conversations with the business community that that is not well known or publicised, and we do not know its implications. There could be an additional up-front fee of £1,000 per year for an individual. A typical visa would be for three to five years, so a company that is recruiting could face an up-front fee of £3,000 to £5,000, and there are additional charges on top of that. There are some issues there. Practical support will be needed, but we also need a better understanding of how that will impact on specific sectors so that we can help them to plan how they are going to be a wee bit more resilient.

Essentially, we need a clearer steer from the UK Government on what will happen to the EU migrants who are currently here.

**Gillian Martin:** It has been mentioned to the committee that it takes far longer to train people for certain sectors than the period will be from article 50 being triggered to whatever the eventuality is. Will you comment on that?

**Gordon McGuinness:** That is a challenge. Until we are clear and policy comes from the UK Government on the transition phase, it is difficult to make a prediction.

We are doing work in areas such as financial services and digital information and communication technology, which is where the skills-related issues are much more apparent. There is also a move at UK Government level to make sure that, in areas where visas are being granted for applicants, the home nations have a plan to address skills-related issues.

A way for us to address those issues is to work through industry leadership groups to get a clear picture of what the skills challenges will be and to work with the Scottish Further and Higher Education Funding Council, training organisations and employers to make sure that firm plans are in place. I do not doubt that the transition phase will be challenging.

**Gillian Martin:** Many of my colleagues have asked this question. When there are skill shortages or recruitment issues in certain areas, what do we do to target Scottish nationals who have not been economically active?

**Gordon McGuinness:** One point is that more welfare powers are coming to Scotland. We have our employability fund, and we will work in partnership with local authorities and tailor programmes where we can. There has been a bit of pressure on that fund. The challenges that we will face because of Brexit and changes to migration arrangements might mean that we need to think about the resources that are applied to the policy area to provide solutions for Scottish and UK nationals to access employment here.

**Gillian Martin:** Is it fair to say that the volume of Scottish nationals that that applies to is nowhere near the volume of EU nationals who are currently in jobs here?

**Gordon McGuinness:** I do not think that there is a good match of supply and demand. Agriculture involves physically demanding work, so is it a match for some people who are coming from longer-term unemployment? I do not think that we have a balance. We will have challenges, so the wider immigration policy is important. What I described is part of the solution, but not the whole solution.

**The Convener:** Do Professor Wright and Stephen Boyd, who have not yet spoken, have anything to say on the issue? If any of the witnesses wishes to come in, simply indicate that by raising a hand.

**Stephen Boyd (Scottish Trades Union Congress):** Gordon McGuinness answered the questions well. My only comment is that although we are talking about the future—the situation once Brexit has happened—there is quite significant anecdotal evidence of a danger that the fall in the real value of remittances is already leading to, if not significant constraints on labour supply in some sectors, then fears that constraints might start biting before Brexit happens.

**Professor Robert Wright (University of Strathclyde):** I have a lot to say on the point. Basically, I agree with Gordon McGuinness, but we have to look at the current situation.

UK immigration policy is the UK Government's responsibility. There have been no promises at all that somehow, after Brexit, Scotland will get some control over immigration. The status quo is that decisions on immigration policy are made in London as opposed to Edinburgh.

Another thing to remember is that it is right to say that there are a lot of A8 migrants who are in low-skilled jobs but who have relatively high skill

levels, which is a big mismatch. That is a problem because it leads to labour market turnover, which is a clear cost. That is not an ideal match or an ideal policy; the position has just evolved because of the free movement of people.

The current UK system is very flexible in a way. It has the tier 3 visa, which was focused originally on low-skilled migrants but was not put into operation. That visa could easily be put into operation, which would attract low-skilled people. That would be a policy for the UK as a whole and, as far as I can see, there would be no input from Scotland specifically. Such a visa would work quite well; it is part of the immigration policy that is used by most countries that have a shortage of low-skilled workers. They do not attract high-skilled workers to take low-skilled jobs; they attract low-skilled workers. I do not think that we need to create a new system or a complicated set of visas. There is a tier that could be used, although it would have to be reactivated and people would have to think about that.

The next issue is what Scotland does. We know that Scotland's demography is different. The workers of the future have never been born. It will not be possible to reskill or provide skills for people who leave school with no basic qualifications or people who have been long-term unemployed—the evidence is out there that it is difficult to get those people back into work and keep them there. That is not speculation; it is known from research by universities and the Parliament.

We have done work on numbers over the years, and the number of people that has been mentioned is relatively small. Hiring our own people who do not work will not fix the problem. We can argue about or discuss why those people do not work, but basically they do not have the skills to work. What they have on offer is not in demand.

For the Scottish situation, we do not have to recreate the wheel. We can learn from experiences such as those of Canada and Australia. If we want more control over immigration, we have to adopt a system that is similar to those in Australia and Canada, in which we would have more say. In such a system, we would have to issue visas that were conditional on people working and staying in Scotland for the minimum time before they can apply for UK citizenship. That will not change with Brexit.

Such a system works well. It gets people who are a better match, rather than highly skilled Polish people who come here, stay one year then return.

I do not see a big change in UK immigration policy before or after Brexit. I do not see any serious problem in attracting low-skilled or middle-

skilled workers to the UK, but the question is how we deflect those workers and convince them to come to Scotland, where they are needed. That is the big unknown, but it was unknown 10 years ago, it was unknown yesterday and it will probably be unknown after Brexit.

The discussion will have to be about Scotland's demographic situation. Labour growth is much slower here; relatively speaking, we need more people in the lower-skilled and middle-skilled group than the UK as a whole does, which in effect is England, because it has 90 or 88 per cent of the population. That is my point.

**Richard Leonard:** As the first Labour member to speak in this evidence session, I must point out to Patrick McGuire that the Health and Safety at Work etc Act 1974 was piloted through Parliament by Michael Foot and was enacted by a Labour Government.

Gillian Martin has reflected on the point that I will address. Brian Buchan from Scottish Engineering said in a previous session that he had seen Polish workers carrying out construction work on a Ministry of Defence contract at Rosyth dockyard. The GMB trade union yesterday published a report on the employment opportunities of decommissioning in the North Sea. Will the panel reflect on whether we could be better at not just skills development and labour market planning but, on a broader level, economic planning—not least in looking at areas where a large amount of public money is being spent in the economy—to try to better match the existing skills base with future work demands?

**Gordon McGuinness:** The Scottish Government has produced its labour market strategy and we will work on that basis. When we look back 10 or 15 years, we see that higher and further education and, to a lesser extent, apprenticeship schemes have not been as closely aligned as they could have been to future proofing the economy and the skills in it. SDS has been working on that with our partners in our skills planning work. It takes a bit of time to embed that in the system and get the changes that we want.

Will it always be possible to deliver from within Scotland what the economy needs? Probably not, but we need to get a balance. The main focus of our work has been on working with people such as Brian Buchan at Scottish Engineering. We have an engineering skills leadership group to look at where the economy is going and the impact of digitalisation on it, and that group has an increasing focus on apprenticeships that are based on science, technology, engineering and mathematics.

Do we have a perfect match now? Obviously not. It is hard to plan for the future, but we have

made good strides forward since Skills Development Scotland came into being.

**Professor Wright:** I always get myself in trouble when I answer such questions because I work at a university. More can always be done to provide the skills that are needed, but providing the skills to young Scottish people is not enough—skills will need to be brought in from elsewhere.

I have been in Scotland since 1991 and before that I worked in London, and I can see that there has been a massive increase in higher education at the expense of further education, so it is hardly surprising that Scotland has skill shortages. The emphasis has been on going into higher education, which is free, so it seems like a good deal for parents. However, about 6 per cent of higher education graduates in Scotland leave the country as soon as they graduate. There is a clear mismatch. I am suggesting not that universities and further education colleges should be turned into skills factories but that there could be a better match in what is taught for free, using state money.

The number of young people in Scotland is declining—the demography is there. There are fewer and fewer 17-year-olds, who make up the core business of universities, and Scotland has a very large higher education sector, so there will have to be a change somewhere along the line. That should be done now, because there are several problems—they relate to free tuition, the declining young population, skill shortages, labour shortages and Brexit—that will become worse if they are ignored.

Further and higher education policy could be reoriented to be more relevant to the skills that are in demand. However, I see little discussion of that, because letting Scotland-domiciled people study for free in Scotland is a vote winner. Changing that would be a vote loser. Until that political dilemma is addressed, little will happen, the current system will remain and we will continue to have conversations such as this one. We shall see.

**Stephen Boyd:** Richard Leonard's question raises several points. First, the scenario involving Polish workers at Rosyth does not worry me, because there is no serious evidence that immigration to Scotland has led to higher unemployment levels or lower wages among the indigenous Scottish workforce. We have good evidence to show that that has happened in the UK as a whole, but I have seen no evidence in Scotland that leads me to be particularly concerned about that.

Secondly, members will not be surprised to learn that I have no ideological opposition to Richard Leonard's point about economic planning and forecasting and meeting skills demand.

However, we must understand that that is tremendously difficult. Gordon McGuinness and his colleagues in the Scottish Government have been putting a lot of work into that area for many years. Four or five years ago, there were huge problems for the oil and gas industry, for example, which the public sector was meant to come in and solve. Then the global oil price collapsed, and lo and behold, the scenario has become completely different—the sector is behaving in a way that will only exacerbate future skills demands, which means that there is a limit to what the public sector can do to fill the gap.

My third point is about the scale of future opportunities. I heard Gary Smith from the GMB on the radio yesterday morning and I looked for the report, but I could not find it anywhere, so I cannot give a detailed response to it.

There is insufficient understanding of the nature and scale of the jobs that will flow from decommissioning. We are talking about a process. At the higher end—decommissioning platforms at sea—there is a lot of evidence that Scottish firms are doing well and are well placed to benefit from future opportunities. At the other end of the process—breaking up rigs in yards—we should be working hard with the Scottish Government to maximise the opportunity that is there. People bandy about numbers such as £100 billion and suggest that it will all be spent on breaking up rigs in yards in Scotland, but that is very unlikely to be the case. We have to be forensic when we look at future opportunities and be realistic and evidence based in our approach to addressing them.

**Richard Leonard:** Many people expected a jobs bonanza in renewable energy, which has not materialised. Does Stephen Boyd have any brief reflections on that experience and whether there are lessons to be learned from it?

11:45

**Stephen Boyd:** Boy, that is a whole other evidence session—there are a lot of issues there. I have mentioned to the committee before that, when I attended the first meeting of the forum for renewable energy development in Scotland in 2003, we published a report on marine renewables in Scotland that talked about 12,000 jobs in wave and tidal by 2010. Those reports were much too optimistic and that was unfortunate, because it embedded some scepticism and resentment in workers who did not see those opportunities begin to flow as quickly as they had been promised.

There are a lot of issues, which go to the heart of energy policy at a UK level, about how we can subsidise those sectors and about industrial strategy at UK and Scottish levels. I find it difficult to be more concise than that. The fact that we

have not generated the levels of employment that were being discussed 10 or 12 years ago is a massive question that does not really benefit from brief responses.

**Patrick McGuire:** I have a brief point on skills and the opportunities that might exist. First, Richard Leonard was correct. I was flustered—I was of course referring to the first regulations under the 1974 act, which were taken forward by the Conservatives under the six pack. However, his point is well and truly noted.

Strangely, despite everything else that I said earlier, I think that there are opportunities from skill shortages. Members of various parties in the Parliament have made moves to try to harness some of the powers that the Government has on procurement, whether by imposing conditions such as paying the living wage or—in the context of skill shortages—setting minimum requirements for apprentices. If a firm is to get a Government contract, it has to be willing to pay a certain wage and to bring on or train people to plug skills gaps. That has always floundered in the past because of the framework directive, the posted workers directive and various strict rules regarding state aid—the list of reasons goes on.

That is one area in which Brexit represents and presents massive opportunities to the UK. The Scottish Parliament has shown itself to be particularly willing to go down that road, so there are massive opportunities to harness the power of procurement.

**The Convener:** Is that because the current procurement rules are European Union based?

**Patrick McGuire:** The procurement rules have certain barriers put in their way—via various European rules that have been set out from the framework directive—that relate to the need to have equality among employers. Specific state-aid rules cover when a Government can or cannot support a business. The posted workers directive relates to workers in different parts of the Community being treated the same and to the free movement of trade. That is a long way of saying that European rules have prohibited or prevented such moves in the past.

**Professor Wright:** The renewable energy bonanza that we have not experienced is not all that complicated to understand. It is not a big puzzle; we do not need a special session.

Two factors caused the situation. The first is that we went into a massive recession, which—for once—was not caused by the Organization of the Petroleum Exporting Countries or somebody else jacking up oil prices. It was not an energy-driven recession. Secondly, unless you believe that the price of oil will stay low for ever, the move has just been shifted into the future. Do you believe that

there will be enough oil in the world to last for ever? No—it is just a matter of time.

The Scottish Government is using the correct policy, which mimics what Canada is doing with respect to the Athabasca tar sands. It is keeping investment in some of the activities going, which will pay big dividends in economic growth and employment in the future, although it is hard to say when that will be. When the price of oil goes up again—which it will—the investments will be made by the private sector as promised before the recession and before the price of oil nosedived.

That is a policy that the Scottish Government has, in fact, got right, but it is hard to say when the price of oil will rise to high levels again.

**The Convener:** I will bring in John Mason at this point.

**John Mason:** I want to return to some of the issues that Gillian Martin raised. Perhaps I can start with Professor Wright, who has provided a slightly discouraging picture of where we are.

There is the short-term issue. In the previous evidence session, we heard that new GPs are going to take 10 years to train, so we will not get them quickly. However, do you think that in the medium to longer term we can change social attitudes in our population so that people are willing to go out and, say, pick fruit in a way that they are not at the moment? We heard that nurses are willing to be nurses, but they do not want to work with older people, and that doctors want to be doctors, but they do not want to be GPs. Can that be changed? Am I being overoptimistic in thinking that we can change such attitudes and adapt our own workforce more to our needs, or do we just have to say that in the medium to long term we will always need to bring people in to do some of these jobs?

**Professor Wright:** Do you want someone else to go first, or are you just picking on me now?

**The Convener:** I am happy for whoever to go first.

**Professor Wright:** It is clearly the latter option. It is not a matter of being optimistic or pessimistic; it is a numbers game. It is all about the number of people. If you look at the population projections under a reasonable set of assumptions, you will see that the Scottish labour force is going to shrink, which means fewer potential workers. The people just are not there to be retained and skilled up on the scale that is needed.

What you should be doing is thinking a little bit about what other countries are doing. In Canada, they do not educate or train nursing assistants. Instead, they have decided to spend all their money on nurses and bring nursing assistants in from abroad. For the reasons that you have

mentioned, they could not get young, mainly female Canadians to study as nursing assistants. That requires a further education degree, whereas being a nurse requires a higher education degree. As a result, most nursing assistants come from the obvious places such as the Philippines, Indonesia and other parts of Asia where the level of training is high enough to enable people to work in Canadian hospitals. Those are the decisions that have to be made. Would you like to have Australian doctors or Scottish doctors? Perhaps Scottish doctors know more about Scotland than Australian doctors, in which case you focus on training your doctors. You cannot train everyone—you just have to make a decision.

We do not have to make such decisions at the moment, given that we are in this pre-Brexit period in which a lot of people are coming to Scotland from the EU because they are allowed to do so. We do not have to think about such questions at the moment but, in the future, we are going to have to, because these people will not be coming to us under the same conditions that they were before. Being able to go and work in Scotland and deciding to stay if you like it is a very different proposition from having to pay a fee and being limited to a stay of three to five years or whatever the visas will allow.

It is not a matter of optimism or pessimism. It is about making hard decisions about where you want to spend your money, the type of people you want to educate and the type of people you want to import.

**John Mason:** So is the problem that we just do not have enough people to put through the higher and further education systems?

**Professor Wright:** That is right. The number of 17-year-olds and other young people is shrinking in Scotland but increasing in England. That is why the problem is different in the two countries.

**John Mason:** I think that you have also suggested that we have put too much of an emphasis on higher education. The tradition in Scotland is that if you get a degree, you are a success, but should we be putting more of an emphasis on further education?

**Professor Wright:** My personal view is that there should be a rebalancing away from higher education to further education, mainly because you lose 6 per cent of your higher education graduates to somewhere else. You are in a situation where you are under demographic pressure; your labour force is not growing at all or is growing very slowly; and it is growing only because the number coming here is greater than the number leaving. Despite that, 6 per cent of the Scotland-born and Scotland-domiciled people

whom the taxpayer pays to educate leave the country. It seems like a kind of madness to me.

Why is it happening? The evidence suggests that they are moving away from Scotland because the job opportunities are better in the rest of the UK and further afield, including the EU. Of course, the EU might no longer be the destination for these people in future, so perhaps more of them will stay—or perhaps more of them will go to Australia, Canada or the United States, in which case the probability of their returning is much lower than if they go to the EU. We need joined-up thinking about the people who are needed in future; the numbers that are needed; and whether they should be skilled up here or whether someone else should do the skilling up, with us just saying, “This is the minimum standard that we need, and you either meet it or you don’t.”

**John Mason:** Mr McGuinness, are we doing too much in higher education and should we switch a bit away from that?

**Gordon McGuinness:** There has certainly been a significant move. Back in the 1970s, about 70 per cent of people went into the wider labour market and about 30 per cent went on to higher and further education. That balance has shifted significantly.

We have been working with partners on the development of foundation apprenticeships and graduate apprenticeships. The aim is to give a better experience of vocational education or work-based education in schools and to try to show that there are different paths into careers. We have had good pick-up from further and higher education.

That is not to say that further and higher education are wrong. The issue is getting people into the right types of disciplines and thinking about how we can multiskill them. For example, is someone just a nursing assistant or can we add value to that? We need to think about the potential roles for automation in healthcare and in wider services. Obviously, we also need to think about preventative measures around healthcare. We certainly advocate more of a balance and more thinking around work-based learning. That was certainly the view of Sir Ian Wood in his review—that there has to be much more of a focus on technical and vocational skills, because that is the way that the economy is moving.

**John Mason:** Does Skills Development Scotland want to ensure that we cover the whole range of skills using as many local people as we can, or do you assume, as Canada apparently does, that for certain sectors we will not bother training people and we will bring them in from outside?

**Gordon McGuinness:** Skills Development Scotland does not have a view on importing skills in that way. We work through our industry leadership groups to try to identify where the key priorities are for industries and where there are skills gaps and volume issues. Given the Government commitment on early years childcare, we are working to get a better understanding of what the current system provides and what it might look like in future. We are doing likewise in areas such as digital and in subsectors such as road haulage. We are considering where the shortages are and where the pressures are starting to build, and we look at the feedback that we get from employers.

There is also an emphasis on what employers are doing. As Stephen Boyd said, this is not just a challenge for the public sector; it is a challenge for employers in the public and private sectors to think about their workforce planning, their needs for the future and how they are investing in their workforce.

**John Mason:** Mr Boyd, should we assume that there is long-term net immigration, or is that not an issue that affects you?

**Stephen Boyd:** For the reasons that Professor Wright has already set out, we should assume that the Scottish labour market will require in-migration in the future. Whether the post-Brexit scenario allows for that to happen is clearly another question.

**John Mason:** Apparently, Canada accepts that, for certain sectors, it just has to take immigrants. Should we do that, or would you not look at it that way?

**Stephen Boyd:** We should always seek to learn from what other countries do. I would certainly be interested in finding out more about that. Forecasting precisely what our skills demands will be is quite difficult at the moment.

**Professor Wright:** There will be a big demand in future for low-skilled people because of the ageing population. You are going to need a lot more semi-skilled and low-skilled health workers, and you are not generating them now. Where are they going to come from?

Another thing to remember is that Scotland and the UK are no different from the United States or Australia in that there are basically two groups of workers that are growing—low-skilled and high-skilled workers. That is because the low-skilled workers provide the services that are demanded by the high-skilled ones, and there is not much in between. That is the issue of the disappearing middle class, which is happening in lots of countries and which results in higher levels of inequality. There have been big long discussions about that, but that is the reality—those two

groups are growing. Skills policy and immigration policy or whatever should be in place to help the groups that are growing to grow.

Why would you want to skill up agriculture workers when you can bring people in temporarily to pick tomatoes or whatever? When I was growing up in Canada—in the stone age—they used to bring in people from around the world to pick strawberries. You have to decide who you are going to skill up yourself, with taxpayers' money and your institutions, and who you are not. There is no discussion of that; there is no thinking that way. Remember that there are basically two groups growing: low-skilled and high-skilled—that is it.

12:00

**John Mason:** I suspect that we could discuss that for a long time but I will leave it there.

**The Convener:** Patrick McGuire, you might not be able to comment on this issue if you are not responsible for employing people in your firm. However, do you have any comment on the issue from the point of view of the legal profession?

**Patrick McGuire:** I am a partner and therefore am involved in employment as much as any of the other partners. I do not have any particular observations on the legal market with regard to migration in or out.

I think that we are beginning to touch on the growing atypical employment situations that exist across the UK and Scotland. Professor Wright's suggestion that there are now just two types of worker might be correct but there are more and more different types of employment situation, ranging from fixed-term posts to agency work and the much-discussed gig economy.

On that point, I will take the discussion back to the EU and the fundamental protections that have been brought in via the EU, and the significant concerns that I have about what might happen in that regard. I will say no more than that the great strides forward in the protection of the rights of agency workers, part-time workers and temporary workers have all come through Europe. We must vigorously hold on to those protections and not allow them to reduce in any way, shape or form.

**Gordon MacDonald:** On that point, my understanding is that EU employment law sought to create a level playing field across countries, so that one member state could not compete with others by having lower levels of protection for workers. Is there a danger that, in order to continue to attract new employment and grow the economy, the UK could end up competing on the basis of lower pay and reduced employment protection for workers? If so, what steps can we or

the UK Government take in order to avoid that situation?

**Patrick McGuire:** I agree with you absolutely—100 per cent. It is interesting that, when most people discuss the fundamental protections that have been brought in for workers via Europe, it is always in the context of the social charter and that side of the EU. However, as you have highlighted, the reason for those protections is actually the complete opposite: it is to ensure that there is a level playing field among all countries so that one country cannot out-compete others by having worse rights or health and safety regulations such that it is cheaper to employ, to injure and to treat employees there. That is what is at the heart of fundamental protections for EU workers, as we have seen. To bring the issue absolutely bang up to date, that is exactly what underpins the judgments in relation to holiday pay and so on in the gig economy. Therefore, there is absolutely a risk that, without the shackles of the EU, and without the binding obligation under the framework directive to have that equality, one way of becoming more competitive would be to cut where it is easy to cut, whether that involves cutting workers' rights in relation to health and safety or immediately pulling back on the protections that have been imposed on the UK in relation to the gig economy. There is no doubt that those areas would be the first things that would go. That is obvious.

There have been signs of that approach in several UK Government publications over the years. For example, in 2011, the Department for Business, Innovation and Skills published a paper called "Flexible, effective, fair: promoting economic growth through a strong and efficient labour market", which talked about minimum necessary legal protections and minimal Government intervention—a light touch, in other words, and we know how badly that went wrong with the banks. In reality, that is the vision. If that comes to pass in relation to workers' rights, what might come out of it is absolutely terrifying.

Let us bring things absolutely up to date by considering the negotiations between the Prime Minister and Nissan, whatever they were. Is it not interesting that a big, strong employer was able to make demands and get certain concessions? Where does that take us? There is a significant risk that employers will start to go to the Prime Minister to say, "You will reduce health and safety standards", or "You will make it easier to pay people less."

What do we do? It comes back to what I said in my paper. First and foremost, there is a constitutional issue, and the Parliament in Scotland and the Scottish Government should be saying that there is a new constitution and the

issues should be devolved to Scotland. Certainly—this brings me back to comments that were made earlier—the current negotiations around the order in council must ensure that the Scottish Parliament has all those powers.

**Professor Wright:** This is an important issue from an economics point of view. I am not a lawyer, but I know a lot about the legislation. One view is that all this employment legislation makes workers more expensive; it is a tax on labour, which makes us less competitive—that has just been mentioned. The other view is that it makes workers more productive, because they are more secure. It is not always the case that there is a race to the bottom to get the cost of labour to a minimum so that we can compete against some low-wage economy; there can be big productivity gains if people feel more secure, because they will work harder. It is not one or the other, although it is couched in those terms.

Mr McGuire did a great job of explaining that. The economics of the issue is that people are more productive if they are more secure, and they are cheaper if there is less employment legislation, so there is obviously somewhere in between that is the ideal place to be.

**Stephen Boyd:** It is important to highlight that, despite the common minimum standards that Patrick McGuire described, there is significant divergence across the EU, particularly in the context of employment protection, and that the UK is already right at the extreme end, in that it is the least stringently regulated.

**Dean Lockhart:** I have a few questions. First, on workers' rights inside or outside the EU, does Stephen Boyd agree with Trades Union Congress general secretary Frances O'Grady, who said that workers in Scotland would be better off in the UK, even outside the EU, than they would be in an independent Scotland?

My second question is for Professor Wright and Mr McGuinness. I believe that there are 67,000 18 to 24-year-olds in Scotland who are not in employment, education or training—the so-called NEETs. What can we do to train those young people and get them into the workforce, given that we have 5 per cent unemployment and a skills gap? There is a young generation that has been left behind, and we should be doing all that we can to get them into some form of training or employment.

Mr McGuire, I have a technical question on your written statement, given that you are here as a solicitor advocate. What advice have you provided on the legal implications of Brexit in your three-page submission? I am not asking about questions of politics or opinion; I am looking for the hard legal advice in your submission.

**Stephen Boyd:** Do I have to start? [*Laughter.*] The first thing to say, just so that everyone is clear, is that the STUC is wholly independent of the TUC and has been since 1897. Why Frances O'Grady felt the need to make such an observation, I do not know. The STUC supported the devolution of employment law in the Smith commission process, and whether we are better in the UK than independent in Europe is a matter that we will continue to consider and address when we need to answer such questions.

**Professor Wright:** On Mr Lockhart's second question, this is a perennial problem, not only in Scotland but in most other countries. Most countries have a population group of young people who leave school with no qualifications—they often have problematic backgrounds and so on. Despite Governments spending lots of money trying to reskill those people, all the evidence points to such an approach not working very well. That is the sad thing.

Whether we continue to try to get those people back into the labour force is a financial question, because it does not seem to work very well. One view of Conservative politicians is to force those people into work by cutting back their welfare benefits so that they do not have much choice. Again, however, that is pretty extreme; I do not agree with it at all.

In a lot of countries, young people in the group that you are talking about go into the army—that is one of the requirements. If a person cannot cut it in the labour market and they have a low skill level, the view is, "Sorry, we are going to make a decision for you".

The issue is a real core problem, but there is no evidence that the idea of retraining people from that group to make them fit for work has been successful, even though a lot of money has been spent on it. As has been pointed out, for a long time, Scotland has had a lot of people in the group that you are talking about, compared with many other countries.

Another approach to deal with the issue is to fix the problems when they start. The school system cannot fix problems that start before schooling age. That sounds controversial, but the view of many people now is that what is needed is extremely early intervention. In no country can the school system fix big problems that are created when people are young—we have to recognise that.

I wish that I had something more optimistic to say but I am looking at the evidence and it is not very optimistic.

**Gordon McGuinness:** In recent years, Skills Development Scotland and our partners have made progress in this area. That is reflected in

such things as school leaver destinations, with collective action between SDS, the colleges and local authorities to help with reporting at a local level. Within the school system, we have a much earlier identification process and data is shared with education authorities to pick up young people who have additional needs and might require additional support. We help with that through job coaches and so on. The problem is not unique to Scotland, but we have made good progress.

Labour market opportunities that might arise in certain areas are subject to what does or does not happen as a result of Brexit. Obviously, that will shape the opportunities that are available for young people within a locality. It is important that there is a regional dimension to that activity and that SDS and our partners across the education system maintain a continued focus on that.

**Patrick McGuire:** Have I understood Dean Lockhart's question correctly? Did he ask whether I have given any formal legal advice to any of my clients, meaning my trade union clients?

**Dean Lockhart:** I am sorry; the question was whether, in your three-page written submission to the committee, you have given any hard legal advice in relation to the implications of Brexit.

**Patrick McGuire:** You are asking whether the submission contains any hard legal advice.

**Dean Lockhart:** Yes.

**Patrick McGuire:** That is a wonderful question.

**Dean Lockhart:** The context is that when economists appear before the committee, they generally give us economic advice. When Scottish Enterprise witnesses appear before us, they tend to give their view on enterprise.

**Patrick McGuire:** I offer an opinion based on my knowledge of the law and my understanding of the legislative process and the devolution settlement in the Scotland Act 1998, which I have spent huge portions of my career studying and understanding, as few lawyers have done.

**Dean Lockhart:** That is helpful.

**Patrick McGuire:** With regard to the question about my being a solicitor advocate, I did not choose my title; it is just a fact that I am one.

**Dean Lockhart:** Thank you. I just wanted to clarify what this written submission is.

**Richard Leonard:** I have a quick follow-up. Perhaps Mr McGuire could help us to understand whether all the existing EU directives that have been transposed into UK law—whether on health and safety or equalities or employment rights—will still be on the statute books on the day of Brexit, subject to further revision or amendment.

**Patrick McGuire:** That is correct. They will remain on the statute book and then be open to the foibles of whichever Parliament takes a political view on them.

12:15

**Andy Wightman:** I would like to follow up some of those points with Mr McGuire.

Mr McGuire, as you have just said, the Prime Minister has stated that all existing legal rights that pertain to citizens here under EU law will pertain on the day on which we leave the European Union. Therefore, the question is about what the fate of those rights may be in the future. You have given us an opinion on that, which is based on your analysis of the current Administration. That is a valid view. However, fundamentally, we are talking about the constitutional politics whereby the European Union will no longer have any jurisdiction over UK law in such areas. What do we need to do, collectively, to retain the best of the workers' rights that we have in this country when we have full domestic control of them—whether that is in the UK Parliament or whether some of them are devolved to the Scottish Parliament? It could be argued that the default position that you have outlined, whereby the EU has underpinned all those rights, has led to a bit of complacency in the labour market about those rights being inviolable, because people thought that we were always going to be in the EU.

**Patrick McGuire:** First and foremost, being in the EU created a social norm out of the fact that workers' rights seemed to be travelling only in one direction. As far as I am concerned, that was absolutely right, and it was utterly outwith anyone's contemplation that that would cease to be the case. In that respect, workers' rights were not susceptible to being used as a political football. With Brexit, however, the situation changes absolutely.

You talk about the constitution, and I have made the point that there is a serious constitutional issue that both Governments and Parliaments have to contemplate. If all the legislative powers over the three areas that I have highlighted—employment, health and safety, and equalities—are vested solely in the UK Government at Westminster, that will unquestionably constitute a significant rebalancing in the relative powers of the two Parliaments, which I do not think anyone ever contemplated. That is a serious constitutional issue to address.

When we move forward and the Parliaments have more power to change the law, what should we strive to achieve? I reiterate a point that I made earlier. One thing that is currently within the gift of the Scottish Parliament is the order in council

relating to the administration of the employment tribunal system. More often than not, the ability to access justice in an appropriate forum is the difference, in effect, between a right existing or not. As I highlighted, there is no better example of that access being removed than the introduction of employment tribunal fees. At this moment in history, we have the opportunity—coincidentally, due entirely to the Brexit vote—to fully take the power to the Scottish Parliament to ensure that, no matter what the black-letter law says, Scottish workers will have the best opportunity to exercise their rights via an employment tribunal. The Parliament must grasp that opportunity.

**Andy Wightman:** Is it not the case that, broadly speaking, employment rights should be harmonised across labour markets? The advantage that comes from EU membership through the harmonisation of workers' rights is the opportunity for workers to work anywhere in the EU and enjoy the same employment rights. If substantial amounts of employment law were to be devolved to the Scottish Parliament, would there not be a danger that there could be an erosion of the labour market across the UK?

**Patrick McGuire:** I do not necessarily accept that analysis. The issue has been debated backwards and forwards on many occasions. There are already some differences in rights—all on the periphery, I grant you—relating to matters of civil justice, the best example of which relates to the damages that are awarded for fatal injuries. The Scottish Parliament has also taken its own steps to protect victims of asbestos-related disease. Although it is very different in Scotland now because of great strides forward by the Scottish Parliament, there has been no particular economic advantage to one side of the border over the other. The other analysis, of course, is to ask whether it is a flight to the bottom or one jurisdiction showing the other the best that it possibly can be. I like to think that it is the latter.

**Stephen Boyd:** I will supplement Patrick McGuire's response to that question. It is an important point. We have always assumed that there would be something of a trade-off between narrow economic efficiency in the integration of the UK labour market and workers' rights in Scotland, which would be better safeguarded if employment law were devolved.

There is a tendency to assume that the degree of integration between the Scottish and rest-of-the-UK labour markets is greater than it is. A couple of years ago, the Bank of England presented some really interesting analysis of labour flows between Scotland and the rest of the UK and, for instance, between US states or Canadian provinces and territories. By quite a distance, the migration flows

between Scotland and the rest of the UK were lower than in those other scenarios.

**Andy Wightman:** Professor Wright, how confident are you in the quality of the data that we have on workers who are EU nationals, those who were born in the EU, those who were not born in the EU and those who have or do not have rights of residence to enable us to forecast what might happen in the future and, therefore, determine what provisions we need to make in migration policy and work permit arrangements?

**Professor Wright:** That is a good question. There is a lot of data and a lot of data that is not used. I have always found that the Scottish Government does a lot of statistical analysis of not very important issues. For example, we have the census, labour force surveys and information on higher education graduates through the Higher Education Statistics Agency. We have a large number of surveys, but the analysis of those surveys has not taken place yet to the extent that is needed because it is expensive and the Government has to find somebody to do it. Perhaps the incentives do not exist in the further and higher education sectors for the staff there to do the analysis, but there is enough data to answer all the main questions. The question is how we get the people with the knowledge and interest to start doing it, because the statistical service in the UK Government and the Scottish Government is not doing it to the extent that it should.

**Andy Wightman:** Why not?

**Professor Wright:** I do not know. I do not set the work agenda for the Scottish Government. It just ended reporting a mass of tables on everything that you could possibly think of from the most recent census but nothing specific, such as how long the typical Polish worker in Scotland has been living here, what he or she was doing and whether he or she moved from a low-skilled job to a high-skilled job. That information is available, but we have to think about what information the Government needs. That should be the priority and it should not produce the other information that it does not need.

I know all the people and have taught a lot of them. The skill exists to do a lot more, but it is a political issue to decide their work for them. Enough issues have been raised today that would be a good start to some of the things that you need to understand better, particularly in this time of uncertainty.

Brexit will be a negotiation and we may have to adopt other things to get something else. We may have to adopt all the EU employment law that we maybe like or do not like because we want access to the single market. Who knows what the

outcome is going to be? Nobody can really say what the situation will be six months or one year after Brexit because we do not know what the negotiations will give to us. Because of all the uncertainty in the negotiations, I am a bit concerned about saying what will happen in the short run and then thinking about what will happen 10 years down the road. It is nice to hear all the legalistic discussion, but there is nothing that says that those laws will have to be in place in the future because they may or may not be as a result of the Brexit negotiations.

**The Convener:** Thank you very much. We will move forward to the future. I thank each of our guests for coming. We move into private.

12:25

*Meeting continued in private until 12:48.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

---

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

---

All documents are available on  
the Scottish Parliament website at:

[www.parliament.scot](http://www.parliament.scot)

Information on non-endorsed print suppliers  
is available here:

[www.parliament.scot/documents](http://www.parliament.scot/documents)

For information on the Scottish Parliament contact  
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: [sp.info@parliament.scot](mailto:sp.info@parliament.scot)

---



The Scottish Parliament  
Pàrlamaid na h-Alba