

# **LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE**

Wednesday 14 November 2007

Session 3

£5.00

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## LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

9<sup>th</sup> Meeting 2007, Session 3

### CONVENER

\*Duncan McNeil (Greenock and Inverclyde) (Lab)

### DEPUTY CONVENER

\*Kenneth Gibson (Cunninghame North) (SNP)

### COMMITTEE MEMBERS

\*Alasdair Allan (Western Isles) (SNP)

\*Bob Doris (Glasgow) (SNP)

\*Patricia Ferguson (Glasgow Maryhill) (Lab)

\*Johann Lamont (Glasgow Pollok) (Lab)

\*David McLetchie (Edinburgh Pentlands) (Con)

\*Jim Tolson (Dunfermline West) (LD)

### COMMITTEE SUBSTITUTES

Robert Brown (Glasgow) (LD)

Rhoda Grant (Highlands and Islands) (Lab)

Tricia Marwick (Central Fife) (SNP)

Margaret Mitchell (Central Scotland) (Con)

\*attended

### THE FOLLOWING GAVE EVIDENCE:

Kerry Barker (Scottish Public Services Ombudsman)

Professor Alice Brown (Scottish Public Services Ombudsman)

Jonathan Fair (Housing Supply Task Force)

Allan Lundmark (Housing Supply Task Force)

Councillor Harry McGuigan (Housing Supply Task Force)

David Robb (Scottish Public Services Ombudsman)

Councillor Chris Thompson (Housing Supply Task Force)

### CLERK TO THE COMMITTEE

Martin Verity

### SENIOR ASSISTANT CLERK

Jane-Claire Judson

### ASSISTANT CLERK

Ian Cowan

### LOCATION

Committee Room 2



## Scottish Parliament

### Local Government and Communities Committee

*Wednesday 14 November 2007*

[THE CONVENER opened the meeting at 10:00]

### Subordinate Legislation

#### Environmental Impact Assessment (Scotland) Amendment Regulations 2007 (SSI 2007/484)

**The Convener (Duncan McNeil):** Good morning. Welcome to the Local Government and Communities Committee.

We had intended to discuss the Scottish statutory instrument, but the Subordinate Legislation Committee decided that it wanted to draw it to the Parliament's attention. We will therefore place it on next week's agenda.

### Housing Supply Task Force

10:01

**The Convener:** I welcome today's witnesses. I am delighted that they can be here. Councillor Harry McGuigan and Councillor Chris Thompson are from the Convention of Scottish Local Authorities; Jonathan Fair is chief executive of Homes for Scotland and Allan Lundmark is its director of planning communications.

I thank you all for your attendance. I understand that you could not make our previous evidence session on 26 September, when we received evidence from your colleagues on the housing supply task force. We look forward to completing our evidence taking this morning.

Would anyone like to make an opening statement before we move on to questions?

**Councillor Harry McGuigan (Housing Supply Task Force):** I just want to say, on behalf of the COSLA representation, that we appreciate the fact that you have given us the opportunity to respond to questions. We obviously want to stress that we share the concerns of all about housing supply—particularly affordable housing supply. I look forward to answering the questions that you put to us and am glad to assist in enabling you to understand the issues and to develop initiatives, approaches and working relationships with us so that we can achieve that common objective.

**The Convener:** As I said, we took some evidence on 26 September. At that point, there had been only one meeting of the task force. We understand that there has been a second meeting. On the basis of the evidence that we took previously, we expected that it would focus on themes, objectives and a work plan. Can you update us on progress? What decisions about the task force's future work were made at the meeting?

**Councillor McGuigan:** The task force has identified an approach that will look at geographic areas to try to develop an understanding of specific difficulties in housing supply. The three areas are Edinburgh and the Lothians, greater Glasgow and parts of rural Scotland.

An important stakeholders event will be held in Edinburgh and the Lothians. It is an opportunity to develop a deeper understanding of the specific problems in the area that are barriers to housing supply in general, not only affordable housing supply. We want to analyse and understand the problems and make recommendations that provide options that might enable us to make an impact in those specific geographic areas.

There might well be general lessons that we can also learn. Obvious, almost predictable, things have come out already, such as the assertion, which some people make, that there are unnecessary barriers from local authorities in regard to land supply—we would of course contend that that is not the case. There are other issues, such as whether the land supply problem is compounded by difficulties with developers—the objective of developers is not necessarily to assist us in reaching the goal of a better supply of social housing. Those matters are currently being considered, and we hope that options will emerge for serious potential solutions to the issues that we face in this important area.

**The Convener:** We will touch on some of those themes as the evidence taking goes on. In the evidence that we heard previously, the theme of relationships between the sectors was not confirmed—I do not know whether that will be a theme. Is there work that is focused on the areas that are covered by the housing improvement task force and the homelessness task force, or are you not considering that?

**Councillor McGuigan:** You cannot consider housing supply without taking into account the homelessness legislation and the commitment—a very good commitment—to the 2012 target. It is fine to give commitments to a particular target, but there are realities: resources, and a common will, are needed to enable us to achieve it. It would be fallacious to suggest that there is an easy way to deal with the problem and to achieve that target unless we have a collective, sensible view on the

pace at which we can move towards the target and the resources that will be needed. I am talking about the aggregated resources—the intelligence as well as the finance—that will be necessary. That is a critical area for us.

**The Convener:** Does anyone want to pick up on the general points?

**Johann Lamont (Glasgow Pollok) (Lab):** How many meetings have you had so far?

**Councillor McGuigan:** We have had two meetings.

**Johann Lamont:** Have you been asked for input to the green paper, or will you be expected to give a response—not as COSLA, but as the housing supply task force? Given what you have just said about resources, has the housing supply task force been asked to contribute to the very current and live discussion surrounding the budget and the comprehensive spending review, ahead of the announcement today? Will the budget have had any input from the task force?

**Councillor McGuigan:** There have not been any specifics in connection with the budget. Indeed, at all the meetings that I have attended with ministers and cabinet secretaries, the opening gambit has been that we cannot go into the territory of spending because of the comprehensive spending review—they do not know what money will be on the table. That has been a disappointment, and we have made that point, but we have recognised that there is no settlement figure and that it would be a shot in the dark to talk in detail about resources at that stage. We cannot talk about solutions unless we know what level of resources will be committed.

**Johann Lamont:** So you have not even been asked to flag up the challenge of resource? I appreciate that you do not know the immediate figures, but have you not been asked to comment on the implications of having a strategy? Will you be consulted on the green paper on housing? Will you respond as a group?

**Councillor McGuigan:** Perhaps I should recap. The uncertainty arising from the comprehensive spending review has been flagged up, but as part of our case for a more coherent, collective and sensible approach to affordable housing supply, we have made clear and strong representation about the need for resources. We have made strong representation in relation to Communities Scotland. The solutions to local and regional problems are best understood, identified and solved by the agencies in those areas. We must have control of investment in the localities where the need is manifest—we have certainly made strong representation on that. We have expressed a degree of disappointment about the missed opportunities in last week's announcement in

relation to Communities Scotland. We feel that we should move toward identifying the resources that will come to local authorities for regeneration—we hope that we will move away from a ring-fencing approach to that—and local investment in housing. We have made that general representation without going into specifics about amounts.

**Johann Lamont:** So the task force was not consulted on the abolition of Communities Scotland?

**Councillor McGuigan:** The task force was not consulted on that.

**David McLetchie (Edinburgh Pentlands) (Con):** I have a question about the targets and the overall background against which you are conducting your work. Please correct me if I have the figures wrong but, as I understand it, the current level of house building is about 25,000 units a year in the private and social rented sectors, and the Government seeks to raise the level to approximately 35,000 units a year within a 10-year timescale. As a housing supply task force, do you start from the assumption that that is achievable and deliverable, or is it part of your job to assess whether the target is achievable and deliverable?

**Councillor McGuigan:** I know that I am responding all the time, but I have one important point to make. Neither I personally nor COSLA is necessarily convinced that having targets and numbers is the best and most sensible approach to meeting serious local needs. Depending on market circumstances, it might not be possible to achieve the target of 10,000 more new homes a year for a variety of market-forces reasons. In certain parts of Scotland, particularly rural areas, it may not be possible to achieve the required figures. The situation will vary from place to place, so one template will not fit in all areas.

**David McLetchie:** Perhaps other members of the panel, particularly those from Homes for Scotland, might like to say whether the target is sustainable and achievable.

**Jonathan Fair (Housing Supply Task Force):** You are correct: the current output of the sector is about 25,000 units per annum. Homes for Scotland has consistently taken the view that we should aspire to produce approximately double that number per annum in the foreseeable future.

**David McLetchie:** Did you say “double”?

**Jonathan Fair:** That is correct.

**David McLetchie:** If you think the number should go from 25,000 to 50,000, would that thereafter be the approximate plateau level that we should deliver year on year? For how many years should we run at that plateau level?

**Jonathan Fair:** The figure of 50,000 is a target to which the industry aspires. The green paper that was produced last week contained a target of at least 35,000 units per annum by the middle of next decade. All the members of the housing supply task force will no doubt want to comment on that target as part of the natural consultation process on the document.

Homes for Scotland supports the principle that we should make a significant difference to the housing supply in all tenures and that we should do that sooner rather than later, to address deficiencies to which a number of people point in the supply and affordability of housing.

10:15

**David McLetchie:** I understand that your position is that the number of new houses that are constructed should increase rapidly from 25,000, which has been the relatively steady figure for several years, that making that figure 50,000 is achievable and that it should be sustained at 50,000 for the foreseeable future. Is that correct?

**Allan Lundmark (Housing Supply Task Force):** Perhaps I should explain where the 50,000 comes from. It comes from an analysis of how we replenish our housing stock. At 25,000 units per annum, we replenish our housing stock by just under 1.5 per cent per annum. Most of Scotland's housing stock was built with a design life of 60 years, so that position is unsustainable. In broad economic terms, it means that we lose stock faster than we replenish it.

To replenish housing stock at a sustainable level, we must consider how to replace it in a 50-year cycle, which pushes the rate towards 2 per cent. If we factor in the unmet need that is emerging from studies such as housing needs assessments, the figure starts to push above 40,000 and closer to 50,000. That is where we are coming from. In a sense, the discussion is not about whether we can sustain that level of production; to tackle the problems in our housing stock and the unmet need and demand, we must reach the number that we have given. The question that I encourage members to ask is what we must do to reach that level of stock replenishment.

We have said that we will not achieve the figure overnight—we will have to move towards it with year-on-year growth in production. The question is how we go sustainably from 25,000 units a year to 35,000 and wash over that towards 50,000. We must reach that target level if we are to do something about replenishing our stock and meeting the unmet need and demand.

We have given a guiding figure rather than a target. That is what the industry, working with our

colleagues in the social rented sector and now those who provide public sector housing, must do to achieve that figure.

**Jonathan Fair:** The housing supply task force has directly tasked Homes for Scotland with producing a scoping paper on the capacity building that is required in the industry. We will present that paper for consideration at the task force's next meeting at the end of this month.

**David McLetchie:** I will describe one thing that I do not understand about the 2 per cent. When I look around Edinburgh—where I have lived most of my life—and Glasgow, I see tenement buildings, most of which are more than 100 years old. I, and, I suspect, many people around the table, were brought up in such houses. I do not recognise the idea that the Scottish housing stock has a replacement cycle of 60 years and that we need to work on the basis that 2 per cent is replaceable. Are you suggesting that, for example, the whole of the Great Western Road in Glasgow will have to be demolished and replaced in short order?

**Allan Lundmark:** No.

**David McLetchie:** Exactly. If that is so, why do you take 2 per cent of the total and say that 50,000 is the answer? The idea that vast areas of traditional Scottish tenemental housing would have to be replaced even within 60 years is absurd, as that housing has been standing for well over 100 years and is of very solid construction.

**Allan Lundmark:** We are saying that properties are built with a design life—a capital life, if you like—of 60 years. Factored into the calculations is the fact that much stock has its life extended because it is refurbished and rehabilitated throughout its life. However, we also know that that is not happening to some stock. In the past 30 or 40 years, we have lost public sector housing in far less than 60 years. Stock that was built in the 1950s and 1960s has been lost.

The figure that we reached is the target that we have to look to if we are to have an adequate housing stock. A lot of expenditure continues to go to refurbish and rehabilitate the existing stock. That is fine, and we tried to factor that in. We also tried to consider the ways in which stock is lost. Private sector stock that was built in the 1940s and 1950s will need significant investment because, for example, it does not meet the targets for sustainability and energy usage that modern houses meet. The question that arises is whether we need to do something to that existing stock or whether we should replace it. We tried to make judgments about that in arriving at the figure.

I stress that we are not saying that we have to reach the target. What we are saying is that a housing stock of that order will adequately house

Scotland's population. It is an ambition that we should move towards. We must consider whether we have the procurement systems in place that will allow us to deliver the level of investment and provide that replenishment rate.

**David McLetchie:** To summarise, you think that we should build 50,000 new houses a year and that that is sustainable year on year?

**Allan Lundmark:** No. We should accept the figure in the consultation—35,000—and consider how we can reach that. However, given the indicators of market pressures and demands, our ambition is to wash over that and go beyond it.

Also, it is not simply a case of reaching 50,000 and sustaining that figure. Population characteristics and people's ambitions change, so the figure will have to be constantly monitored. For example, the new-build figure will change if we increase the amount of money that goes in to replenish the existing stock.

I am not saying that we have to reach the figure, but the ambition is to reach 50,000 a year and stay there. Demand is market driven. If demand tails off, production will tail off. However, if we have that ambition, it will allow us to focus on the impediments to achieving that level of investment.

**The Convener:** I think that Councillor Thompson is anxious to come in on that point.

**Councillor Chris Thompson (Housing Supply Task Force):** Yes, convener. Good morning, ladies and gentlemen.

Targets have to be realistic and achievable. I suggest that the type of information that you and your colleagues will be looking for is not just an arbitrary figure for the number of houses that need to be produced. We need to look far deeper than that. We need to ask questions about land supply. What is the present land supply? Does it meet the requirements? Will it meet the requirements of any targets? What about the process of development planning? How long does it take?

The other question that we have to ask is the thorny one about infrastructure. We are talking about building a certain number of houses. Do we have the infrastructure to do that? I am thinking about Scottish Water, roads, the capacity to meet public transport needs and so on. Also, a big question arises about the capacity of the building industry. Huge projects are happening in Scotland and the United Kingdom and there is big pressure on skills. The targets can be achieved only if we have the capacity. To be frank, it is dangerous to set an arbitrary figure. Do we have the land supply, the people to build the houses and the infrastructure? All those factors must go into the calculation if the target is to be achievable.

**The Convener:** We will have one more question on the matter. I promise that we will move on to land supply, planning and skills shortages.

**Kenneth Gibson (Cunninghame North) (SNP):** That was a significant contribution. Questions are being raised rather than answered by your comments, Mr Fair and Mr Lundmark. Both of you used the expression "foreseeable future". What is the foreseeable future in your view?

Like Mr McLetchie, I am concerned about building standards. Have they deteriorated so much that houses will in future have a life expectancy that is half that of those built a century ago? How does that chime in with sustainable development?

The objective of 50,000 houses, which is too round a figure not to have been plucked from thin air, seems to be a holy grail for the industry, but what is the realistic timescale for achieving it?

**Jonathan Fair:** Whether we look at an uplift of 35,000, 40,000 or 50,000, we all agree on the clear need substantially to increase the supply of housing in the Scottish marketplace across all tenures and, as has been pointed out, if we are to do that, we will need to think carefully about the support mechanisms, professional skills and supply processes that will allow it to happen.

In the private sector, the businesses that we represent are flexible in their approach to meet the demands that they face in the marketplace. As we are focusing on targets, let us take the example in the green paper, which suggests moving to a target of 35,000 units within the next decade. That represents approximately a 5 per cent per annum increase on current production levels. It is extremely achievable given the economic climate in which we operate, but it needs to be backed up with a recognition of the importance of, for example, planning skills and adequate resources. There must be clearly linked Government investment in infrastructure support mechanisms such as schools, roads and transport networks, utility supplies and waste mechanisms, to allow that managed increase to be integrated into existing communities.

**The Convener:** That discussion perhaps went on a shade too long, but I must arrive at the conclusion that the targets that should be set will differ from one member of the task force to another. Even their significance is not accepted by all on the task force, and I suppose that Chris Thompson is saying that targets are all very well but, unless we address the other issues, we will not achieve any of them. We are discussing this morning not our targets but what has been announced by the Government.



I hope that we can now get into the substantive issues that could be barriers. I ask Alasdair Allan to open on that.

**Alasdair Allan (Western Isles) (SNP):** Councillor McGuigan touched on the availability of land for housing, which cannot be characterised as a problem for rural or urban Scotland as a whole. The situation varies a lot geographically. Do the witnesses have a view on how it is possible for local authorities to reconcile the conflict that, on the surface, there appears to be between the pressures on local authorities to ensure best value and to sell land and their equal responsibility to ensure that land is available for affordable housing?

**Councillor McGuigan:** That question goes right to the heart of a particular financing matter. Local authorities have a responsibility to secure best value receipts to enable them to undertake the capital programmes that they embark on, not just in housing but to meet other social needs. We will continue to make strong representations on enabling local authorities to release land without that barrier and without being penalised financially as a consequence.

**Alasdair Allan:** Has the task force come to a view about the scale of the assets we are talking about? Does the extent to which local authorities have suitable land vary geographically?

10:30

**Councillor McGuigan:** It does indeed. The picture is different throughout Scotland. There is an expectation that local authorities or public agencies have sufficient land to make available, but that is not necessarily the case—it is certainly not the case in North Lanarkshire and perhaps in other parts of Scotland. That has to be factored into the equation. Costs to local authorities will be contingent on the amount of land that they can make available.

**Allan Lundmark:** Land supply is the deeper issue that we must consider before we think about land ownership. We conduct housing land audits for all mainland authorities in Scotland, and our information leads us to conclude that around 30 per cent of the land in development plans cannot be built out in the lifetime of the plans, because it is impossible to remove constraints. Constraints fall into two categories: physical constraints in relation to the provision of infrastructure, such as water supply, drainage and roads; and constraints to do with community infrastructural requirements, because contributions must be found towards transportation systems, such as railways, and other community facilities, such as schools. Land supply is heavily constrained to start with, because of the exact match system that our planning

system attempts to implement, but it is further constrained because it can prove impossible to remove the constraints that I described.

The problem leads us into two potential avenues of inquiry. First, we can consider whether we need to release more land in different locations. Secondly, we can consider how to be smarter about removing the constraints that threaten the viability of projects. We must address those issues before we address land ownership. If we do not, it will not matter who owns the land, because the private sector will not be able to promote development opportunities if the financial burdens are stacked up.

**The Convener:** Johann Lamont has a question, to be followed by a question from Jim Tolson.

**Johann Lamont:** I am sorry, convener, can we move on? I thought I was after Jim Tolson.

**Jim Tolson (Dunfermline West) (LD):** On the back of the land supply issue it is important to consider infrastructure, in particular in relation to Scottish Water and the provision of drainage and sewerage infrastructure, which has been a problem on a number of sites. What is the task force's approach to that? Will proposed or future investment in Scottish Water improve the infrastructure and ensure not only that land is available but that the necessary infrastructure for water and sewerage is in place to enable programmes to be taken forward?

**Councillor McGuigan:** Throughout Scotland, perceptions of the relationships that local authorities have in relation to necessary infrastructure supply differ. In the main, the feedback that we get is that Scottish Water has covered some mileage in terms of those relationships. The issue is not just Scottish Water but other utilities and the types of development that communities require. It is not simply about the numbers and the targets that we set; it is about identifying the needs and aspirations of the people who live in our communities. Local authorities and their strategic partners in community planning have a responsibility to ensure that our plans mirror the expectations and aspirations of the people in our communities, so that we have sustainable communities.

We talk about the availability of houses and what the target should be. I am not making a political point, but we should remember that the right to buy is a big issue that has created problems in social housing, albeit that many people say that it has brought great benefits. The right to buy has seriously affected the availability of social housing in many areas of Scotland, and it is in danger of creating ghettos in certain townships. That has to be addressed through a deep, accurate understanding of local needs that

does not simply take account of the aspirations of a particular business sector.

I often look for the business plans that we hear about—they have been described as master plans—but I have not seen an awful lot of evidence that developers are in the business of master planning. Some developers' approach is, "Get in, get the development done and get out"—with as little pain as possible to the market benefits that they will receive from developing the land. We need a much more partnered approach to considering local needs and communities' aspirations. Developers' aspirations should dovetail with local needs.

**Councillor Thompson:** COSLA members have strong views on the development constraints that have delayed developments in recent years. The good news is that dialogue between local authorities and Scottish Water is far more positive. However, the investment programme for 2006 to 2014 that has been agreed with and will be managed by Scottish Water does not reflect Scotland's housing growth needs. COSLA thinks that there should be early analysis of current water and drainage infrastructure capacity needs, which should take into account the increased number of houses that are needed. Scottish Water is doing its best, but there is not enough money in the investment programme.

**The Convener:** Scottish Water and the utilities are not represented on the task force.

**Jonathan Fair:** That is correct.

**The Convener:** Is that an obvious omission, or was it too difficult to include them? All the evidence that the committee has taken suggests that the utilities and Scottish Water present a significant barrier to development. I am sure that the companies have a view, but they cannot put their view to the task force because they are not represented on it. Should that omission be corrected?

**Councillor McGuigan:** I do not know whether it is necessary for the utilities and Scottish Water to be on the task force, but they should certainly be present and fully involved in deliberations at stakeholder events, and there should be on-going dialogue between local agencies and infrastructure agencies. I would be surprised if Scottish Water or other infrastructure agencies were not represented at the event on Edinburgh and the Lothians on 20 November.

**Bob Doris (Glasgow) (SNP):** Convener, I want to follow up Councillor McGuigan's comments on social housing, but do you want to continue the discussion on infrastructure?

**The Convener:** It might be helpful to stick with infrastructure.

**Johann Lamont:** I apologise for losing the plot earlier. I was looking in my papers for a reference to a question on land availability that I asked other members of the housing supply task force, when the committee took evidence from them at a recent meeting. It is alleged that private sector developers hold on to land, thereby managing the market and, in effect, managing supply. How does Homes for Scotland respond to that? Would a public register of privately held land be helpful?

I am equally interested in the land that is held by the public sector. The housing supply task force will not just consider affordable housing, but land supply is a particular challenge in the context of affordable housing. Witnesses have made clear the challenge that local authorities face. The contradiction for the Government is that it is advising local authorities that have high housing debt to sell off housing revenue assets—land—but if local authorities sell land to manage their debt, they cannot make the land available to housing associations for building. Will that issue be flagged up by the housing supply task force?

Also, will you comment on the effectiveness of the benchmark in planning advice note 74, on affordable housing? Does it need to be revisited, strengthened or brought to the attention of all concerned again?

**Jonathan Fair:** I will answer the first of those questions. I am not aware of any evidence that backs up the allegation that the private sector land banks. In the context of an economy where developers and house builders compete for land more often than they compete for customers, it is clear that there is a lack of land supply rather than that there is land banking, which is the public perception that is often fomented against the industry.

Developers are incentivised, by virtue of their company targets and the need to satisfy their shareholders, to bring land to development as quickly as possible. Given that it takes about two years, on some occasions, to take land fully through the planning system, there is no incentive for developers to land bank. They spend significant money, time and resources to get to the point of development. By the nature of their company structures, house developers make money by developing and selling on properties. They are structured to make that happen as quickly as they possibly can. I do not accept that the private sector land banks, and I am not aware of any evidence to support the claim.

**Councillor McGuigan:** We could discuss the matter for a long time. COSLA has discussed it with local authorities in Scotland and almost all of them cite examples of what they consider to be land banking by developers. We cannot be certain about the extent of land banking, but local

authorities convey to us that it is a real problem throughout Scotland. The housing supply task force needs to look into the matter when it considers land supply in general. The issue is not only public sector land supply; it is land that is apparently held back because market conditions do not encourage housing development on it.

**Allan Lundmark:** I will expand on a point that our chief executive, Jonathan Fair, made.

The two years that it can take to promote a project through the planning system kick in from when the project is driven into a development plan and a consent is driven out, or when an application is lodged and a consent is driven out. There is another period before then, when one attempts to get land driven in to the land supply in the first place, which can take more than seven years.

No developer will promote land into the planning system unless they have some kind of control over it, usually through an option agreement. Confusion might arise because people assume that the developer is land banking. In fact, they have an option to develop the land if they are successful in promoting it through the planning system. No one would promote land through the planning system—and go to all the expense of doing so—if they might lose the right to develop the land at the end of the process. That is why there are option agreements. We need to be careful about what we mean when we talk about land banking. At times, it is essential to have land in one's control, if not necessarily in one's ownership.

On the point about local authority land, I understand the dilemma around attempts to release land at low cost to allow affordable housing to be built on it, and the need to maximise capital receipts from that land. We should examine whether that land can be promoted for development in much the same way as land is promoted by private developers or private landowners. Essentially, one tries to build out to the maximum value in the knowledge that contributions will have to be made to supporting infrastructure and to making land available for affordable housing under the quota system that has been referred to.

10:45

There is no reason why that process could not almost be retrofitted, so that the local authority promotes the land for development, understands the costs that it has to incur in servicing the site, passes it over at cost value to the registered social landlord for the affordable housing, and then seeks to gain market value for the balance of the site for market housing. That commercial risk could be taken. The model is used successfully by

the Highland Housing Alliance, which does not compete against the private sector for land that the market is promoting anyway, but looks at sites that, for some reason, the market will not develop. It plans the front-end engineering of the site, makes it available at cost to the registered social landlord, and then puts the balance of the site on the open market. In one example in Tain, part of the secondary release was for individual self-build and part went to a volume builder.

We need to do more work on whether the model that the private sector uses to grow private land can be used by the public sector to achieve release for affordable housing and to realise some uplift in capital value for the balance of the site when it is released for private development. I accept that a huge commercial risk has to be taken in doing that, but, given the buoyant housing market, I see no reason why we should not examine whether that model can be used by the public sector.

**The Convener:** There are issues around land banking, which is a sensitive issue for Homes for Scotland. There are challenges for local government—we have heard evidence in the past that we need more central direction and a regional focus, and that we need to focus on six or seven basic markets around Scotland. What are the chances of 32 local authorities working together more strategically to meet the challenges of housing needs in wider regional areas?

**Councillor McGuigan:** There is already strong evidence of willingness to work together—doing so is common sense. It is happening with regard to waste and economic development. We are not resistant to the idea that local authorities can work together with other strategic partners in areas or regions—indeed, they could and should do so. We do not want centralised control. One of our main objections with regard to Communities Scotland was that a template was handed down to local authorities and they had to fit into it. The template did not necessarily match, in any way, the real needs of their areas.

It is not a case of one size fits all, but local authorities and other agencies may want to work together to enable us to achieve the goal of providing housing across all tenures, and affordable housing in particular. Other, more localised, approaches might better suit the requirements of particular areas. There is no hang-up, as far as local authorities are concerned, about working together and identifying new mechanisms and new arrangements to enable us to secure the objective of good housing for our people.

**The Convener:** The language is not mine but, in evidence to this committee on 26 September, the phrase “central direction” was used by Shelter and

the Scottish Federation of Housing Associations. They also said that a solution cannot be found for 32 local authorities.

**Councillor McGuigan:** I am not going to get into a discussion on the number of local authorities; the current arrangements are for 32 local authorities.

I am anxious to advise the committee that COSLA and Scottish local authorities are not barriers to identifying new, sensible and better arrangements for enabling us to achieve our objectives. However, we should reflect on the experience of Communities Scotland, as the centralised strategic lead body, and the difficulties and inefficiencies that have arisen. Bureaucracy has developed, and onerous burdens have been placed on local authorities. The work has become about monitoring, inspections, returns, and targets here and targets there. It has become a box-ticking exercise. We want to move away from that and get on with the business of delivering houses.

**The Convener:** Do you have a clear understanding about what will replace Communities Scotland and the central direction that lots of people agree is required? Who will deliver that central direction?

**Councillor McGuigan:** We do not have a clear understanding. I suppose that we will have a clearer idea after 2 o'clock this afternoon, when we hear the full financial settlement. However, our understanding is that not a penny of additional resources will come under the control of local authorities and not a single member of staff of Communities Scotland will be moved to local authorities, which are concerns. We recognise that abolishing the quango is removing one buffer, but we hope that it is not simply replaced by another centralised buffer of civil servants.

**Bob Doris:** Johann Lamont mentioned PAN 74, and I wanted to come in on your earlier comments on affordable housing. PAN 74 is one of the few tools that local authorities have to work with the market to ensure that 25 per cent of any new development—such as regeneration developments within existing communities—is social or affordable mix. I am led to believe that Scottish planning policy 3 is soon up for review. What are the views of Homes for Scotland and COSLA on the figure of 25 per cent?

Further, is there tension between Homes for Scotland's aspirations and the need for affordable housing? I have some information that Homes for Scotland previously indicated that the planning system should facilitate and assist development rather than control or regulate it. One point is that the market does not want to act on housing needs assessments in local communities because it is

not profitable to do so. Is there a necessary tension?

**Councillor Thompson:** From the COSLA side, we do not believe that a 25 per cent target is particularly useful. The situation varies throughout the country and from council to council. We need to be far smarter and to ensure that there is a level of discretion when considering different areas, the market and land supply. For example, an affordable house in Edinburgh or Glasgow would not be an affordable house in landward Lanarkshire or other parts of the country. We need to look at local solutions for local areas. It is only right that local authorities ensure that there is affordable housing, but the local solution must fit what is happening. Rather than create a percentage that can be a rod for everyone's back, we should answer the question of what is needed for the future. I think that we can do that without losing focus.

**Bob Doris:** Are you saying that there should not be a suggested percentage, or that there should be more flexibility in meeting a target and negotiating locally with developers?

**Councillor Thompson:** That is exactly what should be done. Local authorities should be charged with the job of setting targets in particular areas, having assessed the local needs with others. That takes us back to the importance of setting achievable targets. In everything that we do, we should have such targets instead of setting ourselves goals that may be appropriate in one area but completely unrealistic in another. Also, we should not set goals that are far too low—we may have to set higher targets in certain areas because of current market prices.

**Bob Doris:** Would you like local authorities to have more power and discretion to formulate the percentages as part of their local housing plans?

**Councillor Thompson:** I believe that we are in the best position to do that.

**David McLetchie:** My question follows on from Mr Doris's question about policy in relation to the percentage of affordable housing in new developments. Most people think, superficially, that if permission has been granted to build 200 houses, of which 25 per cent are to be affordable, and they see 150 new houses being built by Cala or another developer that is a member of Homes for Scotland, 50 more houses will be built somewhere. However, all the evidence that we have received suggests that hardly any of those houses have been built or are in the process of being built. Can you explain why they are not being built, despite the fact that the planning system apparently dictates that they should be built as part of the overall development?

**Jonathan Fair:** I ask Allan Lundmark to answer that question.

**Allan Lundmark:** I agree entirely with Councillor Thompson about the need for local flexibility. The 25 per cent figure is a benchmark; all too often, we lose sight of that. It is supposed to be justified by reference to a housing needs assessment, and those assessments are different throughout the country and in different parts of local authority areas.

It is worth pointing out that the requirement is for 25 or 15 per cent of the houses, not for 25 or 15 per cent of the land. I make that point because the extent to which the percentages work depends on the viability of the project as a whole. It is much easier to achieve 25 per cent in areas where land with a low existing use value is released than in areas where land with a high existing use value is released. When the requirement to allocate part of the site for affordable housing might take the development value just below the existing use value, the site will not be promoted. The viability depends on the nature of the land that is promoted for development. When the land has a low existing use value, it is easier to push the percentage towards 25 per cent.

We are not aware of projects where that 25 per cent figure has been achieved, other than on land that is delivered by the public sector, where the public sector has been prepared to take the hit in terms of the allocation. Mostly, the figure is around 15 or 20 per cent, or lower, because of project viability.

The other thing that has to be borne in mind is the need for policy stability. It takes time to factor affordable housing requirements into land deals. One large urban authority in Scotland had a policy of requiring 15 per cent affordable housing on most of its sites, and it took us about two years to see that requirement effectively built into land deals and projects. Then, as the projects began to proceed, PAN 74 was published and the local authority moved to change the requirement to 25 per cent. The projects are now stalling. Our view is that if the requirement is left at 15 per cent, the local authority will get 15 per cent; if it is raised to 25 per cent, the local authority will not get that. It will take a long time for that requirement to be factored into the land deal and, even then, because of high existing use values, it may not be possible to achieve that percentage. The authority will then end up negotiating back down towards the figure of 15 per cent. Policy stability is, therefore, important. Fundamentally, it is about project viability.

11:00

**David McLetchie:** So is the higher requirement that is imposed on the development a constraint on the supply of housing?

**Allan Lundmark:** Yes. It goes back to what I said earlier. Sometimes, the cumulative effect of constraints on a project is such that one cannot remove them and bring the project to fruition. That sits with the requirement for education, the requirement in Edinburgh for a trams contribution and all the other contributions that we have to make.

You asked about some of the projects that stall. Our impression—I stress that it is only an impression, because we have not gone back to examine the section 75 agreements on such projects—is that the cumulative burdens in the section 75 agreements threaten viability and therefore projects stall, probably predicated on an assumption that the market will rise and eventually remove the red numbers from the assessment sheets. I cannot be objective about that or confirm it to you, but our impression is that that is the problem.

**Councillor McGuigan:** The term “project viability” has been used. It is not an objective term and does not necessarily mean the same thing to all of us. That is why it is imperative that local agencies and developers get to grips with what they mean by “project viability”. I fear that my definition might be different from the one that my colleague has suggested.

In David McLetchie's initial question, I think that he said that the affordable 25 per cent of the development would be built somewhere. With respect, that is a dangerous mapping arrangement to commit ourselves to, because we are trying to encourage mixed-tenure developments in our communities.

**Johann Lamont:** I am interested that the green paper on housing makes no reference to PAN 74. Can we assume that you will ask the minister to consider those issues? PAN 74 is intended to rationalise the discussion so that people do not start out saying that a development should be 70 per cent affordable housing and get beaten down to 25 per cent. Instead, the proposal is tested against whether it fits with the planning policy on mixed tenure. PAN 74 tries to create a situation in which the benefit that communities derive from developments on their doorsteps is worth more to them than money that is given to the council for other things. Will you comment on the challenge of how we tie in a commitment to the 25 per cent benchmark so that, rather than the units being pushed off to be built elsewhere, a mixed community is created and local planning gain

provided, in that the community can see that affordable housing is available to it?

**Councillor McGuigan:** The green paper gives us an opportunity to examine our expectations in detail. Serious reflection is needed on what used to be called planning gain and what it means. I have heard people talk about a planning gain that was four miles away from the housing development. When we move into territory like that, it becomes absurd. The planning gain must assist in the infrastructural arrangements and other community features that are necessary in the area. We have been critical of some aspects of the green paper that was announced the week before last, but it provides an opportunity to continue serious discussion and negotiation about the best outcomes from the consultation that will be held.

**Johann Lamont:** The green paper does not refer to planning advice note 74 at all.

**Councillor McGuigan:** No, but it can be opened, of course.

**Allan Lundmark:** One of the things that the green paper does is point out that there are different ways of providing affordable housing other than by providing social rented accommodation. To that extent, it refers to examples in PAN 74. We know that we have a continuing problem with affordable housing and that planning authorities emphasise social rented accommodation, but year on year, the targets set by Communities Scotland for social rented accommodation have been met. For the past couple of years, Communities Scotland has been tasked with delivering 6,000 units and it has done so. Before that, the target, which was 4,500, was also met. Throughout the terms of the past two Administrations, those targets were hit every year. At that level, the problem is being dealt with.

I fully accept that that begs the questions whether the units are being built in the right locations, whether we need to build more units and whether we build in the most pressured areas or where the opportunities arise.

The one thing that we have been very bad at since the beginning of the decade is considering the other categories in PAN 74: shared ownership, shared equity, discounted low-cost sale and housing built without subsidy—in other words, starter or entry-level homes. We lobbied hard for starter homes to be included in PAN 74. The private sector has not been allowed to exploit the opportunities for building starter homes for sale. Do not misunderstand me: I am saying not that we do not need to continue to build social rented accommodation, but that we can relieve some of the pressure if we get smarter at building low-cost homes for sale, whether through building more

housing that is brought to the market without subsidy or using schemes such as shared equity or homestake for new builds.

The green paper points to the opportunities to get people into the housing market and to build houses for first-time buyers. We need to get a bit smarter. We have member companies that deliver those solutions south of the border, but we have not been in a position to deliver them in Scotland.

**The Convener:** I call Patricia Ferguson.

**Patricia Ferguson (Glasgow Maryhill) (Lab):** My question takes us on to another issue. I do not know whether you want to take another related question first.

**The Convener:** I will call Kenny Gibson in that case. We are approaching the end of this line of questioning, but you could also mention skills, capacity and types of housing tenure, Kenny.

**Kenneth Gibson:** Yes. The task force is focusing on three geographical areas: the Lothians, greater Glasgow and rural areas. "Rural areas" is not very specific. Do you mean all Scotland's rural areas, or will the task force look at specific locations in rural Scotland?

**Councillor McGuigan:** The task force will look at a specific area of rural Scotland. I could use the term "the Highlands", but that is a huge generalisation too. I cannot give you the specifics of what will be covered.

**Kenneth Gibson:** But you will be looking at an area in the Highlands.

**Councillor McGuigan:** Yes.

**Kenneth Gibson:** Okay. We touched on skills briefly. Are you concerned that we will not have the skills to meet the targets, whether they are specific or aspirational? Do we have enough joiners or plasterers on the ground to do the work? What would you like the Scottish Government to do to increase the supply of people who are able to do such jobs?

**Councillor McGuigan:** I will let Chris Thompson answer your question about skills. We are not just talking about the physical construction of the houses. We hear a lot of criticism that planners are professionals who are there to put up barriers, but that is not the case. There is a dearth of planners throughout Scotland. Some of us might see that as a virtue in some situations, but there is a serious need for more planners. We will be making strong representations on that. I will ask Chris Thompson to answer your question about the capacity of the building industry to put up the houses.

**Councillor Thompson:** The issue is important. I reiterate what Harry McGuigan said: the shortage of qualified planners and building control staff in

the system affects the ability of the public and private sectors to handle a number of issues. COSLA has made a bid to meet the requirement. Like many other people, we hope to hear about our bid soon.

The building industry faces an interesting time because of the Olympic games, the Commonwealth games and the amount of building that is going on throughout the United Kingdom. There is no question but that there is a shortage of skilled tradespeople. With the help of the previous Administration and the current Government, many local authorities have increased the amount of training available. We must put more money into that.

COSLA must encourage the private sector to carry its responsibility for apprenticeships. Some companies are good at that, but subcontracting can cause problems at times. In a big development that has taken on other contractors, it is hard to ensure the proper numbers of trainees and apprentices.

Another impact on the availability of affordable housing is the migration of workers whom we encourage into the country to feed our building industry. That is a catch-22 situation. As we try to meet the building industry's need to build more houses, we attract more people to build those houses, which has an effect. There are no short-term answers. We need more people in the trade professions, to increase modern apprenticeships in the trades and to involve schools, so that parents and pupils see becoming a joiner, plumber or whatever as a positive outcome.

**Kenneth Gibson:** I discussed with Planning Aid the shortage of planners and it told me that a when of new planners would come on stream soon and that the shortage, which is a serious problem, should be resolved in the next two or three years.

I will move on to the type, tenure and geographic location of affordable housing. One point that has emerged clearly from today's meeting is that there is not much consensus among the witnesses, and therefore in the housing supply task force, about land banking, affordable housing or whatever. How confident is the task force that agreement will be reached on the type of housing that we need, the balance of tenures and the geographic locations? We know that, for example, a glut of two-bedroom waterfront flats has appeared in places such as Edinburgh. I am not convinced that you are all pulling in the same direction for recommendations. Will the task force be able to make recommendations to the minister on those matters?

**Councillor McGuigan:** It would be unfortunate if we gave the impression that we are not

committed to a serious, mature and intelligent examination of all the aspects. I am confident that if the commitment exists to take a deeper look than ever before at many of those matters, we can come out of that process with a set of options that can be presented as realistic and achievable, as Chris Thompson has said repeatedly. I have listened to discussions in the task force and I am confident that there is a will to embark on that voyage of discovery or whatever it may be. I believe and hope that we can come out with something positive for the future.

**Kenneth Gibson:** Can the target of 30,000 affordable homes by 2012 be met?

**Councillor McGuigan:** I said that I am not a great one for targets, but that does not mean that I want us to deliver only 28,000 homes. I want to see the analysis of need, which I want to be met. I also want meeting the aspirations for ownership and different types of tenure to be taken seriously. If we do not make recommendations that will improve the optimism that we can tackle the Scottish people's affordable housing needs, that will be a major disappointment.

11:15

**Alasdair Allan:** Does the panel have any views on definitions of affordable housing? I know that it is a vexed subject, but do you have a meaningful definition?

**Councillor McGuigan:** I would not like to venture a definition of affordable housing here. It depends on where you live, the stability of your income and so on—it is like a lot of other things. I think that it was Jonathan Fair who spoke earlier about the shortage of affordable housing throughout Scotland. If you look at North Lanarkshire, for example, an aggregate figure tells us that there is sufficient affordable housing, so it does not look like we have a major problem in that area. However, once we start to focus on particular areas, such as Cumbernauld, we find a remarkable difference between the figure there and the aggregate. It comes down to criteria. We need to look at how we define need, who has defined it and how thoroughly. We can do that.

**Jonathan Fair:** Allan Lundmark made a valid point about PAN 74—it highlights five different types of affordable housing. The debate sometimes becomes polarised and identifies only social rented housing as affordable, which is missing a trick. Homes for Scotland would like there to be a much greater focus on the range of different types of affordable housing that PAN 74 identifies in local plans and with investment structures that support that type of development.

**Councillor Thompson:** We need to remember that one size does not fit all in this situation. A two-

bedroom apartment on the river might be quite affordable depending on which area you live in—

**Kenneth Gibson:** And on which river it is.

**Councillor Thompson:** However, if you live in a landward area, you could probably get a reasonably sized farm for the same amount. The question has a local dimension. As Harry McGuigan said, we have to look at what is happening in a particular area and the question of affordability has to fit into that local community. We need to be careful that we do not look for an easy answer or set a target for affordability, but that we break it down to local community level.

**Allan Lundmark:** I encourage the committee to go beyond the definitions of the five different types of affordable housing contained in PAN 74. One of the things that we are not good at is breaking down the housing need assessments for different types of housing. That is a flaw. We identify a housing need and we tend to assume that it can be met only by social rented accommodation.

**Patricia Ferguson:** Given today's evidence and that given on a previous occasion, I echo Mr Gibson's comment about the apparent disparity of views on the task force. It is probably just as well that no report of your work will be published—I think that you would struggle a little to condense your discussions for publication—but that is a trick that will be missed. I had hoped that part of the task force's work would be to give guidance and advice to the Government on how this important issue should be dealt with.

I listened carefully to what was said about a definition of affordability. There could be a definition, but it should not necessarily be about money or house prices; it has to be about what an individual in a particular situation can afford. It would be disappointing if no work were done to see whether a broad definition could be identified and used.

I return to another of Mr Gibson's points that was not covered. How do we make sure that people's needs are met? I am not talking about just in social rented housing, but across the board, although it probably applies more in social rented housing than in other sectors. The people who come to my surgeries often come because they are in overcrowded accommodation or because they are unable to get the kind of housing that they want in the community in which they want to stay. In my constituency, that applies equally to both sectors, although the problem is probably more acute in the social rented sector. What is being done to address that? Will more one and two-bedroom flats continue to be built when what people need, in fact, are three and four-bedroom homes or larger apartments?

**Councillor McGuigan:** I would expect the local housing strategy, which is a mechanism for identifying and addressing need, to include mixed tenure housing and the types of housing variations that fit the required need in an area. After all, we have to ensure that we deliver the types of houses that people require.

We might well struggle with the definitions. I do not like definitions myself; I would rather have a better understanding of the outcomes that can be achieved from particular approaches. However, although we might not come up with any definitions, I believe that we will be able to formulate some options that will take us further along the road of meeting our people's housing needs than we are at the moment.

**Jonathan Fair:** I can reassure the committee that, using the regional zones that were selected as a proxy for identifying general supply problems, the presentations delivered at the task force's second meeting very much concentrated on the issue of appropriate housing mix. I am certain that it will also form a key theme of the wider seminar and consultation process that has been planned for 20 November and the rural development issues that will be discussed in mid-December.

**David McLetchie:** At the committee's previous evidence session with some of your colleagues, the issue of community engagement arose, and I understand from our background briefing that the task force is carrying out thematic work on that. What themes are being explored, and what progress is being made?

**Councillor McGuigan:** I would not attempt to give a very full response to that question; after all, it is difficult enough to get one's head around the concept of community. Phrases such as community empowerment and community engagement might well roll off the tongue easily, but it is an extremely complex matter to maximise and achieve real community engagement in which communities begin to feel more responsible or become reconnected with decision-making processes that affect their lives.

We will look at the different models that are out there, including local forums and area partnerships. I am not tremendously optimistic about finding any easy answers to this very difficult problem, but we have to keep striving to find the best options at any particular time. I simply hope that we can keep building on what we are doing.

I am a great believer in local involvement in local issues. However, politicians, officers and other agencies come to communities with a blueprint already in their heads for the best way of dealing with their various issues and difficulties. The problem that we have to overcome is that the



community has usually not participated in drawing up that blueprint.

**Councillor Thompson:** COSLA recognises that there will always be objections. However, evidence has shown that if communities have the facts in their possession early on and know about the planning process, their objections will be made from a knowledgeable background. In fact, in many cases, many of their worries and fears will fall away.

That said, we should accept that it is most unlikely that someone who lives with a nice outlook will approve of any proposed development on that land. We must get better and smarter at supplying people with the information that they need and should learn to welcome their comments, even if they are objections. Local authorities are working towards that aim, and I know that much of the private sector is working closely with us to help us to balance people's fears and demonstrate advantages to development. At the end of the day, though, we need to take objections on the chin.

**Jonathan Fair:** The committee has clearly been briefed on the housing supply task force's future activities. I should point out that a scoping paper on this very theme has been tabled for discussion at the task force's third meeting. In order to identify good practice, Homes for Scotland will certainly contribute to that paper some recent and publicly acclaimed examples of sound community engagement that our members have delivered on. As a result of that engagement, objections to what were in some cases very substantial developments and, in others, much smaller-scale but still very contentious projects have been removed to allow the development to proceed.

**The Convener:** I thank the witnesses for attending this morning's meeting. We wish you well in your work and will follow your progress with keen interest.

There will be a short break as the witnesses change over.

11:26

*Meeting suspended.*

11:33

*On resuming—*

## Scottish Public Services Ombudsman

**The Convener:** Item 3 is consideration of the work of the Scottish Public Services Ombudsman. The ombudsman has published her report for 2006-07, which was laid before Parliament and of which members have a copy. We are pleased to welcome Professor Alice Brown, the ombudsman, who is accompanied by David Robb, director of policy and development, and Kerry Barker, complaints investigator. I invite Professor Brown to make an opening statement.

**Professor Alice Brown (Scottish Public Services Ombudsman):** Thank you for inviting us to present our annual report. We welcome the opportunity to discuss some of the issues that the office has faced over the year and to get feedback on the challenges that lie ahead. In previous years, we presented our annual report to the Local Government and Transport Committee and had a lot of good discussion about a number of issues. As ever, lack of time prevents us from going into a lot of detail, so we are happy to provide any additional information in writing or to have follow-up meetings with members if that would be useful. We have provided a briefing paper to members. You will be pleased to hear that I will not repeat all the content of it, but I will emphasise one or two points.

I thought that it might be helpful, particularly for new members of Parliament, if I first explained the background to the establishment of the ombudsman's office. It is now five years since the office was established. Pre-devolution, Scotland had ombudsmen; it had a local government ombudsman to reflect the fact that the local government system here is separate, a housing ombudsman and a Scottish part of the office of the UK Parliamentary and Health Service Ombudsman. However, the Scotland Act 1998 identified that, post-devolution, Scotland would have to make arrangements for complaints about the Scottish Government to be taken in Scotland and to consider devolved areas.

The Scottish Parliament thought imaginatively about what it might do. It had consultation exercises and asked what kind of ombudsman's office Scotland wanted to reflect the new conditions. Scotland has led the way in that regard. Rather than creating lots more offices, the Parliament decided to merge the former offices, rationalise the service and consider the matter from the point of view of members of the public whose complaints could cover different areas of responsibility, such as local government and

health. The idea of the one-stop shop emerged whereby people could come to one office to have their complaints addressed. There were lots of other ideas about how to make the office more modern and accessible. In the past—this still applies to the Parliamentary and Health Service Ombudsman in England—people had to make their complaints in writing, via an MP. Currently, in Scotland, people can come straight to our office or they can e-mail or text their complaint to us—I know that this committee has a particular interest in such methods of access. We can also receive complaints in different languages; we do that almost instantaneously, which makes a big difference.

It is useful for new members to have a wee bit more information on what the ombudsman does. We are part of the administrative justice system and are seen as an alternative to the courts where there is a dispute between a member of the public and a public body or a body delivering public services. We are charged with considering whether there has been maladministration, service failure and, in the health service, clinical failure—our remit is wide ranging. We consider whether there has been individual injustice for the person making the complaint and the wider lessons that can be learned so that improvements to the broader delivery of services can be made.

The ombudsman should be seen as the last resort. We work on the principle that disputes should be resolved with the parties concerned as far as possible and should escalate to our office only if they cannot be resolved. Once we have made a decision on a complaint, that should be the last resort, too, unless our decision is judicially reviewed—we might come back to that point.

We are complaint focused in the sense of providing an independent source to consider a complaint and a dispute. Most complainants want an explanation of what went wrong and an apology if that is appropriate, but they also want some demonstration that the organisation has learned from what went wrong and that the same thing will not happen to someone else.

We are independent and impartial. We are not an advocate for the complainant, although we try to level the playing field. We also take evidence from the body that is being complained about. We should put this in perspective: of all the transactions that are made throughout public services in Scotland every day, whether in local government, health or housing, only a small percentage make their way to the ombudsman's office. Most problems are resolved at their root.

Therefore, our core work is to take inquiries from members of the public and do a bit of signposting. Quite often, people come to our office when they should be contacting the Financial Services

Ombudsman in London, for example. We take complaints and pursue them at different levels by considering them to determine whether we can resolve them informally. Some that we cannot resolve informally we take to full investigation. Last but not least, we consider whether there are broader lessons to be learned from the complaints. We work with the bodies under our jurisdiction to prevent complaints from arising in the first place but also to demonstrate how they put the lessons from a particular complaint into practice.

You will see from the annual report that the sectors that we cover are wide. We cover everything in local government and the health service—that includes complaints about individual general practitioners and dentists, for example—housing associations, the Scottish Government and all its agencies, further education and higher education. Our office covers virtually everything in the public service.

If you have had a chance to look at the annual report, you might have seen that many generic issues arise, such as poor communication and poor record keeping. However, there are also specific issues of importance in particular sectors, so not only do we have to be generalists and consider the generic issues, we also have to be specialists to identify some of the things that go wrong in particular sectors.

You will also have seen from the briefing paper and the report that inquiries and complaints continue to rise but that the rate of increase is now lower than previously. It is beginning to level off a little. People are more aware that they can complain, but a crucial area of work for us is working with bodies to prevent premature complaints—in other words, complaints that have not been through the process of the body itself—coming to us. That is quite a challenge for us. We have done quite a lot of research and have worked with the bodies concerned. For example, we have a meeting with the Society of Local Authority Chief Executives and Senior Managers to talk about that, because it is a particular issue in the local government sector and for housing more generally.

Last year, we got additional resources to deal with cases that come into the office. Those were welcome and helped to identify the time taken to handle complaints, which we were concerned about. As a result, our on-desk numbers have reduced dramatically from thousands at the beginning of the year, through about 900 in April down to about 600, which is a much more manageable level for complaints investigators such as Kerry Barker and her colleagues to handle.

Under the theme of proportionality this year, we have introduced what we call our gateway

initiative, whereby we screen out early on some of the cases that have come to us prematurely and identify others that can be resolved quickly. We have also introduced new key performance indicators for staff on some of those matters and are giving timescales to individual members of the public.

What is the impact of our work? Members should be aware that we lay a monthly compendium of all the cases that we report on—the total was 315 last year. We provide a monthly commentary, which we circulate to your offices, because we appreciate that nobody necessarily has the time to read all the reports. However, issues that interest members might come up in particular commentaries. You can use the commentary as a source and then find out more information from our website or by contacting our office, if that would help.

We consider how to feed back the learning from our cases. We have good examples, particularly in the health service, where there have been changes in procedures for handling conditions such as deep vein thrombosis or eating disorders, and in policy and guidelines on issues such as free personal care, which is a topical one. It is not for us to make policy on such issues—far from it—but it is for us to identify the need to address them in some way or another.

We provide a lot of information for complainants in leaflets and through our website. I was interested in your discussion with the previous panel of witnesses, because planning is a big issue for us and one on which many members of the public perhaps expect us to do things that we cannot do. We feel quite frustrated about that, so we have produced more leaflets to help the public to understand that we cannot overturn a decision if it has been properly made through the planning process. However, that is often misunderstood and people feel that we are unable to help in the way that they would like us to.

11:45

We also produce lots of information and guidance for bodies under our jurisdiction. We have a valuing complaints initiative to help bodies get it right in the first instance, to prevent disputes from escalating, and to encourage them to apologise if things go wrong. David McLetchie discussed that with us when we appeared before the Local Government and Transport Committee. We produced a leaflet on that, because often an apology can defuse a tense situation and prevent disputes from escalating.

We have a role in raising awareness. We provide a lot of information for MSPs and councillors, as well as others, because we know

that your constituents come to you with a lot of issues and we are happy to provide advice for you on how to deal with them.

Lots of initiatives are still to be worked on. We discussed with previous committees and with ministers whether Scotland should introduce legislation to allow public bodies to apologise without fear of litigation. The UK Parliament has passed the Compensation Act 2006, which allows bodies in England and Wales to do just that, but it excludes Scotland. In that sense, there is a gap. I hope that that can be taken forward.

We have introduced an accreditation programme for our complaints investigators in partnership with Queen Margaret University. The course is part of its masters programme and is open to people working in other public bodies in Scotland and elsewhere. The pilot course started earlier this year and we were pleased to see people from other offices on it; one local authority sent people on it, which is encouraging.

We contributed to the Crerar review, which considered the whole issue of regulation, audit, inspection and complaint handling. We were encouraged that the review endorsed our view that there should be a model complaints process for all the public services in Scotland. We commented on some of the proposals in our briefing paper.

We are very much engaged in discussions on shared services with new offices such as the Scottish legal services complaints commission. We are also part of the administrative justice steering group. The UK Tribunals, Courts and Enforcement Act 2007 has an impact on Scotland's administrative justice system. We are keen for Scotland to consider how that act will play out. We have made proposals about taking a Scottish perspective on some of these issues. That does not cover the regulation side but relates to tribunals and alternative dispute resolution, on which the Cabinet Secretary for Justice led a debate in the Parliament recently. The topic is close to our heart. We are not regulators, but we are an important bridge. We consider the injustice for the individual and the lessons that can be fed back to regulators and inspectors.

We are also engaged in considering the new human rights bodies. The Equality and Human Rights Commission has been established and there will be a Scottish human rights commission. Neither body will be able to consider individual complaints, but we can and we are getting a growing number of complaints with a human rights dimension. We will want to work effectively with those new bodies to ensure that our work is complementary and does not overlap.

Last but not least, we have commented on our first and only judicial review to date, on a free

personal care case. We have decided not to appeal the judgment of Lord Macphail on the ground of cost; it has already cost our office and the public purse quite a lot of money to defend the judicial review. We also have to consider that it would take about a year and a half for us to get a judgment. We felt that the case should not have gone to judicial review—the issue was that there had to be clarification from the Government in office at the time. We are encouraged that that clarification will now be provided and that Lord Sutherland is undertaking a review. We are happy to share with the committee the evidence that we submitted to the review, because it raises points about other anomalies in the system.

We are also taking part in COSLA's consideration of the matter and we look forward to seeing the Auditor General for Scotland's report on it, which is due out in January. Free personal care was always going to be an issue for the Government and Parliament of the day to consider, and we welcome the review.

I am happy to take questions on our work and, indeed, any suggestions for the future.

**David McLetchie:** I will follow up your comment on the judicial review in the McLachlan case. You mentioned cost. Will you tell us how much it cost the ombudsman's office to participate in that case?

The minister subsequently described Lord Macphail's decision in the Parliament as being entirely in accord with the operation of the law and the published guidelines. The essence of the decision was that the liability to make a payment for care costs arose on the date on which a contract was entered into with a care provider, not on the date of assessment. What legal advice did your office take in making its initial decision? Do you have legally qualified staff in your team?

**Professor Brown:** On the cost, the process is not finalised yet, because we are considering our appeal and we will lay before the Parliament another report that presents our view on where we are now. However, we estimate that it is likely to cost our office about £100,000. We still have to wait to see how Lord Macphail awards the other costs, because we could be liable to pay Argyll and Bute Council's costs as well.

Mr McLachlan—I can mention his name because he has gone on public record on the matter—has also incurred costs because he was named and decided to appear. Because of that decision, he had to pay costs to the court for appearing there and, of course, he had his expenses for travelling to Edinburgh. He could also be liable for costs. That worries us because of what it says to individual members of the public. I think that it would be a huge barrier for a member

of the public to bring a complaint to our office if they felt that they could be named publicly and would then feel the need to defend their reasons for pursuing the issue, as Mr McLachlan did.

Let us not forget that, two years ago, Mr McLachlan raised the issue and we said in our report that it was unreasonable for any member of the public to be caught between two public bodies that were disputing who should pick up the cost. He made two complaints: one about the Scottish Executive and one about the council. His view, with which we agreed, was that he was being sent from one to the other. Each body was saying that it was the other's responsibility. It is impossible for an individual to resolve such a situation. Meanwhile, his father's need continued, although his father has died since the case started. That is not a satisfactory position to be in and was not a satisfactory position for us to examine because, at the end of the day, we felt that it could be resolved only by clarity on the position and there are clearly differences of view on that.

Kerry Barker is with us today because she is the complaints investigator who worked on the subject. Indeed, she is working on the related subject of continuing care. The committee might be interested in some of the overlap with that.

That is the position on cost. We are still waiting to see how Lord Macphail awards the costs, so it could cost us more than it has hitherto. Therefore, we felt that it would not be wise to pursue an appeal.

The legal advice that we got at the beginning was on our interpretation of the situation. However, let me make it clear what an ombudsman's role is and what a judge's role is. They are quite different, and Lord Macphail explains that well in his judgment. Indeed, he was supportive of the approach that we took and was not critical of the investigation and process.

The Scottish Public Services Ombudsman's office does not make law or policy. We consider issues first of all from the perspective of the person who has made the complaint and whether there has been a problem that has led to injustice or hardship. In the McLachlan case, the test for us was whether it was reasonable in the circumstances for the council to pay the costs. We considered the parliamentary debate, the legislation, the guidance and the different interpretations that other authorities had made. Different local authorities may interpret the same types of issues differently, which was an issue for us. We did not make a technical, legal judgment on the legislation; rather, we said that it was unreasonable for the payment not to kick in at the point at which provision was made. Previously, there was a loophole in respect of delays in assessment, which meant that some people had

long waits. That gap was closed to some extent as a result of local authorities agreeing that people should not have long waits.

David McLetchie made a clear point about costs arising on the date on which a contract is entered into. I should make it clear that I am talking about new people coming into the system rather than those who are already in the system, unless they decide to change care homes, perhaps. Delays between assessments and the point at which contracts are entered into could be an issue. In many areas, it is families who identify care homes and go through much of the procedure. It would be an additional burden on individual local authorities to have to do a lot of that work.

Kerry Barker may want to add to what I have said.

**Kerry Barker (Scottish Public Services Ombudsman):** I think that what has been said is right. I must watch myself, as I am in danger of becoming a complete anorak on the subject. David Robb will shout at me if I try to get too technical.

I think that it is right to say that the full implications of what Lord Macphail said have not been fully explored yet. With all due respect to the current company, those implications were not fully explored in the parliamentary debate. To be fair, the debate was not intended for that specific purpose—it was about the tangential issues of who was represented, who was not and who had chosen to join the debate. However, what Lord Macphail said has other implications that directly impact on the interpretation of when and whether a duty to pay for a person who is ostensibly a self-funder arises for a local authority. I do not think that we have fully explored those implications yet.

**David McLetchie:** Was there not a judicial review against the ombudsman because you exercised a power to ordain that the council should make a payment to Mr McLachlan's family? If you had not made a definitive order that was binding on the council but simply expressed an opinion on the reasonableness of the council paying costs—you mentioned a reasonableness test—would there have been less of a basis or perhaps no basis for a judicial review? Perhaps I am being the devil's advocate. You said that the ombudsman is not a judge, but the fact that sanctions are at your disposal in effect makes you a judge and therefore makes such judgments susceptible to judicial review. If, on the other hand, you were a commentator and made recommendations and not judgments with sanctions, your decisions would not be subject to judicial review. Is that analysis correct?

**Professor Brown:** We make recommendations; we do not have enforcement powers. We laid a report on the matter last year, and the Local

Government and Transport Committee asked what would happen if the council did not agree to pay the costs. We have the power to lay a special report—which we have never had to do yet—in which we can point out to the Parliament that a body is not carrying out recommendations. It is correct that responsibility for holding such bodies to account and asking why they may not be carrying out recommendations should then move over to the Parliament. We would have laid a special report if there had not been a judicial review.

There is a more constructive way of looking at things. We identified that there was an issue and we were happy to discuss it with the sector—with COSLA and others—with a view to finding an alternative solution to going down the judicial review route. It is clear that anomalies exist; the issue is how to address them.

So, as an ombudsman, we did not make a ruling that the law explicitly says X; we took a much more holistic view and said that, given the legislation, the guidance and the debate in Parliament, it was reasonable for the family to assume that, as there was clearly a need for care, once the care was provided it should have been paid for. We should remember that we are talking about only the amount of money that applies in those circumstances, not the whole package.

You asked about legal qualifications in our office. As it happens, Kerry Barker has legal qualifications, as do one or two other members of staff, but we do not recruit on that basis alone—far from it, because the test that we use is whether the average person on the street would think that something was reasonable. We want to avoid strict legal interpretations.

12:00

**Jim Tolson:** I welcome your annual report, which is interesting. I will touch on several points that arise from it; I hope that you can answer my questions. Your report mentions information leaflets, with the suggestion that councils do not provide enough clarity and are possibly unwilling to be open with the public. What can we do to address that situation? Are leaflets enough, or do we need to do more, perhaps by improving training or public services?

The report highlights nursing care, which is a concern to me, because I have a lot of casework about the quality of nursing care for constituents. That casework is on the increase, but checks by social work and the Scottish Commission for the Regulation of Care seem continually to find no case to answer. Are such complaints generally on the increase? Are initiatives such as the independent advice and support service improving the situation?

The report compares the number of complaints about the health service with the number of complaints about local authorities. The figure for local authorities seems high. Does that demonstrate that the quality of service is comparatively poor, particularly in the housing sector, which is mentioned in your report? In discussing housing, you touch on the right to buy, but there is not much detail. What are the key complaints regarding the right to buy? Can you provide a breakdown of the figures on that?

You mention work that is being done on further and higher education, particularly in relation to overseas students. I am keen to see the results of that. Can you provide the committee with information on that as soon as possible?

You produce newsletters. We have been provided with some today and I have some on file in my office—they are very good. That is good practice by the SPSO, which I welcome. I also welcome your plans to expand that service.

We have touched on judicial review. I do not want to go into great detail about that and make too much of a public comment, but I largely agree with what the SPSO has done. The decision was reasonably mature and it is a pity that we cannot take the matter further. I welcome the decision that you have highlighted today.

With regard to the scrutiny review, the SPSO has a justifiably high reputation and is working well and improving, so plans to dilute its powers and create a second tier of scrutiny are simply ludicrous.

You touched on human rights. Given the excellent job that the SPSO has done since being created from a merger of several services, perhaps it would avoid confusion for members of the public if the EHRC and the SCHR were also merged. I would appreciate any comments that you have on that.

**Professor Brown:** That is a lot to cover. I will do my best, but if I do not cover everything, we will follow up on your points. I welcome your feedback on our new newsletters for the housing sector and other matters.

You asked about human rights. It would not be for me to say whether there should be a merger between the EHRC and the SCHR. In the previous session of Parliament, there were long debates on that issue, and we gave evidence to the Justice 1 Committee. Our view, which we also expressed to the Finance Committee, is that there should be clear criteria for establishing any new office. Basic questions should be asked. Are we clear about its functions in the first place? What is it there to do? Could those functions be performed by another organisation? If not, why not? If the committee would find it helpful, I would be happy to provide it

with those questions. They are useful principles to consider before moving into another area. We are a small country and, having created some simplicity, we do not want to make matters more complex than they need to be.

I very much welcome the opportunity to work with the new organisations. They can consider the evidence from our individual cases to see whether there is a need to carry out a fuller investigation into those issues. It is a huge challenge for all public bodies to consider the best way to deliver their services, bearing in mind their duty to do so in a way that is compliant with human rights. It is about not just following the letter of the law, but considering how they deliver a service that meets the specific needs of different members of the community. There is quite a lot of work to be done in that regard. The new bodies will be very busy in the initial stages, and we look forward to working with them.

I am happy to provide the committee with our submission to the Crerar review. We look at the health service as a good example of Scotland simplifying the process considerably, which it did by removing an extra tier of the independent review panel. There is a question over whether the same should be done for social work, where there are also issues about the review panels. Scotland moved to a much simpler process in April 2005. Once a complaint has been raised with the health service, it comes straight to us. That links to your point about the independent advice and support service, which is a support network run by Citizens Advice Scotland. We worked with CAS, the department and officials to develop that. If people get the right advice early on, the situation does not escalate—it neither goes to court nor comes to us. It is appropriate that people should get the right solution early on. We would be concerned not to put in additional layers that would act as a barrier to people complaining and add to the complexity and the cost. Further, there can be a conflict of interest, if a body is not seen by the public as being truly independent. England, Northern Ireland and Wales are following the lead that Scotland has taken in the health model to simplify the complaints process. We welcome lots of aspects of the review, but that one aspect of it—about adding additional layers—is a kind of backwards step.

You asked about further and higher education. I come from the higher education sector, which has only relatively recently—in autumn 2005—come under our jurisdiction, after particular pressure from the student unions. We have been looking at the trends, and are looking forward to working with the sector on a more in-depth survey. For example, why are most complaints received from overseas students? It is not unconnected with the fact that the costs involved in studying here are

high if people come from overseas, so the notion of the contract between the student and the institution is more acute. There may be issues to do with expectations—what people expect when they come here—and cultural differences. We need to understand that a bit more. We have been working with the higher education sector, which has been very receptive to thinking about that. Scotland wants to recruit lots of students from overseas, for good reasons, and it is important that those students have the right experience when they are in Scotland. What is encouraging about a lot of our work is the way in which we can work with the sectors, and provide feedback on those general issues, to allow them to take that forward.

You asked about comparisons between health and local government, particularly in relation to poor housing. That is quite an interesting area. For good reason, we see only a small percentage of the complaints that arise. I am interested in encouraging those sectors to analyse much more effectively the complaints that they handle before they even come to us. I keep making the point that that is free market research—they have the information at their disposal. Our valuing complaints initiative is about asking chief executives, “Do you know how many complaints your sector has received? How are you addressing them and how do those efforts link to other measures that the Auditor General might be asking you to take to deliver best value?” In other words, we want those sectors to make connections between complaints as a way of demonstrating that they are responsive to members of the public and that they take seriously the handling of complaints on service delivery.

Just as the front-end delivery of service should be valued, so, too, should the front-end handling of complaints about the service. Staff should be trained effectively—that goes back to our accreditation programme. Bodies should be encouraged to send people on such programmes. Complaints handling should not be seen as the job that no one wants to do. As soon as one mentions complaints, people feel negative. I often use a former secretary of state’s quotation that complaints should be treated as jewels to be treasured. That does not reflect how staff feel when someone is complaining to them, but the point that was being made was that complaints teach organisations to listen and to ensure that their services are delivered in the way that they want them to be delivered. All the evidence shows that it is much better for staff, who are often pressurised, if they feel that they can handle complaints effectively. We are working on that with the sectors through the valuing complaints initiative. I cannot go into all the details now, but we would be happy to provide you with more information.

The issue that was raised on right to buy is again to do with guidance. People need to know that if a housing stock transfer is agreed to, it may have an impact on their right to buy. We were concerned that, in some cases, people were being informed about that change in rights only at the point at which they signed the new contract. We felt that, as with any big financial commitment or contract issue, people should have time to consider all the facts and possible impacts before they sign on the line, and that that should not impact on their other rights. We asked appropriate officials in the Government whether we could have some clarity on that, because we thought that it was unreasonable to expect someone to sign on the line without realising that, as a result, they might not have the same rights that they thought they had. It is a question of providing clarity. Some of your earlier witnesses spoke about the importance of being clear with members of the public, which improves the situation for service deliverers as well.

I have not quite covered all your points. Was my answer sufficient?

**Jim Tolson:** I have taken notes on most of them. What you said was helpful. If you and your colleagues have additional information, you can get back to the committee at a later date.

**Johann Lamont:** I want to ask some brief questions about confidence in your organisation. I was interested that you said that the fact that Mr McLachlan ended up being liable for costs would act as a disincentive to people bringing complaints. It is certainly the case that when constituents of mine have complained at local level, they have been told—especially by the health service—that they would be co-operated with, were it not for the fact that people were so litigious. In my experience, people are not litigious. The phrase that is most commonly used when people bring a complaint is, “We don’t want this to happen to someone else.” The ombudsman system is extremely important, but people must have confidence in it.

How many cases have you upheld on appeal? You might have said in your opening remarks. You say that you are the body of last resort, but there are people who never get as far as that last resort because they cannot resolve matters in their own heads. Such situations are difficult. My understanding is that if the number of cases that are upheld by the Scottish Public Services Ombudsman, as the body of last resort, is very small, that must challenge confidence in the system.

Your reports are laid before the Parliament. You seem to suggest—I am sure that this is the case—that when you uphold a complaint and there is action that the Parliament could take, you would

expect it to take it, but that there is no locus for the Parliament or MSPs when you do not uphold a complaint. That is a challenge as far as the perceived existence of a parliamentary role is concerned. In some circumstances, there is no parliamentary role; that issue has been raised with me. What can you do when people have no confidence in the investigation? I have specific constituency cases that relate to that situation. What confidence can you give us, as folk who receive such reports, that people's complaints are tested in such a way that they can be reassured that although yours is a body of last resort, it is reasonable for them to have confidence in it?

12:15

**Professor Brown:** Those are good points. Obviously, I cannot discuss individual cases but I can talk about the generality.

One challenge for our office was that we inherited many different processes from the organisations that were involved in the merger. In that change, our organisation needed to look at the whole process of investigation and how we handle complaints and inquiries before they reach the investigation stage. There are many different steps in the process before that stage.

We have outlined a clear process that we follow. The challenge for us is to explain that process as well as we can to members of the public and those who bring complaints on their behalf, so that they understand it clearly. We can start off on the wrong foot if people think that we can do things that we cannot do, or if they think that certain outcomes—for example, that we can get a chief executive sacked—will happen as a result. People sometimes come to us with unrealistic expectations. We need to make a good connection with the complainant early on, when we consider whether the complaint can be resolved without going through the whole process.

In our office, the process includes different stages. As I said, we have a gateway project, in which we consider whether the complaint has come to us too early and whether we should encourage the complainant to go back to the body first. We can help the complainant on how to do that by providing guidance and so on.

The next stage is to consider the complaint in more detail. Whether we can deal with a complaint is not always a straightforward issue. Obviously, some cases are straightforward, but others are on the boundaries of our jurisdiction because of the topic or timescale involved, the body that is the subject of the complaint or the fact that the complainant is perhaps not a member of the public for the purposes of the Scottish Public Services Ombudsman Act 2002. Those complications all

need to be considered in detail. We then gather information from the body that is the subject of the complaint so that we can consider the issues further. In some cases—particularly complaints involving health—we might need to seek further advice so that we can consider what the key issues are.

The complaint may then come to the weekly panel that decides on marginal cases. With some complaints, it is obvious that they need to be investigated or that they cannot be taken further or can be resolved quickly. The panel considers cases that might be on the boundary and makes a judgment against the criteria.

When we decide to investigate a complaint, the complaints investigator draws up an investigation plan. We publish standards and commitments against which our investigations can be judged, so anyone who wants to complain about our service knows in advance the criteria that we set out. The investigation plan identifies what the facts of the case are, what should have happened, what people say happened, what types of questions we need to ask and what kind of evidence we need to look for. The plan is signed off by the investigation manager and, with the manager's endorsement, the complaints investigator can then proceed with the investigation.

On concluding the investigation, the complaints investigator drafts a report—again, that is looked at by the manager—that brings together the evidence and draft conclusions. We share the draft report with the complainant and the body that has been complained about. That system did not apply in all our previous offices, but we introduced the practice so that we could invite comments on whether we have, for example, missed a vital piece of information or misunderstood the evidence. However, issuing the draft report tends to attract challenges to the decision rather than additional information. That is understandable, because people whose complaint has not been upheld may feel that we have not understood some things. We receive their comments and then decide whether they have provided substantive new information or a different interpretation that would make us change our finding. If we change our finding substantively, we issue a second draft and again give the people involved a chance to see that draft.

At the end of the day, the complaint is either upheld or not upheld or partially upheld. On average, individual complaints might have four to five heads of complaint, some of which might be upheld or not upheld. Indeed, only bits of those might be upheld, depending on the wording of the complaint. Again, we explain that and try to demonstrate how we have reached the judgment in our report. That is a technique on which we



provide training for our staff who are involved in providing that service.

When we have not upheld a complaint, it is sometimes on a technicality of one sort or another, but we try to make broader recommendations about where improvements can be made. So, even if we have not upheld a specific complaint, we sometimes find other things to comment on. That is linked to the point that was made about how information is fed back to parliamentarians. We try to draw out some of those points in our commentaries. We might do that, for example, if we were concerned about a general trend in poor care for the elderly. Jim Tolson raised that point.

There is a real challenge for us, and our focus is on how we can continue to explain and improve the process, because there is never any end to seeking such improvement. The process can always be better, and we want it to be as good as it can be; that is why we also need training to support improvement. At the end of the day, it is a success for us if someone comes to us with a complaint and, even if we do not uphold that complaint, they still think that the process was fair.

**David Robb (Scottish Public Services Ombudsman):** The question was about the proportion of cases upheld. We were a little disappointed when the annual report was published and some newspaper reports focused on the small number of complaints that are finally upheld, out of all the complaints that are brought to us. We think that a slightly more helpful figure, which is in the report, is that, of the 315 reports published last year following a formal investigation, 46 per cent of the complaints were either fully or partly upheld.

A lot of complaints are sifted out at early stages. We have spoken about the large number that come to us too early in the process. There is also a significant percentage of complaints that we are unable to look at because the body concerned is not within our jurisdiction. Something like 60 per cent of complaints are sifted out at a fairly early stage. Of those that progress to the investigation stage, we uphold or partly uphold roughly half. We think that that is a more helpful figure.

To build on what Alice Brown said, I would like to say something about the draft report that we recently received from independent consultants about satisfaction levels among complainants. We want to be a learning organisation. We are in the dissatisfaction business, but it has been heartening and encouraging to find that, even though the figures are quite low, those people who stay with us further through the process are the ones who are most satisfied. We want to give the public confidence. Often the people who are most unhappy are those whom we tell that we cannot look at their case. For those whose cases we

accept, there are noticeably higher satisfaction levels. That gives us some confidence that the processes are robust and seem to be helpful.

**Professor Brown:** We have quality assurance processes, which are part of David Robb's responsibilities. There are other mechanisms for dealing with complaints that are made about us, which allow us to examine the issues involved. If we are asking other people to learn from their complaints, we must clearly demonstrate that we, too, learn from any complaints that are made about us.

**Johann Lamont:** You must have a lot of information on patterns of behaviour by individual organisations about which people have felt obliged to come to you. A quite significant number of the initial complaints that people make are batted back, which must mean that there is systemic failure in those organisations. Do you report formally on the pattern of complaints about specific organisations to ensure that those issues are addressed? Can you interpret the figures to show that complaints arise because, for example, people have been treated shabbily at the point at which they should have been treated properly and should have been allowed to make a complaint, with the result that they end up coming to you inappropriately?

**Professor Brown:** Absolutely. That is one of the things that we try to do by working with chief executives and feeding back to them. We try to produce an annual letter for every chief executive in which we set out the types of issues that arise and say that, although we might not have upheld all the complaints, there seems to be an issue in X or Y department.

Our discussion with SOLACE on Friday will include how we feed back what we have learnt in our organisation. That feedback will complement SOLACE's in-house information, which we encourage the organisation itself to feed back. SOLACE has a lot more numbers than we have, and we need to put the two sets of information together to identify areas for improvement, in individual organisations or in bits of organisations. Sometimes, there is not a big issue in one department.

We have to be careful about using raw numbers, because—as in other areas of life—numbers alone do not tell you everything. We say that if an organisation encourages people to raise complaints, it should not see that as a negative. Suppressing those complaints to get low numbers might mean suppressing dissatisfaction. All the evidence—including the evidence on health from the new service that has been set up with Citizens Advice Scotland, with which we did some research—shows that for every person who complains, there are usually about four or five who

were dissatisfied and had cause to complain but decided not to do so. The evidence also shows that those who are most vulnerable and most dependent on public services are the least likely to complain. Bearing all those things in mind, there is also the challenge that not all complaints are justified—that is another point to make with regard to organisations that deliver services in sometimes difficult circumstances.

**Alasdair Allan:** In some ways my point touches on what Professor Brown has just said.

What wider, direct engagement does your office have with the public? I have seen some of the material that has been produced for members and for the public, but—just judging from the contents of my own postbag—a lot of people out there fundamentally misunderstand what your office is for. I will not identify any individuals, but people think that you can intervene in neighbour disputes, personnel matters and so on. To what extent does that perhaps not hamper, but frustrate your work? What efforts are you making to overcome some of the general public's misunderstandings about what your office is for?

**Professor Brown:** That is an excellent point—it is a frustration for members of the public and for us, too. A lot of the general inquiries that we get involve our explaining what we can and cannot do, or who may be able to help rather than ourselves. We do not have the resources to carry out large public awareness campaigns, but we nonetheless have to think about the most effective way to increase understanding and knowledge. We do that by working with other agencies: the citizens advice bureaux in different parts of Scotland, the Scottish Consumer Council, Age Concern Scotland and Shelter Scotland. Those bodies are in direct contact with members of the public, and if they understand what we do, they are then best able to give advice about that to members of the public. Similarly, we want to have effective engagement with members of the Scottish Parliament and with councillors, because they will hear some of the issues at first hand.

We have held different events. For example, recently we held a reception in the garden lobby of the Parliament. More crucially, we also held a lunch-time event for parliamentary and constituency staff, because often MSPs' staff handle such issues. That event was fully subscribed, so we want to hold another one. We also invite members to send their staff into the office because if they speak to our front-line staff, they will get good knowledge of what we do, what we cannot do, and what is the right advice to give people.

Because the situation is confusing, together with other organisations, we have produced a route map, which we want to update. We have a one-

stop shop for complaints and I think that that is why we get a lot of early complaints. People think, "I will go straight to the ombudsman, because I do not want to waste my time going through a body that I have already fallen out with." We have to give an indirect message that although people have the right to complain, they have to complain through the appropriate channels.

It is a challenge to simplify the process further, and we can do so only by working in partnership with other bodies—such as advocacy agencies—that engage with members of the public. When we hold broader events—we have held events for the health sector and we are planning to hold similar events next year for that sector and for local government—we want people from within the sector to come along, but we also want people there who represent the public, because they are able to feed directly into the process of identifying what needs to be done. It is not easy—information technology helps, but not everyone has access to it, and people want different forms of communication.

12:30

**The Convener:** Thank you. You have given us a flavour of what is positive about the changes in culture that can be achieved in many of the agencies that we deal with. From our experience, we know that the culture of how they deal with complaints needs to change.

However, let us return to the most negative aspect of the past year's work—the McLachlan complaint against Argyll and Bute Council. Such situations change organisations when you get involved. What about your most recent involvement with the courts? We have been talking about alternative dispute resolution, yet an organisation that has been set up to bring that about has found itself in the courts. Let us leave aside the money, for the moment, as that is another issue. Can you tell us about the decision that was made to publish your judgment against Argyll and Bute Council? Was legal advice sought at that point or further down the line? I am trying to establish whether your organisation was aware of the legal implications and risks associated with that action before your judgment was issued. Who took that decision?

I have been in a similar situation myself. I have argued with lawyers to proceed with something that did not make much sense legally but which involved a situation that I felt was extremely unfair. Was there a distance between the caseworker and the organisation? Were all the risks evaluated, including the risk to your reputation and the costs? At what stage were the decisions made? What lessons have you learned from that sad

experience? Do you hope that Parliament will take up some of the issues that you mentioned earlier?

I know that I have asked a lot of questions.

**Professor Brown:** I will do my best to address them all. We have a process for making the final decision on any case. Any case could end up being judicially reviewed, so we must be satisfied that we have reached our decision on the basis of the evidence that is in front of us and that any court that examined the decision would consider that we had been reasonable in the process that we followed and in using the paperwork that we had at our disposal. We were encouraged by the fact that the judge in the case that you mention said that we had been reasonable.

Clearly, some of our cases are potentially more risky than others, as they might take us into areas where we have not been before. The case that you mention took us into one such area, although we had pursued similar cases that were connected to free personal care and continuing care. It is only when a policy is implemented that problems arise and individual members of the public try to resolve them. When they do not get a satisfactory answer, they come to us so that we can look into the matter. In pursuing such a case, an individual complaints investigator will raise the issue with their manager, who will then raise it with me and the director of investigations. We are a team but, ultimately, the responsibility rests with me as the ombudsman and head of the organisation.

I was fully satisfied that the investigation had been carried out appropriately and that the conclusions that had been drawn were sound. However, we asked for legal advice at that stage on whether our interpretation—our argument, if you like—held up. The legal advice that we received was that our argument held up and, on that basis, we felt that it was unreasonable for the council to refuse to pay for the individual's personal care.

One of the difficulties in the case was the fact that the ground rules changed during the judicial review process. The council's original argument was that it could not afford to pay for the personal care. However, on the third day, the case turned and became much more about legal interpretation. There was nothing that we could do about that once the proceedings had started. It was a bit frustrating for us because, if we had known in advance that that was going to happen, we would have argued the case rather differently. Hindsight is a wonderful thing and, when we consider the case, we wonder whether, if we had slightly changed one word or another, the outcome might have been different. Who knows? One should not speculate, although a different judge might also have produced a different outcome.

You are right to say that we should now ask what lessons we can learn from going down that road. We had a conversation with Argyll and Bute Council in advance, in which we told it what we were likely to do and why we had reached our conclusions. The next thing that we knew, our decision was being judicially reviewed. In similar cases, especially when we are in new territory, we will want to reassure ourselves—as we did in the case in question—that we have gone through the proper process, that the investigation has been carried out thoroughly and that, if we need legal advice, we have taken it. However, legal advice is just that—legal advice. At the end of the day, a judge can make a different decision. We satisfied ourselves that we had addressed the risks, but we will move forward from there. In other cases, we will go through the same process.

**The Convener:** Essentially, the recommendation from front-line staff was that there was no standing back from the issue. Legal advice is important, but if I am paying and there is the potential that I will lose £100,000, the case will not proceed.

**Professor Brown:** Legal advice is very important.

**The Convener:** You were given poor legal advice.

**Professor Brown:** I would not necessarily reach that conclusion, no.

**The Convener:** Why did the legal advice that you received not anticipate that there would be changes in the judicial process?

**Professor Brown:** One cannot anticipate everything that will happen when a case is judicially reviewed. I am satisfied that the legal advice that we received was sound. Other people who looked at the case were surprised by the outcome. However, there is no point in deliberating on a particular judgment. As Kerry Barker explained, we need to examine the case in much more detail, so that we can understand the full implications of the judgment.

Lord Macphail said that he reached his conclusion reluctantly and by a narrow margin, based on a strict interpretation of the legislation. He rejected all the other points that the council raised. Another judge might have decided to take a more holistic approach and give more weight to the intentions of Parliament, as reflected in parliamentary debates. To some extent, the outcome depends on who gives the judgment. I am not saying that the judgment was wrong or right—the judgment remains until another judge or set of judges reaches a different conclusion. By its nature, the matter is open to different judgments.

**Kerry Barker:** It is important to reiterate the point that Alice Brown has made—that the judge's decision was based on an argument that was made by the council only on the third day of the judicial review proceedings. That evidence was never put before us when we examined the complaint and was not in the original petition of complaint. The judge upheld none of the grounds in that petition; his decision was based solely on a fine legal twist that was raised on the third day. We had two days at the beginning of March and another day in late May. After a considerable period of time, we came back for 24 hours—six hours in legal speak—and the argument was brought up that day. We had no opportunity to address the point, because it was raised only on the last day of the judicial review proceedings. Our lawyers gave us sound legal advice and are still of the view that their advice was sound. However, what matters is what the judge says on the day.

**The Convener:** You confirm that the legal system is expensive and unpredictable, but I am trying to determine how rigorous the assessment of risk was. There was a risk to the reputation of a body that tries to avoid the justice system and courts, as well as a risk to the public purse. As a member of the Scottish Parliamentary Corporate Body, I, too, faced the situation of having to seek legal advice. The cost of getting good legal advice shocked me, so I know that there is a dilemma.

You are, very honourably, accepting the ultimate responsibility for whether systems were rigorous then and are rigorous now in assessing the potential impact of future legal proceedings. However, I am not convinced that we have got to the heart of the situation.

**Professor Brown:** I reassure you that the case went through a rigorous system on the way to the final decision. The starting point was the complaints investigator, who has delegated authority to conduct an investigation, and the case made its way through the system with support from the manager and with the director of investigations, who was one of my deputies at the time, and me going through the arguments and papers and considering other pieces of legislation.

Another important issue that has not come out in some of the debates is that of the other pieces of legislation that impact on free personal care. We considered all that when reaching our conclusion. A rigorous system is in place and the case underwent a considerable amount of debate and discussion in our organisation, with the lawyers and then with counsel, who also thought that we had an extremely strong case.

**The Convener:** When did counsel become involved? Was it after the action had been initiated?

**Professor Brown:** Yes—obviously, that was an additional cost.

**David Robb:** The convener has touched on an important general point about the lessons that we can all learn from the first time that the SPSO has faced a judicial review. Clearly, there have been many other cases but this is the first time that a public body has taken one of our cases to judicial review, and we can learn general lessons from that.

We hope that this is not the start of a trend. We hope that, with the bulk of cases, public bodies, whether local authorities or otherwise, will accept our recommendations as they have done in almost every case in the past, and complainants will get a satisfactory resolution. Standing back from the particulars of this case, I think that there are general questions to ask about processes and lessons to be learnt about risk assessment and about whether we can be clearer in any cases that might arise in future.

**The Convener:** Your organisation's commitment to the complainer has been honest and real. As I have said, I have been in similar situations. However, at times, hard decisions will have to be made about that commitment and where such a commitment can lead the organisation's reputation and its cost to the public purse. There will be lots of ins and outs.

Thank you for coming along and making yourselves available to take questions on that matter and others. We appreciate your attendance and look forward to working with you in future.

*Meeting closed at 12:43.*

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