



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

LOCAL GOVERNMENT AND REGENERATION COMMITTEE

Wednesday 21 December 2011

Session 4

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.scottish.parliament.uk or by contacting Public Information on 0131 348 5000

Wednesday 21 December 2011

CONTENTS

| | |
|---|-----------------|
| DECISION ON TAKING BUSINESS IN PRIVATE | Col. 477 |
| LIVING WAGE INQUIRY | 478 |

LOCAL GOVERNMENT AND REGENERATION COMMITTEE
15th Meeting 2011, Session 4

CONVENER

*Joe FitzPatrick (Dundee City West) (SNP)

DEPUTY CONVENER

*Kevin Stewart (Aberdeen Central) (SNP)

COMMITTEE MEMBERS

Kezia Dugdale (Lothian) (Lab)

*Mark Griffin (Central Scotland) (Lab)

*Margaret Mitchell (Central Scotland) (Con)

*David Torrance (Kirkcaldy) (SNP)

*Bill Walker (Dunfermline) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dorothy Cowie (Scotland Excel)

Patrick McGuire (Thompsons Solicitors)

Iain Moore (Scottish Government)

Dr Richard Simpson (Mid Scotland and Fife) (Lab) (Committee Substitute)

John Swinney (Cabinet Secretary for Finance, Employment and Sustainable Growth)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 2

Scottish Parliament

Local Government and Regeneration Committee

Wednesday 21 December 2011

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Joe FitzPatrick): Good morning and welcome to the 15th meeting of the Local Government and Regeneration Committee. As usual, I ask everyone to check that they have switched off their mobile phones. I had better check that I have switched mine off—I have.

We have apologies from Kez Dugdale, for whom Richard Simpson is substituting. Richard, do you have any interests to declare?

Dr Richard Simpson (Mid Scotland and Fife) (Lab) (Committee Substitute): Nothing specific in my declaration of interests would apply to this committee.

The Convener: Do any other members want to declare interests?

Kevin Stewart (Aberdeen Central) (SNP): I will declare the usual interest: I am a member of Aberdeen City Council.

Bill Walker (Dunfermline) (SNP): I should do the same: I am a member of Fife Council.

David Torrance (Kirkcaldy) (SNP): I am a member of Fife Council as well.

Mark Griffin (Central Scotland) (Lab): I am a member of North Lanarkshire Council.

The Convener: Okay. Thanks very much.

Our first item of business is to decide whether to take in private items 5, 6 and 7. I propose that we do so. Is that agreed?

Members indicated agreement.

Living Wage Inquiry

10:02

The Convener: Our second item of business is the third and final oral evidence session on our inquiry into a living wage in Scotland. We have two panels of witnesses. Our first panel will focus on whether the procurement process can incorporate requirements relating to a living wage. I welcome Iain Moore, head of the Scottish Government's procurement policy branch; Dorothy Cowie, director of Scotland Excel; and Patrick McGuire from Thompsons Solicitors.

I invite the panel members to make an opening statement on the general issue of the living wage and any difficulties that they foresee.

Iain Moore (Scottish Government): Thank you for inviting me to the meeting. I will keep my opening remarks short, on the basis that the written paper that I submitted in advance of the meeting set out some of the issues associated with making payment of a living wage a criterion in the public procurement process.

I will say a little bit more in general terms about some of the work that we are doing in the Scottish Government procurement directorate. We have in essence three main goals: to achieve value for money for the taxpayer; to maximise economic impact and to make it easier for Scottish companies, especially small and medium-sized enterprises, to bid for work; and to buy sustainably. Good procurement is a balance between cost, quality and sustainability.

I will focus on the policy side of the directorate. We have responsibility for public procurement legislation, and, in particular, the implementation of the European public sector procurement directive through Scots law, and for overarching procurement policy in Scotland.

The "Scottish Procurement Policy Handbook", which sets out high-level procurement policy, contains the details of the governance arrangements and rules that apply to the procurement community in Scotland. It was devised in conjunction with the procurement policy forum, which consists of key stakeholders from across the public sector. The handbook applies to all Scottish public bodies, which must comply with European procurement legislation. However, the application of the policy in individual procurement exercises is a matter for individual bodies, which are, for the purpose of their procurement activities, autonomous.

Public procurement spend in Scotland is about £9 billion per annum. Over the course of the past couple of years, we have worked hard to listen to

the concerns of the private sector, SMEs and the third sector and have reacted to what they have told us about our procurement policies, practices and processes.

That is why, in 2008, we introduced the public contracts Scotland portal, which provides easy online access to contract opportunities. More than 60,000 suppliers have registered, 84 per cent of which are SMEs, and 350 public bodies have placed, between them, in the region of 27,000 contracting opportunities. We are currently working on a standardised prequalification questionnaire to make the process for companies wishing to prequalify for public contracts in Scotland less repetitive and less bureaucratic.

We have published guidance known as the procurement journey and, most recently, the supplier journey, for purchasers and suppliers respectively.

The Scottish Government is continuing to look for ways in which we can improve our processes to ensure both that there are opportunities for SMEs and the third sector in Scotland to compete fairly and equally for public contracts and that we strike the balance between cost, quality and sustainability.

Dorothy Cowie (Scotland Excel): Good morning. I run Scotland Excel, which is the centre of expertise for local government. We are one of the bodies that follow these policies and procedures. We work quite closely with the Government, along with the centres of expertise that represent the other sectors, in trying to shape and influence its policy to meet our members' requirements. We now have all 32 councils on board as members but we operate on the basis that, as Iain Moore said, all 32 are independent and make their own judgments about policies.

We have quite a traditional contract portfolio. Typically, it has focused on the supply and delivery of goods, but part of the business case that was made to develop Scotland Excel was about getting into the higher value, more strategic and more complex areas of procurement. Moving forward, our portfolio will not only change in relation to what it delivers but increase significantly as we get into social care and construction. We have already made quite good inroads in that regard.

Although that is our main business, we also work closely with local authorities to help them with their reform journey. For many of the initiatives that Iain Moore mentioned in his opening statement, we are the conduit between the Scottish Government and local authorities—and the other way round, if you like, as we try to influence the Scottish Government's direction of

travel to ensure that the reform happens effectively.

Patrick McGuire (Thompsons Solicitors): Good morning and thank you for the invitation to attend the meeting. I am a partner at Thompsons Solicitors, the firm that represents the vast majority, if not in fact all, of the country's trade unions. We therefore have considerable experience in trade union-related matters.

Given that, as members will be aware, the living wage is important to trade union colleagues, we have become more and more involved in the debate on it. In that context, I have come to look at the issue more and more closely in recent years. As I have been invited to the meeting to express certain opinions, in addition to having carried out my own research into the living wage—indeed, I have spent many years looking into it—I took the liberty of obtaining an opinion from one of the leading experts in the area, an advocate from the English bar called Professor Christopher McCrudden, whose opinion was given to me only in the last day. Having spoken with him, I am happy to share that opinion with the committee, which I will do after today's evidence session.

In a nutshell, the opinion that I expressed in my written submission, which Christopher McCrudden shares, is that it is possible to introduce a living wage condition in the procurement process via legislation in the Scottish Parliament. My submission and the submission prepared by the Scottish Government procurement directorate are by no means a million miles apart. In fact, the two documents highlight the same issues as being at the heart of the matter. They come down to a fairly small number of pieces of European legislation—the Treaty on the Functioning of the European Union and three directives—and one or two cases, particularly the case of Ruffert, which we will no doubt discuss.

We can explore the issue in more detail but, looking at it in the round, I have come to the view that, provided that the approach to the living wage is done in a specific way and is introduced at a specific point in the procurement process, such an approach can be taken. However, it is important that the policy objectives of any such legislation are clear from the outset and maintained throughout. In that regard, the Scottish Parliament has lots of experience and has treaded lines on many occasions in relation to the Scotland Act 1998 and devolved issues. I suggest that, on the living wage, a similarly clear policy route should be taken, although with an eye to Community law, rather than the 1998 act.

The Convener: Thank you. You say that you will write to us with a copy of that legal opinion.

Patrick McGuire: Absolutely. I will forward it before the end of the week.

The Convener: That would be appreciated.

David Torrance: On the inclusion of the living wage in the procurement process, are the panel members aware of any legal challenges that contractors have made or are in the pipeline?

Iain Moore: I am not aware of any challenges.

Dorothy Cowie: Nor am I.

Patrick McGuire: No. We are here to discuss the law, so policy and politics should perhaps be left out of it, but I know that trade union colleagues have expressed the view that that point is pretty important. Ultimately, if it is decided to introduce a piece of legislation, realpolitik will come into it. Will there be a challenge? Thus far, there has not been one, and I know that trade union colleagues question whether there would ever be one.

Kevin Stewart: I am interested in teasing out the issues around the Dirk Ruffert v Land Niedersachsen case. One opinion is that we should look for a voluntary agreement at some point in the process, although Mr McGuire suggests that a change in the law might be beneficial. I ask the panel members to tease out the issues surrounding that case and to give their opinion on whether it is possible to change legislation here to deal with the issue or whether, as is suggested in the submissions, the approach should be voluntary only.

Iain Moore: My understanding of the Ruffert case is that it is about a public procurement process that sought to include collective agreement as part of the contract. That was challenged on the basis that, although it is possible for measures to be compatible with European law if they are designed and necessary for the protection of all workers—which I understand is why the United Kingdom's national minimum wage is not in conflict with the Treaty on the Functioning of the European Union—in the Ruffert case, the condition applied only to contractors on public contracts and was therefore deemed not to be of universal application. That was the real problem. Patrick McGuire might be able to expand on that, but that is my understanding of where the sticking point came in that case.

10:15

Kevin Stewart: It would be useful if we could hear from Patrick McGuire.

Patrick McGuire: I am happy to oblige. I appreciate that this might lead to a lengthy answer, so feel free to prompt me to move along and accelerate through it if that proves necessary.

However, it may assist if I start at a fairly basic level and then move on to Ruffert so that you can see clearly my view on the matter.

In European law generally and, certainly, in European law on procurement, there are various pieces of legislation that, if they are not absolutely contradictory, certainly have tensions between them. The Treaty on the Functioning of the European Union and various directives contain basic positive and negative obligations that say that a country must not do certain things or that it must do certain things.

The first thing to bear in mind is that there are, in effect, two caveats to those fundamental obligations. First—and, in the context of this discussion, importantly—it is possible to breach, for want of a better word, the fundamental obligation provided that it is justifiable. That is to say that a country can do something that it is obliged not to do, or not do something that it is obliged to do. Therefore, the ability exists to take certain actions that, on the face of it, are in breach of the obligations but can be justified. That has not been fully explored yet but, in many ways, it is what this discussion comes down to. If the living wage policy involves a prima facie breach, can it be justified? My view and that of Christopher McCrudden is that it can.

Over and above those basic obligations, there is a second tier of rules. In our speak, they may be called enabling provisions. That is to say, they permit us to do things over and above the basic, fundamental provisions and to go beyond that which is required. That, also, is at the heart of the matter.

The article about which I am talking, which relates to Ruffert, is referred to in the papers, but I will highlight it again. It is article 26 of the public sector procurement directive—there is a mirror article in the utilities directive, which is article 38—and it comes down to this:

“Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications.”

This is the important point:

“The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”

We must think about the words “social and environmental considerations”. We say that a clause relating to the living wage would fall under that term.

In the Ruffert case, several important matters must be borne in mind that can be distinguished from what we are talking about.

First, the case concerned the treaty and the posted workers directive. Under the posted workers directive, certain obligations are placed on member states in relation to protected workers posted from one member state to another. The obligations include, among other things, a requirement in relation to wages and a minimum wage. It is clear from the directive that there is an obligation on the member state to address that issue through “law”—that is the term that is used. Through jurisprudence, that would be taken to mean regulations, laws or acts of the Administration.

The big difference in the Ruffert case is that the wage that was set and ultimately challenged was not contained in a piece of legislation such as an act or regulations but arose out of a collective agreement between the Government and a particular trade union relating to a particular sector—the construction sector—and, more than that, not even to the entire construction sector, but only to a small part of it.

That is one of the first differences that we have to consider, because what we are proposing is setting a living wage that would be enshrined in legislation. The easiest way of doing that would be simply to amend the Public Contracts (Scotland) Regulations 2006, which would result in a wage set by legislation. Secondly, it would have universal application. In Ruffert, the wage did not even apply to the entire construction sector or to the whole country; it applied only to part of the construction industry and only to certain geographical areas within the member state. We are talking about universal application in the sense that—for the record, the convener is indicating that I should hurry up and I am all but there—the legislation would apply to all workers who obtain work through all public procurement. As far as I am concerned, that would be universal application. There is another debate around whether, even if the primary obligation is taken to be breached, that breach can be justified.

It is important to remember two things about the Ruffert case—I will make this brief. First, all the advocates arguing the point in the Ruffert case accepted—or, perhaps, assumed—that the primary obligation was breached. There was no argument at all about whether it was breached; in fact, whether it was breached is not at all clear. I suggest that empirical evidence should be obtained to see whether the introduction of a living wage would be empirically discriminatory against employees in other member states. That was assumed in the Ruffert case; I form no view on it one way or another because I do not have the empirical evidence, but I strongly suggest that that be taken forward.

The second thing is that, even if there is a fundamental breach and even if the empirical evidence does not support the position, I strongly believe that the breach can be justified.

Margaret Mitchell (Central Scotland) (Con): I thank all the panellists for their written submissions, which were very helpful.

I address myself to Patrick McGuire in the first instance. Going back, I understand that the Ruffert case can look at legal precedent—that it can affect the directives—but is there not a hierarchy here? If we are looking at the principles of the treaty, one of which is the fundamental principle against discrimination, is that not a much higher authority than even a directive? It would be interesting to see how that plays out in legal terms. Will the panellists, starting with Mr McGuire, give their views on that?

Patrick McGuire: The hierarchical picture that you paint is absolutely correct, but as I said earlier we do not have the evidence to say that a living wage would discriminate against workers in other member states. The assumption was made by everyone in the Ruffert case that it would be discriminatory, but there is no evidence one way or the other. That is why I say that, if we do anything, we should get the evidence and look at it.

As regards the hierarchy, member states always have the opportunity to justify why they are stepping beyond one of their obligations. In the Ruffert case, an attempt was made to argue that that was justified, but it came down to the fact that the process was not done properly or well. To me, Ruffert was a blueprint for what should not and cannot be done, but the corollary also holds true—it could be a blueprint for what can be done, if the issue is approached correctly. That involves stating the policy from the outset. The policy and the justification for it come down to this: if a decision were made to introduce a living wage in procurement legislation, it would centre on the protection of workers.

When we talk about the protection of workers, it is important—

Margaret Mitchell: I will stop you there, because I have a feeling that we are about to get a long explanation of an issue that we have already gone into.

Is it not the case that implementation of a living wage would amount to the protection of workers only if it was not a restriction on the freedom of suppliers to provide services? That goes back to the fundamental theory that introducing the living wage in the way in which you suggest—universally—would be inherently discriminatory, which is backed up by the Confederation of British Industry Scotland in its letter to the committee. I do

not know whether you have seen that letter, but it certainly raises serious concerns about how the universal application of a living wage would play out for local businesses and how it would affect their ability to have the freedom to be suppliers to the public sector. Is that not the nub of the issue? Should we not concentrate on that, instead of relying too much on one case, which, in the hierarchy of legal priorities, might be pretty low down the scale?

Patrick McGuire: I would make several points in response to that. First, in the letter to which you refer, the CBI is promoting a policy line, for obvious reasons. It is not submitting a legal argument and it is certainly not addressing matters in a legal fashion.

As regards your point about the legal hierarchy, if what you say is correct and the hierarchy is as rigid as you say, member states would never have the ability to step outside it or to justify breaching fundamental obligations. However, the hierarchy is not that rigid. Member states are entirely entitled to step beyond the basic obligations, provided that that can be justified. In my view, the position is that, legally, it can be justified. If we move into the realms of real experts, rather than the CBI, I have an opinion that I will distribute, which is from the man who wrote the book—he is the pre-eminent expert on the issue—who agrees with that position.

Margaret Mitchell: Perhaps the other panellists could comment.

Iain Moore: You raise a valid point when you refer to discrimination, which is one of what we refer to as the overarching principles that all public bodies have to take into account in their procurement activity, along with equal treatment of suppliers and proportionality. Non-discrimination is something that we must always consider.

Interestingly, when the European Commission gave a view on the incorporation of a living wage in public procurement processes, it said that a living wage would appear to count among the contract performance clauses that may be included in public procurement contracts. Quite tellingly, however, it went on to attach two caveats to that. First, it said that such a clause could apply only to the contract workers who were working directly under the public contract and not to all the workers. Secondly, it said that such a clause must not be directly or indirectly discriminatory. It is not very clear what that would mean in practice. That is why the Cabinet Secretary for Infrastructure and Capital Investment has written to the Commission to ask it to explain the circumstances in which it believes that it would be possible to incorporate a living wage clause without being directly or indirectly discriminatory.

Margaret Mitchell: Thank you—that was helpful.

10:30

Dorothy Cowie: I have nothing much to add to that. We take our advice and guidance on the legalities from the Scottish Government. I suppose that I am a poor practitioner who has to juggle all those tensions that Patrick McGuire outlined, and try to make sense of it all without taking too many risks. I know that the evidence that the committee heard last week was about whether the idea is legal and whether we can or cannot do it. Today you are hearing why that is the situation.

Dr Simpson: I hope that members will bear with me, because I have come late to the debate. The subject is of particular concern and interest to me, not least because a living wage promotes good health.

The papers seem to discuss universality—the more universal we make the living wage, the more likely it is to be okay; we would not be discriminating, because all contracts would contain a living wage. Do the panellists agree that that is confirmed by the fact that the minimum wage is not seen as discriminatory, although many countries do not have a minimum wage? If the living wage is made universal, it will not be a problem. However, the European response, to which Mr Moore has just referred, says that if we use a contract performance clause to implement a living wage, it must apply only to the workers who will be involved in that particular tender.

I would like the panellists to give us some help with the seeming paradox that if the Scottish Government legislated to say that there should be a living wage for all procurement, that degree of universality would make it more likely that the living wage would get through and it would be better than trying to apply it to individual contracts, which is what the other section of the European Commission's response says. Will the panellists comment on that? At the same time, will they indicate if they think that public health is of any importance or relevance? Under other European law, introducing discriminatory legislation on issues such as the minimum unit price might be okay if it is not seen as disproportionate or discriminatory.

Patrick McGuire: I am happy to be the first to answer that. Dr Simpson has pretty much hit the nail on the head of my position and that of the advocate to whom I have already referred. In your narrative lies the answer that using legislation to apply the living wage to all public procurement will provide universality, with the caveats that are highlighted in the EC's response.

I would like to raise one issue in relation to that response, which has been helpfully set out in the submission from the Scottish Government's public procurement directorate. The response is in two parts. The first question is whether the living wage can be required under legislation, and the second is whether it can be promoted in an informal manner. The EC's responses are found under the second heading of the directorate's submission but it is as important, if not more so, to consider it under the first heading.

Article 26 of the EU public procurement directive, to which I referred earlier, is at the heart of the issue because it concerns social and environmental considerations. If the legislation on a living wage also has those considerations, it would, in our view, be acceptable under competition law. In many ways, the European Commission has already given us the answer that, with the two caveats that it has set out, the living wage can be viewed in that way and it can be done.

Dr Simpson: It is just a matter of having the political will to do it.

Patrick McGuire: I suggest that, at this stage, it is entirely a matter of political will. I do not think that we will ever have an absolute answer. What is the point in going back time and again when we have more than enough of an answer from the EC? It is now a case of whether we are brave enough to do it.

Iain Moore: Dr Simpson's point is the same as the point that Thompsons Solicitors rehearsed. I am grateful that they have agreed to share their paper with us, and we will of course study it.

There is one other article—we have not really touched on it—that we would need to consider. The question is whether what we are doing could breach article 56 of the Treaty on the Functioning of the European Union—in essence, the right for companies to set up and operate businesses—and could be deemed to discriminate in some way against companies from outwith Scotland that come here to set up businesses. A number of issues have still to be considered.

Kevin Stewart: I will go back a little bit, to the Dirk Ruffert v Land Niedersachsen case. It was mentioned that the set-up was not even a piece of legislation, but a Government agreement with a small part of the construction industry. Was that a federal German Government deal or a deal by Land Niedersachsen only?

Patrick McGuire: I do not have the answer to that.

Kevin Stewart: Perhaps we need to look at the situation more in the round, as that question is entirely relevant. I have difficulty in some respects

with the fact that we keep referring to the member state. The Scottish Government or the Scottish Parliament may choose to do something, but Scotland is not a member state of the European Union and would be classed in the same vein as Land Niedersachsen.

We need to find out where that regulation comes from. It may well be worth studying that case in more depth, and getting someone from the Commission to address the committee on that point. I should say, of course, that I wish that Scotland was an independent member state, and then we would not have to deal with that issue.

The Convener: Does anyone want to comment on that?

Patrick McGuire: I think that the position is different, in so far as the Ruffert case was an agreement with a trade union in a particular sector. The difference between that and the picture that Mr Stewart has just painted relates to how we would justify what we are talking about doing, and how we would justify a prima facie breach of article 56—article 49 as was—of the treaty.

There are three prongs to the justification. First, there is the overriding principle—why we are doing it—which, most powerfully, comes down to protecting workers socially and protecting their dignity. It is important to bear in mind when we talk about the tensions between the approaches of the European Community that the Community is giving the dignity of workers more and more influence and weight, so that would be a powerful justification.

Secondly, we must consider whether the approach that is taken is justifiable to achieve that aim. Is a living wage a justifiable way of achieving or promoting the dignity of workers? Thirdly—to answer Kevin Stewart's point—we would have to show that it is necessary and that there is no other way to do it. That is the devolution point—is it necessary? We would have to consider the Scotland Act 1998 and its schedules. The minimum wage is irrevocably reserved to Westminster, so Scotland can do only what it can. At present, the most that Scotland can do is to set a living wage rather than a minimum wage, so when we talk about what is necessary, that is why: it is as much as Scotland can do.

Kevin Stewart: We can go over this ground but until we know about the Niedersachsen situation and what this case actually means over there, I do not think that we can make a judgment. Like most of my colleagues around the table, I would like a living wage to be introduced but it has to be done properly and without challenge. As far as I am concerned, today's evidence has opened an

entirely new can of worms and I think that we need to study the Niedersachsen experience a bit more.

Margaret Mitchell: Let us suppose that we were to adopt the living wage and that the scenario described by Iain Moore, in which the involvement of UK companies in competing for contracts might affect employment law, were to play out. Given that employment law is a reserved matter, we would, in effect, be trying to alter a policy that is reserved to Westminster. Could you comment on that?

Iain Moore: You have identified one of the key issues—employment law is a reserved matter. If we are seeking to use public procurement processes as a means of ensuring that suppliers to the public sector pay a living wage, a question remains about the extent to which we can do that through policy or legislation. We do not yet have all the answers about whether it would happen through policy, hence our letter to the Commission. We need to do some more research into exactly what powers we have to introduce and mandate the living wage as part of a public procurement process.

Patrick McGuire: I am quite clear that such a move will not trigger that issue of the reserved nature of employment law, because it is all about the remedies that are pursued. What happens if a company that successfully wins a contract and ought to be paying the living wage does not? We suggest that the devolution problem can be avoided if—sadly—the individual workers affected do not have the right to take the employer to task through an employment tribunal or other means and insist that they pay the living wage. Instead, it would be an inter partes issue between the Government or the tendering state and the party that wins the contract. It does not impact on employment law because we are not changing, improving or impacting on individual workers' individual rights. From the perspective of remedies, they would have no more power than they ever had—which is why employment law is not triggered and why we come back into the realms of political will.

Margaret Mitchell: But Mr Moore's scenario related to a UK company and the fact that different employment regulations would apply to workers in England than to workers elsewhere.

Patrick McGuire: No, there would be different—

Margaret Mitchell: I do not think that we are going to agree on this, Mr McGuire. The beauty of legal opinion is that it differs. I suspect that we are going to get more such opinion on this issue, but we are quite clear where you stand.

I want to move on and explore article 26 of the procurement directive, which says:

“The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”

Let us look at some of those “social ... considerations”. We are certainly looking at the living wage with regard to private sector companies contracting for public sector work but does barring such companies from tendering because they simply cannot afford to pay the living wage not impact on fairness and private sector workers' rights? Mr McGuire might well be dismissive of the CBI letter, but it sets out hard facts and the practical concerns of local businesses on the ground about the impact of this move at a time when these people are struggling to keep their jobs and pay their bills and rent.

I want you to answer this question, because in your submission you said that there was a possible defence in article 153 of the Treaty on the Functioning of the European Union. You said:

“Article 4 of the Council of Europe's European Social Charter also specifically protects the right to fair remuneration.”

You are arguing from the perspective of public sector employees, but what about people in the private sector who would not even be on the starting block, because their employers simply cannot afford the living wage? That takes us back to the freedom of suppliers to provide services. Given the dire economic straits that we are in, there is a much bigger picture. The living wage is something that we would all aspire to have in the good times and we hope to work towards it, but we are not in the good times, sadly.

10:45

Patrick McGuire: First, public procurement goes considerably beyond the public sector. Private companies regularly bid for and succeed in winning public procurement contracts. My argument is in no way aimed at promoting the rights only of local government employees—

Margaret Mitchell: Sorry to interrupt you, but you probably misunderstood me. I was talking about private companies. Many such companies could be excluded from tendering because of a living wage condition in the contract. That was my point.

Patrick McGuire: Noted. Again, we have got into the realms of policy and politics. It is for the Parliament to form a view on whether that issue is important or whether it is more concerned about the dignity of workers. That is for you, not for me, as a lawyer—

Margaret Mitchell: When you say “workers”, do you mean private sector workers or just public sector workers?

Patrick McGuire: I mean absolutely all workers—

Margaret Mitchell: In that case you have made my argument.

Patrick McGuire: I do not think that I have. I am happy to discuss policy and politics—I am as much a political animal as anyone else is—but it is not for me to do that in this evidence session. However, if a private company wins a contract post procurement and its workers are earning the living wage, that will be wonderful and will certainly improve the workers' dignity, will it not?

Margaret Mitchell: What about companies that are at the margins? What about companies that are paying the minimum wage and for whom paying the living wage would be the burden that broke their back and added people to the dole queue? What about them, Mr McGuire?

Patrick McGuire: Companies will set their own rates, depending on the conditions. One would hope that if company A can tender at a rate that will be profitable while paying the living wage, company B will do the same. If we look at company B, the company that you are concerned about—*[Interruption.]* You have thrown your hands up in the air, but I have not finished giving my answer. Are the directors of company B taking more profit than they ought to do? Did they not put enough money in the bank in the good times? Who knows—

Margaret Mitchell: Do they have overheads that mean that paying the living wage will be an additional burden?

Patrick McGuire: The suggestion—

Margaret Mitchell: There are real, practical considerations—

The Convener: I think that you are getting into a bit of a debate here—

Patrick McGuire: I would like to finish my point. The suggestion that all private companies will not be able to compete for contracts is nonsense, plain and simple.

Margaret Mitchell: That is clearly not what I said. You may choose to misrepresent me. Some companies might not be able to compete. That is the point. We are talking about all workers, not just a certain section.

Dr Simpson: I have a feeling of déjà vu. That was the argument that the Conservatives made when they opposed the minimum wage. It is clear where the member is coming from—it is the idea that people should be allowed to compete on the basis of exploiting workers rather than paying them a living wage.

I have been trying to think of examples of a requirement in relation to wages, apart from the universal minimum wage. The Scottish Agricultural Wages Board sets a wage that is different from the minimum wage. Do the witnesses have comments on that, or do you want to submit comments to the committee later?

Iain Moore: I am afraid that I cannot comment, because I have no knowledge of the agreement. Sorry.

Dorothy Cowie: I am in the same boat.

Patrick McGuire: I am well aware of the situation. Dr Simpson is correct. The wage rate is set centrally and is significantly higher than the minimum wage. Of course, that is the model that lies behind representations by Unite to the committee, for example, on the creation of sectoral bargaining units up and down the country—the union is firmly behind such an approach. That is another way of skinning this particular cat.

The Convener: If members have no more questions, I thank the panel.

10:49

Meeting suspended.

11:02

On resuming—

The Convener: I welcome the second panel of witnesses. John Swinney, Cabinet Secretary for Finance, Employment and Sustainable Growth, is accompanied by Scottish Government officials Iain Moore, head of the procurement policy branch—welcome back—and Calum Webster, policy officer for employability and tackling poverty policy. I invite the cabinet secretary to make some opening remarks.

The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney): I welcome the opportunity to give evidence to the committee for its inquiry into the living wage in Scotland. The Government's purpose is to focus Government and public services on creating a more successful country with opportunities for all Scotland to flourish through increasing sustainable economic growth. We believe that the levels of poverty and inequality in Scotland are unacceptable and our efforts to address low pay and in-work poverty are an important part of our work in tackling this significant issue, but the areas in which we can act are limited by the reservation that was applied to the national minimum wage and employment issues as part of the determination of the Scotland Act 1998.

We have demonstrated our full support for the principles of the living wage in Scotland and are leading by example. We implemented the living wage through our Scottish public sector pay policy in 2011. We are raising the rate to £7.20 from April 2012 in line with the recent uprating that the Scottish living wage campaign announced.

I welcome the fact that an increasing number of local authorities are adopting the living wage. As the committee will know, local authorities are independent, autonomous bodies and as such decide on their own terms and conditions of employment and set their own rates of pay. It is therefore wholly a matter for each local authority to consider its own circumstances in determining whether to implement the living wage, and rightly so.

We know that problems of in-work poverty have persisted over the past decade in Scotland. Work is still the best route out of poverty, but we have to work very hard with the powers that we have to ensure that work genuinely provides people with a route out of poverty. To that end we are striving to ensure that the workforce in Scotland has the abilities and skills to obtain and retain good-quality, well-remunerated employment. We are also doing all that we can within the powers available to us to ensure that Scotland is a place where companies can flourish and are able to choose to pay a living wage to their staff.

I have outlined the Scottish Government's support for the principle of the living wage, and we are leading from the front by paying our own employees a living wage. However, we should not lose sight of the fact that the use of public procurement as a means of promoting the living wage has wide implications that go beyond employment issues—such as the cost and practical implications for private sector and third sector organisations competing for public sector contracts. The committee has been made aware by evidence from other witnesses that European Union law limits the extent to which public bodies can require contractors to pay their staff the living wage as part of the procurement process. Developments in European case law have raised questions as to the extent to which the living wage can form part of the public procurement process. My colleague, the Cabinet Secretary for Infrastructure and Capital Investment, has written to the European Commission seeking its view and its advice—in the hope that we can all be clearer on this question. When it comes to hand, we will of course share the Commission's response.

We are working to maximise the contribution of public procurement spending to the Scottish economy by providing training and apprenticeship opportunities, by encouraging innovation, and by helping Scottish firms—in particular, SMEs—to

compete effectively for contracts. We are committed to maximising the social and environmental impact of public procurement activity in Scotland. That will be the focus of the forthcoming bill on sustainable procurement, on which we will undertake extensive consultation with stakeholders.

I hope that I have set out some of the Government's thinking on this important question, and I would be happy to answer questions from the committee.

Bill Walker: I am very much in favour of the living wage—either now, or as an aspiration in some areas. It is to be welcomed.

The Scottish Government has experience of the issue, so I will ask two questions about the cost of the living wage. Cabinet secretary, you are known as a master of numbers; can you give us an idea of the benefits that may come to the Government from applying the living wage? What has been the percentage increase to the total staff bill in the Scottish Government as a result of the implementation of the living wage?

John Swinney: The additional cost of paying the living wage for what I would call the central Government community—the areas of pay policy for which the Scottish Government has absolute responsibility—is £1.707 million. That is the cost of uprating staff to the living wage.

The economic implications of the living wage manifest themselves, as regards the public purse, through increased tax contributions by individuals, increased national insurance contributions, reductions in income-related benefits, and through tax credits. There are clearly benefits to the public purse. However, I point out to Mr Walker that all those benefits accrue to the United Kingdom Government and cannot flow into the funds available to the Scottish Government. That is because of the way in which the block grant operates.

If individuals receive higher remuneration, their disposable income will increase. As a consequence, they will have greater spending power, which must clearly benefit the Scottish economy.

Bill Walker: You gave an absolute amount for the cost of implementing the living wage, but what is that as a percentage of the total Government wage bill? I imagine that the figure is tiny.

John Swinney: Yes. The estimates that we had at the time of implementation—the policy has of course been implemented—were in terms of full-time employees, although I do not have an absolute split between devolved and reserved central Government employees. However, 0.8 per cent of full-time employees and 1.9 per cent of

part-time employees had to have their salaries increased.

The split between devolved and reserved employees is roughly 68 per cent devolved and 32 per cent reserved. I would not want to apply those percentages absolutely across those numbers, but I think that they give the committee a shape for the extent of the issue that has been dealt with.

The Convener: Did the Scottish Government experience any issues regarding single status or equal pay when it introduced the living wage?

John Swinney: The Government would have had to be mindful of that. Clearly, that factor can affect the balance of remuneration between different employee groupings within salary scales. There has been no challenge or counter-presentation to the implementation, but clearly the Government must be mindful of that issue, as must any other public authority.

Dr Simpson: Women tend to be paid lower wages and I am interested to know whether the cabinet secretary has any information on the proportionate effect of the living wage on women as opposed to men.

John Swinney: I am not sure whether I have a gender breakdown in front of me today, Dr Simpson, but I will certainly investigate whether we have a gender breakdown on that data. I can supply it to the committee if we have it.

Dr Simpson: Thank you.

The Convener: That would be useful. We got evidence last week from officials from the Convention of Scottish Local Authorities and we also got evidence from London that showed significant differentiation according to gender.

Margaret Mitchell: Can you comment on the potential for amending regulation 39 of the Public Contracts (Scotland) Regulations 2006 to enable a requirement that all contracting authorities stipulate payment of the living wage as a condition for performance of the contract? Would you be in favour of that?

John Swinney: I certainly think that there is a strong argument for that. As I said to the committee, I support the living wage and believe that it should be applied if it can be deployed in a sustainable way. There is undoubtedly a legislative vehicle that could be used to require contractors who are responsible for undertaking public sector contracts to pay a living wage. We would have to be confident, however, that, in terms of the scrutiny of procurement activity by the European Union, that approach would be deemed to be consistent with our EU procurement obligations. The statements from the European Commission to date have not given us that clarity. The purpose of the letter that Mr Neil has written

to Commissioner Barnier is to establish a much clearer interpretation of that point.

Margaret Mitchell: I want to tease out why that is the case and consider the practical implications of the discrimination point to which you referred and which Mr Neil is raising with the Commission with regard to treaty principles. I also want to consider the restriction on the freedom of suppliers to provide services. I do not know whether the cabinet secretary has seen the CBI Scotland letter to the committee, which recommends

“a highly cautious approach to the uprating of the National Minimum Wage”.

It states that the introduction of a living wage would have a greater effect on young people and their interaction with local businesses. What are your views on that, cabinet secretary? Do you, too, have reservations and concerns and feel that the living wage could have an adverse impact? We are talking about political judgments and—despite what Dr Simpson appears to believe—we all aspire to people receiving a living wage. However, we have an unprecedented legacy of debt and these are austere times. What we would like to implement and what would be in the best interests of the economy may be two different things.

11:15

John Swinney: I do not feel the need to be cautious about decisions that the Government has taken in applying the living wage to the organisations for which we have responsibility. Our decisions have been entirely sustainable. In the spending review, I announced a decision to uprate the living wage to £7.20 an hour, and that decision was taken in the context of the sustainability of public finances. I have no uncertainties about that whatsoever.

As I said, there are different elements to the rolling out of the living wage to other sectors. In the local authority community, each local authority must determine the extent to which it considers the policy sustainable. A number of local authorities have already gone down that route, judging the payment of the living wage to be sustainable, and I respect their right to do so. In the private and third sectors, organisations must make their own decisions on the sustainability of paying the living wage, taking their financial health into account.

There is uncertainty in European procurement legislation. On the one hand, EU law precludes—rules out—requiring, in a procurement process, the payment of a living wage. However, on the other hand, public organisations can make additional requirements of contractors in the procurement process. Some of those requirements can relate to the terms and

conditions of the engagement of personnel. Those two elements mean that we are not sufficiently clear as to whether the living wage can be part of the procurement process—hence the letter that Mr Neil has written to the commissioner. The Government believes that this issue is important and that we should seek clarity and consider the implications for our procurement regime.

Margaret Mitchell: Is introducing the living wage via conditions not, *prima facie*, almost the same as including it in the actual tender document?

John Swinney: If there were no facility for additional requirements to be applied to the procurement process within the context of European law, I would accept Margaret Mitchell's point. However, that facility exists. In essence, two instruments of the European legislative regime are not sufficiently clear to allow us to come to a judgment. We need clarity before we can proceed, and clarity is exactly what Mr Neil is trying to obtain.

Kevin Stewart: I do not know whether I am an anorak or a masochist, but I have undergone some European procurement training. It was, at various points, baffling to say the least. When does the cabinet secretary expect Mr Neil to receive an answer from the Commission? Have any other bodies, such as COSLA, approached the Commission, or anyone else, for advice on procurement rules?

John Swinney: I cannot give Mr Stewart any therapy for his European procurement training; nor can I offer him any certainty as to when we will receive a reply from the Commission. The letter has been issued to the Commission, and we hope to receive a response as soon as is practicable.

I am not aware of any additional representations that have been made to the Commission by other public bodies in Scotland, but a number of local authorities clearly have an interest in the matter, because they are paying a living wage and I suspect that they have the same aspirations as the Government to take forward the issue as effectively as they can.

Kevin Stewart: What, if any, discussions has the cabinet secretary had with COSLA about the implementation of the living wage by local authorities?

John Swinney: I do not recall having any specific discussions with COSLA on the issue, although I will have the record checked to determine whether that is the case. The reason for that is that, as I have set out publicly on countless occasions, I respect the autonomous nature of local authorities in Scotland, which are free to determine their own approach to pay and remuneration.

I have certainly discussed pay and remuneration issues with COSLA on different occasions and I have set out privately to COSLA my developing thinking on issues related to pay policy. As part of those discussions, I may well have set out to COSLA the Government's intentions prior to committing ourselves to the payment of a living wage. I have certainly made no attempt to compel local authorities to follow the direction taken by the Government.

Mark Griffin: What is the cabinet secretary's opinion on the possible creation of a living wage unit in the Scottish Government? How could it measure the impact of the introduction of a living wage on the reduction of in-work poverty? How could it have a positive impact on the Government's anti-poverty strategy?

John Swinney: I know that the issue has emerged as a point of discussion and dialogue with many witnesses during the committee's evidence sessions. I do not want to be unhelpful, so I will set out some of the reasons why I take the view that I take, which is that I do not think that an independent living wage unit is currently required within the Government.

First, when I prepared to come to the committee today I sought advice from different areas of Government to equip me to answer the committee's questions—the committee can judge how effective that process was. I took advice from the procurement division, the employability unit, the pay policy team, the finance directorate and some of our third sector advisers into the bargain. I make that point to illustrate that the living wage is not a compartmentalised issue but one that spans a range of areas in Government. The challenge for us is to ensure that all those areas of Government point in the same direction to support the ministerial direction on the application and implementation of a living wage and that different strands of Government reflect that in their choices, approaches and priorities. The establishment of a living wage unit seems to be a compartmentalised solution to an issue that spans a range of Government departments.

I have also looked at living wage units in other jurisdictions and authorities. The Greater London Authority has been cited as one example. I do not think that the arrangements that are in place there add a great deal to the focus that we have brought to our teams' priorities spanning a range of areas in Government in taking forward our approach. For that reason, I am not persuaded of the merits of establishing an independent living wage unit, but I assure the committee that the living wage is a significant ministerial priority that will be taken forward as part of the Government's broad agenda.

Bill Walker: When the possibility of a living wage unit was mentioned to us some time ago, I thought that it was a good idea to have someone pull everything together, look after things and possibly try a bit of enforcement and so on. Some witnesses even told us that it would not be particularly expensive to implement. Does the cabinet secretary agree that, to borrow a comparison from education, this sort of thing should be mainstreamed and that it should be a given? The living wage is being implemented for Government staff and I hope that it will be implemented for others throughout society soon. Do you agree that the living wage should be mainstreamed and that compartmentalising it into a particular unit would not be helpful and could be counterproductive?

John Swinney: That is essentially the point that I am making. There are a number of areas of Government from which I would need to take advice to advance this issue. It would be no different for an independent living wage unit—it would have to do exactly what I have had to do to prepare for this meeting.

The key challenge for Government—this is the point that I made to Mr Griffin and to Mr Walker—is that its priority and policy focus must be reflected in what the different areas of Government take forward. I am confident that that is the case. I am also confident that we will have the analytical tools to ensure that we are aware of the level of participation in connection with the living wage and its application in Scotland.

Mark Griffin: The aspiration for me is for the public sector to drive the living wage right across Scotland and for the private sector to start taking it up as well. One of the benefits of a living wage unit that I see is that it could do analysis of the benefits of a living wage in the public sector and possibly in public sector procurement, such as those that we heard about from previous witnesses, including the impact on sickness absence and employee turnover. That analysis could then be used as a method of persuading the private sector to adopt the living wage as well.

John Swinney: I said at the outset that I did not want my answers to sound in any way obstructive, because all the analytical work that Mark Griffin talks about can be undertaken by Government. There is political will to exercise leadership in this respect. The Government believes that it has done so so far, but it is for others to judge whether that is the case. We can then take forward that agenda, drawing on the expertise in a number of different areas that we require to draw on to make sure that our policy approach on this important question can be as effective as possible.

Dr Simpson: If the response from the European Commission is positive and clear—that is a fairly

big if—and permits public procurement contracts to include a living wage requirement, do I take it from the cabinet secretary's remarks that he would want to pursue that fairly actively?

John Swinney: Yes.

Dr Simpson: The CBI's letter to us, which has to be taken seriously, is particularly concerned about youth employment. There is already an area where there is a differential between the minimum wage and the wage paid to young people: the Scottish agricultural wages board has set a different minimum wage, which applies to young people. I am not looking for an immediate response from the cabinet secretary but has anyone looked at whether there is an effect on youth employment because of the agricultural wage? It is not like the minimum wage situation in which someone younger is not paid as much. As I understand it, the agricultural wage is a set one of £6 something-or-other, and it applies to everyone whether they are 16 or 60.

11:30

John Swinney: I am not aware that any analysis has been undertaken in that area but I will explore the point and reply to the committee.

I have not seen the CBI letter that came to the committee this morning. We have to take account of representations of that nature but we also have to look for the best mechanisms for stimulating and encouraging the development of higher-paid employment in Scotland to ensure that we improve individuals' opportunities and life chances and, as a crucial consequence of that, have a beneficial effect on their living standards and spending power. Of themselves, those are significant contributors to the enhancement of our country's economic performance.

Dr Simpson: Cabinet secretary, we are clearly as one on that.

I appreciate that you have not seen the CBI letter, but it says that the impact of a living wage

“would fall most heavily on young people, with international evidence showing that they face disproportionate exposure to the negative employment effects of a minimum wage.”

It also quotes some research from the Low Pay Commission report of 2011. I wonder, however, whether that is missing the point. Other mechanisms for supporting employers who are taking on young people could be used to offset any introduction of the living wage when it has such beneficial and positive effects in other directions.

John Swinney: If I may say so, it sounds as if the analysis in the CBI letter is rather compartmentalised. It seems to think that it is purely and simply an issue about the living wage

and does not look at some of the broader issues that might well be associated with that, not least of which is the enhancement of the spending power and living standards of young people, and their ability to make independent decisions on their own to make an economic contribution.

If we take a compartmentalised view of these questions, there is a danger that we will not properly assess the full range of issues and benefits that could arise as a consequence.

Dr Simpson: At the moment, the procurement system includes the concept of best value. Is there room for manoeuvre within that such that firms that are on prequalification lists could have a star against them if they introduce the living wage, because they would then be providing best value for the economy in Scotland as well as helping with the dignity and protection of workers?

John Swinney: One of the great mistaken beliefs about best value is the belief that it is about being the cheapest. That is expressly not what best value is about. Dr Simpson is moving into the correct territory when he talks about the purpose of the best value assessment being to consider a range of factors, not just price. Of course, price is important and it is a key driver of value, but if we are in pursuit of best value, we should properly and fully consider a range of other factors in that process.

That takes me almost full circle back to where I started with Margaret Mitchell on the advice that we are seeking from the European Commission. Under our current procurement regime, we can judge between one company and another and base that judgment on a variety of indicators that we consider to be important for the prequalification process for public sector contracts. Under European law, we are free to make those judgments just now; however, we are unclear as to whether that extends to questions such as the living wage, and the point of Mr Neil's letter was to seek that clarity.

Kevin Stewart: I wonder whether I can tease that out further. I am interested that the cabinet secretary has raised the issue of best value because I think that a lot of folk out there think that that is all about money. Does the power of wellbeing fit into this situation? It could be argued that providing a living wage would improve the wellbeing of not only the folks receiving it but the entire community.

John Swinney: That strikes me as a material consideration in the process. As I said to Dr Simpson a moment ago, we can—and do—apply a whole range of qualifications and factors to the public procurement process and other public bodies do likewise. However, we will keep coming up against the question whether the application of

the living wage is consistent with European law. Whichever way we look at the issue, we repeatedly come back to the need for clarity on that.

Mr Stewart, though, is absolutely right. We can consider and reflect on a range of material factors in determining the correct approach to take to procurement and the power of wellbeing will undoubtedly be one of them.

Margaret Mitchell: Taking into account all the other factors that you have mentioned, do you agree that the Scottish Government's priority is—and must be—to maximise employment opportunities?

John Swinney: Yes. The Government has made it crystal clear that we face a very difficult situation in the labour market. We had material this morning from the Scottish Trades Union Congress about the scale of the employment challenge for those in the long-term unemployed category. That is one way of looking at the problem; it is certainly a concern, but there are many other ways of looking at it. The Government has focused on trying to maximise employment opportunities for individuals in Scotland. The employment rate in Scotland is higher than it is in the rest of the UK, although in my view it is not high enough. Unemployment levels are too high, and the Government will continue to strive to support the development of new employment opportunities for our citizens.

The Convener: Members do not have any more questions. Do you wish to make any final remarks, cabinet secretary?

John Swinney: No, convener.

The Convener: I thank the cabinet secretary for his evidence.

11:38

Meeting continued in private until 12:06.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Members who wish to suggest corrections for the revised e-format edition should e-mail them to official.report@scottish.parliament.uk or send a marked-up printout to the Official Report, Room T2.20.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by RR Donnelley and is available from:

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN

Revised e-format available
ISBN 978-1-4061-8065-7

Printed in Scotland by APS Group Scotland