The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

FINANCE COMMITTEE

Wednesday 20 November 2013

Session 4

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FINANCE COMMITTEE
29th Meeting 2013, Session 4

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Gavin Brown (Lothian) (Con)
*Malcolm Chisholm (Edinburgh Northern and Leith) (Lab)
*Jamie Hepburn (Cumbernauld and Kilsyth) (SNP)
*Michael McMahon (Uddingston and Bellshill) (Lab)
*Jean Urquhart (Highlands and Islands) (Ind)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bruce Crawford (Stirling) (SNP)
Peter Hope-Jones (Scottish Government)
Elspeth MacDonald (Scottish Government)
Paul McNulty (Scottish Government)
John Swinney (Cabinet Secretary for Finance, Employment and Sustainable Growth)
Kerry Twyman (Scottish Government)
Bill Watt (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Committee Room 3

Scottish Parliament

Finance Committee

Wednesday 20 November 2013

[The Convener *opened the meeting at 09:31*]

Landfill Tax (Scotland) Bill: Stage 2

The Convener (Kenneth Gibson): Good morning and welcome to the 29th meeting of the Scottish Parliament's Finance Committee in 2013. I remind everyone present to turn off any electronic devices such as mobile phones.

Our first item of business is stage 2 of the Landfill Tax (Scotland) Bill. We are joined by the Cabinet Secretary for Finance, Employment and Sustainable Growth and his officials. Members should note that the officials cannot speak on the record at stage 2 and that all questions should be directed to the cabinet secretary.

I also welcome to the committee Bruce Crawford MSP and members of the public.

Members have copies of the marshalled list of amendments, and the groupings. We will take each amendment on the marshalled list in turn.

Sections 1 to 10 agreed to.

Section 11—Taxable disposals: power to vary

The Convener: Amendment 8, in the name of Bruce Crawford, is in a group on its own.

Bruce Crawford (Stirling) (SNP): I will explain some of the background to amendment 8.

About 18 months ago, I was contacted by constituents from Blanefield about contaminated land in part of the village that had been built on the site of a former calico print works that closed in 1898. It was found that the houses, which were built in the late 1950s and early 1960s, were situated on land that had been contaminated with lead and arsenic. After testing and retesting, it was found that 13 properties remained in need of remediation due to the levels of contamination.

The residents of Blanefield and Stirling Council have come together to work to find the best possible solution to the matter and the many challenges and obstacles that they face. The cost of remediation to Stirling Council—it is the appropriate authority because there is no other body left that could pay for it—and my constituents is extremely high, which is partly due to the cost of the landfill tax. Initial estimates suggest that the cost of decontaminating the land is likely to be well over £500,000, of which a large proportion—about £250,000—would be the cost of landfill tax.

The circumstances are unusual—if not unique. The residents all bought their houses without any knowledge that the land is contaminated, and the developer is long out of business. However, the residents now face huge costs that they cannot possibly meet. My constituents have worked closely with Stirling Council officials over the past 18 months. The council has agreed to provide £125,000 towards the cost of remediation, and it plans to use its in-house contractors to have the land decontaminated through a best-value process. Unfortunately, the landfill tax element of the projected costs will not all be met by the council, which will leave a significant burden on the 13 householders.

I have written to the Westminster Government about the matter and have been told that it is not feasible to grant landfill tax exemptions for such specific circumstances under the current legislative framework. It is entirely possible that the matter will not be fully resolved until the Scottish Parliament takes on responsibility for the landfill tax, which is why I thought it necessary to lodge amendment 8, which would amend section 11 of the bill, and is designed to allow for exemptions to be given by certificate when costs fall on

"persons whom the Tax Authority considers were not responsible for the land becoming contaminated."

John Mason (Glasgow Shettleston) (SNP): Would that exemption be very wide? The words

"were not responsible for the land becoming contaminated"

could cover the situation that Bruce Crawford described, for which I have sympathy, as well as a very wide range of people who could claim that they did not know about that.

Bruce Crawford: You must have known exactly the point that I was about to come to, Mr Mason. I am about to address that matter.

Amendment 8 would not solve all the problems that my constituents face, but it would provide them with the comfort of knowing that it would result in a significant reduction in the overall costs that they face individually. That said, I acknowledge the shortcomings of the amendment, which could open the door to a developer purchasing land, finding it to be contaminated and not going through the proper due diligence process, and then seeking to find an exemption through a certificate. Mr Mason's point is therefore correct. Such a result is not my intention, so I ask the committee to view the amendment as a probing amendment. I also ask the Government to consider lodging an amendment at stage 3 that would assist and aid my constituents in dealing with the unique circumstances at Blanefield, but

which would also avoid opening the door to any unintended consequences.

I move amendment 8.

Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): I have a huge amount of sympathy for the people who are affected. I do not know whether they contacted all members of the committee, but I remember that they certainly contacted me, way back.

I very much welcome the fact that amendment 8 is to be viewed as a probing amendment, because it may be worded a little too widely. I know that Bruce Crawford accepts that, so my remarks are directed more at the Government for its further consideration. The amendment is not worded as it would need to be in order to address the intention that the appropriate circumstances should be those in which persons have been unaware of contamination. It is important that any new amendment that is lodged be worded in such a way. The amendment talks about responsibility rather than awareness of the land's contamination. That will need to be factored in, as well.

I welcome the fact that Bruce Crawford lodged amendment 8. The issue is important, and we need to take it on board and consider it.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): Perhaps the cabinet secretary will address my particular point in his response.

I wonder whether the action that Bruce Crawford wishes for could, in fact, be carried out under section 11. I presume that that may be the case, and I also presume that there is no equivalent provision in United Kingdom legislation. I am entirely sympathetic to amendment 8, but I wonder whether it would make a substantive difference in practice, because both the section and the amendment use the word "may". I presume that the Scottish ministers would have the power under section 11 to carry out the exemption and to waive the tax, as Bruce Crawford seeks, and that the amendment therefore merely illustrates one of the circumstances that could lead to the section 11 power being triggered.

The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney): First, I thank Mr Crawford for lodging amendment 8 and for the opportunity to consider what is clearly a very important issue for his constituents. Amendment 8 sets out a particular circumstance in which ministers could apply an exemption under the powers in section 11 of the bill. I quite understand the significance of the issue that Mr Crawford has raised, and that remediation of contaminated land can have serious financial consequences for individual householders.

The key point that I want to make to the committee is that the proposal in amendment 8—this was also Mr Hepburn's point—would go significantly wider than individual householders who we would all accept might inadvertently find themselves in such situations. I have great sympathy for the householders of Blanefield who have found themselves in a situation that is not of their making.

However, my understanding of how the issue has been handled and the approach that Stirling Council has taken is that the issue might have to be addressed before the bill would come into effect. I understand that Stirling Council might be moving to invitation to tender, so some of the work might have to be done sooner than the legislation's coming into effect in April 2015. The bill therefore might not provide a practical solution to the specific circumstances that Mr Crawford has raised on behalf of his constituents.

The general point is that householders might inadvertently find themselves in such circumstances in other cases. Obviously, the committee must consider whether making specific provision for that on the face of the bill would be appropriate.

My office has advised Mr Crawford that under the existing terms of the United Kingdom landfill communities fund some remediation financial support might be available, through a grant application by the Blanefield residents. Although the UK legislation does not provide specifically for such circumstances, I think that there is an opportunity to discuss with those who operate the UK landfill communities fund whether it is possible to identify a practical way to get financial support that would enable the householders to contribute to remediation without it coming from their own resources. I hope that that opportunity can be pursued.

On the specifics of amendment 8, my first concern is that it is a technical amendment. The amendment would not extend the powers in the bill, because the proposed exemption could already be provided by regulations under the current wording of section 11, so Mr Chisholm is absolutely correct in that respect.

My second concern reflects Mr Hepburn's point and is on the scope of amendment 8. Extension of the exemption as is proposed would be a way out of tax for anyone who owned contaminated land. A person might have bought contaminated land with the intention of undertaking remedial work to realise the full value of the land; amendment 8 would relieve them of having to pay landfill tax in such circumstances. I am anxious not to provide for such a result.

I propose that supporting land remediation projects ought to be one of the objectives of the landfill communities fund when the Scottish landfill tax is introduced in April 2015. In essence, that would provide practical arrangements for dealing with remediation and would offer the opportunity of support for members of the public who find themselves in situations such as Mr Crawford's constituents have found themselves in. Further thought will be required in order to set out the details of that in regulations, in due course.

I hope that my remarks have provided assurance to the committee on the Government's thinking on the issue. I am happy to provide what assistance I can to Mr Crawford in the short term to try to ensure that the landfill communities fund can engage constructively with him on the issue.

The Convener: Thank you. Bruce Crawford will wind up and say whether he wishes to press or withdraw amendment 8.

09:45

Bruce Crawford: A number of interesting points have been made. I do not want to go back over the ground that Mr Mason and Mr Hepburn have covered, except to say that their comments were germane and correct.

Malcolm Chisholm wondered whether, under the bill, regulations could apply in this case. I will seek to discover from the cabinet secretary whether regulations could be fashioned to deal with the particular and unique circumstances in Blanefield and to provide some assurance for the future. After all, I am not entirely certain that Stirling Council will prosecute the process to the degree that will enable everything to be completed by 2015. The council is going about the matter in a very canny and sensible way, and recognises that if it were to proceed at the moment there is no way that the householders could possibly find the resources.

With regard to resources, I was very grateful to be contacted last week by the cabinet secretary's office about the landfill communities fund; indeed, I met the fund's people yesterday. Unfortunately, the structure of the landfill communities fund in Scotland is such that opportunities are limited for the Stirling area to receive much in the way of resources; the fund is very much defined by the activity of a landfill operator in a particular area and any resources that might be available as a result of a landfill site will be identified for the community in the area. It is also not clear whether the fund's criteria are wide enough to allow the Blanefield situation through the door.

That said, I very much welcome the cabinet secretary's commitment to working with me and seeing whether there is a way through this issue. I recognise the wide-ranging nature of my amendment and seek to withdraw it; however, given the circumstances, I might have to consider lodging another more tightly drawn amendment at stage 3, if that is required.

Amendment 8, by agreement, withdrawn.

Section 11 agreed to.

Sections 12 to 19 agreed to.

Section 20—Credit: bodies concerned with the environment

The Convener: Amendment 9, in the name of Michael McMahon, is in a group on its own.

Michael McMahon (Uddingston and Bellshill) (Lab): When we received evidence on the consultation on the bill, some suggested that we should look to the landfill communities fund to provide resources for environmental projects outwith the areas affected by landfill sites. I do not know whether people intended to create such an impression, but the proposal immediately rang alarm bells with me. Another argument that was made—and which I completely understand and have no difficulty with—was that the 10-mile-radius criterion in the fund can, in some cases, be too restrictive. For example, a settled community in a rural area might be experiencing exactly the same impacts from air pollution, noise and smell from the lorries going through it as a community that is adjacent to a landfill site, but the site itself might be more than 10 miles away. I am therefore not looking to restrict the use of the landfill communities fund and leave out communities outwith the 10-mile radius that are clearly being impacted on.

Amendment 9 seeks to challenge the thought processes that seemed to come through in evidence that money could be taken from the landfill communities fund for projects that would benefit areas that are not directly impacted by a landfill site. That view concerned me; indeed, after speaking to people about the implications of such a change in the use of the landfill communities fund, I saw that such a move could be only detrimental to the communities that are directly impacted by these sites. By its very nature, the fund is diminishing; however, although the amount that is available from the fund will fall over time, a landfill site's impact on a community will be felt for longer than it has been used as a practical facility. Given that the amount of money in the fund will fall while the impact remains, I would be concerned by any move to reduce the fund further to provide money for projects that have no connection with a landfill site. That is why I lodged amendment 9.

John Mason: The word "vicinity" jumped out at me. Could you define that?

Michael McMahon: As I said, it is not about the impact on the vicinity; it is about there being no impact. During the stage 1 debate, concerns were expressed that there are communities outwith the 10-mile radius, or the vicinity, that will be impacted on as lorries travel through them; that is especially true in rural areas. I totally understand why people do not want there to be a restriction on the criterion, but I want there to be a restriction on the use of the funds where no direct connection can be made between the area that is benefiting from the spend and its being

"in the vicinity of a landfill site".

The wording was suggested to me by the legal advisers who advise on the drafting of amendments.

Two options were put before me; one was very complex and amendment 9 was the most simplistic. To be fair, it seemed to be the most logical amendment; I am sure that those who have more knowledge of drafting could tell you why there were two possible amendments, of which one was more complicated than the other. I wanted the amendment that would achieve the most basic thing, using a simple set of criteria that surround the landfill communities fund.

I move amendment 9.

Gavin Brown (Lothian) (Con): I agree entirely with the principle that Mr McMahon has laid out today and during the various committee stages and the stage 1 debate. In many respects, it is a principle to which the committee signed up in its report.

My concern about amendment 9 was fleshed out in part by John Mason in his intervention; it concerns the word "vicinity". The strict dictionary definition that includes the word "surrounding" is pretty narrow. It would be quite restrictive and, going by what Mr McMahon has said, it would tighten things up far more than he intends. If we agree to the amendment and the word "vicinity" goes into the bill, it will be much more difficult for the committee and Parliament to define the distinction between rural and urban under the 10-mile rule. The principle is right, but if we agree to amendment 9, particularly considering its use of the word "vicinity", it could become unduly restrictive and we might have problems when we try to flesh out exactly what we intend to achieve.

John Mason: I want to expand slightly my point on the word "vicinity", which Mr McMahon and Mr Brown have mentioned. The assumption has sometimes been made that 10 miles might be too little and that we might need to look at a wider area, whereas in the city 10 miles might be too broad. I have a landfill site in my constituency and all parts of Glasgow would probably be within 10 miles of it. On Mr McMahon's argument, which I agree with, places on the far side of Glasgow are in no way disadvantaged by that landfill site, so I like the idea that the benefits should go primarily to those who are most severely affected.

I am not entirely convinced by amendment 9, but I hope that the regulations will reflect some of the debate that we had at the committee about how we get a balance. The distance should not just be a fixed distance.

Jean Urquhart (Highlands and Islands) (Ind): I too have sympathy with amendment 9, especially given what we have done with our rubbish in the past. Times are changing and many landfill sites are closing down or being finished and treated, and the whole idea is that we will not take stuff to landfill in the future. It occurs to me that, instead of trundling to landfill, the lorries will trundle to the recycling depot and other areas, so we need a different way of thinking. If the money that is being raised is for environmental projects that are related to the recycling industry, it would be a great shame, particularly in the area that I represent, to have a 10-mile radius. It would be a nonsense.

We should look much more widely at the issue and I think that in a year or two we will see it quite differently. I do not support amendment 9.

John Swinney: Michael McMahon's amendment 9 would insert a condition that money from the tax credit scheme or landfill communities fund should be spent within

"the vicinity of a landfill site".

The argument on that was advanced at stage 1.

In addressing amendment 9, I would like to highlight the issues that are under debate on this question. The presence of a landfill site has, in essence, two main effects. The first is the disamenity that a landfill site causes the community in its vicinity and the second is the detrimental effect that the site has on the wider environment. The first of those—the disamenity on the surrounding community—is crystal clear, but the detrimental effect that the site has on the wider environment is more difficult to define. Michael McMahon has highlighted that lorries will travel through communities to reach a landfill site, which may create a disamenity, and that disamenity may be created by the emissions that emerge from a landfill site, which may have a wide impact on the environment over a large geography.

It is on those questions that we are searching for a conclusion. The debate on those questions has informed a lot of the evidence that has come to the committee, which has clearly caused some concern to Mr McMahon, and I have some sympathy with the position that he has expressed to the committee on this point.

As I indicated in my response to the Finance Committee's stage 1 report, I agree with the principle that the communities that are most affected by a landfill should benefit from the money available through the fund. The fund that will be established as an integral part of the tax, under sections 18 and 20, will, I am sure, be of significant benefit to the communities in the vicinity of a landfill site, but it should not be available to communities further afield that suffer no disamenity from having a landfill site nearby.

The question that arises out of that is on the extent to which the fund should apply to reflect the impact that landfill sites have on the wider environment. We have already considered the potential for the fund to support land remediation projects, such as the one on Blanefield that Bruce Crawford has brought to the committee's attention, and the fund could support other environmental and other types of projects.

In the consultation prior to the bill's introduction, a majority of respondents supported the view that funding for environmental and biodiversity projects should be available through the Scottish landfill tax communities fund, on the basis that landfill sites contribute to climate change and are responsible for a sizable element of Scotland's greenhouse gas emissions. We need to consider that issue and come to a conclusion on the terminology that will be put in place around the scheme. As a matter of course, I would prefer to see that in regulation rather than on the face of the bill.

The exchange between John Mason and Michael McMahon highlighted the difficulties. I have every sympathy with Mr McMahon on the question of trying to pin down this point and I have no criticism of the ability to get the issue to a fine point. It comes down to the point about vicinity. For me, "the vicinity of a landfill site" is quite a tight term, which may not serve the purposes on which we are all trying to agree.

During stage 1, I indicated that I would be happy to discuss the approach to the issue with Mr McMahon. I welcome the opportunity to hold that discussion and I would be very happy to do that informally with other committee members before stage 3 if that would help, to provide colleagues with the opportunity to reflect on the issues that are at stake.

There is no disagreement that communities that suffer disamenity from a landfill site should have access to the fund; that is agreed absolutely. The question is, if we are going beyond that impact and disamenity, how far are we going and on what basis?

10:00

I am mindful that, predominantly, the consultation responses argued for a position that appears to me to be slightly broader than that for which Mr McMahon has argued today. I will be anxious to consider that evidence in dialogue with members in advance of stage 3, so that we can either come to an agreement on the best way forward or, alternatively, leave space for members to be able to exercise their proper and due right to advance issues at the final stage of the bill. I will be happy to facilitate those discussions and to do so timeously before stage 3.

Michael McMahon: I very much welcome the cabinet secretary's comments. For clarity, I should say that I seek a direct link between the impact of the landfill site and the communities that may benefit from the funding from the landfill communities fund. I get the general point that landfill sites contribute to climate change, but everything appears to contribute to climate change, so where do we stop with that? Some communities suffer a direct impact—or, in the terminology, a disamenity—whereas other communities do not suffer disamenity for which there is a direct linkage to the landfill site.

I very much welcome the opportunity to discuss the issue further with the cabinet secretary. On that basis, I will not press my amendment today.

Amendment 9, by agreement, withdrawn.

Section 20 agreed to.

Sections 21 to 40 agreed to.

Section 41—Subordinate legislation

The Convener: Amendment 1, in the name of the cabinet secretary, is grouped with amendments 2 to 7.

John Swinney: Amendments 1 to 7 deal with setting out which procedure should apply to certain order-making powers. The amendments are in response to recommendations from both the Finance Committee and the Delegated Powers and Law Reform Committee following the stage 1 process.

Amendments 1, 3 and 7 relate to section 17, "Liability of controllers of landfill sites." They follow on from a recommendation in the Delegated Powers and Law Reform Committee's stage 1 report, which identified that regulations made under section 17 could increase the scope of the tax. The amendments will mean that regulations made under section 17 that would change the liability of landfill site controllers will be subject to the affirmative procedure.

Amendments 2, 4 and 6 relate to section 11, "Taxable disposals: power to vary." I note the

Finance Committee's recommendations that the power should be subject to the affirmative procedure. Creating an exemption may prove suitably controversial to merit further scrutiny. Therefore, the amendments will make all orders under section 11 subject to the affirmative procedure.

Amendment 5 relates to section 13(4), which provides for the setting of additional rates of tax. The amendment will make all orders under section 13(4) subject to the provisional affirmative procedure. I note the Finance Committee's recommendation that the power should be subject to the affirmative procedure. However, to stop contractors and operators taking advantage of any change and perhaps rushing materials to landfill, amendment 5 seeks to apply the provisional affirmative procedure in order that any change can take immediate effect.

I move amendment 1.

The Convener: I think that there are no further comments from committee members. Cabinet secretary, do you have anything to add?

John Swinney: I have nothing to add.

Amendment 1 agreed to.

Amendments 2 to 7 moved—[John Swinney]—and agreed to.

Section 41, as amended, agreed to.

Sections 42 to 44 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. Members should note that the bill will now be reprinted as amended and will be available tomorrow morning. The Parliament has not yet determined when stage 3 proceedings will take place, but members may now lodge stage 3 amendments with the legislation team. Members will be informed of the deadline for amendments once it has been determined.

I thank the cabinet secretary for his attendance today. I call a brief recess to allow the cabinet secretary and his officials to leave and to allow a changeover of witnesses. There will be a five-minute break.

10:04

Meeting suspended.

10:09

On resuming—

Criminal Justice (Scotland) Bill: Financial Memorandum

The Convener: Our second item of business is to take evidence from the Scottish Government bill team as part of our scrutiny of the Criminal Justice (Scotland) Bill's financial memorandum. I welcome Elspeth MacDonald, Peter Hope-Jones and Kerry Twyman. I understand that a member of the bill team would like to make a brief opening statement.

Elspeth MacDonald (Scottish Government): Thank you, convener—I will make an opening statement.

The Criminal Justice (Scotland) Bill is a wide-ranging and forward-thinking reform that will modernise and strengthen the Scottish criminal justice system. Most of its provisions have been developed from the recommendations of two independent reviews: Lord Carloway's review of criminal law and practice and Sheriff Principal Bowen's review of sheriff and jury procedure.

Lord Carloway's review was prompted by the Cadder case, which had a significant and immediate effect on the criminal justice system and resulted in the abandonment of hundreds of prosecutions, including some for very serious crimes. The provisions of the bill that implement the recommendations of Lord Carloway's review are intended to create a criminal justice system that is able to meet the requirements of modern society and provide as much resilience as possible against any unexpected future developments in European Court of Human Rights jurisprudence.

The costs that are associated with the bill are of course set out in detail in the financial memorandum. The Cabinet Secretary for Justice and the Cabinet Secretary for Finance, Employment and Sustainable Growth have made it clear that the costs are reasonable in the context of reforms that will put Scotland at the forefront of human rights protections and introduce efficiencies to the criminal justice system.

The financial memorandum was developed through close consultation and discussion with key partners, including Police Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Prison Service, the Scottish Court Service, the Scottish Legal Aid Board, the Convention of Scottish Local Authorities and the Association of Directors of Social Work. The costs are based on the information that was provided by those various bodies—including the shadow marking exercise—and on their professional experience and judgment. We consider what we have set out to be

the best possible estimate of the costs that are associated with the bill as introduced.

I can give more detail on the process, if the committee would find it useful. However, that might come out in questioning.

The Convener: I am happy to see whether it comes out in questioning. I might even ask something along those lines myself.

As usual, I will start off the questions and then open out the session to committee colleagues. My first question is in regard to written evidence from the Faculty of Advocates, which states:

"In characterising the additional costs to the Court Service as 'opportunity costs' the"

financial memorandum

"relies on savings in court time which it is anticipated will be achieved by the Bowen proposals. Since those proposals relate to solemn cases prosecuted in the sheriff court, it is difficult to see how they could be relevant to the High Court."

Can you comment on that, please?

Peter Hope-Jones (Scottish Government): The faculty is correct to point out that the specific savings that are identified in the sections on sheriff and jury reforms will impact on sheriff and jury courts. However, we developed the estimates in close co-working with the Scottish Court Service, which has indicated to us that it is able to accommodate those within existing resources. That is also indicated in the written submission to the committee.

The Convener: Okay. You will have seen some of the responses that we received from local authorities on the financial memorandum's estimate of the provisions' total recurring opportunity costs. West Dunbartonshire Council stated that the figure appears to be

"the result of a series of informed guesses".

The council also stated that the assumption that it would result in opportunity costs

"appears to have been arrived at on the basis of no evidence whatsoever".

Peter Hope-Jones: The first thing to say with regard to the responses from local authorities is that the estimates in the financial memorandum were developed, as we have said, through consultation with COSLA and the ADSW. We reached agreements with those bodies as representatives of local authorities more widely. We did not talk with individual local authorities. It is therefore understandable that a small number of local authorities might not completely hold the same view as those bodies. It is worth noting, too, that the local authorities' responses to the committee are not unanimous in the positions that they present.

We went through a detailed process to estimate the impacts on local authorities. There are two major ones to consider. One relates to corroboration, on which there was a detailed exercise on the back of the shadow marking exercise, about which I can talk more if members are interested in it. The second concerns the proposals on the sheriff and jury procedure. Again, we undertook an analytical exercise based on existing models for predicting impacts and I can provide more details on that if it would be helpful.

10:15

The Convener: Some of the local authorities are quite critical. West Dunbartonshire Council said that no consideration had been given to

"the allocation of staff time to accommodate new work arising".

It also said:

"the potential increase for Community Payback Orders is also likely to increase demand on criminal justice staff—with no financial contribution provided."

I am concerned that some of the local authorities feel that their concerns have not been addressed at all. I understand what you say about COSLA as the umbrella organisation, but the local authorities seem to feel that their direct concerns have not been considered.

Peter Hope-Jones: The concerns that have come out were not raised with us when we were producing the financial memorandum. As I said, we discussed the impacts, so we stand by the estimates in the memorandum as part of the opportunity costs that have been presented more generally.

Elspeth MacDonald: I suppose that the difference is that we dealt with COSLA and the Association of Directors of Social Work and calculated the costs on a Scotland-wide basis. The information that we have strongly suggests that there will be no great impact on any particular local authority and that, therefore, the proposals can be absorbed within current allocations of staff. If that were not to be the case, we would want to know that, but that is the best information that we have.

Some of the local authority submissions assume that certain things will happen under the bill that are not necessarily provided for in it and that are not intended to be provided for in it.

The Convener: Will you elaborate on some of those?

Elspeth MacDonald: Could I elaborate on that in writing? It is something that I have just come across.

The Convener: Thank you for that.

You talked about social work directors being consulted, but Dundee City Council says:

"No consideration has been given to the potential increased volume of Social Work reports as a result of an increase in the number of prosecutions and associated requests for Social Work court reports."

If social work directors were consulted, I am confused as to why the council thought that no consideration had been given to that.

Elspeth MacDonald: Somewhat unhelpfully, I am also confused, because we consulted in good faith, if you know what I mean. We understand the position to be as we set it out. It is robustly set out in the financial memorandum and we understand what we say to be correct. The submissions have not caused us to move from what has been said already.

Peter Hope-Jones: In the financial memorandum, we have tried to drill down quite deeply into the impacts of the abolition of corroboration. Quite a lot of detail is set out on that. However, the concern about social work reports was not raised with us when we produced the memorandum, so it is not reflected in it.

The Convener: Opportunity costs have already been raised. You have an explanation in the financial memorandum of what they are, but I ask you to talk us through that for the public record and so that everybody knows what we are talking about.

Elspeth MacDonald: The financial memorandum differentiates between financial costs and opportunity costs. We consider opportunity costs to be the impacts on staff time and other existing resources that can be managed through measures such as prioritisation of functions and increased operational efficiency.

That approach was agreed with our key partners as we moved forward. We discussed it in detail, and over some time, with all the bodies that we have mentioned. Where a specific need has been identified for additional staff as a result of the bill, that has been included as a financial cost. Where a new process has been identified or an increase in volumes of cases has been predicted, and where the impact of that has been spread throughout Scotland in such a way that it is manageable within existing resources, that is classified as an opportunity cost. That is the approach that we took with local authorities.

There may be savings, but an example of opportunity costs would be around training. Initially, Police Scotland anticipated a substantial requirement for the backfilling of posts and overtime payments in order to achieve implementation of the bill in 2014. Notably, the Commonwealth games and other major events will be a real drain on police resources. We responded to those concerns, and we have set out a timetable for implementation, which allows training to be completed without the need for widespread backfilling and overtime payments. That works through staff schedules and cover arrangements, which means that the staff costs that are associated with training can be considered as opportunity costs rather than a financial cost.

That is about reorganising the business to absorb the changes. A lot of what is in the bill is business as usual for many bodies. Court cases are business as usual for the courts and investigating crime is business as usual for the police. However, there are new ways of doing that business that people will need to be trained up for, and then those new ways of doing business will become business as usual, too.

We should not lose sight of the fact that the new processes that are being introduced are not being layered on top of old processes; they are replacing what is in place already. For example, the new process for arrest and detention replaces what is there already. The new process for looking after suspects of crime is different, but the police look after suspects of crime as a matter of course now.

I suspect that that is a more cogent explanation of opportunity cost—it is what we expect to be done in the normal course of business as usual, even though we are facing a significant change management exercise. Organisations throughout Scotland should be able to deal with that, and that is the way in which we have looked at it. That is also the way in which our key partners have accepted it.

The Convener: I will touch on one specific area before opening up the discussion to colleagues round the table: that of vulnerable adult and child suspects. When the police assess an individual as being vulnerable, the bill requires them to secure the attendance of an appropriate adult as soon as reasonably practicable. The financial memorandum states that that

"will not entail additional costs ... as Appropriate Adult Services are provided at present on a non-statutory basis."

Local authorities are questioning that assumption. Aberdeenshire Council has said that social workers undertake the role on a voluntary basis and that training costs are £5,000 per volunteer. If that provision becomes statutory, it would mean that those individuals would have to be available 24 hours a day, and there would be backfilling costs that have not been considered. Could you talk us through that aspect of the FM?

Elspeth MacDonald: That is the example that I was thinking about of a local authority making an assumption that something will become statutory that is not statutory now. We have no intention of making that provision statutory although, if the

Parliament makes it statutory, we would have to reconsider the matter. The bill as introduced did not make a statutory requirement for appropriate adults to be provided. Therefore, that is not included in the costings of the bill.

The Convener: You are saying that there is no inevitability or likelihood that that will take place.

Elspeth MacDonald: It is certainly not the Government's policy that it should take place, although obviously the bill is now in the hands of the Parliament.

Peter Hope-Jones: At the core of the estimates on vulnerable adults is an agreement with COSLA that the practice around providing appropriate adults will not change as a result of the bill. They will continue to be offered in the way that they are now, and therefore the costs will be the same. We have also agreed with COSLA that we will carefully monitor how the bill is implemented. We will continue to liaise with COSLA and react if there are, in fact, changes.

The Convener: Thank you for that. I open up the discussion to colleagues round the table.

John Mason: The convener raised the question of opportunity costs. Will you say a bit more about that? I understand from your explanation to the convener that you are suggesting that opportunity costs exist where something is going to stop and something else is going to start, so the amount of work just carries on. My understanding was that it is hoped that the legislation will lead to more rape convictions. Does that mean that there will be more people going through the courts and more people in prison?

Elspeth MacDonald: The stop and start is part of the explanation, and the rest is that we expect this to become business as usual. We expect the police and the courts to be able to deal with the business that arises from the changes, by and large, as normal. We have identified where there are additional costs for which we need to provide extra funding.

John Mason: You said that it will become business as usual. My understanding is that less serious cases never go to court because the courts are so full. If you bring in more rape cases, will that mean that other cases will fall out of the system?

Elspeth MacDonald: Sorry, but I do not agree with your original proposition that less serious cases would not proceed.

John Mason: Do you agree that that is what happens at the moment?

Elspeth MacDonald: I am saying that I do not agree that that is what happens. It is not for me to answer that, but that is not my understanding of what happens at the moment. We would expect the most serious cases to proceed. We are talking about increased volumes of between 1 and 6 per cent at the serious end, so we do not expect an overwhelming amount of additional casework as a result of the bill. The Crown Office has confirmed that in its evidence.

John Mason: On the Scottish Prison Service, paragraph 192 on page 70 of the financial memorandum states:

> "In the short term, SPS considers that it can accommodate the current forecast population within its existing capacity and existing budget."

Is there spare capacity in the prisons at the moment?

Peter Hope-Jones: Yes. The Scottish Prison Service has indicated to us that there is capacity in the prison system to accommodate the increase that we have indicated in the short term. The SPS and the Scottish Government undertake regular prison population projections and plan the estate provision on that basis, and we will continue to do so in order to monitor the actual impacts of the bill.

John Mason: I had understood that at least some prisons are overcrowded and are at more than their expected capacity. Is that not the case? If it is the case, they could not have spare capacity.

Peter Hope-Jones: It would be for the Scottish Prison Service to comment on that in detail, but my understanding is that there are complexities around the matter and it is not a simple question of counting out the number of empty cells in Scotland. The SPS does analysis of what is manageable. Also, it is a reactive organisation. It does not set the number of people who are in prisons. That is done by judges, and part of the SPS's job is to cope with changes in demand for prisons. It has assured us that what is proposed is manageable in the short term.

John Mason: Specifically on rape, I presume that the idea is that, if more people are convicted, that should reduce the crime rate over time and therefore there should be a saving. Has that been built in, or is it too long term?

Peter Hope-Jones: That has not been reflected directly. It is something that we discussed and obviously it is a policy objective, but it is hard to quantify a specific impact in individual years.

10:30

Elspeth MacDonald: The period of the financial memorandum is too short to take account of that kind of effect although, as Peter Hope-Jones says, it is one of the objectives that we are aiming for.

John Mason: If I have read the media correctly, some people have questioned whether there will be more convictions, because there will be other hoops to go through instead of corroboration, such as stricter jury numbers. One school of thought is that there will be fewer convictions and therefore that there will be savings. Has there been a risk analysis or probability assessment of that?

Peter Hope-Jones: In our calculations in the financial memorandum, we used existing conviction rates, simply because that is the best evidence that we have available. However, we worked in other factors. For example, for Lord Carloway's review, he did some analysis of the types of cases that would go forward for prosecution, and we built that into the model of the additional cases that will proceed.

Arguments can be made about the impact on the conviction rate. Some argue that the rate might be lower and some argue that it might be higher. For the purposes of our calculations, we went with the current figure, because we felt that anything else would be speculation and would involve trying to add or take away a certain percentage, which would not be particularly constructive.

Jamie Hepburn: On the shadow exercises that have been undertaken, the Faculty of Advocates set out that the financial memorandum

"does not provide sufficient information on those exercises to allow for meaningful comment."

How would you respond to that suggestion?

Peter Hope-Jones: The shadow marking exercise was set up by the Crown Office and the police so it would be for them to answer on the detail of exactly what they underwent. However, it should be noted that the Crown Office has provided supplementary written evidence to the committee that provides more detail of exactly what went into that exercise. Since then, it has also set out, in evidence to the Justice Committee, the new prosecution test, which reflects broadly what was done in the shadow marking exercise.

Jamie Hepburn: You would refute the suggestion that there is not enough information about those exercises.

Peter Hope-Jones: In the financial memorandum as published there is not a huge amount of detail. That is a reasonable point. However, what the Crown Office has put out since gives a decent picture of what was undertaken.

Jamie Hepburn: So the information is there.

The Faculty of Advocates also stated that the predicted increase in the number of prosecutions is "surprisingly small", the implication being that the figure given might underestimate the cost of prosecuting cases through the courts. However, I noted that the Crown Office and Procurator Fiscal Service has set out that it is content that the estimated costs and savings set out in the financial memorandum, as it applied to the COPFS,

"are reasonable and are as accurate as possible".

How would you respond to the faculty's suggestion that the predicted increase in the number of prosecutions was surprisingly small?

Peter Hope-Jones: I noticed that in the submission from the Faculty of Advocates. The first thing that I would point out is that the faculty also stated that, overall, the financial memorandum is a reasonable summary of costs. Secondly, it did not give much evidence for why it feels the way you describe. The estimates for corroboration in the financial memorandum were as the result of those detailed shadow marking exercises, which reproduce the process of decision making in actual cases. It was quite a robust way of evidencing the estimates. We feel that the estimates are strong and reliable.

Elspeth MacDonald: It might be useful at this point for me to provide the detail that I referred to earlier on the process that we went through in reaching what we have in the financial memorandum. We undertook detailed discussions with partners about the implications of the bill for their services. That included looking at what would happen if impacts were at the higher end of ranges and the likelihood of that happening.

Our financial estimates are, in most instances, a range of possible outcomes within which we have indicated a best estimate. Where we have used a range, it is because it is best statistical practice to do so. We have then based best estimates—unless we have specifically indicated our own workings on the point—on the professional experience and judgment of the various bodies involved. We have used that methodology with the various bodies that we have referred to, so we consider that the result has been a thorough consideration of the implications of the bill, including the need for training and changes in processes and methodology. That is informing our planned timetable for implementation, and a full plan will be prepared once the final terms of the bill are known.

I hope that that provides some sort of background to the process, which has been pretty robust, I have to say, and has taken some time.

Jamie Hepburn: That is helpful. The faculty also suggested—the deputy convener made this point, too—that

"the incidence of convictions may change"

as a result of the bill and that, if so,

"an assessment which simply applies the existing proportion of cases in which a conviction is secured to the 'additional' cases prosecuted would underestimate the costs to SPS and local authorities."

How do you respond to that?

Peter Hope-Jones: That is an illustration of exactly what I was talking about earlier. The Faculty of Advocates submission argues that the conviction rate may be higher, and that would impact on the number of convictions and therefore on prisons. However, as we heard, there is an argument that the conviction rate may in fact be lower because a bar is being removed to certain cases going forward, which potentially increases the number of cases. We felt that there was no sufficiently robust evidence either way on which to base a calculation, and that is why we have used the existing figure.

Jamie Hepburn: I appreciate that it is pretty difficult to know what the conviction rate may be in future. The deputy convener also referred to the Scottish Prison Service position in response to the financial memorandum. For absolute clarity, can you confirm that it is not expressing any concerns about capacity issues in prisons or about the costs involved in the bill and that such concerns have not been presented to you?

Peter Hope-Jones: There are wider conversations about prison capacity. Prison numbers are projected to increase by about 200 places per year in any case. That does not specifically incorporate the predictions in the financial memorandum, but it does reflect an expectation that there will be legal changes and that those changes are liable to lean more towards stronger prison sentences. It is also worth noting that we should consider the increases in prisoner numbers in the wider context of such things as community payback orders as a more robust and flexible community sentence, the presumption against imposing short prison sentences of three months or less, and the range of policy initiatives designed to reduce reoffending, such as the reduce reoffending change fund. There is a wider picture about prisoner numbers, obviously, and the bill feeds into that wider conversation.

Jamie Hepburn: I suppose the point is that the Scottish Prison Service is not knocking the Government's door down saying that there is a financial problem as a result of the bill.

Peter Hope-Jones: Not as a result of the bill. It has said that, in the short term, the estimates set out in the financial memorandum are manageable within capacity.

Jamie Hepburn: Thank you.

Gavin Brown: Is the average cost of a community sentence £2,400?

Peter Hope-Jones: I believe that that is the figure that we use in our calculations. Let me just check that—it is set out in the financial memorandum. If you repeat the question, I will confirm the figure.

Gavin Brown: Is the average cost of a community sentence £2,400?

Peter Hope-Jones: We have used the figure of £225,000.

Gavin Brown: Sorry?

Peter Hope-Jones: We have used the figure of £225,000.

Gavin Brown: For a community sentence?

Peter Hope-Jones: Oh no—I am sorry—the figure that I cited was for secure accommodation.

The Convener: Perhaps you could get back to the committee with that information.

Peter Hope-Jones: Yes. We will get back to you on that.

Gavin Brown: Let us assume that the cost is of that magnitude. You assume that there will be an increase in the number of community sentences. You have a low estimate of 120, a best estimate of 480 and a high estimate of 1,140. If we work to your best estimate of 480 additional community sentences a year, on what basis do you assume that there will be no additional costs on local authorities with that number of additional cases?

Peter Hope-Jones: The costs associated with community sentences are different from those associated with prisons in that they are mostly about the staff time involved in the supervision of the sentences. It is worth noting that the 480 additional cases modelled in the financial memorandum are, at around 2.8 per cent of the total figure of 16,916, a relatively small percentage increase.

The position is set out as part of the opportunity costs model that we have explained in some detail. They are manageable because the workloads of social workers and other relevant agencies can be repositioned.

Gavin Brown: What percentage increase in community sentences would be needed for there to be an additional cost to local authorities?

Peter Hope-Jones: I am not sure that I can answer that specifically. However, aside from the bill, there is increasing emphasis on community sentences in the justice system.

Kerry Twyman (Scottish Government): We do not have the calculations to hand. On staff time, were we talking about an extra couple of hours a week, the expectation would be that current staff could absorb that; were we talking about a large

enough increase in cases to require additional staff to be recruited, there would be a financial cost. In the discussions with COSLA on the issue, it was not considered that there would be a high enough impact, based on these numbers, to require the recruitment of additional staff members.

Gavin Brown: In that case, what percentage increase is needed before new staff are required? You are saying that you have not done those calculations.

Kerry Twyman: In the discussions that were had, the feeling was that the potential increase was not anywhere near enough for there to be a cost. Even when we looked at the figures at the high end of the range and divided the cases across all the various authorities in Scotland, the numbers did not come out high enough for there to be an absolute need to recruit additional staff. It was felt that the potential additional cases could be managed by current staff levels.

Gavin Brown: In evidence presented to the committee, West Dunbartonshire Council, which the convener mentioned, has said that there would be additional costs; Falkirk Council has said that there would be increased staffing costs; Fife Council has questioned your assumptions; and Renfrewshire Council has said that it would be very difficult to absorb the costs. The message that we are getting from local authorities is that there will be increased costs, but you are saying that there will not. I am simply trying to work out the percentage increase in sentences before additional costs are incurred. We are getting a very different message from what you have presented to us.

10:45

Peter Hope-Jones: Only a minority of local authorities have written in on this issue and it should be noted that, although they have picked up a number of small issues, Fife and South Lanarkshire said in their submissions that, overall, the financial memorandum gives a reasonable estimation of the costs and they broadly accept it. As I have said, the agreement was made with COSLA as the representative body.

Elspeth MacDonald: It might be helpful if we respond by letter on the various issues that local authorities have highlighted so that we can reassure you on each and every one.

The Convener: That is going to be a big letter, right enough.

Elspeth MacDonald: Yes, but my point is that, in some cases, assumptions have been made that do not apply and, in others, we can provide the committee with specific answers. We would look to do that rather than not answer your question now.

Gavin Brown: I accept the point that not every increase in cases will lead to additional costs, but I find it very difficult to accept that there will be no additional costs whatever. No doubt some of the costs can be absorbed, but the evidence that we have received is that not all of them can be, and I merely ask you to reflect on how you have reached your conclusion that none of the additional cases will lead to additional costs. I find that surprising, but I will leave the matter there.

Elspeth MacDonald: I am happy to respond and clarify the position for you.

Gavin Brown: Thank you.

The Convener: You do not need to respond on the assumed costs of community sentencing, because the figures can be found in table 29 of the financial memorandum.

Michael McMahon: I have only a short question. We have seen evidence of the disparities in the figures that are being cited and read the concerns of local authorities. In its submission, Falkirk Council has stated that, because of the concern about what might be described as the wide margin of error between the financial memorandum and the local authorities' assessments of the impact of the legislation,

"It would be preferable if the ... Government gave an undertaking to review costs in the light of experience so that any marked increase could be funded".

Can you give that commitment?

Peter Hope-Jones: Yes. We will certainly be monitoring the bill's impact and maintaining communication with the key bodies.

Malcolm Chisholm: I find this financial memorandum interesting for two reasons. First, many of the debates on costings are inextricably bound up with the bill's fundamentally controversial aspects, a good example of which is corroboration. There is an inherent uncertainty about all of this, but I suspect that people have reached their particular conclusions because of their position on the policy rather than anything else. I will certainly follow the matter with great interest.

That was merely a comment. My question is more about the second aspect of the financial memorandum that I have found intriguing: opportunity costs. I must admit that, all this time, I have been struggling to see why you have used the term. As I understand it, the opportunity cost of a policy is all the things that you cannot do because you are implementing that policy. However, you seem to be using the term almost as a code for efficiency savings, which I have to

say puzzles me. If it is fundamentally related to efficiency savings, such a move has been questioned by the Association of Scottish Police Superintendents, which is saying—and I will not read out the quote—"Look, we're already making lots of efficiency savings to free up resources for early and voluntary retirement." Some people might have the suspicion that some of the big sums of money attached to opportunity costs are slightly misleading and that they really should be called financial costs. After all, you cannot have unending efficiency savings and simply badge up all the additional costs to be dealt with through efficiencies.

Elspeth MacDonald: I have already explained what opportunity costs are. There is an element of efficiency saving but, as far as the police are concerned, the fact is that, if the bill is passed, 17,234 police officers who are doing their job one way just now will have to do their job differently and the main costs of that will fall on the front-line officers.

In some instances, the bill's provisions—the Bowen provisions, for example—will provide efficiencies themselves. However, although everyone in central or local government is being asked to look for efficiency savings, that is not the core of the opportunity costs as we use the term in the financial memorandum. The general expectation on bodies is that they will make efficiencies, but we are not necessarily offsetting new costs against efficiencies. A lot of these costs are not new; instead, they are resources that are being used for something different.

Malcolm Chisholm: That might be closer to the normal meaning of opportunity cost, but it raises the question of what will not be done that is currently being done. Central to the concept of an opportunity cost is the idea that you cannot do certain good activity because you are now doing something else. However, that does not seem to have been acknowledged in the narrative around opportunity costs in the financial memorandum. Indeed, you seem to be almost redefining language in a way that I find slightly puzzling.

Kerry Twyman: The police costs form one of the largest opportunity costs in the bill; as paragraph 128 of the financial memorandum makes clear, the figure for that is £9.8 million, the bulk of which relates entirely to training. In that case, the term "opportunity costs" might, as you suggest, not mean substituting something for something else; instead, because we have moved the implementation date from 2014-15—a year in which, according to the police, the additional training would have required backfilling and overtime, with all the real financial costs that that would have carried—to 2015-16, the police have indicated that they will be able to spread the training across the year in a way that ensures that it can be accommodated in normal police time and will not require any backfilling or overtime. It would therefore have been very misleading to have classed that as a financial cost; the training, the figure for which is £8 million, will be carried out during normal police time.

As for the £1.2 million for training staff time for delivering training, we are talking about staff who are currently in post delivering training. The discussion, again, was about whether, if we moved the implementation date to 2015-16, it could be worked into the normal training for police without the need to take on additional training staff, which again would carry a real financial cost. Arguably, that could not be classed as a real financial cost as it was effectively being absorbed by moving the implementation date and not carrying any additional cost.

As we have discussed, a similar argument can be made about the prisons cost. At the moment, prisons have flexibility in managing their portfolio and estate and can move prisoners around and they indicated to us that no direct financial cost arose from the bill's provisions.

I do not know whether that helps.

Malcolm Chisholm: The prisons example is probably the best one because it has the highest cost—I think that the figure is £22 million as a result of increased prison places. It is hard to imagine how we can have a lot more prisoners at no real cost.

Kerry Twyman: It comes down to the use of the average figure of £37,000 per year for a prisoner place. This is where the opportunity cost concept comes into its own, because putting one more prisoner into the prison estate will not necessarily cost £37,000. That figure takes into account the costs of and depreciation in the estate, and putting in one more prisoner will not require the building of a whole new prison. We have used the figure of £37,000, but that is the average cost of a prisoner across the estate. The cost of putting an extra 200 or 300 people in prison per year will not be £37,000 each; it will be the amount that it costs to feed those extra prisoners and the various direct costs that are attributable to their being in prison.

Malcolm Chisholm: Even those are financial costs rather than opportunity costs. You might assume that staffing levels are related to the number of prisoners in some way, too.

Kerry Twyman: The indication that we have had from prisons is that the costs of an extra 200-odd prisoners are already largely included in what have been put forward as the annual prison running costs. The prison running costs include some flexibility for prisoner numbers going up or down on an annual basis. That is why, in previous

years, prisons have had underspends during the year. Running costs have been slightly lower than had been anticipated because prisoner numbers have been slightly lower. That happened last year, in 2012-13.

Malcolm Chisholm: I may not have looked at enough financial memorandums to know, but that seems an interesting concept to introduce into the world of financial memorandums. It could be used in any financial memorandum to disguise financial costs. I am not accusing you of doing that—I would have to look into the issue more—but it could always be argued that the costs involved are not real costs because they can all be absorbed. Do you know what I mean?

Kerry Twyman: Yes. That is why we have been careful to agree the opportunity costs with our partners. When they have felt that there would be an additional financial cost, our partners have been vocal. As I outlined, there are specific areas in which the police have said that the bill will result in additional financial costs, and those have been captured in the financial memorandum. The same goes for the Scottish Legal Aid Board.

We would not have called the costs in question opportunity costs if that had not been agreed with the partners concerned. You are absolutely right that that could lead to our trying to badge everything as an opportunity cost, which would be misleading. However, had we called many of those costs financial costs that would not have been transparent, either. We are not spending £10 million on training police officers specifically for the bill. That training will form part of their normal in-year training.

John Mason: I have a supplementary question on the issue that has just been asked about. Mention has been made of paragraph 128, which refers to

"staff time for attending 18 hours of training".

I do not know whether that applies to every officer. Paragraph 126 says:

"This can be achieved through reallocation of the officer from normal duties in most cases without the need for overtime payments".

Therefore, the extra time that Mr Chisholm was talking about will be included in officers' total normal hours. That means that they will go to less training on things such as first aid and equal opportunities or that they will spend less time on the beat. I do not see the police in my area sitting around or having long tea breaks.

Have you done any digging on what normal duties will be cut out to enable that extra work to be done?

Peter Hope-Jones: It would be for the individual agencies to comment in detail on what they would and would not do, but we have had conversations about detailed implementation plans. That process is continuing, but the outcome will depend slightly on the final form of the bill and other factors. We are talking about the financial year 2015-16, which is quite far ahead to be thinking about training and workload issues.

The Convener: I do not know that it is. Is all that not included in the forward financial projections in the financial memorandum?

Peter Hope-Jones: What precisely are you referring to?

The Convener: You said that 2015-16 was quite far ahead. Surely we have to think about such things when we look at the long-term cost implications in the financial memorandum.

Peter Hope-Jones: Absolutely, but we might not have to look at the exact detail of which training courses police officers will or will not go on.

The Convener: Surely you have to do that as part of the process of looking at the overall costs. When it comes to the financial memorandum and the bill, you must know what you will be paying for.

Peter Hope-Jones: I am sorry—I do not mean to suggest that we have not modelled what training will be required for the bill. That is set out as an opportunity cost, and it will need to be balanced against other training priorities.

11:00

The Convener: I want to go back to some things that have not been covered during the session. The total recurring costs are a very precise £6.587 million per annum, but I note that non-recurring costs are £2.703 million and £1.648 million in 2015-16 and 2016-17, respectively. Do you envisage any further non-recurring costs, or will it all be resolved within two years, after which the costs will, in effect, be zero?

Peter Hope-Jones: The non-recurring costs to which you refer are primarily police capital costs for additional interview rooms. Those costs are modelled on the basis of what was put to us as the plan for meeting the requirements of the bill. The position around police premises is slightly more complicated now that we have a single police force, and all sorts of rationalisation is being done around that. Those figures are based on what the police told us.

Within the change that is going on at the moment, there is reasonable capacity because of costs being freed up through the rationalisation of the estate. Apart from what is being modelled here, work is being done in the police on capital fund management and the building of new

facilities. Those costs are therefore potentially manageable within the other work that is going on.

The Convener: Thank you for that.

In its submission, the Faculty of Advocates has said that no

"estimate for costs attributable to additional appeals generated by the change in the law"

seems to have been considered.

Peter Hope-Jones: Yes. A cost is quoted for the Crown Office. It raised that with us as a specific issue for its team that deals with appeals, which saw an increase in workload as a result of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. It anticipates that there will be another increase in workload for that team. However, the issue was not raised with us by any of the other agencies, so we felt that it would be specific to the work of that team and we have not looked at it in other areas.

The Convener: You do not think that there should be any costs in the financial memorandum to reflect that.

Peter Hope-Jones: It would not be standard for the financial memorandum to say that there will be more appeals because we are changing the law. That does not apply to all financial memoranda of this type. However, we felt that it was worth reflecting that in the financial memorandum simply because the Crown Office raised a specific issue about that particular team and was able to provide evidence.

The Convener: Gavin Brown wants to come in.

Gavin Brown: My question is on a separate point.

The Convener: That is okay. You have the floor.

Gavin Brown: Table 3 of the financial memorandum, which is on page 39 of the document that I have in front of me, has a heading that refers to opportunity costs. For the SPS, the opportunity costs for 2015-16 are £6.85 million, becoming £14.6 million for 2016-17 and then going up to £18.65 million and £22.75 million. Do the opportunity costs for the SPS continue along that trajectory over time? I take on board the fact that there is not a direct cost every time that there is an extra prisoner. However, if the opportunity costs are on that trajectory, they must, at some point, become real financial costs and they cannot then be classed as opportunity costs.

Peter Hope-Jones: I can see how the table is slightly misleading. The figure for 2018-19 is for the bill's full impact, and we expect the figure to be at that level from then onwards. The figures are staggered in that way because they are modelling prison sentences that might be several years long. In the first year there would be additional sentences, whereas in the second year there would be additional sentences but also people continuing to serve the sentences that were brought in in the first year. That is why the figures ramp up to a particular level, which we expect to be the long-term level.

Gavin Brown: Would there be no prison sentences of longer than three years? You say that the figure will get to £22.75 million and never go higher than that, but what if some prison sentences were considerably longer than three years? Surely the figure would then go up.

Peter Hope-Jones: I think that the figure was reached using an average prison sentence of eight years; therefore, it will take four years to reach the average level. After four years, people will start to leave prison who went into it as a result of the bill, and our analysts suggested that that is where the figures will start to level out. It is not an exact science, so there might be some variation, but that is the picture that our analysts developed.

The Convener: Okay. That was a digression from what we were talking about—I apologise for that.

Let me take you back to appeals. You were talking about the financial memorandum. Surely, if there is an additional cost from appeals under the legislation, that should at least be touched on in the financial memorandum. That cost must be funded somehow, must it not? If additional appeals are generated by a change in the law, there must be a financial implication.

Peter Hope-Jones: We did not have sufficiently robust evidence to suggest that there would be an increase in the number of appeals across the board. The team in the Crown Office raised a particular issue about its workload and that is what we reflected.

The Convener: Should that be looked at a wee bit further?

Peter Hope-Jones: We can have conversations with other agencies and get back to you, if that would be helpful.

The Convener: Thank you very much.

The financial memorandum states that Police Scotland and the COPFS conducted shadow reporting and shadow marking exercises. That was touched on earlier in Jamie Hepburn's questioning. The Faculty of Advocates has stated:

"The FM does not provide sufficient information on those exercises to allow for meaningful comment."

Earlier, you talked about the process being thorough and robust, but the Faculty of Advocates has said that it cannot even comment meaningfully

on the exercises because the process has not been robust and thorough. How can we get an accurate reflection of what the bill will impact on financially if that is the case?

Peter Hope-Jones: The exercise that was undertaken was absolutely robust and thorough. Perhaps the description of it in the financial memorandum was not as detailed as it might have been, but the additional information that the Crown Office has now presented gives a good picture of the thorough investigation that occurred.

The Convener: Okay. Thank you.

Would the bill team like to make any further points before we wind up?

Elspeth MacDonald: I thank the committee for its thorough scrutiny. We will provide the other information that was asked for that we could not provide off the cuff.

The financial memorandum represents a great deal of hard work with all the main bodies concerned, all of which have signed it off. It is, therefore, an agreed position with the main bodies that are affected by the bill. Despite the financial memorandum's novel aspects, we intended at all times to reveal to the committee as much relevant information as we could, together with our thinking behind the conclusions that we reached.

The Convener: Thank you very much for responding to our questions. We look forward to receiving further information in writing.

I suspend the meeting for five minutes to allow a change of witnesses and to give committee members a natural break.

11:09

Meeting suspended.

11:16

On resuming—

Procurement Reform (Scotland) Bill: Financial Memorandum

The Convener: Our final item of business is to take evidence from the Scottish Government bill team as part of our scrutiny of the Procurement Reform (Scotland) Bill's financial memorandum. I therefore welcome to the meeting Paul McNulty, Bill Watt and Neil Ramage. I believe that a member of the team would like to make a brief opening statement.

Paul McNulty (Scottish Government): Thank you, convener. I would like to say a few words just to set the financial memorandum in context and to correct a few misunderstandings in some of the written submissions that the committee has received.

In developing the content of the bill we consulted very widely. It was always likely to be the case that different stakeholder groups' views on the bill would be very different in many respects. The majority of the written submissions that you have received appear to be from the procurement community, which is of course a very important stakeholder group. I note, however, that some other groups have a very different view. For example, the Infrastructure and Capital Investment Committee has heard from Jim and Margaret Cuthbert, who described the bill as extremely weak and who clearly felt that it did not go far enough. Some civil society groups are lobbying us also on the basis that the bill does not go far enough.

It has been quite a challenge to steer a way through those opposing views during the process. We have been very conscious of the need to avoid imposing unnecessary burdens on public bodies. We believe that the bill that we have introduced strikes an appropriate balance. It is also important that for the big amount of money that we spend—the financial memorandum says that it is more than £9 billion per annum, but we think that it could be as high as £11 billion—the bill is effective in responding to business concerns about procurement and, in particular, that the bill promotes a change in culture towards sustainability in its broadest sense and helps us deliver value from the spending.

The risk of imposing unnecessary burdens is one of the reasons why the bill is very flexible in terms of allowing public bodies to determine their own approach. A good example of that would be community benefits. We are not saying that public bodies have to do something; we are asking that they consider community benefit clauses in higher-value contracts. If they do not think that it is

appropriate to include such a clause, all that they must do is say so in the contract.

On the thresholds for advertising, we looked internationally at what other European countries do. What we are proposing at £50,000 for advertising contract opportunities is relatively high in comparison with other countries. In fact, UK ministers are out to consultation on a similar piece of legislation that proposes contract adverts at a value of £10,000. We have worked hard in Scotland to strike an appropriate balance and ensure that we pitch the thresholds at a sensible level.

A good example of the differing views is provided by the University of Dundee. One of the submissions that you have received questions our approach to the pre-qualification questionnaire process, which is understandable. However, in January this year, Dundee university's construction management research unit shared with us a paper that it had prepared, which suggests that the costs of the pre-qualification process to Scotland could be as high as £1 billion for the construction sector alone. We are not convinced that the problem is quite that bad, but it is clear that there is a problem, and our discussions with business suggest that the PQQ process is widely inefficient. It is hugely important to get a degree of consistency in how public bodies evaluate bidders in order to reduce costs.

Some of the written submissions seem to have assumed things that we are not intending to do under the bill. For example, there is a suggestion that we are promoting a one-size-fits-all approach for PQQs. We know that that will not work, because of the different types of things that are being bought. However, we are proposing that, for the sorts of questions that are typically asked for various categories of contract, public bodies should use the core set of questions that we have been trying to promote for a number of years. As part of the evidence base for the bill, we have considered what public bodies are doing, and we have found that the vast majority of them are not currently complying with the core questions that we have agreed with purchasers and businesses. Tackling that issue is hugely important.

There has also been a suggestion that we are going to make higher education and further education institutions uncompetitive. In fact, we have been in discussion with APUC Ltd and the University of Edinburgh about an exemption in the bill for contracts in pursuit of research and teaching commissions. We have given APUC a written commitment that we will introduce such an exemption. That is not in the bill, as we would intend to implement that in the regulations that the bill provides for.

There has been a further suggestion that the rules might apply to call-offs under framework contracts that have already been competed for. In fact, the bill provides for a specific exclusion for that category of contract.

If we get this right, the net costs should be insignificant, because there is an opportunity here to make the procurement process substantially more efficient.

The Convener: Thank you for that opening statement.

It has been interesting to have received a number of submissions from local authorities and health boards, many of which said that they did not expect any cost implications upon them, which is very unusual for the committee—as I am sure the bill team from the previous item would agree.

As is normal practice, I will ask some opening questions, and I will then open up the session to colleagues around the table. The first question is about staffing costs in relation to secondary legislation and guidance. The financial memorandum states:

"It is currently not clear whether these costs will continue beyond 2016/17,"

so no costs are therefore provided. Surely there should be some contingency in that regard.

Paul McNulty: One reason why we have suggested that there might not be a requirement beyond 2017 is that we have a procurement policy team already. We have a team of lawyers who work on procurement. There is existing capability to support the current legislation and policy in this area.

The bill proposes new statutory guidance and regulations on various aspects of procurement. There will be a need for additional staff resource to support the development of those regulations and that guidance. It is possible that there will be a need for additional central policy support but, at this point, we are not clear whether the existing policy team will be able to manage once the new pieces of legislation and guidance have been developed and published.

The Convener: So, in effect, you are keeping that under review.

Paul McNulty: Yes.

The Convener: You will be aware of the position of the Scottish Federation of Housing Associations and its concerns about procurement capability assessments, which it has said are "not useful for associations".

The SFHA points out that it has 170 member organisations, and it estimates that, overall, the cost of implementing the bill could amount to

£50,000 a year per association, as specialist staff will obviously be required to deal with the assessments, and a further £8.5 million in other costs. That comes at a time when a number of other burdens have recently been imposed on housing associations through welfare reform and so on. Can you tell us why housing associations should be included?

Paul McNulty: The approach that we have taken in the bill is to mirror the application of European public procurement directives to Scottish bodies. Registered social landlords are covered by those directives by virtue of a European Court of Justice case dating back to 2004. For procurement purposes, RSLs are regarded as part of the public sector.

On the additional costs, although there can be exemptions or derogations where competition is not appropriate—if there is only one potential provider, you do not need to compete—in our experience, if the procurement is conducted properly, the net savings should outweigh the costs. I suppose that, if housing associations are claiming that they will face a substantial additional cost, I would question whether they have the resources in place to manage their existing procurement activity.

We note from the SFHA submission that, typically, the annual turnover of SFHA members is only around £5.5 million. That means that some of the more advanced elements of the bill, such as publication of procurement strategies, are unlikely to apply to a typical registered social landlord. Only the larger RSLs, such as Glasgow Housing Association, will be covered by that provision in the bill.

The Convener: So basically you are saying: first, the bill mirrors the impact of European law; secondly, many RSLs should experience a net gain; and, thirdly, many RSLs do not have sufficient volume of procurement to merit some of the concerns that they have expressed and they should perhaps be sharing staff and expertise across housing associations.

Paul McNulty: That would be one consideration. Clearly, RSLs are already subject to European public procurement law for contracts of a value of around £150,000 and above, although there is a higher threshold for construction. All that we are doing is introducing some new requirements that have various thresholds attached: £50,000 for service contracts and £2 million for construction contracts.

Those are relatively large amounts of public spending that we suggest probably ought to have some process attached to them. I suppose that RSLs would argue that they are not public bodies, but they are regarded as such for the purposes of procurement law.

The Convener: Regardless of what I said initially, some local authorities have concerns about the financial memorandum, some of which I want to tease out just now.

For example, Aberdeen City Council's written submission states that

"additional administrative responsibilities ... are not reflected in the FM... the impacts of lower thresholds on Local Authorities are ... greater than that upon the Scottish Government... the Bill will require ... additional processes ... and will require training to be provided ... and ... additional staffing time".

Can you talk us through that a wee bit?

Paul McNulty: On a bill like this, we were probably never going to get universal agreement on what the right approach should be. We worked hard to engage with stakeholders, including a range of local authority representatives. We engaged extensively with COSLA, which we believe is relatively comfortable with the bill as introduced, albeit that it has made some specific requests in its written submission about keeping the arrangements under review.

One reason why we have opted for enabling powers is that we are very conscious that we need to ensure that we do not do something on procurement that has negative rather than positive effects. Our intention to keep the arrangements under review is in line with COSLA's request. If what we have delivered has the negative impact that Aberdeen City Council has described, ministers will have the flexibility to adapt their approach quite quickly either by changing the substance of what public bodies are asked to do or by varying the thresholds at which the requirements apply.

Bill Watt (Scottish Government): In its written submission, Aberdeen City Council acknowledges that requirements are already competed, so there will already be an element of process sitting behind that. Essentially, we are looking to enshrine good practice in legislation. The bill is about standardising the processes within individual organisations where appropriate to make it simpler to do business with the public sector.

The Convener: I have a final point before I open out the session to colleagues. In paragraph 41 of its submission, APUC—advanced procurement for universities and colleges—says that the bill

"has the potential to require highly bureaucratic activities and wide consultation, for areas of annual expenditure that could be circa £13-15k, to undertake resource intensive impact assessments which will be costly and could delay and compromise delivery of the actual need."

Will any of you comment on that?

11:30

Paul McNulty: There is a particular concern in that sector. Changes in the approach to funding universities in England mean that they are likely—in fact, almost certain—to come out of the scope of procurement legislation completely. The area has long been contentious. A bit like RSLs, such bodies do not tend to regard themselves as typical public sector bodies.

We cannot do anything to help the sector in relation to application of European public procurement law, because that was the subject of a European Court of Justice ruling on the University of Cambridge some years ago. However, we have undertaken to help the sector by working with it, and I confirmed to APUC in September that we will work to introduce an exemption that will cover research and teaching commissions.

APUC is particularly concerned that, if it has to go through a degree of process before it can reward a contract whereas English institutions do not because of the changes to the funding model, that might place it in an uncompetitive position when chasing commercial research and teaching commissions. We have given an undertaking that we will tackle the issue.

The Convener: Thank you very much for that response.

Jamie Hepburn: I want to turn our attention to table 1 in the financial memorandum, which is a summary of Scottish Government expenditure. Across the three years that the table sets out, system costs will be £560,000 each year. There is a helpful explanation that that money is already being spent and can be soaked up into the existing budgets; it is not a new or additional cost. I do not know whether you watched our last exchange, but we spoke about an "opportunity cost". Perhaps that is what you can call it.

The Convener: That phrase is banned in this session.

Jamie Hepburn: I will bear that in mind.

I suppose that the question is: what are the system costs? Paragraph 12 says that contracting authorities will have to

"publicise their intention to seek offers (contract notice) and the award of a contract or framework agreement (award notice) on the Public Contracts website".

Are there any other system costs, or is that it?

Paul McNulty: The systems costs that are referred to relate principally to two things. The first is public contracts Scotland, which is the contract advertising portal that will be the vehicle for advertising contract notices. It is provided for us by a third party: an Aberdeen-based small to medium-sized enterprise called Millstream Associates, which I am pleased to note now has the contract to provide the Welsh Assembly Government's portal as well, which is a positive development.

The second is a thing called PCS tender, which is our e-sourcing software that allows bidders to respond electronically to tenders that are advertised on the portal. It is provided by a multinational company called BravoSolution and will be the vehicle for delivering the database for PQQs. We will ask public bodies to utilise that, to make it easier for bidders to complete their bid information when they are asked to submit the PQQ.

There are other system costs that are not directly associated with the bill. They are far more substantial and support an e-transactional system that is a shared service system that is used by just more than 100 public bodies in Scotland. This year it will process more than £5.5 billion-worth of transactions. It is not included in the financial memorandum because it is not relevant to the bill's provisions.

Jamie Hepburn: I suppose the essential point is that it is an existing budget—

Paul McNulty: It is an existing budget; that is right.

Jamie Hepburn: —and there will be no additional demand.

Paul McNulty: We do not think so. There is quite a competitive market for this type of system. BravoSolution is contracted for a period. We will need to recomplete the contract that Millstream has because it has expired, but we do not expect the cost to vary substantially, because it is a competitive market.

Jamie Hepburn: I turn to the issue that the convener raised about the perspective of the Scottish Federation of Housing Associations that it should not be included in the bodies that are subject to the bill. It was interesting to hear you say that, in essence, European directives dictate its inclusion. I seek absolute clarity. If the SFHA was not included, would the bill fall foul of EU law? Would it be a breach of the law?

Paul McNulty: No, the SFHA could be included or excluded. The Government decided that the simplest path was to mirror the existing public procurement legislation. That is proving relatively controversial, not least for RSLs, although we are also being lobbied about utility bodies such as Scottish Water.

The reason why we took the approach is that it is readily understood because we have had

regulations implementing EU directives in Scotland since 2006 and at a UK level since the early 1990s. We do not have to include or exclude anyone by virtue of EU law; it was simply the policy choice that we exercised on the simplest approach for the bill.

Jamie Hepburn: That is a helpful clarification. You had an exchange about the matter with the convener, but I will explore it again. You disagree with—I was about to say "you dismiss", but that would be to put it too strongly—the SFHA's perspective that the bill will be overly burdensome for its members. Is that correct?

Paul McNulty: We are not close to the sector, but the bill should be burdensome only if there is currently limited process around the award of contracts. We talked about local authorities. All 32 of them have procurement strategies and standing orders that govern the award of contracts. If the bill represents a significant burden, it is likely to apply in areas where there is not currently a procurement strategy or a significant degree of process around the award of contracts.

Jamie Hepburn: You talked about the requirements of housing associations being changed slightly as a consequence of the bill. Will you talk a little more about that and how it might impact on them financially?

Paul McNulty: There are various thresholds. We gave a lot of thought to the issue precisely because we wanted to do what was appropriate and to determine whether there might be an additional burden.

For the publication of procurement strategies, an authority would have to have regulated procurements of a value of more than £5 million in the relevant financial year. That means that it would have to award and place new contracts at that value over the course of that financial year. If a typical RSL's total turnover in any financial year is £5.5 million or thereabouts and that includes staff costs or other costs that would not come into the procurement category, it suggests that only a relatively small number of RSLs would be subject to that provision in the bill.

Likewise, the provision on community benefit clauses has been pitched at the level of contracts of a value of £4 million and above. Some of the local authority representatives who gave evidence at the Local Government and Regeneration Committee last week suggested that we might have pitched that figure too high. However, if the RSL sector typically has low-value contracts, the provisions will not apply to it.

Jamie Hepburn: I hear what you say about the fact that you do not know the sector well. I presume that dialogue continues and you are listening to concerns.

Paul McNulty: The Scottish Federation of Housing Associations was on our sounding board for the bill.

Jamie Hepburn: That is reassuring.

I will change tack slightly. It was interesting to hear you say that you have given a commitment to APUC about—if I picked it up correctly—an absolute exemption for research-related procurement.

Paul McNulty: One of the key concerns that the universities have is that much of their income derives from commercial commissions. In other words, if a private sector company wants a piece of research to be conducted, universities will compete for it.

Clearly, if English institutions are taken out of scope completely for any process relating to procurement, there is a risk that they might be fleeter of foot in pursuing the research commissions. Our proposal is to have a blanket exemption associated with the bill that will say that, if a body is awarding a contract that is in pursuit of a research or teaching commission, the bill's provisions will not apply to that contract.

Jamie Hepburn: That is interesting. The University of Edinburgh's concern was that, with the provision as was, it would have to meet compliance obligations at a lower-value threshold than would apply to institutions elsewhere in the UK. I am not sure what the threshold is elsewhere in the UK, but I heard you say that there is consultation on whether it should be a £10,000 threshold.

Paul McNulty: The UK Government is out to consultation on the £10,000 figure.

Jamie Hepburn: Presumably the position now is totally the other way round and they have a comparative advantage.

Paul McNulty: What is different is that if the English institutions are taken out of scope completely for public sector procurement rules, which is possible because of changes in funding, the UK Government's consultation on a £10,000 threshold might not apply to English institutions.

Jamie Hepburn: Obviously, that is up to the UK Government.

Paul McNulty: Yes.

Jamie Hepburn: My final questions are on part 4 of the bill, which is on remedies. The financial memorandum sets out that,

"where a public body is found to be in breach of its duties",

the courts can impose penalties. However, you stated that such cases are rare, so no additional costs are expected. Can you quantify that? What does "rare" mean in that context?

Paul McNulty: We do not have a central database, so the number is difficult to quantify. We think that we know about most of the cases that result in a judgment; typically, the number is a single figure in Scotland.

Jamie Hepburn: In what timeframe?

Paul McNulty: In any given calendar or financial year. A relatively small number of such cases go through the court process and result in a judgment. Occasionally, there are quite difficult cases that are problematic for all concerned. However, part of the issue is that we need to have measures that will be effective in responding to business concerns.

We were lobbied quite hard, particularly by business and third sector representatives, to go much further than we have to create a kind of procurement ombudsman. We have not ruled that out, as we will have to revisit the issue in the context of implementing the new European public procurement directive, which we expect to be adopted early in 2014.

Jamie Hepburn: Given what you have said, it would seem a bit much to have a procurement ombudsman.

Paul McNulty: There is quite a bit of an appetite for that in parts of the business community and the third sector.

Jamie Hepburn: Perhaps someone is looking for a job—who knows?

It is obviously difficult to give numbers for how many items or services are being procured. However, the financial memorandum helpfully said that the value is about £9 billion. I note that you said that it could be as high as £11 billion. Can you quantify for any given year the cost value of what has been procured that might have gone to court? I understand that that is quite specific detail, so if you cannot give it to us now, it would be helpful to have it in writing.

Paul McNulty: We can tell you the value. I think that Scotland was the first European country to create across the public sector a procurement information hub, which is basically an analysis of the outputs of the accounts payable systems of all 32 local authorities; all the health boards; roughly 90 per cent of the central Government family, which is a big corps of Scottish Government departments, agencies and non-departmental public bodies; and about 90 per cent, in terms of value of spending, of the higher education and further education sectors. Others are in there as well. The numbers are not complete yet for 2012-13, but we think that the data will show that procurement spending in that financial year was between £9.7 billion and £10 billion.

Jamie Hepburn: I think that we are talking at cross-purposes. My point was about the value of the procurement in the cases that go to court. That is why I said that you could give me the information in writing if you cannot give me it now.

Paul McNulty: I cannot quantify that. Some of those cases concern contracts that were not awarded, so an estimated rather than actual value might be attached.

Jamie Hepburn: Of course.

Paul McNulty: We could have a look and write to the committee.

11:45

Jamie Hepburn: That would be helpful. I am fully aware that I am asking a pretty detailed question that you might not be able to answer here and now.

Paul McNulty: We will have a look and see what we can find.

Jamie Hepburn: The information might demonstrate not only how rare those cases are but what their value is. Thank you.

Michael McMahon: Jamie Hepburn has covered some of the questions that I wanted to ask in relation to APUC's submission. APUC points out that, in response to the consultation exercise, it

"commented on the significant financial and resource impacts"

that the bill will have on contracting authorities. It says:

"we do not feel our comments have been fully recognised in the current draft of the Bill."

Is that after you gave the commitment to the exemption on research and development?

Paul McNulty: The formal consultation produced 251 responses, and approximately 200 of those were submitted on behalf of organisations. A hugely diverse range of opinions were expressed to us, and it was simply not possible to accommodate everyone's desires.

Some of the comments that we have received from stakeholders make it clear that they think that the bill does not go far enough. In my opening remarks, I mentioned Jim and Margaret Cuthbert, who said in evidence to the Infrastructure and Capital Investment Committee that the bill is "extremely weak".

There are extreme ranges of opinion on what the bill should and should not contain. I am sure that Angus Warren and APUC feel the way that has been described, but we have tried hard to

steer the right path among the differing views on the bill.

Michael McMahon: Even if we accept that there are differing views and that not everyone will be satisfied with the outcome once the discussions have taken place, the accuracy of the assumptions in the financial memorandum leaves concerns for APUC. Its submission states:

"the assumptions in the Bill's latest explanatory notes state that there will be no financial impacts on contracting authorities when in fact there will be significant negative impacts."

We have had before the committee various financial memoranda in which there have been assumptions that people have challenged, but seldom have I seen someone suggest that the disparity is between zero impact and a huge impact. Can you explain that degree of divergence?

Paul McNulty: That is APUC's view; it is not shared by all the respondents to your call for evidence. Colin Sinclair, who is the director of national procurement for NHS National Services Scotland, is relatively comfortable with what we have proposed. I believe that COSLA, with certain important caveats, is relatively comfortable. It is one view—

Michael McMahon: Yes, but that view relates to the respondent's areas of expertise. That has to be a concern, regardless of whether other people are comfortable. As the convener said, the health boards and local authorities do not see the problems that APUC sees. Is there a way of addressing the concerns that the university sector has raised? When we see concerns being raised to the extent that they have been, it is clear that the accuracy of the financial memorandum is in effect being challenged. That should concern us all.

Bill Watt: If I may scoot back to your earlier point, it might be worth noting that Aberdeenshire Council and Aberdeen City Council acknowledge in their submissions that

"Many areas which we outlined would prove unnecessarily burdensome or costly if implemented, have been reworked to make these more deliverable."

The elements of the bill will apply to those councils in a similar way as they will apply to APUC and contracting authorities in the further and higher education sectors, excepting the earlier discussion about the exemption on research and teaching contracts.

Gavin Brown: Table 1 on page 15 of the financial memorandum was mentioned by Jamie Hepburn. It sets out three broad costs: system, staff and non-staff costs. According to the memorandum, system costs will continue after 2016-17 and non-staff costs will not. However, there is uncertainty about staff costs. Will you expand on that? What is the most likely outcome for staff costs after 2016-17?

Paul McNulty: A lot will depend on what happens as the bill develops and the extent to which there is an on-going requirement to produce new guidelines or new regulations. Once the bill is enacted, there will be an intensive period during which that material will be developed. We will need to take a view on the staff costs in about 2016-17 on the basis of whether the job is done, whether the systems are rolled out as required and whether the need for new and additional procurement guidance will continue. That is why we have said that the staff costs are relatively uncertain.

We know about system costs, which we expect to continue pretty much as is. The non-staff costs relate to adaptations that we will need to make to existing guidance—we have a range of guidance that is made available for public bodies—and those costs will include the provision of training and the adaptation of existing systems. We envisage that those costs will focus principally on the initial period of activity.

Gavin Brown: I seek a quick clarification on the system costs. I am not 100 per cent sure from reading the table as a whole and the bits underneath it, but am I right in thinking that the £560,000 a year is a new and additional cost?

Paul McNulty: No—it is not. We have existing contracts with two companies—a company called Millstream Associates, which provides the public contracts Scotland portal, and a multinational company called BravoSolution, which provides the e-sourcing software that will support the provisions in the bill on pre-qualification processes. The figures are derived from existing costs that are fully budgeted for in the directorate.

Gavin Brown: Whether or not we have the bill, that cost will exist.

Paul McNulty: Yes.

Gavin Brown: You mentioned a piece of work that the construction sector carried out, which estimated that the cost to the industry of the PQQ process is about £1 billion a year. Is that roughly what you said?

Paul McNulty: In January, the University of Dundee's construction management research unit published a paper, which we can share with the committee if that would help, that raised the concern that the potential cost—the paper acknowledged that the data was not as reliable as it could have been—to the public and business sectors of the PQQ process could amount to about £1 billion a year in the construction sector alone. We think—I suspect that the research unit also

thinks this—that that is probably an overestimate. Nonetheless, all our engagement with businesses tells us that that is their number 1 concern about procurement.

Public bodies typically ask similar questions in different formats, which means that companies face continually churning out and regurgitating the same information in slightly different ways. We want to capture the information on a central database but, to do that, people must use the standard core questions. If those questions are not appropriate in a particular case, something different will need to be done—indeed, some respondents to the committee have said that a one-size-fits-all approach does not work in a particular context. We agree, but people must adopt the core questions as far as possible, to reduce the cost to business.

Gavin Brown: Let us assume for argument's sake that the figure is £1 billion—I take all your caveats on board. By what percentage could that £1 billion be cut as a consequence of the bill and any follow-up secondary work? I do not expect you to give me an exact figure—a ballpark figure will do.

Paul McNulty: It is difficult to have a precise feel for such a figure. I repeat that the £1 billion cost is an upper estimate.

Bill Watt: We included an illustration in paragraph 91 of the financial memorandum, which is based on some of the information that we received about the cost of the PQQ process. We used the most conservative of the figures, which was the £1,000 that the Civil Engineering Contractors Association quoted, and we looked at management information from our systems over a two-year period to see the number of contracts and expressions of interest. For illustrative purposes, that gave an estimate that £75 million could be saved for the business sector.

Jean Urquhart: I will raise some issues that have arisen in my experience of procurement over the past few years. I am pleased to read and hear your explanation of the PQQ process becoming simpler, as that has been an issue.

I will go back to small companies getting into the portal, as there is some frustration about that. You mentioned the company that runs the portal—is it Shoreline?

Paul McNulty: Sorry?

Jean Urquhart: What company runs the portal?

Paul McNulty: It is Millstream Associates.

Jean Urquhart: Are you comfortable about the process by which companies can get their names on the portal? Is there any appeals process if companies are rejected? If so, who decides?

Paul McNulty: There is no limitation on who can sign up, except that we let companies register only if they have a legal right to register because they are based in Scotland, the rest of the UK, Europe or a country that has a trade agreement with the UK and Europe, such as the United States or Japan, that means that its companies have a legal right of access. If a company is not registered in one of those countries, it is not allowed to register on public contracts Scotland.

Aside from that, there is no process whereby we sift out companies and prevent them from registering. Some due diligence is conducted by Millstream Associates whereby, if someone who is registered uses language or terms that might be regarded as inappropriate, a process applies. However, public contracts Scotland is not a mechanism for vetting who can and cannot apply for public contracts—registration is free.

Jean Urquhart: That is a change.

Paul McNulty: That is what happens in relation to public contracts Scotland. There are various ways in which public bodies sift companies and have done so in the past.

In the bill, we are dealing with some of the issues that business has raised with us. In particular, over the past few years there have been a lot of examples of public bodies setting entry levels that we believe are completely inappropriate. For example, a public body in Scotland said that any company that was bidding for a contract should have an annual turnover that was 20 times the value of the contract. We thought that that was crazy and we intervened. We got the public body to change its process, but we could not persuade it to reduce the turnover threshold to below 12 times the contract value, which is still completely inappropriate and is damaging to SMEs. Elements of the bill are designed to help us to tackle such issues and to ensure that we have a consistent approach across the public sector, to make it easier for SMEs to participate.

Jean Urquhart: Do you feel that the bill, with its present wording, can deal with that?

Paul McNulty: Yes. There is a specific provision on annual turnover. We are also seeking powers to make regulations and issue statutory guidance on the selection of tenderers, so that we can cover a range of issues that individual businesses and business representatives have brought to us.

Jean Urquhart: My next question is on the same theme. According to the financial memorandum, the bill is intended to

"encourage local action ... maximising public procurement's contributions to wider socio-economic and environmental policy objectives."

How will those contributions be measured against what happened before the bill?

12:00

Paul McNulty: Because of the constraints of European procurement law, the point at which most can be done to help local firms and deliver local benefits is what might be called the pre-procurement phase, when a body is deciding what it wants to buy. We have focused very much on how public bodies address those issues in the context of their overarching strategy for procurement.

As for how we might measure the impact, we expect the bill to give us a lot more visibility about contracts, because there are provisions on contract registers. The more contracts we can get through public contracts Scotland, the better data we will have, because we will be able to interrogate public contracts Scotland to understand who is being awarded contracts and who is receiving notices of contract opportunities. There will be ways in which we can measure the bill's impact; they will not be perfect but, over time, the bill will generate a body of data that will tell us whether more or fewer of the contracts advertised through public contracts Scotland are going to Scotland-registered companies or SMEs.

Jean Urquhart: Will the bill allow larger contracts or will it encourage those seeking to deliver procurement to break down large contracts into smaller bundles?

Paul McNulty: We are pretty much asking public bodies to do what you describe in their procurement strategies. We are asking them to think about how to structure their requirements in a way that gives SMEs a better opportunity to compete, so that should encourage people to think carefully about how they structure their requirements.

We take that approach for the contracts that we award; there are always further collaborative contracts, and there is a degree of evaluation of the potential economic impact that looks at the Scottish landscape. We do not always get it right, but we go through that process and we think that the wider public sector should also adopt it, because it is important. We cannot forget the need to pursue savings when they are necessary, but decisions to pursue savings through larger contracts have to be taken in an informed fashion and should be taken only when necessary.

Jean Urquhart: Is that the area where the Cuthberts might think that you have not gone far enough?

Paul McNulty: I think so.

Jean Urquhart: We need to analyse what is best value. Is that being ramped up or insisted on, or are there criteria for identifying best value versus the lowest price?

Paul McNulty: We are trying through the strategies to encourage people to make a broader definition of best value and to think about the wider economic, environmental and social aspects of what they are doing. That cannot always be built into a procurement process, because of EU law, but that can be done up front, when a body decides what it wants to buy and how to buy it.

The Convener: Jean, we are focusing on the financial memorandum, not the wider policy aspects of the bill.

Jean Urquhart: I am sorry—that is fine.

John Mason: It was mentioned that the average size of SFHA members is about 1,800 houses, with a turnover of £5.5 million, and you suggested that they would not be caught much by the procurement rules. However, if a housing association built 50 houses at £100,000 a time, that could easily cost £5 million, even though the rent from the development might be just a couple of hundred thousand. Is it the case that we cannot really say from the turnover whether a housing association would be caught, because it would be the capital project that was caught?

Paul McNulty: I assume that, in the figures that the SFHA has given us, the turnover includes capital spending.

Bill Watt: Paragraph 18 of the SFHA's submission says:

"The average association ... will procure possibly £ 2-3M of repairs and maintenance work in a year".

John Mason: I was thinking more about associations building new houses, which would take them over the limit, because that would not be included in their turnover.

Paul McNulty: It might.

John Mason: In paragraph 12 of its submission, the SFHA questioned the savings that associations could make. Figures from a previous study showed that they could save between £26 million and £42 million. Where do you feel that their savings could be made?

Paul McNulty: Typically, if procurement processes are managed correctly, it is possible to drive savings. That is what the public sector in general has done. I am not close enough to the housing sector to give a specific answer. In relation to the procurement information hub, which I described, we have worked on a couple of pilot projects with RSLs to look at some data, but we do not have a comprehensive picture of the spending in that sector.

John Mason: So the suggestion is that the sector might be spending too much at the moment.

Paul McNulty: Our experience is that, by applying commercial disciplines to procurement activity, it is possible to drive substantial savings. That has been our experience with the public procurement reform programme.

John Mason: Would such savings be achieved mainly through amalgamation—by getting several housing associations or other organisations to work together?

Paul McNulty: They could be, if those organisations chose to do that. We have just published a review of construction procurement that suggests that some of the smaller public bodies that are engaged in such activity should do precisely that to ensure that they have the right skills and resources in place to manage their procurement activity.

John Mason: If they joined together and got a bigger contract, would that squeeze out some of the smaller—

Paul McNulty: It might squeeze them into the scope of some of the bill's provisions.

John Mason: I was thinking that it might squeeze out some of the smaller building companies, which those organisations would no longer be able to use.

Paul McNulty: That would be a decision that they would have to take. As part of the strategy, we are asking people to think about the impacts of what they are doing.

Bill Watt: Paul McNulty made the point that most, if not all, bodies already have policies in place. As I mentioned earlier, for the most part, the bill is about embedding good practice and standardising those policies within and across organisations, when that is appropriate, so that it is simpler to do business with the public sector. An example of that is the fact that a private sector body can go to public contracts Scotland and look at opportunities across the public sector rather than having to search in various locations for public sector contract opportunities.

John Mason: I will go back to what universities and colleges have said. I am not sure whether some of the concerns that they have raised are valid. They are concerned that their ability to short leet would be reduced. Do you agree? They also feel that, as a result of the process for which the bill provides, they might end up with worse terms of payment. Is that a valid concern?

Paul McNulty: We do not agree with that assessment. We think that some respondents to the committee have misunderstood what we propose on pre-qualification questionnaires and shortlisting. We are not proposing a one-size-fits-all solution—we know that that does not work. We know that some bespoke questions will almost always be needed, but there is a range of issues that it is pretty standard to ask about, such as experience of similar contracts and accounts. Everyone asks those questions, but they do so in different formats.

John Mason: So universities and colleges will still be able to weed out many of the initial applicants.

Paul McNulty: Absolutely.

The Convener: That appears to have exhausted the committee's questions. Do you or your team have any further points to make?

Paul McNulty: I do not, thank you.

The Convener: Thank you very much for your helpful evidence.

Meeting closed at 12:08.

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