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Official Report

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

Wednesday 4 December 2013

Session 4

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INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE
25th Meeting 2013, Session 4

CONVENER

*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP)

COMMITTEE MEMBERS

*Jim Eadie (Edinburgh Southern) (SNP)
*Mary Fee (West Scotland) (Lab)
*Mark Griffin (Central Scotland) (Lab)
*Alex Johnstone (North East Scotland) (Con)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Tom Ballantine (Stop Climate Chaos)
Kay Blair (Scottish Housing Regulator)
Stephen Boyd (Scottish Trades Union Congress)
Michael Cameron (Scottish Housing Regulator)
John Downie (Scottish Council for Voluntary Organisations)
Mike Emmott (Chartered Institute of Personnel and Development)
Chris Oswald (Equality and Human Rights Commission)
Pat Rafferty (Unite)
Martin Rhodes (Scottish Fair Trade Forum)
Dave Watson (Unison Scotland)

CLERK TO THE COMMITTEE

Steve Farrell

LOCATION

Committee Room 5

Scottish Parliament

Infrastructure and Capital Investment Committee

Wednesday 4 December 2013

[The Convener *opened the meeting at 09:30*]

Decision on Taking Business in Private

The Convener (Maureen Watt): Good morning, everyone, and welcome to the 25th meeting in 2013 of the Infrastructure and Capital Investment Committee. I remind everyone in the room to switch off any mobile devices, as they affect the broadcasting system. Some members might refer to their iPads, because we provide their papers in digital format.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take in private item 4, which is consideration of the evidence that it will hear today and has heard in the past on the Procurement Reform (Scotland) Bill, and to take in private all future consideration of evidence and draft reports on the bill?

Members *indicated agreement.*

Procurement Reform (Scotland) Bill: Stage 1

The Convener: Agenda item 2 is evidence taking on the Procurement Reform (Scotland) Bill. We will hear evidence from two panels of stakeholders. The first panel is composed of representatives from the third sector and from the Equality and Human Rights Commission. I welcome Tom Ballantine, chair, Stop Climate Chaos; John Downie, head of public affairs, Scottish Council for Voluntary Organisations; Chris Oswald, head of policy and communications, Equality and Human Rights Commission; and Martin Rhodes, director of the Scottish Fair Trade Forum.

Gentlemen, to what extent did the Scottish Government consult your organisations on the bill's provisions?

Tom Ballantine (Stop Climate Chaos): I speak on behalf of my coalition. I was fairly extensively involved in a steering group that looked into the bill in its initial state. Documents and information from that consultation were sent out to my coalition. Within that big, wide coalition, which has limited resources, there were different levels of engagement.

John Downie (Scottish Council for Voluntary Organisations): I sit on the procurement reform advisory group, which is chaired by the Deputy First Minister and includes the Federation of Small Businesses, the Coalition of Care and Support Providers in Scotland and the Scottish Chambers of Commerce. Over the past year, that group has had quite intensive discussions around the table with officials. I might take issue with the word "consulted"; whether or not the Government consulted, I do not think that it listened, and that problem is inherent in the bill.

The Convener: We will come on to that.

Martin Rhodes (Scottish Fair Trade Forum): The experience of the Scottish Fair Trade Forum was very similar to that of Stop Climate Chaos. We were involved in the steering group and the wider consultation process.

Chris Oswald (Equality and Human Rights Commission): Because the EHRC has a regulatory role as well as a policy and development role, we were not directly involved in the bill's formulation. However, we responded to consultations and we worked on our guidance jointly with the Scottish Government procurement team as the bill was being developed. I think that we had some influence there.

The Convener: Will the bill deliver the Government's policy objectives of

"delivering social and environmental benefits, supporting innovation and promoting public procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business friendly"?

John Downie: I think back to when Alex Neil was the Cabinet Secretary for Infrastructure and Capital Investment. The vision that he articulated for the bill was about local job creation and helping to build resilient communities. We took a delegation from the sector to talk to him about the bill and everybody bought into that vision. At that point, we thought that the bill would make a real difference and would help us to direct more procurement spend into local communities.

Since then, however, that aspect of the bill has been lost. In our written evidence, we say that the bill

"has a fundamental flaw, as it fails to address"

what we are trying to achieve in procurement and how we are going to use it

"to benefit people and communities across Scotland."

At the moment, making economic growth the overriding factor is not working. As a member of the advisory group, I recently read a paper on procurement's contribution to sustainable economic growth. Even before I could comment, the guys from the health side of the Scottish Government were asking what the bill was doing to address health inequalities and a range of other issues. We are spending more than £9 billion a year but we are not directing that effectively to support local businesses and local job creation. That is where we have difficulties with the bill.

I understand where the difficulties lie in translating the vision into the practical provisions of a bill, but we have not got right in the bill the fundamentals of what we are trying to achieve. For us, given all the things that we have said about people's wellbeing and the need to spend money in a different way, sustainable economic growth is a secondary outcome. As well as creating more jobs and taking more people out of unemployment, the bill could promote better health outcomes. There are a range of factors, and we feel strongly that the social impact that we talk about in our written submission is being missed. That is the fundamental flaw in the bill, although there are other issues surrounding that, which I am sure will come up in questions.

The Convener: I am sure that you will be able to talk about those.

Tom Ballantine: We made our concerns known early in the consultation process, but I do not think that they have been entirely addressed by the bill that we have in front of us. Without definitions of environment and sustainability, it is difficult to see how the bill will work. It is crucial that the bill includes a definition of sustainable development and, specifically, the idea of living within environmental limits.

We can talk about economic, social and environmental benefits, but unless we understand the place of each of those benefits in the hierarchy or mix, the economic benefits will inevitably rise to the top and the environmental benefits will not be given their proper place, particularly when it comes to climate change and emissions. So, from the problem of the definition we move on to the question of the place of environmental benefits in that hierarchy. There is then the question of how we will ensure that any beneficial environmental outcomes are delivered. What will the monitoring and enforcement mechanisms be?

The Convener: If one of the objectives is to promote local businesses and to buy locally, is that not a sustainable environmental policy?

Tom Ballantine: It is, but section 9 talks about the duty only to "consider" economic, social and environmental benefits in procurement. That does not mean that they are going to happen. I may be wrong, but the concern is that if those benefits are just considered and there is no real understanding of what is meant, we will get delivery of primarily economic benefits without any acknowledgement of the social and environmental benefits.

The Convener: Is what you seek not more likely to be contained in subsequent regulations and other subordinate legislation? By its very nature, the bill must be fairly high level because it covers such a wide range of procurement bodies.

Tom Ballantine: That has been put to me before and I hope that, if the matter is not covered to my satisfaction in the bill, there will be better coverage further down the line. However, without the initial definition of what we mean by sustainable development it is difficult to see how regulation and guidance will flow naturally from that high level. I suggest that, at the top, we start with a clear definition of what we are trying to achieve and have some idea of the hierarchy within that. After that, yes, we can move to a strategy and guidance on how that is going to happen.

Martin Rhodes: The forum's perspective is similar to that which Tom Ballantine has just outlined. We recognise that guidance and regulations will set out the detail of how we will achieve more fair trade procurement through the public sector. However, the bill fails to offer us a statement of intent at the higher level. Our interest lies in how procurement in the public sector could be used to strengthen and bed in the commitment resulting from Scotland's achievement of fair trade nation status earlier this year. A statement of

intent that sets that out in the bill would give procurement officers greater confidence.

We recently held a conference with public sector procurement officers from local authorities, higher education, the health service and so on, and the message came through—as it has in our conversations with procurement officers for a number of years—that some clear statement at the top level that sets out what we want to achieve through procurement would give procurement officers the confidence to get down to the detail of how to do that. We are happy to work with the Scottish Government on guidance for procurement officers on how they can do that within Scottish and European Union law.

Chris Oswald: We are in a slightly different position with regard to equalities because since 2002 we have placed a series of requirements on public bodies in Scotland relating to race and disability, and subsequently gender. Procurement has always been defined as a public function for the purposes of equality legislation, and public bodies in Scotland are already required to pay due regard to equality in any procurement opportunity, irrespective of the size of the contract.

The commission's concern is partly that there is an ambiguity in the bill. I take Martin Rhodes's point—in our experience, procurement officers are reluctant to use the equality provisions, perhaps because they do not understand them or they feel that there is a potential conflict with European law, which is incorrect.

Our research backs up the suggestion that there is reluctance, but we were unable to identify—when we looked at procurement opportunities in apprenticeship training, for example—any positive examples of conditions being placed in award criteria or in contracts.

In our field, the issue of intent is to a certain extent addressed in the Equality Act 2010 and in the public sector equality duties, but there is still confusion at procurement officer level and reluctance to take a positive view. I am happy to expand on that point later as we move further into the technical aspects of the bill.

The Convener: That is interesting.

John Downie: On the point about definitions and guidance, the bill is very much an enabling bill and relies heavily on policy guidance. As I think was pointed out in earlier evidence, the general provisions are very light on specifics and the duties are ambiguous, which becomes part of the problem. There is current guidance, and we know that current procurement legislation, particularly in relation to social care, has not been followed, as Annie Gunner Logan has articulated at a number of committees.

The bill is reliant on policy guidance, and that comes down to interpretation and whether people follow the guidance and, in reality, that does not happen as much as we would like it to.

Alex Johnstone (North East Scotland) (Con): I will move on to more specific aspects of the bill.

First, does the bill apply to the right set of contracting authorities? Is there anybody in there who should not be, or anyone who should be who is not?

John Downie: Scottish Water is the obvious example of a body that should perhaps be in the bill. The provision should apply across all public bodies—that is our view.

Alex Johnstone: Does anyone else have a view on Scottish Water's exclusion? Specifically, I wonder whether there is a climate implication in that regard.

Tom Ballantine: I am thinking as you are speaking, and the exclusion certainly seems surprising. As you can imagine, as a wide coalition we do not always take a specific stance on specific authorities, so I am not in a position to say yes or no to anything. What I can say is that, in principle, we would want the provisions to apply as widely as possible. I do not think that I am authorised to go any further than that.

Alex Johnstone: If anything comes to mind, you can always let us know.

Do you support the introduction of the new regime for contracts below the European Union threshold? What are your views on the thresholds that the bill introduces?

09:45

Martin Rhodes: We have not taken a view on those issues. To pick up on those and previous questions, we would welcome as wide and far-reaching a provision as possible on the authorities that are covered and on the levels, although we recognise that there are constraints on what can be done and that there are constraints on procurement other than those that relate to our interests. The responsibility and duty relating to fair trade that we think that public sector bodies should have should be as wide as possible.

John Downie: As we said in our submission, we support the inclusion of national thresholds, but the differentiation that the thresholds will create in the bill is a bit unclear. For example, it is not clear how the threshold of £50,000 will lead to a differential between contracts that are above and below that figure. If we are to have a threshold, as other European countries have, we must be clear that the regime below the threshold is slightly lighter.

We say in our submission that the threshold in France is €90,000. Below that figure, a lighter-touch procurement process is used, and a lot of trust is placed in the commissioning body, whether it is a local authority or another public body, to decide on the outcomes that it wants—I hope that that is done in conjunction with service users and perhaps suppliers in a co-production approach—and to decide who is best placed to deliver the contract. That happens across Europe. Above the €90,000 but below the European threshold, a slightly more detailed procedure applies. Above that, the full contract process is used.

We are saying that, if a contract is for £30,000, the procurement process should not be the same as that for a contract for £300,000. We need to differentiate, and that needs to be clear in the bill.

Alex Johnstone: I noticed that your written submission makes a comparison with Greece, which I am not sure is entirely the right place to go. Is it appropriate for us to look at what is done in other European countries and try to match their thresholds?

John Downie: We should do that. A lot of research has been done. We have on file somewhere a report that concerns European comparators, so we can see how processes work in those countries. We can even look at how other countries design and write their contracts in a perfectly legal way to consider the social impact, which is an approach that is used widely across Europe. A good recent example is that United Kingdom companies lost a contract to build trains down in Derby whereas, when a similar contract came up in Germany, it was written in a way that meant that only a German company could win it.

In procurement, we need to consider factors such as the social impact of putting 400 people in Derby on the dole and out of work. Procurement is not just a matter of cost; we need to look at the value of the contract, the quality that we will get, the outcomes that we are delivering and the impact on our communities and on local people. Otherwise, contracts will end up costing us more.

Martin Rhodes: Alex Johnstone asked about what we can learn from Europe. From our perspective, there is lots to learn from different examples and approaches to fair trade in procurement across Europe. Valuable lessons could be learned.

It is also important to recognise that Scotland can be a leader in fair trade. Scotland is only the second country in the world, after Wales, to achieve fair trade nation status, which means that it can lead the way. There are examples of innovative approaches to fair trade in public sector procurement in Scotland. We would be happy to work with the Scottish Government to look at how those practices could be shared through guidance that the Scottish Government could issue to local authorities and other public sector bodies.

Alex Johnstone: I am keen to get views on the thresholds from other witnesses, too.

Chris Oswald: Under the Equality Act 2010, economic thresholds do not apply—the argument is about proportionality, so the issue is the impact on equality. That has a resonance with what others have said. One of our concerns about the introduction of thresholds is that they could cause confusion between the 2010 act and the procurement regime that is intended to be introduced.

I will give an example. A number of local authorities and other public bodies outsource staff support. Those can be quite small contracts—for example, £3,000 for, say, 100 hours of staff support. However, the nature of the contract means that the service being delivered is very personal, so you would want to stipulate that the person providing the support has knowledge of, for example, harassment at work, domestic abuse or transgender issues. The service that is being provided is an intimate one. The issue is less about the threshold and more about the purpose of the contract and what is being procured. That is a slightly different principle from that of arbitrary numbers and requires a greater focus on the purpose of the contract.

In any of those considerations, there is a proportionality argument. You do not just introduce equality conditions for the sake of it; you have to be able to justify them. They have to be thought through in an equality impact assessment in the same way as could be done through an environmental impact assessment.

The Convener: Why are other countries seen as managing to stay within the EU rules while delivering contracts to national companies within their own jurisdictions?

John Downie: That is partly to do with the fact that they look at the cost benefit analysis and the risk factors. From my own experience, I know that the UK and Scottish civil services try to build all the risk out of all our guidance and legislation and everything else that we do. However, there will be risk.

An interesting part of the debate is about the living wage. I read some of the earlier evidence in which people quoted the situation in London. We are all aware that London was willing to take the risk that people would challenge it—of course, it did not think that anyone would. The living wage was introduced in London on the basis that it was felt to be a good thing to do and was something that could be done. However, we asked the European Commission, “Can we do this?” instead

of saying, "We want to do this. How can we do it within the legislation?" and taking a different, proactive approach.

That relates to risk factors. We try to take the risk out of every procurement. We have talked to procurement professionals in the Scottish Government's procurement groups, and one of the biggest issues for them is legal challenges. To them, an efficient procurement system has fewer legal challenges, although I do not think that that is a particularly good measure of how a procurement system should work. We want to empower staff who work for public bodies to make the right decisions—ones that are based on getting the right local outcomes. As I said, I would hope that that would come through taking a co-production approach with service users, following the Christie principles and making sure that public services are designed with a procurement system that delivers the best outcomes. At the moment, we are not delivering the best outcomes.

The Convener: In your experience—you might not be able to answer this question; we can probably find the answer elsewhere—are there lots of legal challenges at the EU level?

John Downie: Different countries face legal challenges, perhaps because they take more of a risk. For example, France is seen as somewhere that takes more of a risk. However, relatively speaking, I do not think that the numbers are that high; I think that we worry too much about the issue.

Let us say that we have a threshold measure of under £90,000 that we use to empower public officials and public bodies to go through a process of getting three to five quotes for a contract. If they have thought about the outcomes and can justify their selection of the best people or the best organisation—whether public, private, or third sector—to deliver the service, that is clearly a proposition that elected members should vote for and senior officials should put it into place.

This is all about making a judgment, and the bill tries to take that out of the process, which brings the system into disrepute, if I may use that word.

The Convener: We now move on to part 2 of the bill, which is on general duties and procurement strategies. Gordon MacDonald has some questions on that.

Gordon MacDonald (Edinburgh Pentlands) (SNP): In your opening remarks you touched on your views on the sustainable procurement duty, and someone commented that we will have only to "consider" the sustainable procurement duty and, as I understand it, have clearer statements and policy guidance. In its written evidence, the Equality and Human Rights Commission has stated that it has found no examples of the 2004 public sector directive on equality in public sector contracts being used. How can we beef up the legislation to ensure that, unlike the public sector directive, the sustainable procurement duty is not ignored?

Chris Oswald: I do not necessarily think that it is about legislation. As has been said, it is about procurement officers being confident that they will not be challenged. At the moment, there is more a sense that they will be challenged than there is evidence to show that innumerable challenges are being made. As a result, reluctance and conservatism have come in.

The research that we have quoted in our submission is specific to skills development and training, about which we raised particular concerns in research on apprenticeships that we published earlier this year. For me, the issue is less about thresholds than it is about the utility of what is being bought and the environmental and social gains that can be made.

The actual figure could be a distraction. I can see that it is tidy in an administrative sense, but the focus should be much more on what we want to achieve through the duty. The duty is not just about eliminating discrimination; it is also about advancing equality, using it to redress past injustices and having an impact on community relations to ensure that imbalance or a sense of unfairness does not grow in communities. The model could be further explored. As far as equality is concerned, it constitutes a slightly tighter test of "due regard". "Due regard" in case law now means a conscious direction of the mind. The courts came up with that rather clumsy phrase, but it essentially means that one must take seriously equality implications and that one can be challenged if one does not.

Martin Rhodes: For us, the bill is about giving people confidence. The detailed guidance will deal with the process, but confidence itself is very important. Our experience of talking to and working with local authorities, universities, schools and colleges suggests that if the people who are at a high level in, for example, a local authority or a university administration and who have the political leadership to tell people what they want them to do produce a clear and public policy statement, procurement officers will sit down and look at the guidance and gain the confidence to do what they need to do. I am aware that a lot of the time it sounds as though we are criticising overly cautious procurement officers, but it is the fault not of the procurement officers themselves but of the organisations in which they work that have not set such frameworks. The bill offers the opportunity to make a clear statement of intent on social duties and to give those at the front line of procurement the confidence to deliver.

Tom Ballantine: I have already alluded to the idea that we need a clearer definition of "sustainable". However, an easier way into this would be similar to the recycled goods provision in section 31, in which people will be required to buy a certain number of recycled goods or things that come from recycling. Putting a similar duty on suppliers and procurers with regard to goods that are procured and the emissions that are attributable to them would achieve a similar end and would beef up the importance of meeting the environmental target.

Beyond that, I very much agree that much will come down to the framing of the guidance, the training that is to be offered and procurers being confident that, if they do the environmentally good thing, no one will come down on them like a ton of bricks telling them that they should have looked at the cost first.

10:00

Gordon MacDonald: If the guidance is framed correctly and people are given confidence, will the bill help third sector organisations to bid for public contracts more easily?

John Downie: The bill has that potential, if we get it right. Part of our submission is about the need to separate buying of things from buying of services—in particular, services that are supplied by the third sector. That is one of the big issues. In our view, tables, chairs and glasses cannot be bought in the same way that people services—social care services, mental health services and alcohol and harm-reduction services, for example—are bought. That needs to be done in a very different way. The bill could help as you suggest if, through the committee's report, we address some of its inadequacies and think about the direction in which we want to go.

The bill is fast becoming a missed opportunity. We need to turn that around and take the opportunity to deliver more opportunities for local businesses, the third sector and local job creation. I think that we can do that, but the bill needs some fundamental reworking.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): Can you be specific about the reworking that is required?

John Downie: I gave the specific example that we need to separate the buying of tables, chairs and computers from the procurement of people services. That is fundamental and needs to be in the bill, because otherwise, the same procurement process will be used for those two different things.

We have touched on thresholds. Let us make it clear that there are different ways of doing procurement under the different thresholds. As Martin Rhodes said, we need to empower local procurement staff and give them the confidence to make the right decisions. Specific provisions could be included in the bill that would help the process and move things forward.

Adam Ingram: I understand where you are coming from—you are looking for a culture change in procurement processes. The bill provides an opportunity to set out the mission, but I am looking to you to spell out precisely how we can change the culture. Does that go beyond legislation?

John Downie: We have recently had a number of interesting discussions. The Cabinet Secretary for Finance, Employment and Sustainable Growth asked us to do a study on long-term funding for the third sector. In my view, it is not possible to talk about long-term funding for the sector without considering procurement.

We have had a couple of extremely positive discussions with the Convention of Scottish Local Authorities and directors of finance on the issue. I have taken two delegations from the sector to talk to them, and we had a meeting with the cabinet secretary. To a significant extent, those discussions hinge on cultural and behavioural issues—I think that the cabinet secretary himself said that at the end of the meeting. Culture and behaviour cannot be changed by legislation. As Martin Rhodes said, that is to do with what happens in an organisation and whether the agenda is driven from the top. The leadership needs to say that it wants to promote positive social outcomes, to make a difference to the local community, to be more sustainable, to use more fair trade products and—Chris Oswald mentioned this—to use equalities legislation to enhance people's wellbeing. That needs to be driven by the public bodies. The issue is one of leadership.

It is not possible to legislate for the cultural and behavioural change that is needed, but it is possible to set a framework and to change the ground rules. That can help to make such change happen, but what matters most is what will happen after the bill. We could have the best bill in the world, but if the culture and the behaviour do not change, it will become meaningless. We need to get that right, and the Scottish Government—along with the trade unions, SCVO and other organisations—needs to invest time and effort to ensure that we can take the opportunity that the bill provides to change things for the future. Behavioural and cultural change will be at the heart of that.

Adam Ingram: Fine. I understand that, but I am looking to you to tell us what instruments we need in order to achieve that without getting everyone together in a room and telling them what to do?

The Convener: There is provision in the bill for training to be taken into account. From the evidence that we have gathered outwith our formal meetings, it is clear that there are well-trained procurers out there; the issue is how we spread that good practice further.

John Downie: The committee probably knows that the Scottish Government had a contract called developing markets, which involved a consortium working to bring together third sector organisations and procurers in order to enhance procurers' knowledge of the third sector and to deliver the kind of culture change that you are talking about. The Scottish Government has just awarded the second contract. Interestingly, it did not consider the bill or the changing environment around self-directed support, and there has been no evaluation of the first contract. We do not know of any outcomes that would show that the initiative has worked to change behaviour and culture. Frankly, we are just wasting money on the second contract, because we need to see what happens with the bill before we can do more.

The mechanisms can be worked out, but what is important in terms of the outcomes that we want is the creation of better relationships between service users—who should be at the heart of procurement—the providers in the public sector and third sector, and the commissioning body. It will not be easy.

Martin Rhodes: Obviously, we have specific concerns about the need to make clear the intention, particularly around fair trade. The definition of "area" is important with regard to the sustainable procurement duty. Section 36(2) says:

> "In this Act, a contracting authority's area is the area by reference to which the contracting authority primarily exercises its functions, disregarding any areas outside Scotland."

We have concerns about that. Many fairly traded products come from outwith Scotland. I am sure that the bill is not intended to mean that people must buy their tea, coffee and bananas from Scottish sources, but there is a danger that that wording will mean that procurement officers will be wary about anything that comes from outwith their geographic area. That is why the issue of confidence is important.

We would like "area" to be defined thematically and not geographically. Many of the products that we are talking about come from the developing world and are not in competition with products that come from Scotland.

Tom Ballantine: We share the same concern, but in relation to emissions and how we account for emissions.

The Convener: With regard to what Martin Rhodes said, we have had submissions about Scotland-based companies that import fairly traded products not getting a fair crack of the whip.

Martin Rhodes: The principle behind fair trade is trade—we are not talking about some sort of charity. It is therefore potentially beneficial to all parts of the supply chain. It may well be that the primary focus is on farmers and producers in the developing world, but there are benefits to small and medium-sized enterprises in Scotland that trade with fair trade producers in the developing world. We are looking for that mutual benefit.

The Convener: Obviously, there is also the question of sourcing food from local farmers as, I believe, Moray Council and North Ayrshire Council—or East Ayrshire Council—are good at doing. Would that be considered to be fair trade?

Martin Rhodes: It would not come under our definition of "fair trade", because our concern is with farmers in the developing world. However, we do a lot of work with local producers in Scotland, because many of the concerns that people have about products—health concerns, concerns about how something has been produced and so on—come into play when people are thinking about sourcing products locally or ethically from elsewhere. As I mentioned, some food items are not available to be sourced locally; we work closely with people to see whether food can be sourced locally, but that cannot always be achieved simply because of what is produced here.

Tom Ballantine: You mentioned the East Ayrshire school meals programme, which I know a little bit about. It is a good example of a scheme that could play straight into a requirement in regulations to procure a certain amount of goods that meet specific emissions standards. Under that programme, they have 30 per cent organic, 50 per cent locally produced and 75 per cent unprocessed food, which seems to have been welcomed by the children, the community and everyone who is concerned with the venture. If we are talking about providing mechanisms to give procurers confidence, that is a prime example of a situation where such things could be encouraged and more could happen.

John Downie: Mr Ingram made a point about the specifics around changing the culture. A number of city councils south of the border have been working closely with their supply chains. One issue that they have been trying to address has been to ensure that suppliers understand their objectives clearly—for example, if they want more sustainable transport, or fresher school meals, or to create employment in certain areas. That understanding among suppliers has helped them.

One company had a large contract for supplying school meals, but it was delivering from outside

the area, so it decided to create a local plant in a deprived area where jobs could be created for people in making the food and delivering it from there, which resulted in shorter journey times. Because the company understood the council's objectives for employability, sustainability and lower carbon emissions, it was able to win the contract for a second time much more effectively, as a result of both sides understanding where they were coming from. We need to do a lot more of that.

I have talked to a number of people who work in procurement south of the border, and I have heard examples of situations in which that kind of understanding has helped to create jobs locally. In the case that I cited, it was still a large company that won the contract, but instead of having one big centre it moved itself into the council area and created jobs and supplied locally, in effect, rather than supplying nationally. That kind of cultural change can work.

Tom Ballantine: The East Ayrshire scheme is a good example of creating a hierarchy in procurement. There was a points system; 50 per cent of the points were for cost, 15 per cent were for the environment, and so on. The local authority essentially created a hierarchy and gave the procurers confidence to use it, and they got the result.

The Convener: I am mindful that a lot of the points that Mary Fee wanted to cover, such as those concerning ECHR and fair trade, have been covered, but I shall let her in if there is anything else that she wants to ask.

Mary Fee (West Scotland) (Lab): The fair trade issue has been covered. Do the witnesses see any conflict between the sustainable procurement duty and the general duties to treat suppliers without discrimination and to act in a transparent and proportionate manner? How can contracting authorities resolve that issue?

Tom Ballantine: When it comes to dealing with things in a proportionate manner and transparently, it all comes back to the initial criteria for procurement. If the correct definition is set at the beginning, there would not be any contradiction between a sustainable goal and other goals.

Mary Fee: So it is just about setting the standard or the goal in the right place.

Tom Ballantine: Yes, I would say so.

John Downie: I agree.

Mary Fee: Do you welcome the proposals on procurement strategies and annual reports? What is your view on strategies and reports?

Tom Ballantine: I absolutely welcome the requirement for reports and the like, but they will be valuable only if there are clear guidelines on what is expected to be in reports—specifically, that there must be some indication as to the value to be put on environmental and social as well as economic outcomes.

10:15

Martin Rhodes: Similarly, I very much welcome the idea. To pick up on the point that the guidelines should make clear what is required in those reports, if that is clear, some sort of national report that brings all the information together could be produced. We would like a national approach that looks at what is being achieved through procurement, so that that can be measured and monitored year on year and we can see where improvements have been made.

Mary Fee: That issue has certainly come up before. Most of our previous witnesses have agreed that a report is a good idea, but they wonder who will monitor the report and what action will come out of it. That is really important.

John Downie: I agree with that. Fundamentally, local authorities and other public bodies need to articulate what they are trying to achieve. If that can be done, and if it is the driver for the report, a whole range of outcomes can be measured. As I said, for us, the issue is less about the efficiency of the system and more about whether procurement creates local jobs, reduces health inequalities and addresses a range of other issues. The measures will be different for different public bodies. For example, some local authorities are further ahead than others on the transition to a low-carbon economy. How do we measure such issues? What we measure will be the key. It needs to be valuable and should allow us to try to redirect the spend in future. There will have to be someone to monitor the situation, perhaps not independently, but in an objective manner.

Mary Fee: I suppose that such a report, if it is monitored, can be used to build the strategy and make it stronger.

John Downie: Yes.

Tom Ballantine: As well as having a report, a lot will depend on the implications if bodies do not meet their responsibilities. We already have duties on sustainability under the Climate Change (Scotland) Act 2009. I have been reading the Transform Scotland report "Doing their Duty? Is the Scottish public sector helping deliver sustainable transport?" The report says that very few local authorities have plans to reduce their emissions from transport and that large numbers of people are still flying rather than taking the train down to London. If those kinds of things are

included in the reporting system, the question will be what happens if bodies do not meet their responsibilities.

Chris Oswald: There are already duties to report on the mainstreaming duty on equality, so I would not particularly want to encourage further layers of reporting. Therefore, where we can integrate things, that would be helpful. An issue at the edges that concerns me is that we potentially have two different regimes in place—one to deal with equality, which is about protected groups of men and women, such as ethnic minorities and disabled people, and one that is about social inequality, which predominantly means deprivation. Under the bill, there is the potential to have thresholds in play relating to social inequality but not thresholds relating to protected groups.

We need to be clearer about what we are trying to achieve. We would be concerned if procurement officers defaulted to the thresholds rather than to the sense of the Equality Act 2010. A sense of unfairness might be generated as a result of there being two very different approaches in play, with the Equality Act 2010 looking at the purpose of contracts and the bill looking at the size of contracts and their financial components. Perhaps a way through that is to focus more on the issue that John Downie raised about what the purpose is—is it about buying physical goods or buying support services? There could perhaps be more exploration of that area.

Mary Fee: Do you think that that would be down to guidance under the bill?

Chris Oswald: Guidance helps but, in my experience of working in race and disability and now across all the equality strands, guidance in itself has not changed culture. We see that, by creating or facilitating networks of positive procurement practice, we encourage and drive up standards. It is about officers being confident in what they are doing. European legislation is often seen as a massive inhibitor, but unjustly so, because the inhibitions and prohibitions are not there. There is a cultural sense in procurement that there are things that you can and cannot do, which we want to get past.

We have seen some positive examples of procurement recently. For example, the ScotRail franchise's approach to disability is very good, although I would not want to comment on the extent to which it is good from an environmental point of view. There are positive examples out there of how we can drive up standards and meet people's needs, but I would suggest that they are not the common factor that you see across all procurement.

Mary Fee: Does it come back to the training that is given to procurement officers, and their awareness of what they can do without breaching European regulations? Is it a training issue?

Chris Oswald: Training certainly helps, although leadership and having positive role models in this area—seeing somebody else take a risk, be successful and have good outcomes—also helps enormously. We come back to the issue of reporting. Reporting the positive outcomes that you have had encourages other people around you to change their practices.

Tom Ballantine: Just as a gloss on that, on the issue of positive outcomes, when we talk about environmental outcomes, it is particularly important that one looks beyond just the economic and sees the other positive benefits. If procurers were able to take into account the wider benefits, such as in health, it would make it much easier for them to make better procurement decisions.

The Convener: We move on to specific duties.

Jim Eadie (Edinburgh Southern) (SNP): Before I ask about specific duties, I want to pin the witnesses down on a couple of points that have come up in their evidence this morning.

I start with Mr Ballantine. What specific duties could be placed on contracting authorities that would achieve the environmental objectives that you seek? You talked about the need to get the definition of sustainable procurement right. When it comes to evaluating the environmental costs and benefits when awarding contracts, is there a specific duty that the bill could introduce?

Tom Ballantine: You are probably aware of a number of points that we have raised on that front. Essentially, when we are talking about sustainability and therefore the duties that flow through the bill, we have given five guiding principles of sustainable development, which are already agreed by the Scottish Government. The first of those is living within environmental limits. The first point is to include in the bill a proper definition of what you mean by sustainable.

I have had several discussions over the months about precisely where the guidance should be put—how much should be in the act, how much in strategy and how much in guidance. I would not profess to have wording today that would deal with that, but what would help and undoubtedly deliver is the kind of thing that we have for recycled goods. In the same way as there are regulations for recycled goods, we could have something for suppliers who are effectively meeting reduced emissions targets.

Jim Eadie: How would procurement officers evaluate the environmental costs and benefits when making those procurement decisions?

Tom Ballantine: You would ask the suppliers to provide an annual assessment of carbon

emissions attributable to their business and to provide information on the carbon emissions attributable to the whole life of goods and services supplied. You could require the procurer to procure a certain quantity of goods that meet those standards, worked out on the basis of the information that you have been given.

Jim Eadie: That is helpful.

Mr Downie, you said that we needed to use the bill to drive and direct procurement spend into communities. If I heard you correctly and if I read your evidence correctly, one way in which we could do that is to have a faster procurement process below a certain threshold. The £50,000 threshold was mentioned. How would we achieve that? Are you looking for an amendment to the bill to achieve that?

John Downie: We would probably have that threshold. The bill talks about a threshold but, as I said earlier, there is not a clear differentiation between the different procurement processes either side of that line. The bill needs to be clearer on that. Whatever threshold is set, whether it is £50,000 or £90,000, the bill should be clearer about how procurement will operate below it. At the moment, there does not seem to be any difference between procuring under the threshold and procuring over it.

Something that has come up in earlier evidence is the difference between commissioning and tendering. At the moment, particularly in social care, there is a drive to give bodies a choice between commissioning a service and putting it out to tender. The approach will depend on the framework that is set around the service.

Things are certainly changing. At the long-term funding meetings that I mentioned, a director of social work from a large Scottish council said that the framework that it has created around social care procurement is designed to bring into the framework smaller, niche players, usually from the third sector. It is designed to enable them to bid for contracts and to work with larger social care suppliers to put in bids, because in many cases they can supply the niche services that people need, and general services can be provided by someone else.

As Chris Oswald said, there are some good examples in which procurement at the local level is driving forward change. As he said, the system is not yet perfect, but it is a way forward in changing the dynamic among the supply chain. If we want to enable more of that, it is important to remember the distinction between commissioning and tendering, but it would also be helpful to have a system that makes it clear what rules apply above and below the threshold. As I have said, we should have a lighter touch below the threshold.

Jim Eadie: I am sure that we will return to that issue. I ask each of the witnesses to say quickly whether they have a view on the requirement to place contracts above a certain threshold on the public contracts Scotland website.

John Downie: I agree with that. If all the information is made accessible to as many people as possible, that will give everyone the opportunity to be involved.

Martin Rhodes: The more transparency and openness we have in the process, the better. If the requirement is a way of achieving that, I agree with it.

Tom Ballantine: I agree.

Chris Oswald: In my organisation, every procurement opportunity, irrespective of its size, is advertised openly.

Jim Eadie: That is helpful. I move on to community benefit requirements. Are you generally supportive of those and the level of the contracts to which they apply? Do you have any thoughts on how the bill's provisions on that could be strengthened?

John Downie: In thinking about the level, it is important to consider what a community benefit clause is. Technically, a community benefit clause can be built into any size of contract as long as it is proportionate. For example, if a contract is worth £25,000, the community benefit might be £500, and that sum could be donated to a local playgroup. There are different ways of doing it. We tend to look at large contracts and wonder how we can bring in wider community benefits, but we need to rethink what we mean by community benefit and consider proportionality across all types of contract.

Lots of small and medium-sized organisations in the public sector are delivering lots of community benefit anyway. For example, they might sponsor a local school team or a local choir. They do a range of things locally including, for example, taking on local kids through work programmes. They do a lot that is community benefit, but it would be good for that to be clearer in local contracts and for it to be measured. In the third sector, we would say that everything that we deliver is community benefit, but I think that we need a wider rethink of contracts.

The level is probably too high at the moment. I would like to see community benefit as a measure in all types of contracts. Today and in our written evidence we talk a lot about the wider social impact, because that takes community benefit to the next, more strategic level.

10:30

Chris Oswald: As you have probably gathered, I am concerned about the use of thresholds. We should look at the way in which the 2010 act operates. First, you consider the extent to which a procurement opportunity is relevant to equality or—in John Downie's case—to community benefits. If you feel that it is, you go forward and set award criteria, and monitor the performance conditions as the process moves forward.

I am slightly anxious about lighter-touch approaches below certain thresholds because we need to focus not on the value of the contract but on its utility and purpose. The word "discretion" tends to cause anxiety among people in the equality and human rights professions, because we have seen negative examples of discretion being used.

We need to have in place a structure that says what the purpose is and what the potential benefits are, and which asks whether it is proportionate to build in award criteria and to monitor the performance conditions. That structure is in place for equalities just now, and I hope that there will be some read-across in the bill because, selfishly, I would not want the equality provisions to be watered down by the introduction of thresholds.

Jim Eadie: That is helpful. We are already seeing a tension emerging in the debate.

John Downie: I do not think that there is a tension. Chris Oswald was talking about the need to decide what the right outcomes are. Part of the problem at present concerns the different thresholds. I chair a social enterprise, and I will give you a good example. We were talking to three different local authorities in one big geographical area. One was not interested in what we were doing; one commissioned the service—it was worth £25,000, which was below that authority's threshold; and the other local authority decided to put it out to tender. It was exactly the same service, and we were left wondering why one authority was bothering to tender it out at that level while another was straightforwardly commissioning it because it felt that the offer delivered a good service, and it had seen the track record and had seen that the service had worked locally.

For a lot of suppliers in the third and private sectors and others, some clarity is needed in that respect. You need to decide what you want to achieve—I agree with Chris Oswald that we need to know what the outcomes are. I am confident that people locally and in public bodies, working within the right framework, can decide on that.

Jim Eadie: The bill gives the Government the power to instruct contracting authorities to have due regard to workforce issues such as the inappropriate use of zero-hours contracts and the unacceptable practice of blacklisting. Do you have any views on that?

John Downie: We are totally opposed to blacklisting—we are one of the organisations from across civil society that signed up to the 10 asks, along with trade unions and others.

The issue of zero-hours contracts is an interesting one. I remember when those workers were called sessional workers; I was one myself at one stage. They are used in the third sector by a relative minority of organisations; perhaps 20 per cent of organisations might use them, and some of those contracts are requested by the workers. There is flexibility in that regard, but the issue is whether people are on such a contract by choice or whether they have been forced into it. A lot of the zero-hours contracts in the private sector at present involve people being forced into that type of arrangement, and they do not have any choice. There must be a balance that involves choice, but in general—

Jim Eadie: I was asking specifically about the inappropriate use of such contracts.

John Downie: We are against their inappropriate use, but we are in favour of their appropriate use.

Mark Griffin (Central Scotland) (Lab): Is the bill ambitious enough in dealing with workforce-related issues, specifically with regard to the living wage?

John Downie: I do not think that it is. We can and should introduce the living wage through the bill.

I have talked to a number of local authority leaders. They understand completely that they cannot put a living wage requirement into contracts on, for example, social care provision, particularly for those that relate to third sector providers. However, if we have a public services workforce in which the staff effectively come from across the third, private and public sectors and councils are paying the living wage to their own workers but they will not put that into, account for and allocate funding to a contract for a third sector organisation to pay a living wage to their staff, we need to consider the inherent unfairness of that. Will that get challenged if it is not in the bill? Will that be an issue?

People have raised that as an issue for the private sector but, as long as there is a level playing field, everybody will be happy. We should use the opportunity that the bill presents to implement the living wage. I am aware of the implications of that—the cabinet secretary would have to talk to local authorities about their funding

allocations—but how much would that cost us and what would the benefit be to low-paid workers and the local economies where they spend their money? You can see the benefits outweighing the risks.

Chris Oswald: Under equality legislation, account can be taken of previous findings of discrimination in procurement against an organisation but, given that there is not a huge number of discrimination claims coming through, that only deals with the negative consequences. I agree with John Downie that there are opportunities here—certainly through the award criteria—to encourage organisations to adopt policies and procedures that would be beneficial, including flexible working and living wages. Although I doubt whether those could be enforced in the sense of one of those matters being the one thing that tips in favour of one organisation's bid, procurement can play a positive role, and developing flexible working and diversity of the workforce are just two examples.

Mark Griffin: The Government has said repeatedly that it would not put a requirement for the living wage in the bill for legal reasons and that it would use guidance to encourage employers to pay the living wage. Will that be enough to lead to the sea change in pay and conditions that we hope to achieve?

John Downie: No.

Mark Griffin: Okay—thanks.

I move to another part of the bill. Although transparency has been mentioned, I will cover transparency after the contract has been awarded. Do you agree with the proposals to provide debrief information to allow bidders for contracts to get feedback on where they went wrong and how they can improve for their next bid?

John Downie: It is good to have more communication between commissioners, tenderers and suppliers. We need to see more of that not only at an earlier stage before contracts are agreed, but after that. In my example from south of the border, I mentioned that people understand what the objectives are of that public body, which will then help them to bid for a contract. When a bidder loses out, they should be told why the bid was not good enough and in what matters they failed. Increased communication and relationship building will help, remove complaints and allow people to learn so that they can be better prepared the next time around.

Martin Rhodes: In general, we would be supportive of anything that makes the process as transparent as possible. A big driver for positive social change is when people can see the processes and that those are more transparent at every level. That might be in the relationship and discussions between those who are issuing the tenders and those who are bidding for them. If people see that including social criteria in their tender has a positive effect, that can be a driver to make real improvement in what we get out of public procurement.

Adam Ingram: I want to wrap things up with a couple of specific questions on certain sections of the bill. What are your views on section 31? Do you support the proposals on the procurement of recycled and recyclable products?

John Downie: Yes.

Tom Ballantine: I have already welcomed that particular section. My only other comment is that it could be extended into other areas.

Mark Griffin: On that point, do you think that a similar amendment could be made to section 10, on supported businesses? Under section 31, the Government will set out in regulations that a specific proportion of recyclable products can be procured and I wonder whether it would be appropriate in section 10 for a specific proportion of contracts to be awarded to supported businesses.

John Downie: I have always tended to be in two minds on that question. It might sound perfectly reasonable, but you would have to ensure that that pool of supported businesses met quality standards and other criteria and could deliver what you wanted. Social enterprises have been mentioned in this respect; as a chair of a social enterprise, I can tell you that there are different types of social enterprise, some of which are community based and others that are larger than that.

We need to give everyone the opportunity to be part of the process and make bids, and that will come down to the change in culture and relationships. We should certainly be very wary of stipulating that, say, 10 per cent of all contracts be designated to particular types of organisations. Might that, for example, result in organisations changing their formation to suit those criteria?

Chris Oswald: There is a problem with the definition of supported businesses as it stands, because a number of organisations that might not consider themselves to be providing supported employment could fit into it. In supporting the Sayce review, which essentially moved away from supported businesses as a model for employing disabled people, the commission wants disabled people to be far more integrated into the workplace.

Pragmatically, another problem with your suggestion is that there are very few supported businesses left in Scotland and they provide fairly limited goods. Requiring local authorities to give a

certain amount of contracts to such organisations could, again, be setting them up to fail, and I would prefer an emphasis on the purpose of the contract rather than on some figure that has been plucked out of the air for a threshold or a particular proportion of the business being supplied to a particular sector. It should all be based more on the utility and purpose of the contracts.

John Downie: With regard to disabled people, the SCVO runs community jobs Scotland, a consortium of more than 500 organisations, and at the moment we are looking at how we help young people with long-term conditions get jobs, as well as being very focused on disabled people. Those jobs will be real jobs in regular—or should I say mainstream—third sector organisations. The issue—procurement can still be used to do this—is how you support organisations that are taking on people who are disabled or who have long-term conditions. It can be done; with the right support, public and private sector organisations are more than willing to take people on. Such an approach will also take us away from the prospect of setting up some supported businesses to fail.

Adam Ingram: As you know, the bill provides remedies for suppliers. Is it necessary for the remedies regime for the new sub-EU procurement threshold to be similar to that for the above-threshold regime? Are those provisions appropriate?

The Convener: Does anyone wish to respond?

Martin Rhodes: To be honest, we do not have a view on that.

John Downie: Remedies certainly need to be in place but I will have to think about that particular issue and come back to the committee on it.

Tom Ballantine: It is important to have remedies. However, with regard to the bill's provisions on actionable duties and non-compliance with section 8, I am concerned, again, about how we are talking about sustainability and sustainable procurement. If people are required only to consider economic, social and environmental aspects, it is difficult to see how that will flow into things being actionable, remedies and so on, unless there is some clarity on how those three aspects relate to one another

The Convener: As members have no further questions and our witnesses have no final comments to make, I thank the panel for what has been another useful and thought-provoking session that has provided us with a lot of questions to ask the cabinet secretary when she comes before us. If later on you feel that you have forgotten anything—I know that John Downie is going to come back to us on a particular issue—please provide it in writing to the clerks.

I suspend the meeting for five minutes for a changeover of witnesses and a comfort break for members.

10:46

Meeting suspended.

10:51

On resuming—

The Convener: Our second panel on the Procurement (Scotland) Bill includes representatives from trade unions, including those that submitted public petition PE1481, on blacklisting. I welcome Stephen Boyd, assistant secretary, Scottish Trades Union Congress; Mike Emmott—I hope that I have got your name right—employee relations adviser, Chartered Institute of Personnel and Development; Pat Rafferty, PE1481 representative, Unite; and Dave Watson, Scottish organiser, Unison Scotland.

Gentlemen, to what extent were trade unions consulted on the bill's provision?

Dave Watson (Unison Scotland): We were consulted in the formal sense and we made submissions at every stage of the process. We were also involved in a series of discussions with officials and others in relation to the bill. We have worked on procurement for many years, and one of the advantages has been the degree of stability over the years in the officials who have dealt with procurement, which is something that you do not always find in Government departments. They always go out of their way to try to address issues, even though they are very pushed for time.

Stephen Boyd (Scottish Trades Union Congress): I endorse Dave Watson's comments. The STUC has a long-standing and constructive working relationship with officials in the procurement directorate.

We were involved and represented in all the various working groups that were established around the bill and we have also maintained a regular and quite constructive engagement with ministers. We have no complaints about the level of engagement.

The Convener: Will the bill deliver the Government's policy objectives of

"delivering social and environmental benefits, supporting innovation and promoting public procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business friendly"?

Dave Watson: In broad terms, the bill is fine, but generally it is too timid. It reflects a risk-averse approach to procurement. It focuses essentially on housekeeping—on tidying up systems—rather than on the wider benefits that we could get from

the £9 billion to £11 billion of procurement. That is why we have focused on issues such as the living wage, tax dodging and employment standards. Using procurement to address those issues is one way that the devolved legislature can tackle those issues. That is why we are part of the 10 asks coalition, which has been referred to several times already.

There is an issue about where you pitch a lot of these things but, for us, the important thing is that the bill sets out a clear statement of intent. Very often with people who are involved in procurement and other arrangements, if you set out clearly what you want to achieve, you can change behaviours. That is where we see the bill at its strongest.

The Convener: I think that we will cover the specifics that you mentioned later.

Mike Emmott (Chartered Institute of Personnel and Development): The CIPD is a professional body; we are not a trade union as such, but you could say that we represent the human resources community in all its manifestations from HR managers to academics, students, consultants and so on.

I am afraid that I have not spent as long on the bill as I perhaps should have done. However, looking at some of the documents around the bill, including the Scottish Government's policy on procurement in relation to blacklisting, I want to see a clear focus. The word "objectives" is important—the consideration of what you are trying to achieve. In order to protect individuals and improve practice, you probably need a forward-looking focus. Some of the wording about the nature of the inquiries to be made looked as if it might be wider than what is needed to make sensible decisions about procurement for the future.

That may be a slightly arguable point, but I am simply trying to ask, what are you trying to achieve? That is what needs to be clear. I do not speak for business because the CIPD is not a business body—it is a professional body—but I think that having a forward-looking focus, protecting individuals and improving practice is the right approach.

Stephen Boyd: To supplement Dave Watson's comments, the STUC found the bill slightly disappointing when measured against the early aspirations for what was then described as a sustainable procurement bill. About 18 months or two years ago we enjoyed discussions with ministers about the bill. At that point, we were talking about issues such as economic impact and ministers seemed quite confident then that they would be able to do something really new, different and challenging. We were much more circumspect about what might be achieved but, nevertheless, the aspirations were set very high and I do not think that the bill really delivers on any of them.

The Convener: As I mentioned to the first panel, the bill covers such a wide range of organisations that it needs to be quite high level. Could the points that you have raised be addressed through subsequent legislation and regulations?

Stephen Boyd: There is certainly scope for that but we have concerns about specific issues, such as the living wage, which is not mentioned in the bill or in any of the supporting documents. It seems to have fallen off the agenda and we are concerned about that.

Pat Rafferty (Unite): As you mentioned earlier, convener, I was involved with the Public Petitions Committee in relation to the petition on blacklisting. Mike Emmott touched on the topic of blacklisting and we would certainly like to expand on blacklisting and how we address it within the bill.

The Convener: We will certainly go into more detail on that later on.

Alex Johnstone has some questions on the key concepts and application of the bill.

Alex Johnstone: Thanks, convener. Does the bill apply to the right set of contracting authorities?

Dave Watson: From our perspective, when I read through the bill the first question that screamed out at me was, "Where's Scottish Water?"

I thought about it and then it clicked that of course Scottish Water is unusual in Scotland because it is a public service that is covered by the utilities directive. I suspect that that is why it is not included. I think that some of the officials have said that in evidence to you before. I understand that point, but I still think that Scottish Water should be included. The reason for that is that the utilities directive is fine, but the bill is seeking to establish a number of general and specific duties right across the public sector.

Scottish Water is clearly part of that. It is a big purchaser; its capital programme is worth £500 million a year, so it is very important for industry. The specific duty should apply to Scottish Water and other public corporations on the same lines.

11:00

Alex Johnstone: Do you support the introduction of the new regime for below-EU-threshold contracts? What are your views on the thresholds that the bill introduces?

The Convener: Is that for Dave Watson again?

Pat Rafferty: Dave Watson is our lead person.

Dave Watson: As members know, there is an enormous variety of thresholds across Europe. One advantage of having a higher threshold is that it makes bidding simpler, because simpler processes can be used. It might also mean that we can have wider quality considerations that are not as constrained by European rules, which might happen if thresholds were not set at the right level. Proportionality, which is a clear concept in European law, would apply.

I am wary about only one point. One advantage of the application of the procurement regime relates to access to contracts. Small businesses and some minority groups and others have historically not always accessed contracts because they have not been aware of them. We might say that that could be balanced by the provision in the bill that says that everything should be published on the public contracts Scotland website. However, I know that small businesses would say that they do not have the time to hunt through that website, which involves a complicated searching exercise. There might be a risk that purchasers get into relationships in which they work with a limited group of suppliers, which other suppliers might find difficult to break into. A balance must be struck.

A point about thresholds that has not been highlighted is that the new EU directives that we are awaiting may address thresholds in relation to health and social care procurement. We hope that, when the final directives come through, there might be flexibility through higher thresholds to exclude health and social care, which is a big issue for us and others. A swathe of our problems with procurement boil down to health and social care and particularly social care. How we address that issue could be a factor.

A lot of community benefit issues relate to the higher threshold—£4 million—which is quite high. If we look at procurement contracts by value, they look big, but we should not lose sight of the fact that they are made up of a lot of small contracts.

A balance is involved. I do not have an absolute answer. However, if too many public sector contracts are excluded from the process, we will have to be wary about access to those contracts.

Alex Johnstone: You have talked a lot about balance. How will the new thresholds affect contracting authorities and bidders for contracts? Does the bill's structure create a fair position for contracting authorities and potential bidders or does it give one or the other an advantage?

Dave Watson: I do not think that there is an advantage. We represent most of the staff who do the procurement job in public bodies. Balance is an issue at the moment, and judgments must be made. Simplicity is fine, but it has a trade-off—do people get the full access that they require? There is no easy solution, but the approach of pitching different types of contract in different ways is probably right.

It is right that we have the flexibility under the bill to adjust the thresholds in secondary legislation. One advantage of the reporting mechanisms is that we can start to learn a bit more about how the provisions are being applied. You as legislators might think that something has not worked well and ask whether the thresholds should be changed.

Alex Johnstone: Has the bill avoided the pitfall of making the procurement process simpler for those who are implementing it by making it harder for those who are bidding?

Dave Watson: I was speaking at a conference of procurement professionals the other day, and that was not their view. To be honest, I am probably not some of our members' most popular trade union official, given that we keep adding to the things that should be done through procurement. Most procurement officials would say that their job used to be about sorting out technicalities and getting a cheap price, and now they have all those other things to do. In fairness, that would be the view of procurement professionals.

Sadly, my answer has to be, "Well, life's like that." Essentially, life gets more complicated and the provisions get more complicated. Procurement officials would argue that the provisions do not necessarily make things simpler for them. In fact, they will be required to take account of a much wider range of factors.

Alex Johnstone: Do any other witnesses agree or disagree with Dave Watson?

Pat Rafferty: I would not dare disagree with Dave Watson.

Stephen Boyd: Absolutely.

The Convener: We move on to part 2, on general duties and procurement strategies. Gordon MacDonald has some questions on that.

Gordon MacDonald: What are your views on the proposed sustainable procurement duty?

Dave Watson: As—

The Convener: Dave Watson definitely seems to be the lead witness.

Dave Watson: As a participant in the Stop Climate Chaos coalition, I defer to Tom Ballantine's earlier evidence, with which Unison Scotland largely agrees. He outlined the reasons for that duty and there is not much point in my repeating them. We largely go along with those

views. It is part of the 10 asks, and we have given some specific views about that issue.

Gordon MacDonald: Do you see any conflict between the sustainable procurement duty and the general duties to treat suppliers without discrimination and to act in a transparent and proportionate manner? How might contracting authorities resolve such a conflict?

Dave Watson: I do not want to tread into the area of the living wage, because I presume that you will ask us about that later. There are some specific issues around discrimination in connection with that and I will be happy to explain some of the legal issues as we see them.

The value of general duties is that they set the statement of intent that I was talking about earlier. The difficulty that a lot of our members find in implementing them—as I said to another committee in a discussion about better regulation—is that they sometimes struggle to know which duty to apply if there is a conflict. If you are a meat inspector inspecting animals going down an abattoir line, are you more worried about the diseased animal or about the economic impact of stopping the line? If you are a meat inspector, you just cannot make those judgments, so if we are going to have those duties, the right approach is to apply them at a higher strategic level, so that those duties apply to the guidance that public bodies have to apply. We do not want confusion for our members at the sharp end when they have to apply those duties in individual cases.

Gordon MacDonald: Is it a case of ensuring that we have the right policy guidance in place?

Dave Watson: That is absolutely right. First there is guidance, and then the individual procurement rules and policies of individual local authorities, because that is where our members in procurement put their focus.

Gordon MacDonald: Do you welcome the proposals on procurement strategies and annual reports, and how might they be used to hold contracting authorities to account?

Dave Watson: I very much welcome them. There is value in them, as long as they do not become just a tick-box exercise. To be honest, it is up to us as civil society organisations and to yourselves as legislators to pull in people who just do the box ticking. It gives us the opportunity to get a better picture of how those things work in practice, enabling us to evaluate the impact of legislation and regulation.

Adam Ingram: Dave Watson said that, in his view, the legislation is too timid. On the previous panel of witnesses, we heard from the likes of John Downie, who indicated that he doubted whether behaviour would change on the back of the bill, and that what is required is a cultural and behavioural change so that procurement officers have the confidence to bring to bear consideration of local social impact and the like. What do we need to do to the bill to effect that change?

Dave Watson: I am not quite as cynical as John Downie is on that issue. My view is that cultural change needs a number of stages, and legislation has an important effect. For example, with the legislation on violence at work, we argued that, as a result of the Parliament saying that assaulting people at work—in that case, it was emergency workers—was wrong, the training and guidance would start to be introduced. That got out among the public and things started to change. Another good example is drink-driving. The cultural attitude that, dare I say it, Mr Ingram, you and I might remember from many years ago has changed. It did not change overnight and just because legislation kicked in, but the legislation was a catalyst for a broader cultural change. I entirely accept that passing legislation does not in itself make cultural change, but it can be the start of a process that will in a number of years deliver useful change.

Mike Emmott: I agree with Dave Watson that pressures from outside can fly a flag and test what the rest of the community thinks—you pick up flak or you get support. Adam Ingram is absolutely right that culture change is needed. It is almost tautologous to say that we need culture change to change behaviour, because when we get the behaviour, we know that we have the culture. As Adam Ingram said, the question is how we do it.

I have two points on that. One is that those at the top of an organisation have to believe in what they say. By and large, people at the top of organisations do not get a lot of credibility just for saying things, so they have to find ways of communicating that are believable and believed and they have to behave in accordance with what they say.

My second point has sort of come up already. I am no kind of expert on procurement, but if it is just left as a job for the procurement guy, he will be stranded and it will become a box-ticking exercise as he has nowhere to go. Instead, an organisation can embrace procurement, take it on board and accept it in the way that happens with legislation, good practice or standards that have to be applied. The issue is about leadership and line management training. If it is left to the procurement people, it could just be a dead letter.

Stephen Boyd: In many ways, this is quite an old debate. Eurostat publishes figures on the proportion of procurement spend that is spent domestically. Obviously, there are no figures for Scotland as it is not a separate member state, but the United Kingdom is always right at the low end

of the spectrum in that regard. We are told that that is because other countries do things differently, and there have been various reviews of that over the years. Back in 2004, I think, we had the massive Wood review, the purpose of which was to identify what other countries did differently. However, the review's conclusions were very weak. It could not identify anything practically that other nations did differently—it was all about the whole culture of procurement.

On how to change that, Dave Watson made the point well about legislation. Training and resources are absolutely vital. In our submission, we mentioned the Marrakech training programme. I know from speaking to procurement officials in Transport Scotland for example that people have taken a different view of the procurement process after going through that training.

The signal that comes from the top is important. A few years ago, we had a discussion with Government officials about what might be achieved in a particular industrial sector in Scotland and what the role of Government might be in that. Those officials were very positive about the way in which Government might send signals to the private sector about forthcoming contracts. Lo and behold, a few years later, we have been told that that just cannot be done under EU law so, if we are going to procure in that area, the contracts will necessarily flow out of the country. We need to think ahead and send strong signals.

The Convener: When I read your submission, I thought that the Marrakech programme must have involved an exotic holiday for somebody. Could you explain that a little more?

Stephen Boyd: There are other people in the room who could probably do that a lot better than I can. I think that the programme has been delivered mainly to central Government procurement officials, although I might be wrong about that. It is about trying to get the procurement community to look at the range of issues that can be included in the procurement process—the kind of issues that we are discussing today. I will not embarrass myself by trying to give you any more details, but I can perhaps commit to providing something on paper to the committee at a later stage.

The Convener: Thank you. I will have to look it up myself.

11:15

Pat Rafferty: The bill gives us an opportunity to enforce guidance that already exists—I am thinking of the guidance on the living wage and blacklisting, in particular. We welcome the Scottish Government's recent guidance on blacklisting and how, through procurement, the public sector can deal with companies that have been involved in it.

However, guidance is guidance—it is discretionary; it is not enforceable. The bill gives us an opportunity to enforce some of the existing guidance, particularly the guidance on blacklisting. Although we have every confidence that the guidance on blacklisting will be applied by most public bodies, especially the local authorities, the bill could send a strong message that that is to take place, and I think that the committee needs to give that serious consideration.

Jim Eadie: Good morning, gentlemen.

I have a specific question for Mr Watson on what his organisation's submission—which I read with interest—says about freedom of information. It states:

> "We want to see amendments to the Bill to the effect that all companies bidding for public contracts should, as a condition of the contract, have to comply with FOI legislation as regards that contract."

What is the intention behind that? Given that we are in Edinburgh, were you thinking of contracts such as the one for Edinburgh royal infirmary? A lot of information in relation to that contract has been redacted from what is available to the public under FOI on the basis that it is commercially confidential. Is that the target of your organisation's proposition?

Dave Watson: I have spent what seems like half my life chasing details of that particular contract from the Scottish Information Commissioner and the courts. I have the proverbial scars from that case and from many others.

For us, the principle is that, if a company wants to bid for the public pound, it must buy into public values such as openness and transparency. We are not saying that freedom of information requirements should apply to all the processes of a company—such as a big construction company—that bids for a contract; we are saying that the processes that relate to the contract for which it is bidding should be open to FOI. All the defences to do with commercial confidentiality and other arrangements that exist under the current FOI provisions would still apply. The simple principle is that, if a company follows the public pound, it must buy into public values.

Private finance initiative contracts are a classic example. We have pursued information on such contracts—I have written a book on the subject, which highlights all those arrangements. However, the issue goes wider than that. People are entitled to have a level of transparency on a wide range of public contracts. In fairness, I think that the bill tries to provide transparency; I just think that the FOI bit has been missed out.

Jim Eadie: I wanted to get that out of the way at the start—thank you for that clarification. I look forward to the amendments to the bill in due course.

I turn to the community benefit requirements in the bill. I will begin with Mr Boyd. The STUC's submission indicates that the requirement that contracts that have a value of £4 million or more should include community benefit clauses is not strong enough. It says that the bill only states that such clauses should be included, not that they must be included. Can you tell us a bit more about that?

Stephen Boyd: I am slightly concerned that there is a growing misconception that the bill stipulates that community benefit clauses must be included in such circumstances. I notice that the Scottish Parliament information centre briefing briefs to that effect. It is very important to get it on record that the bill contains only a "should".

Community benefit clauses are potentially an extremely useful lever for local economic development. In Scotland, we have a sector-based economic strategy, which I would argue can work very well for certain parts of the country but less well for others. I think that we need to focus increasingly on what levers we can pull in those other parts of the country that will boost local economic development. Community benefit clauses—if they are well designed—are one such lever.

We have numerous examples from around Scotland and the Scottish Government has published good literature on the issue, which I think has been underused. We can learn from those good examples and ensure that public contracts deliver genuine economic benefits that will leave a durable impact in communities. I therefore argue that contracts of the scale we are discussing should stipulate that community benefits must be delivered as a minimum.

Jim Eadie: Is that the right level at which to set the threshold?

Stephen Boyd: I do not have a compelling view on the level of the threshold, although it certainly seems high. I have seen no justification of why contracts of half that size should not contain community benefits. The threshold seems entirely arbitrary, and I have not seen a decent explanation of why a value of £4 million should be the starting point.

Dave Watson: I agree with Stephen Boyd: I think that £4 million is too high. I understand why the threshold has been set at that level, although other thresholds were considered. Those are large contracts, but there are other large contracts for which we would want to lever in community benefits, particularly for the local community.

We should pitch the threshold at a lower level. I do not have a precise figure, but I would even go as low as half of the current threshold—£2 million. Otherwise, we are talking about only the very big contracts and not extracting community benefits at a local level.

Pat Rafferty: I would not disagree with my colleagues Stephen Boyd or Dave Watson on lowering the threshold. The threshold of £4 million seems to be quite high and would bar some organisations from participating.

Jim Eadie: Just for completeness, does Mr Emmott have any views on that?

Mike Emmott: I will pass on that.

Jim Eadie: It is clear that there is an opportunity in the bill and in any associated guidance that is issued to cover workforce-related issues, such as the inappropriate use of zero-hours contracts and the often illegal and unacceptable practice of blacklisting, as stipulations when awarding contracts. I would be interested to hear the views of witnesses; perhaps it would be appropriate to kick off with Mr Rafferty, given his interest in the subject.

Pat Rafferty: Thank you—I touched on the issue of blacklisting earlier. Although we welcome the guidance from the Scottish Government, there is a clear opportunity in the procurement bill to enshrine the guidance and give it a legal impact and a strong footing so that local authorities and other public sector bodies can enforce the provisions and ensure that companies that blacklist are dealt with appropriately.

There are discussions going on in the companies that have been found guilty of blacklisting to seek solutions. We need to move the issue forward with regard to compensation and how companies that use blacklisting are dealt with when they are able to retender for public sector contracts.

There are concerns about the level of compensation that is being mooted at present. We have heard a range of figures mentioned, from £1,000 to £100,000, but there is no way that people will get £100,000—it will be more like £1,000. The devolution of powers to the Scottish Government offers an opportunity to address that issue and find a Scottish solution.

There is a great opportunity to address blacklisting companies in the bill. We also need to consider how we deal with a situation that arises while a contract is on-going and a company appears to be blacklisting. There is a real opportunity for us to strengthen the way in which we tackle that scurrilous practice that companies have clearly been guilty of.

Jim Eadie: So, to be clear, you want to put the guidance on a statutory footing by including it in the bill.

Pat Rafferty: There should be a provision in the bill that clearly addresses how we deal with companies that have used blacklisting through the procurement process.

Jim Eadie: What discussions have you had with the procurement officials at the Scottish Government on the issue? Have you suggested that to them?

Pat Rafferty: We have. I have not been involved directly, as a sub-committee has been formed on the issue. Jackson Cullinane is on that sub-committee. There has been dialogue, which is on-going, about how we can frame that.

Jim Eadie: I have here the advice to which you referred. In paragraph 17, it states:

"The Scottish Government intends to meet with the STUC and interested trade unions, on a quarterly basis initially, to review how the guidance is being applied".

Will that be an opportunity for you to have a real stake in ensuring that the guidance—assuming that it is not included in the bill—achieves what it is meant to achieve?

Pat Rafferty: There will be an opportunity to discuss the matter in that forum, but it would be more powerful to have a section in the bill that strengthens the guidance that has already come from the Scottish Government.

The Convener: Is it not covered under section 23, on the selection of tenderers, and under section 24, on the guidance on selection of tenderers?

Pat Rafferty: I do not know verbatim what those sections say, but in discussions I have been told that the provisions are not strong enough and that there needs to be a specific section containing more detail on the guidance.

The Convener: Mr Emmott, blacklisting has been looked at in terms of the tenderers. As a former HR professional and member of your institute, I believe that blacklisting is sloppy HR practice. What is your comment on that? How would your organisation approach the issue?

Mike Emmott: You have put your finger on an important element. I would not have said it myself, but sloppiness is probably at the heart of some of the real problems that have occurred.

My chief executive officer, Peter Cheese, gave evidence to the Scottish Affairs Committee back in September and made it clear that we totally condemn blacklisting. As you may know, some of our members are currently being investigated under our code of practice for HR staff to see whether they should suffer some kind of penalty. That investigation will, I presume, continue for some time because the legal proceedings in London that are related to blacklisting are just getting under way and the timescales for them look quite long. Therefore, I declare an interest in that some of our members' names have been brought up in the context of blacklisting, and Peter Cheese has said that we totally condemn the practice.

Next week, we will publish a guide on pre-employment checks, which sounds a bit technical. It will not focus specifically on blacklisting, but it will raise the issue of whether any form of blacklisting is ever okay. It will also look at the impact of social media and whether employers are allowed to go online, snoop around and look for things to find fault with. In addition, the guide will talk about the supply chain, the use of contractors and the use of employment agencies or people to carry out checks. We are trying to demonstrate that we draw a line under blacklisting and say how people can keep out of trouble in the future.

That brings me to a general point that follows on from blacklisting. I am happy to talk about zero-hours contracts, on which we have done quite a bit of work—

The Convener: Before you go on to that subject, is there a conflict between what is in the bill on tenderers and employment law, which is still a reserved issue at the moment?

Mike Emmott: There is a layer that you are looking to place around the law. As I said, I am not a procurement guy, but I suspect that that tension always occurs. However, if you accept a layer in relation to equal opportunities and diversity, I cannot see why you would suddenly decide that you cannot have anything other than the law in this area.

As you probably know, there is quite a growth in soft law—although not desperately in the UK—and the European Commission is moving towards softer approaches that do not lay down strict rules about everything. At a global level, there is quite a lot of soft law around the international framework agreement and so on.

I do not have a problem with the fact that there is a law and you are looking to impose a procurement dimension on that as a superstructure, if you like, but in the longer term there is scope for confusion about exactly what people expect and what society expects. Legislation is not popular, and in this case the fact that the matter may be reserved might mean that there is not an immediate option.

11:30

You can argue that using procurement means that you can involve a wider range of attitudes and look at ethical issues, soft issues and good practice, but I make the point that that gives a lot of discretion to the people who make the decisions, which could be quite tough work. Just because something is not good practice does not mean that it is execrable or an awful thing to do. Good practice is a wide range of stuff. The position on blacklisting is clear because several bits of legislation bear on it, including the data protection legislation, where there are massive penalties. However, if you are going to allow, encourage and use discretion, it is probably a good idea to produce a code or some guidelines so that people know against what standard they are being judged.

I know that I am simply reintroducing the question of how guidance would relate to legislation, and I cannot really answer that properly—it is a philosophical question that I perhaps struggle with. However, it is worth a go. We have produced a code on pre-employment checks, and I hope that that might be useful to some of the people who are involved in blacklisting. Similarly, on zero hours, we are talking about codes, and last week we produced some material, which I am happy to send to your clerks, that I think gives a fairly balanced view on zero-hours contracts.

Dave Watson: On blacklisting, I am a member of the group that Pat Rafferty mentioned. We welcomed the Scottish Government's initiative and we took that forward in advance of the bill. In our view, the initiative does not go quite far enough, but that is probably our view on most things. We will review it, but it does send out the sort of behavioural messages that we sent out before. That is also important in relation to some of the wider workforce issues.

Along with zero-hours contracts, we would include people with nominal-hours contracts, by which I mean people who have a contract for, say, 10 hours but regularly work 15 or 20 hours. People will always say that there are people who want such contracts—and there are, in some areas—but that is not the norm, particularly in areas such as care. We need to be clear that, in those circumstances, zero-hours contracts have some unfortunate impacts that may not always be obvious. Interestingly, some of those are similar to the impacts of blacklisting.

The other day, I was doing a focus group with a group of care workers and I said to those who were on zero-hours or nominal-hours contracts, "Would you raise health and safety issues with your employer?" They said, "We're on these contracts. If we raise health and safety issues, we will not be asked back." That is exactly the position that colleagues were in with blacklisting. Sadly, when I then asked them, "What if you saw care abuse?", they said, "We'd be pretty reluctant to raise that as well, to be honest, for the same reason." People on zero-hours or nominal-hours contracts who raise difficult questions do not get asked back, and people are concerned about that.

Another workforce issue that it is clear you can address under the legislation—you raised it earlier, convener—is training. We do not specify in enough detail the required level of training, particularly in the field of care. To be frank, lots of people are recruited into the care field and sent out to deal with complex situations with only a day or two of training. That is just not acceptable. The way in which we procure care is a national disgrace. We really have to get a grip on that, and procurement is the way in which we do that.

The Convener: We have evidence coming from the Health and Sport Committee on that as well. Mr Emmott wants to come back in.

Mike Emmott: I want just to say that whistleblowing is probably a consensus answer to the question of how we can stop employers mistreating people who simply want to draw attention to bad practice. In the national health service, the issue has been under continuous review for a long time, and there is a recent report by the whistleblowing commission as well. Its main weakness is that it treats it as a legal issue rather than a cultural issue, but that is another point.

Jim Eadie: Just on the back of Mr Watson's powerful contribution on the care sector, I note that you talked about the reluctance of care workers to come forward and report on abuse or lack of compliance with health and safety. We have a national health service whistleblowers helpline. Is that something that we should be thinking about for the care sector?

Dave Watson: It is. Obviously, the NHS helpline does not affect the broader groups. There is a petition on local government whistleblowing in the Public Petitions Committee at the moment, and a separate issue has been raised in relation to the health service. We provided a submission on that last week, in which we highlighted the recent report of the whistleblowing commission, to which Mike Emmott referred. I think that it was Lord Leveson who chaired that, although he is probably more famous for other matters. That report sets out in considerable detail a lot of interesting procedures. We generally welcome that and think that it could be used in local government and the health service to strengthen whistleblowing provisions.

There are problems because the statute is weak and has recently—only this year, in fact—been

watered down by the UK Government. There are sometimes problems with the disconnect between the statutory provision and the practice. As trade unions, we have to advise members that, if they do something outwith current UK law, they are not always protected from unfair dismissal. That is a problem that we highlight in the legal advice that we give.

We set that out in slightly more detail to the Public Petitions Committee. However, I point you to the whistleblowing commission report, which came out only last week, for a very good analysis of the issue.

The Convener: I am not sure that that is directly related to the procurement bill. I will not take any comments that are not directly related to the bill and are just on whistleblowing.

Pat Rafferty: Okay. I will touch briefly on various points, particularly zero-hours contracts and the bogus self-employed. Those practices are widespread. For all the right reasons, Dave Watson raised the issue with regard to the care sector, but we see it in other sectors, too. For example, in the offshore sector we have bogus self-employed people who whistleblow. It is all fine and good that there is whistleblowing there, but getting people to step up to the plate and whistleblow is very hard indeed.

Some of the survivors of the Super Puma disaster offshore were bogus self-employed. Employers were ready to cut their income. After the trauma that those people had been through, they then had to worry about paying their rent or mortgage and how they were going to feed their family. The issues of the living wage, zero-hours contracts and bogus self-employed have an impact on the economy. People on zero-hours contracts who go to their bank and say that they would like to go on the property ladder and buy their first house ain't going to get a mortgage because, with a zero-hours contract, in effect they do not have a guaranteed income. Those issues have an effect on the economy and on people trying to progress. There are opportunities in the procurement bill to address some of those issues, which will benefit the economy in general.

The Convener: I have worked in the offshore industry. People think that it is good to be a consultant on a zero-hours contract, because they look at the top line, but they forget all the responsibilities that come with that. That is certainly not spelled out by the companies that employ consultants or folk on zero-hours contracts.

Mark Griffin: We have spoken about workforce issues but we have not really focused on the living wage. Are panel members content with what the Government has said about the living wage? Do they agree with the Government's legal position that the living wage cannot be provided for in the bill and with its intention to use guidance to encourage employers to pay the living wage?

Dave Watson: First, we should say that the Scottish Government has done a lot of very good things on the living wage. We in Scotland have the highest proportion of people on the living wage, particularly in the public sector. We welcome the commitment on accreditation because we think that that helps to drive good practice.

Frankly, the gap is in procurement. If we are going to extend the living wage into the wider community, particularly the private sector, we need to remember that procurement is one of the ways of doing that. I do not want to reiterate the obvious case for doing that for employers and workers but, as far as the economic case is concerned, I simply note that, during living wage week a couple of weeks ago, Unison published a Landman Economics report showing that jobs and benefits could be generated in local communities by implementing the living wage through procurement.

The legal issues arose as a result of the letter written by the then cabinet secretary and the reply that was received. Frankly, I would not have written the letter in the first place, because if you write to the European Commission, you run the risk of getting the wrong answer. In any case, we already had a perfectly adequate answer from the Commission in response to a parliamentary question that was asked by an MEP in 2009. The question referred to London, but the response set out the legal position very clearly and the same principle applied.

The key legal issue is that for the living wage to be lawful in procurement it has to be linked to the performance of the contract. The first and overwhelming point is that it must not be discriminatory and, secondly, it must be specified in the contract. This is what we sometimes call the level playing field argument. As John Downie made clear in the previous session, that is the main issue for contractors. When we deal with contractors, they say to us, "Look, Dave, tell us what the rules are. If we're bidding on a level playing field, that's fine." They are concerned that if the issue is dealt with in the evaluation stages, they do not know what they are bidding on. If they are told that they have to pay the living wage, that is fine, because they then know that they will be competing on something other than wage rates. That is the benefit of that approach.

The other legal issue is that the living wage must apply only to the staff involved in the contract. You cannot say to a big private company bidding for a contract, "You have to pay the living wage under this contract," and then tell it that it

also has to pay the living wage to everyone else who has a job with the company. You might persuade the company that it is a good idea, but you cannot enforce it on that basis.

That is my summary, or what you might call the Noddy guide to the legal issues. If you want a full explanation, I suggest that you look at the 14-page counsel opinion that we submitted to the Local Government and Regeneration Committee's living wage inquiry in which counsel set out in some detail how we should deal with those particular issues. I think that everyone here today will agree that, even with the procurement guidance, it will all boil down to a potential challenge under the posted workers directive. Let us think about this: that directive is a European piece of legislation governing cases in which a company, presumably from a low-wage eastern European economy, posts workers to Scotland to deliver a particular public service contract. One could imagine certain high-level, high-wage areas—for example, the offshore areas where the people Pat Rafferty represents work—where a company might want to bring workers over, accommodate them and so on. Can you really see the same thing happening in a cleaning or hospitality contract, where the difference in wages will be between the national minimum wage and the living wage? Is that profit margin enough to pay for the accommodation of hundreds of Polish, Romanian or Bulgarian cleaners or hospitality workers? Clearly it is not, which is the reason why there have been no challenges.

Apart from Alex Johnstone, who I always put on my climate change slides, the only other Conservative politician who appears on the slides for my talks is Boris Johnson. Boris Johnson has said many times—as do his staff, as I discovered when I represented Scotland at the Living Wage Foundation the other week—that you have to take a view on legal challenges. As a lawyer myself, I know that if you ask lawyers for the legal position, that is what you will get. The right question to ask is, "I want to do this, Dave. How can I do it legally?" In the 14 pages of counsel opinion that I mentioned, we tell you very clearly how you do it. As for any legal challenge under the posted workers directive—bring it on. It is not going to happen, certainly not as far as the living wage is concerned; there might be an issue with high-wage contracts, but then the living wage will not apply in those circumstances, as the employees in question are paid well above that level.

If you really want to bottom out the theoretical legal challenges, our counsel opinion has shown how that can be achieved through a small amendment to the bill. Frankly, though, the chances of a legal challenge are absolutely minimal.

It is no good saying that you will encourage people. As Stephen Boyd said, there is nothing in the financial memorandum about it, and it is the care field that will be affected. What it boils down to is that, if you specify the living wage, of all public procurement areas, that is the one where we need resources and where we need the bill to plug the gap. In the care field, it could create a situation in which there is continuity of employment, because people will not treat care as the new retail but will want to stay, and continuity of care. Coupled with the contracts and training issues that I raised earlier, that starts to create a quality provision in a field such as care by using procurement in the appropriate way.

11:45

Mike Emmott: The living wage has got traction and has become popular because employers have chosen, not necessarily without encouragement, to pay a living wage because they think that it pays off for them, often in terms of reputation, and because they can afford it; otherwise they would not do it. There is an issue of affordability, and you have to be careful, especially bearing in mind the fact that, as Dave Watson said, there is a minimum wage, and there is a question in the longer term about how many separate floors you want to run under wages and what is the justification for them. However, it is worth keeping employers on side, as they have been so far, and the proponents of the living wage, the Living Wage Foundation, tend to see it as something to be done by people who can see the value rather than as something that is pushed down employers' throats.

Pat Rafferty: Dave Watson makes a good point about being careful what question you ask and how you ask it, because it can affect the response that you get. Trying to get the living wage beyond the public sector and into the private sector is key, because the other factor is the unlevel playing field that it can create within public services, with some public sector bodies trying to keep services in-house or tendering for services that will pay the living wage, while private sector employers paying the minimum wage can come in and undercut costs for other bodies, so that the services are outsourced and the quality of service deteriorates. All those arguments can be made. To create a level playing field and make it level for the whole tendering process including the public services, you need to broaden it and ensure that contracts stipulate that employers will pay the living wage.

Mary Fee: I want to ask a couple of questions about climate change. Section 3 contains an amendment about the use of recycled and recyclable products, and I would be interested in the panel's views on that. My other question is

about climate change duties and how useful they are in helping to meet our climate change targets, and about their lack of mention in the bill.

Dave Watson: I have two points to make in response to that. First, we think that the recycling provision is a good one. As Tom Ballantine said, it is a model that we could perhaps extend more widely to drive that type of good practice. Often, staff in procurements—whether core procurement staff or the wider group of staff involved in procurement—are screaming out for good guidance, good support and good ideas. Legislation, guidance and the professional networks all help to do that, and the recycling provisions are a good example of that.

Secondly, on climate change, the only thing that I would add to what Tom Ballantine said earlier relates to the current public sector duties with regard to climate change. We feel that perhaps they are not strong enough. I was a member of the group that drew up the guidance on that area. As you will see from recent reports on issues such as the transport strategy, there are areas where the public sector does not seem to have got it right, and that is our concern here too. We warned that that would probably happen, because many of the duties rely too much on top-down, heroic leadership models. In other words, if you read the guidance, it is about chief executives getting together and telling everybody else what to do.

We argued that the cultural change needs to be built from the bottom up. There are great initiatives on climate change. For example, South Lanarkshire Council worked with the Scottish Government's climate change fund on developing climate change ideas in the public sector from the bottom up by using workers. The beauty of that was not only that it created savings and benefits in the public sector but that people took the work out into their communities as a spin-off. Procurement can help, but we really need to get the public sector duty right so that it is more inclusive and drives change from the bottom up.

Stephen Boyd: I absolutely endorse Dave Watson's comments. I will open out the discussion a wee bit. We come back to a word that he used at the start—timidity. Much more can be done through the procurement agenda to support the shift to a more sustainable economy. That veers into innovation territory.

We need to start thinking about procurement in the context of the demand side of innovation policy. We look at that policy pretty much exclusively from the supply side—it concerns skills, finance and so on. However, the scale of public procurement is such that it can create and sustain new markets. Formal procurement can provoke the private sector to produce goods and services that it would not otherwise have produced.

Such issues are probably not for legislation. We might be able to do things through legislation—I have not thought about that too clearly—but we must open up the wider procurement agenda and start thinking about such issues more clearly than we have done to date.

The Convener: I ask Adam Ingram to wash up, as they say.

Adam Ingram: Is the introduction of a remedies regime for sub-EU-threshold procurement necessary and are the provisions appropriate?

Dave Watson: Astonishingly, I do not have a particular view on that. I know that that will gobsmack all my colleagues and the committee.

The Convener: I take it that it is a difficult question.

Dave Watson: There must be a remedies regime. I do not have a strong view on whether we have got the right balance in the scale.

Stephen Boyd: My position is the same.

Adam Ingram: You have described areas in which you want the bill to be beefed up. Do you seek any other improvements?

Dave Watson: I will highlight the issue of tax dodging. As members know, section 23(3)(b) refers to

"an obligation to pay tax".

It will be possible to deal with companies that have been convicted of tax evasion, but there is also aggressive tax avoidance—members will be familiar with the issue. Companies that gain the taxpayer's pound should pay taxes; that is not unreasonable. Members would probably find 100 per cent agreement with that view among their constituents.

The question is how to achieve that aim. There are questions about how far section 23(3)(b) will go and which contracts it will apply to. Will it apply to EU-regulated procurement, which is the big stuff? The tax dodgers are not the small companies but the big companies that can use transfer pricing and other techniques abroad.

We need to look at that issue. People who are more expert than I am have looked at it. In England, provisions under the Public Services (Social Value) Act 2012 are used. We might incorporate elements of that in our bill. Public bodies across Europe—from France to Helsinki in Finland and other countries—are using such provisions and are not being challenged under EU rules for doing so.

This is a big issue for us. It boils down to a point that the convener made about what is reserved and what is devolved. We should not be too worried about that. Over the years, the Parliament has shown great imagination in doing things that it wants to do, even though it might not appear to have the legislative powers to do them. We have used the powers that we have to achieve the same end.

Alcohol pricing is an example of that. Although we might have wanted to deal with the tax on alcohol, we could not do so because the power is reserved, so we found another way of tackling the issue. Violence at work is another example. We dealt with that through criminal rather than employment law. All that I am saying is that we bombarded you with our 10 asks because procurement law is devolved, so let us use that to tackle some of the things that we doubt the UK Government is likely to do much about.

There is movement at UK level on tax dodging, but it is very weak because it looks at general avoidance. All the experts say that 99 per cent of tax avoidance will not be covered by such a new provision. That was last week's announcement. I urge you to read what we said—I am sure that you will—and what we put in our evidence on that point, because civil society believes that that is an important principle that you would want to have something to say about.

Stephen Boyd: I will take the opportunity to stress a couple of issues in our written submission that have not been spoken about. I listened with interest to the colleague in the previous panel who talked about supported workplaces and the contribution that his organisation made to the Sayce review. I emphasise that the Equality and Human Rights Commission was not speaking for the workforce in supported workplaces when it contributed to that review. Members of that workforce are, to put it mildly, extremely sceptical that they will be mainstreamed into workplaces throughout the economy on similar terms and conditions and supported in their employment in the way they are in their current workplaces. Anything that can be done through the bill—we have mentioned a couple of things in the written submission—to help support supported workplaces would be appreciated. At a minimum, we must start gathering decent information on public contracts that are going to supported workplaces. Despite the good work that is done in that area, they cannot provide information about that.

On equality, we mention in our submission that we could force suppliers over a certain threshold to demonstrate that they have undertaken a recent equal pay audit in their company. That would support the range of work that we are progressing with the Scottish Government on women in the workforce, and would be very much appreciated.

I also reiterate my points about innovation. Innovation is not dealt with particularly well in the bill. I am not convinced that that is a legislative matter at all. However, in considering the bill, we must start thinking about the demand side of innovation policy. There is a huge opportunity to do something different and world leading. We need a national task force to look at how all the different parts of the public sector can work together with the private sector to produce a step change in policy.

The Convener: As no one has any further questions to ask or comments to make, I thank the panel for a most helpful session. We will certainly take on board all your comments.

11:57

Meeting suspended.

11:59

On resuming—

Scottish Housing Regulator (Annual Report and Accounts 2012-13)

The Convener: Agenda item 3 is an evidence-taking session. I welcome Kay Blair, chair, and Michael Cameron, chief executive, of the Scottish Housing Regulator. Kay, would you like to make an opening statement?

Kay Blair (Scottish Housing Regulator): Yes. In the interests of time I will keep my opening remarks short, so that you have lots of opportunity to ask us questions. Thank you very much for your invitation to present our first annual report as an independent regulator. Some of you may recall that we presented to the committee last June, but it may be helpful if I articulate briefly our key objective and our work over the year in question.

As you know, we are the independent regulator of social landlords. We are directly accountable to the Scottish Parliament. It was helpful that you gave us one single statutory objective in the Housing (Scotland) Act 2010—although I would not say that that makes our life easy, it has given us a key focus. The statutory objective is to protect the interests of tenants and all those who use social housing services. We monitor, assess and report regularly on social landlords' performance of housing activities. We address the financial wellbeing and standards of governance of registered social landlords. We have a very important and serious role, given the number of people who rely on us as an effective, independent and efficient regulator.

I will describe the scope of our activities. We regulate around 600,000 tenants and their families and around 40,000 people who may be homeless and who are seeking help to find a decent, safe and secure home. We regulate and protect around 100,000 people who receive factoring services from their landlords and, importantly, around 500 Gypsy Traveller families who use the local authority services provided by social landlords at the 32 official sites.

We have a wide scope and play an important role, which we have described in full in the annual report that we are discussing today. I will not go through that in detail, so I will highlight some of our key outcomes. The outcome of our work over the past year was very much linked to our key priorities as a regulator: the financial health and good governance of social landlords in Scotland, and effective service delivery by those social landlords—the quality of service that is delivered on the ground to tenants and others.

In the annual report, we talk about our regulatory activities and our criteria for how we assess RSLs and local authorities; that includes looking at those with which we have a more intensive engagement in a bit more depth. We also describe our preparatory work for the Scottish social housing charter. The charter, which will operate from next April, is important.

We have been very busy with the sector, ensuring that the indicators are the most meaningful and that we have good engagement with it. We also are keen to engage tenants and others on our key priority. As such, we have a comprehensive engagement strategy. We highlighted to the committee last year our national tenant panel, which is part of that strategy. We are keen to engage diverse communities and to reach some of the more hard-to-reach-groups. Our objective makes it clear that we should do that so, as I said, we have set up a tenant panel; I would be delighted to take any questions about that.

That is probably enough from me at this stage. I am sure that you have lots of questions to ask.

The Convener: We have, so we will try to rattle through them.

You published a framework for monitoring how landlords meet the requirements of the social housing charter. Can you explain what the framework covers?

Kay Blair: It covers various criteria that we use in relation to areas of financial strength, how landlords are meeting Scottish housing quality standards and what they are doing to ensure that they have sufficient financial headroom to meet some of the particular risks that the sector faces. We have a clear framework against which we will monitor performance. Michael Cameron can talk in more detail about the eight specific criteria.

Michael Cameron (Scottish Housing Regulator): We have consulted on and published a range of indicators, as Kay Blair mentioned, that we will use from the start of the next financial year to assess landlords' performance in relation to their achievement of the standards and outcomes that are set out in the Scottish Government's charter. In total, we have put in place 37 indicators on which landlords will report to us each year. We will then use that information to produce an annual report on each landlord for its tenants, which we will publish and require landlords to disseminate to all of their tenants. We will also provide tenants with access to online tools that will enable them to manipulate the data in a user-friendly way and to compare their landlord's performance with the performance of other social landlords, thereby enabling them to have conversations with their landlord about that landlord's performance.

Alex Johnstone: While we are on that subject, will you give us an indication of the timescale that is involved in reporting on the charter for landlords and the regulator?

Kay Blair: We will start collecting data after the first full year of operation. It starts in April 2014 and we will be in a position to report—

Michael Cameron: We aim to have those tenant reports available probably in about August 2014.

Alex Johnstone: What benefits will the charter bring for tenants?

Kay Blair: There will be clear benefits, not only in giving tenants information about their individual landlord's performance but in enabling them to put that performance in context and compare it against the performance of comparable landlords in the sector. That will be valuable information, as it will enable tenants and others to hold their landlord to account and to ask questions about issues such as the speed of repairs, how voids are managed in the housing stock and the levels of rent that are charged. There will be lots of really interesting information about things such as satisfaction levels and value for money.

Alex Johnstone: Did you engage tenants in the process of setting up the monitoring framework and the on-going reporting of it?

Kay Blair: Very much so. We were conscious that we should involve a range of stakeholders, and not just tenants but some of the other people who use the services of social landlords. We spent about 12 months engaging with all those people. We did not expect everybody to come to us, so we toured the country and we spoke to, I think, about 750 organisations—which seems a large number—including a number of tenant organisations. We also spoke to individuals. We encourage direct dialogue with us through other means because, as I said, it is important that the system works for tenants and others; that they think that our criteria and indicators are the most important ones; and that they can use the information when they get it. It was important that we spoke in plain language and ensured as far as possible that our language was accessible and well understood.

Alex Johnstone: We look forward to accessing those reports when they are available, but that is a little while away yet. Can you comment more generally at this stage on the current performance of social landlords in undertaking their housing management functions and duties?

Michael Cameron: We are a risk-based and proportionate regulator, which means that our primary focus is on the risks to the interests of tenants and others who use the services of social landlords. We assess the risks for each landlord annually, and develop individual engagement strategies in response to those risks. Within that, we will—as things stand—consider the limited range of performance-related information that we currently receive for RSLs only. When the charter comes in and we receive the full range of 37 indicators that I mentioned earlier, we will have a far richer source of information that will enable us to incorporate far more fundamentally the performance of social landlords into that risk assessment.

At present, our assessment looks at the risks rather than necessarily the performance. Where we have a concern about performance in terms of service quality, we will reflect that in our engagement with the landlord and publish details of what that engagement will involve. We do that for our registered social landlords through our regulation plans, and for councils in collaboration with our scrutiny partners through the joint scrutiny framework that operates for local authorities.

Alex Johnstone: So the work that you are about to undertake, which will be published later next year, will give you a broader picture of what is happening.

Michael Cameron: That is absolutely the case.

The Convener: We move on to the Scottish housing quality standard.

Mary Fee: Earlier this year, the SHR published an analysis of social landlords' progress towards achieving the Scottish housing quality standard, which identified 10 RSLs and one local authority as being at risk of not achieving that standard by 2015. Why is that, and what is being put in place to ensure that they meet the standard?

Michael Cameron: A range of factors contribute to that, some of which are particular to individual landlords. One element is the quality of the stock that landlords have; another relates to historical investment strategies that have perhaps not set up the landlord to respond well to the Scottish housing quality standard; and another is the fact that some landlords do not have access to the national grid for gas. Energy efficiency is an area in which landlords find particular challenges in meeting the standard.

We are aware of the 11 landlords that have identified that they are at risk of not achieving the Scottish housing quality standard. We have regulation plans in place with the 10 registered social landlords in that group, and an assurance and improvement plan in place with the one local authority. We are engaging with those landlords to ensure that we get adequate assurance from them that they are taking appropriate remedial action to enable them to work towards meeting the

standard, and we will continue to monitor their performance all the way to 2015.

Mary Fee: What will happen in 2015 if they have not met the standard?

Michael Cameron: If they have not met the standard by then, we would have to understand the reasons for that and the level of non-achievement. We must bear in mind that those landlords are not saying that they are not meeting the standard for any of their houses; it may be an ever-diminishing group of houses that are outstanding. We would put in place an appropriate regulatory strategy to deal with the particular circumstances of that landlord. It is difficult at this stage to say that we would do X, Y or Z; what we would do would very much be tailored to the individual circumstances and nature of those SHQS failures.

12:15

The Convener: We move on to homelessness. Can you explain in a bit more detail how you will monitor the quality of the temporary accommodation that homeless households are placed in?

Kay Blair: That is obviously on our radar. As we speak, we are conducting a research survey to find out more information about homelessness and the housing options that are available. We will report in January, when we have more information—we will also report what we are intending to do. We are very conscious of the issue, so the board will meet in early January to discuss the findings of that up-to-date report.

The Convener: Councils must know that they have a severe problem in many areas. Have you had any indication of how they intend to tackle it?

Michael Cameron: A fair bit of work is going on in partnership with local authorities and RSLs to try to address the challenges around having an adequate supply of appropriate temporary accommodation. Any rush to try to meet what is undoubtedly a supply-side challenge runs the risk of putting in place inappropriate responses to temporary accommodation issues. It is about local authorities and RSLs working together to build up the supply of good-quality temporary accommodation.

We will have a particular eye to ensuring that we understand how accessible good-quality accommodation is. We will engage with any local authority where we see a risk of people who are experiencing homelessness not getting access to appropriate temporary accommodation.

The Convener: You will know that we conducted our own inquiry into whether the 2012 homelessness targets were being met. Do you have any evidence to date on how that target is impacting on the delivery of local authorities' and their partners' homelessness services?

Kay Blair: We are looking at that and we will have more information on it in January. We are very keen that we get up-to-date information on that impact. Would it be helpful if we got back to the committee in writing once we have more information?

The Convener: Yes. We might also consider whether we have time to question you on it, too.

You are carrying out a study. You have said that the findings will be made available. An article in the press at the weekend said that Shelter was

"frustrated by the failure of the Scottish Housing Regulator to step in and protect the rights of homeless people in the city"—

by which it meant Glasgow. Do you have any comment to make on that?

Kay Blair: I would like to speak to Shelter directly to hear more about that, because I was not made aware that there was a concern about that before the article appeared. It would be premature of me to give an answer when I have not spoken to Shelter to get more evidence about that.

Michael Cameron: It is perhaps worth saying that we have an on-going engagement with Glasgow City Council in relation to its homelessness service. We were aware of the difficulties that the council was having. It is also worth being clear that the council has acknowledged those difficulties. We are engaging with the council on this matter at the moment. We have already published details of that engagement through the assurance and improvement plan. We will be looking for the council to provide us with appropriate assurances that it is in a position to tackle these difficulties in the short term and the longer term.

The Convener: Why do you think that Glasgow specifically has those problems?

Michael Cameron: There are a range of challenges in Glasgow. People who are experiencing housing difficulties in the wider hinterland of the city often gravitate to the area. There are challenges in the fact that the city council does not have its own housing stock and relies on its partners to help it to meet its statutory duty. Glasgow is also in the process of significant change, including the renewal of hostels in the city. A lot is happening that means that Glasgow City Council faces challenges. We want to understand how it is responding to those challenges and, in particular, to ensure that it is able to discharge its duties in relation to people who find themselves homeless.

Mark Griffin: I have a question on the financial health of social landlords. Can you give the committee an update on the financial challenges that social landlords face as a result of economic circumstances and the impact of welfare reform?

Kay Blair: That is a very pertinent question. We have described some of the risks that we think are present in the sector, which are very much to do with the fact that we are in a different lending climate. Borrowing is becoming much more challenging for the sector as a whole because of the level of borrowing costs. Another issue is pension liabilities and how pension deficits are going to be funded and reported in accounts in the future, which might impact on lenders' propensity to lend. The impact of welfare reform is another risk that we are exploring at the moment. There are a number of risks that are challenging for registered social landlords.

Having said that, I believe that the performance of the sector to date has been strong, with a few exceptions. As a regulator, we are keen to ensure that that strong performance continues and that the outcomes for tenants continue to be good. Nevertheless, it would be remiss of me not to highlight the fact that risks are escalating in the sector and are proving to be challenging. Because of that, we are keen to ensure that tenants get a good deal and that landlords are being run well and managed effectively. It is important that we take account of financial health in our regulatory assessments.

Closely linked to that is the need for effective governance in the sector. One of our key priorities is to ensure that social landlords are well governed—that their boards have the right skills and expertise and are equipped to ask the right questions; that they understand the economic challenges; and that they meet tenants' needs effectively. I highlight effective governance, allied to financial health, as one of our key priorities.

Mark Griffin: Thanks for that. Let us focus on the tightening of lending criteria and increased borrowing costs. Are those costs justified, given that social landlords have reported that surpluses and turnover have grown and the fact that the number of registered social landlords recording a deficit is at a five-year low?

Kay Blair: It is up to individual lenders to negotiate an individual deal with each social landlord, so I am not sure that I could give a generic answer to that question.

In terms of the reserve that social landlords have, it is important that they have sufficient financial headroom so that they are able to weather some of the risks that are out there in the sector. As a regulator, we have a remit to regulate not the sector as a whole, but each individual landlord.

Do you want to say something about that, Michael?

Michael Cameron: No, but I would echo that point. When we consider the financial health of an individual landlord, we are looking at that landlord. We do not take a systemic or sectoral view of financial health. The message that we put out recently in a regulatory advisory note that we issued to the sector said that it is incumbent on landlords to ensure that they have an understood, appropriate and sustainable financial headroom to enable them to tackle the type of financial risks that will be coming their way over the next few years.

Mark Griffin: A number of social landlords have said that lending institutions are trying to change terms and conditions when they are applying not only for new borrowing but for existing borrowing, which increases those costs. In your experience, has that been widespread across the sector?

Kay Blair: There are always situations in which a landlord is advised to negotiate and to engage with its lender. We always advise the landlords to ensure that they are properly informing lenders and communicating what they intend to do in future, to keep the lender on board.

It is important that those relationships are managed effectively as there are various events that require landlords to engage with their lenders. For example, when it comes to managing their costs, it is absolutely crucial that each landlord manages the relationship so that the lender appreciates the situation, the issues and the challenges that they face.

We are aware that there are new forms of funding that could be attractive, but we do not know about their potential attractiveness because to date we have not had any firm proposals for new forms of funding come across our desk. All funding has its risks and its costs, so we are keen that the boards of each landlord understand the situation that they are in and what their borrowing costs are and might be in the future, and that the relationships are managed to ensure that lenders are kept informed appropriately.

Gordon MacDonald: In the past financial year, you carried out 22 performance inquiries. In general terms, what were the findings of those inquiries?

Michael Cameron: It is worth saying first of all that those inquiries would have been initiated by a concern that we had or by the identification of a risk. It is not the case that we engage in routine cyclical inspection activity, which would give a broader view of performance, so I sound a note of

caution about taking the outcomes of such inquiries and extrapolating from them across the sector as a whole.

The inquiries have been about specific issues, not about broader performance. What tends to happen when we engage with landlords is that we get a good response and they seek to give us the level of assurance that we need that they recognise and understand the performance issues and have appropriate plans in place to address them. Nothing that has come out of those inquiries has been so significant that we have had to consider using our statutory powers.

Gordon MacDonald: Does the nature of the performance inquiry relate to the financial health of the organisation, to the governance or to the quality of delivery?

Michael Cameron: The 22 inquiries that you referred to were specifically about service quality or performance issues. We have a range of other engagements with a number of landlords around financial health or governance issues, and they do not feature among that figure of 22.

Gordon MacDonald: Also in the past financial year, you managed three landlords out of near insolvency. What factors brought about that situation, and what measures do you have in place to ensure that other RSLs are not in the same position in future?

12:30

Kay Blair: In each of the three cases, poor governance alerted us to the situation. The landlord did not particularly understand the challenges that they faced, did not identify and mitigate risk, and did not understand some of the financial implications of the situation that they were in. Each case stemmed from poor governance.

We engaged closely and intensively with each landlord, because it was extremely important from the point of view of tenant outcomes that we managed the situation and that we found rescue partners, which we helped to facilitate. I am pleased to say that each of those landlords has been rescued effectively.

It is critical that we ensure that that does not happen again. We have initiated a series of publications called “Governance Matters”. It is important that the whole sector understands the issues and challenges that the landlords in those cases faced. We are publicising a range of some of our more serious cases. We are doing so in an anonymous way, in that we are introducing other issues that we encounter in the sector.

As well as launching those publications, we have tried to engage directly with board members in the sector, because we are keen to do that. In addition, we have run a series of governance matters events around the country to facilitate board members in getting together, engaging with one another and learning what went wrong. That will, we hope, enable them to ask themselves what they would have done in similar situations—and, indeed, whether they are in a similar situation—what the right questions to ask are and what kind of assurances should be sought. Those events have been extremely popular, to the extent that we will run them again this year, and we are continuing to publicise particular issues under the governance matters agenda.

When particular issues such as near insolvency arise, we feed them into our regulatory assessments to ensure that we are asking all the right questions and that we are aware of what might happen in similar situations elsewhere.

Gordon MacDonald: Does the fact that you have launched your governance matters publications and events suggest that there is a weakness in RSLs as far as governance is concerned that must be addressed?

Kay Blair: Yes, I think that it would be fair to say that there is. In certain RSLs, there are weaknesses in governance, as has been seen. Having the right skills and expertise and level of challenge round a board table is always a challenge, and we are keen to ensure that they are there. In our advice to the sector, we tell boards to ensure that they continually ask themselves whether they have the right skills round their table; how they can train and develop their members, both existing and new; and how they can continue to attract the right skills so that the right level of challenge—and therefore assurance—is provided.

I acknowledge that there are issues to be addressed, and we are working to highlight them. Regardless of the sector, every board around the country would say that it is always necessary to look at good governance and to ensure that the right skills, experience and knowledge are present round the board table.

Jim Eadie: I return to the financial risk that welfare reform poses to RSLs. The research that you published in October said that, in the first three months of 2013-14, there was an increase of around £789,000 in rent arrears across all RSLs for which you had complete data and that 65 per cent of RSLs saw an increase in their percentage arrears levels.

I want to get a sense of how serious that issue is and how important it is that the Scottish Government does all that it can to mitigate the impact of the bedroom tax through the provision of discretionary housing payments.

Michael Cameron: For some time now, we have recognised the potential risks that welfare reform poses for social landlords. I think that social landlords were among the first to appreciate what some of the challenges would be and that they have already gone some way towards preparing their organisations and supporting the tenants who may be affected.

It is quite early on to draw too many direct conclusions—our first survey covered the first quarter of this financial year. We are certainly conscious that the impact has been mitigated, both by the work that social landlords have undertaken and by the availability of discretionary housing payments, and we will need to see how things progress over the coming year or so. We will repeat our survey on a quarterly basis to ensure that we have as much up-to-date information as possible on what the impact may be. We will put that information—including the mitigating impact of discretionary housing payments—into the public realm so that others can use it to help in evaluating policy responses.

Jim Eadie: What specific measures have you taken, or are you considering, that would encourage landlords to make their tenants aware of the availability of discretionary housing payments?

Michael Cameron: We have issued a range of advice to all landlords, incorporating a number of articles from landlords who have been to the fore in providing appropriate and relevant advice to tenants. At this stage, we are focusing on providing information and encouragement.

I attended a Welfare Reform Committee meeting a couple of weeks ago at which a number of local authorities gave evidence that, as yet, they are not entirely confident that all those who would be entitled to discretionary housing benefit payments have applied for them. There is still some work to be done to ensure that that assistance is maximised.

Kay Blair: We are concerned about the impact of direct payments and the introduction of universal credit when that happens, because it will potentially have an even greater impact on the sector. Given the competing priorities and the financial economic situation, we will have to keep a close eye on rent arrears as a result of that particular event.

Jim Eadie: Just to be clear, is the issue that the benefit is paid directly to the tenant rather than subtracted at source?

Kay Blair: The housing benefit will be paid directly to the recipient rather than what happens at present, which is that housing benefit is paid directly to the landlord. Because that income stream is regular and assured, lenders look on it quite favourably. That is likely to change, and so it is possible that lenders may look on the change as a potential opportunity to evaluate borrowing costs.

Jim Eadie: That is helpful—thank you.

I want to ask about notifiable events, which are serious events that could bring an RSL into disrepute or threaten its stability. Can you give the committee some examples of the type of event that would be considered as notifiable, and tell us whether you expect those notifications to continue at the current levels for 2012-13?

Michael Cameron: Yes. Notifiable events cover a range of circumstances of which we would expect landlords to advise us so that we, as a regulator, are aware of issues that might be developing. They can be quite wide ranging; in our guidance to landlords we set out broad themes and give some examples.

Notifiable events can relate to governance—for example, they can arise if one or more governing body members resign for reasons that are not personal in nature, or if the chief executive or a number of senior staff leave. They can involve potential reputational risks, such as significant media coverage that might damage the reputation of the landlord and therefore potentially impact on the reputation of the wider sector. They can involve particular performance issues—for example, if the Health and Safety Executive is engaging with a landlord regarding a failure to appropriately manage gas safety in the housing stock.

There is a wide range of circumstances in which we would expect landlords to keep us advised. We want to be a proportionate regulator; we do not want to place overly onerous demands on landlords for regular and comprehensive data and information. We have set up a system whereby we are alerted to relevant and pertinent issues.

Jim Eadie: Thank you for that. If I may, convener, I just want to put on record that I found the annual report to be particularly user-friendly and that it presents the information very clearly and understandably.

Kay Blair: Thank you.

Michael Cameron: Thank you.

The Convener: I agree.

I want to go back to the issue of notifications and our earlier discussion about RSLs' performance and the insolvency position. I believe that there have been some amalgamations of RSLs. Is that a good trend or a bad one, and is it likely to continue?

Kay Blair: We do not have a view on whether further consolidation would be good or bad. As I

have said, our objective and duties relate to individual RSLs.

That said, we are aware of more mergers in the sector. More individual landlords need to look at their own situation and ask themselves whether it would be more sensible to share some services or whether there are ways of delivering more cost-effective services in future. Amalgamation might be on the agenda for a number of them, but I have to say that it is not the Scottish Housing Regulator's agenda. The matter is more for individual landlords and the Government as opposed to us as the regulator.

Adam Ingram: In your opening remarks, you invited questions on the national panel of tenants and service users, which I believe has been operating for about a year now.

Kay Blair: That is correct.

Adam Ingram: Can you set out the benefits of the panel's establishment?

Kay Blair: Absolutely. We were very keen to reach a more diverse range of people. Although there are a number of excellent tenants organisations throughout the country, we were keen to reach more minorities, younger people and so on and to offer tenants and others different alternatives and options for communicating with us. After all, not everyone wants to come to meetings.

As a result, we were keen to reach a wider audience not to replace anything that we do but to complement what we do. We set up the panel in what I hope was the most cost-effective way; a lot of its work happens online but, in recognition of the fact that not everyone is online, we also engage with people by telephone and post.

We were hoping to get up to about 500 people. To date, we have more than 300 and have conducted our first survey to find out what the issues and top priorities are. The response to that survey has been really interesting. We found people very keen to engage, but we also want to engage proactively and use the panel to ask certain people certain questions. After all, we do not always want to ask 350 people the same questions; we want to divide things up a bit more.

We think that this approach will really help. After all, it is important for a regulator to have good intelligence and to be aware of current themes and issues. Because our statutory objective is to look after the interests of tenants and others—for example, Gypsy Travellers—we are very keen to engage regularly but cost-effectively as a means of complementing our other engagement with tenants. As you know, we engage with registered tenants organisations and have our own tenant assessors, who provide a very valuable service by looking at specific areas of work.

As for the panel's benefits, we will look at and evaluate the effectiveness of what we are doing as we go along, but the early signs are good.

Adam Ingram: That is good.

You have partly answered my final question in the course of the evidence session, but what do you think will be the key challenges and issues for social landlords over the coming term? Can you list them in terms of priority?

Kay Blair: Our own priorities very much relate to how we regulate. We look at governance and financial health, and clearly with the charter coming into operation next year we will be looking at getting much more information about service delivery.

We see risks and challenges growing because of the current economic situation. As a result, our priorities will be effective financial management by social landlords and to protect and safeguard tenants' interests. One development in the sector is diversification; that might or might not be good but we are keen to ensure that, when social landlords engage in subsidiary activities, they are aware of the risks and benefits of such activity and that tenants' assets are protected when subsidiary companies are set up.

There are lots of issues that we as the regulator will have to address to maintain and enhance our scrutiny and deliver an effective and appropriate regulatory remit.

The Convener: As members have no more questions, I thank the witnesses very much for their evidence. We will be able to discuss your findings on housing options and homelessness in our follow-up work on the 2012 commitments, which I think will happen early next year.

Kay Blair: That would be helpful. We also said that we will send you the report when we get it, which will be early in the new year.

The Convener: Thank you very much. As previously agreed by the committee, we will now move into private session.

12:47

Meeting continued in private until 12:52.

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