



INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

AGENDA

2nd Meeting, 2014 (Session 4)

Wednesday 22 January 2014

The Committee will meet at 10.00 am in Committee Room 1.

1. **Housing (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Rosemary Brothie, Policy Manager, Shelter Scotland;

David Bookbinder, Head of Policy and Public Affairs, Chartered Institute of Housing in Scotland;

Andy Young, Policy Manager, Scottish Federation of Housing Associations;

Alan Benson, Director, Glasgow and West of Scotland Forum of Housing Associations;

and then from—

Paul Brown, Chief Executive Officer, Legal Services Agency;

Michael Clancy, Director of Law Reform, The Law Society;

Garry Burns, Prevention of Homelessness Caseworker, Govan Law Centre.

2. **Procurement Reform (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

ICI/S4/14/02/A

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Clerk to the Infrastructure and Capital Investment Committee
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The papers for this meeting are as follows—

Agenda Item 1

Housing (Scotland) Bill - Background Note

ICI/S4/14/02/1

PRIVATE PAPER

ICI/S4/14/02/2 (P)

Agenda Item 2

PRIVATE PAPER

ICI/S4/14/02/3 (P)

[Letter from Deputy First Minister, 31 December 2013, providing further information on the Procurement Reform \(Scotland\) Bill](#)

[Copy of letter from Cabinet Commissioner Michel Garnier, European Commission to Scottish Government on living wage issues related to the procurement Reform \(Scotland\) Bill](#)

Infrastructure and Capital Investment Committee

2nd Meeting, 2014 (Session 4)

Wednesday 22 January 2014

Housing (Scotland) Bill

Introduction

1. On 21 November 2013, the Scottish Government introduced the Housing (Scotland) Bill. The Bill and supporting documents are accessible at the following link:

[Housing \(Scotland Bill\)](#)

2. The Bill was subsequently referred by the Parliamentary Bureau to the Infrastructure and Capital Investment Committee as lead Committee at Stage 1 of the scrutiny process.

Infrastructure and Capital Investment Committee consideration

3. The Committee considered and agreed its approach to the scrutiny of the Housing (Scotland) Bill on 18 December 2013.

4. The ICI Committee's call for views opened on 20 December 2013 , and closes on 28 February 2014, full details can be found at the following link:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/71398.aspx>

Written submissions

5. Written submissions from CIH (Scotland), Shelter Scotland and the Legal Services Agency, who will give oral evidence to the Committee on the Bill on 22 January, are attached at **Annexe A**.

Oral evidence

6. The Committee took oral evidence on the Bill from Scottish Government Officials on 15 January and the Official report for this meeting will be available on the Committee's [web pages](#) from Monday 20 January.

Next steps

7. The Committee will take further oral evidence from housing sector stakeholders at Stage 1 throughout January, February and March 2014, and is expected to conclude with evidence from the Minister for Housing and Welfare on 12 March 2014.

Steve Farrell
Committee Clerk
17 January 2014

ANNEXE A**CHARTERED INSTITUTE OF HOUSING (SCOTLAND)****WRITTEN SUBMISSION**

A tabular summary of CIH Scotland's provisional views on each of the main measures in the Bill is attached in the second part of this submission. Our Board is meeting in early February to consider the measures in detail.

In December we published a detailed briefing on the Bill, which can be seen [here](#)

To complement the summary table, below we make some general comments on the Bill and then highlight a handful of areas on which we are especially keen to highlight our views to the Committee.

General comments

Overall there is much to welcome in this wide-ranging Bill. As a member of key Scottish Government working groups, CIH Scotland has been closely involved in the development of some of the main provisions, particularly in relation to social sector allocations and tenancies and the private rented sector.

The social sector allocations and tenancy changes are broadly welcome. Some are aimed at helping landlords tackle anti social behaviour (ASB): CIH Scotland supports all of the proposed measures, but no-one should overplay the extent to which they will make ASB easier to deal with. Serious ASB will always be very challenging to deal with, as in most cases there are few, if any, speedy remedies.

CIH Scotland welcomes the changes relating to the private rented sector, including the creation of a new Housing Tribunal to consider all landlord/tenant disputes. We are disappointed, though, that the Tribunal is to cover only the private rented sector and not the social sector, as the current shortcomings of the court system impact much more significantly on social sector tenants and landlords.

Comments on specific provisions*Sections 1 and 85(4) – Abolition of the right to buy*

CIH Scotland warmly welcomes the measures to abolish the right to buy. We recognise that when an existing right is being withdrawn, a reasonable notice period is required. However, we believe that a period of three years from the date of Royal Assent is longer than is necessary. A shorter period will help social landlords plan for the future with greater certainty, and will limit the size of a peaking of sales in the period before abolition.

Section 5 – Removal of prohibition on taking age into account in social sector allocations

This measure was requested by CIH Scotland, as it removes an unnecessary and unhelpful barrier to landlords wanting to allocate to particular groups in specific situations. For example, a landlord may want to allocate a row of five ground floor houses to older people, but cannot currently do this lawfully unless the properties are specially designed. The Bill makes it explicit that removing this age bar does *not* mean that landlords can discriminate against particular age groups – such as younger people – within their overall allocations policy as this would contravene the Equality Act 2010. We therefore believe that the reservations some organisations may have over this measure are unnecessary.

Section 15 – Grounds for eviction – anti social behaviour

This introduces a new requirement for the court to grant a possession order made within 12 months of a tenant's conviction for using the property for illegal purposes or for an offence in or near the property punishable by imprisonment. This mirrors a provision already in place in England. It could make a significant difference in those long standing and difficult cases where landlords have not been able to secure eviction, for example because of lack of willing witnesses.

Some reservations have been expressed about the possibility that landlords might seek eviction after a tenant has been convicted of a relatively minor offence, such as possession of a drug where no other household was involved or harmed. CIH Scotland does not believe that landlords are interested in seeking eviction in such cases, and any concerns about this should be considered in the context of the key aim of this measure, which is to address more serious cases of anti social behaviour.

Housing (Scotland) Bill – CIH Scotland provisional views on main provisions

January 2014

Bill section	Proposed measure	CIH Scotland provisional comment/view
	Abolition of right to buy	
1 and 85 (4)	Abolition proposed to come into force three years from the date of Royal assent, i.e. probably around summer 2017.	CIH Scotland strongly welcomes abolition. We recognise that a reasonable notice period is needed but can see a case for a period which is shorter than three years.
	Social sector allocations	
3	Amending 'reasonable preference' categories in allocations to allow more flexibility - adds under occupying tenants to existing homelessness and badly housed categories.	A relatively minor change, and in practice very little change to the flexibility which already exists.
4	New duty to consult applicants and tenants when reviewing allocations policies, and to report on the outcome (jointly with others, if appropriate).	This is probably in recognition of the flexibility landlords have had for some time over who is prioritised. Will be resource implications for landlords but hard to argue with the measure.
5	Removal of prohibition on taking age into account in allocations, along with reassertion of landlords' Equality Act duties not to discriminate on age grounds.	This measure was requested by CIH Scotland, as it removes an unnecessary and unhelpful barrier to landlords wanting to allocate to particular groups in specific situations. Obviously does not mean landlords can discriminate against particular age groups within their overall allocations policy.
6	New power to take an applicant's ownership of property into account, subject to certain (sensible) exceptions such as where occupying the property could lead to abuse.	This will enable landlords to take into account property ownership which, for example, enables applicants to make profit from renting property out.
7	Clarification of circumstances in which an applicant can be	Clarifications are welcome, though little change in practice, unless the

	suspended from receiving an offer. Doesn't apply to homeless referrals or nominations. Regulations will set out how long a suspension can remain in force, and how far back previous conduct can be considered. New right of appeal against suspension.	regulations on suspension period etc. lead to landlords needing to significantly amend policies. New right of appeal will mean landlords need to be very clear on reasons for suspension.
	Social sector tenancies	
8	Makes more flexible the existing power to give, or demote an existing full tenancy to, a Short SST for ASB: will now apply where there has been ASB in or near the property in last 3 years.	Enhanced flexibility helpful, but landlords will need robust evidence of ASB and this may not always be easy to obtain, particularly in relation to new applicants.
10 and 11	Increases minimum term of Short SSTs given for ASB from 6 to 12 months, and allows for a further 6 months (making 18 in all) where landlord is not ready to make a decision on making tenancy a full tenancy or ending it.	Sensible measure: allows a longer period of engagement and support before decision.
12	New duty to give tenants reasons why a Short SST given on ASB grounds is being ended, and a statutory right of review for the tenant.	Sensible and fair measure, but will need to be handled efficiently by landlord and other parties so that process can be completed prior to the end date of the Short SST.
13	New 12 month qualifying period before tenant can assign or sublet tenancy, and any beneficiary of an assignation, sublet or application to join the tenancy must have lived in property for 12 months and must have notified landlord when they moved in. Also stronger landlord rights to refuse assignation.	Sensible tightening up of the law to prevent abuse such as assignation to people not in housing need. Landlords will still be able to use discretion in cases where minimum requirements are not met. [CIH Scotland had wanted to see the right to assign a tenancy scrapped, creating instead a landlord power to allow it where it fitted with best use of stock.]
14	New 12 month qualifying period for all level 2 and 3 successors, i.e. family	As above, sensible changes to address abuse such as children moving in just prior to a relative's

	members and carers, and increase from 6 to 12 months in qualifying period for co-habiting partners. Person claiming succession must have notified landlord when they moved in.	death. Landlords can still use discretion where it is felt appropriate.
15	New requirement for court to grant possession order made within 12 months of tenant's conviction for using the property for illegal or immoral purposes or for an offence in or near the property punishable by imprisonment.	This mirrors a provision already in place in England. It could make a significant difference in those long standing and difficult cases where landlords have not been able to secure eviction, for example because of lack of willing witnesses.
	Private rented sector	
17 to 21	Introduction of a new Housing Tribunal for the PRS, removing all disputes cases from the sheriff courts.	CIH Scotland has long called for a tribunal system, so this is very much welcomed, but we are disappointed that only the PRS is to be covered at this stage.
23 to 25	Measure to allow third party application to the Private Rented Housing Panel.	Welcome measure which will particularly allow LAs to go to PRHP on behalf of a tenant who does not want to go direct or who has moved on but LA still wants to pursue the landlord.
26 to 52	Regulation of letting agents: a national registration scheme, dispute resolution scheme and statutory code of practice.	Welcome measures, similar to those which now cover property factors.
	Regulation of mobile home sites	
53 to 71	A range of measures aimed at strengthening the licensing regime covering sites on which people live permanently, including a 'fit and proper person' test for site owners.	Welcome measures which have been long awaited by park/mobile home residents. May be resource issues for LAs in terms of enforcement but legal changes are sensible and proportionate.
	20 year rule – shared equity schemes	
77	Technical, but important, amendment to the 20 year rule to facilitate provision of the SG's £220m Help to Buy new	Welcome as it provides lenders with the necessary assurances to enable them to participate in the Help to Buy (Scotland) scheme.

	build shared equity scheme.	
	Scottish Housing Regulator – transfer of RSL assets	
79	Removes requirement on SHR to consult tenants and lenders before a transfer of assets to another RSL, where there is an imminent threat of insolvency. Also removes duty on SHR to always obtain a valuation, and to direct a transfer at an open market valuation in insolvency cases.	These changes were not the subject of previous consultation. There may be some concerns, for example among lenders anxious that a transfer could be conducted without consultation and at a below market valuation. Our sense at this stage, though, is that in practice, in most cases it would not be necessary for the SHR to act with such speed.
	Defective property designation	
80	This measure removes the 'defective property' tag from 12 types of PRC houses classed as such in the 1980s so that owners qualified for grant assistance.	A straightforward measure: financial assistance ended some time ago and so the designations are obsolete.

SHELTER SCOTLAND

WRITTEN SUBMISSION

Shelter Scotland welcomes the opportunity to brief the Infrastructure and Capital Investment Committee on the Housing (Scotland) Bill at Stage 1, in advance of us submitting full written evidence¹. Shelter Scotland supports the broad aims of this Bill: to “enhance housing conditions, retain much needed social housing for the people of Scotland and safeguard social and private tenants”².

Shelter Scotland has been involved in the consultations and advisory groups which have fed into this Bill and supports many of the intentions of the proposed legislation. However, we feel strongly that **all** legislative changes

¹ This overview is a precursor to Shelter Scotland's full written evidence which we will submit to the Scottish Parliament in February 2014.

² Scottish Government press release (Nov 2013)
<http://news.scotland.gov.uk/News/Improving-housing-quality-67e.aspx>

must help to ensure that the housing sector functions as effectively as possible so that everyone has access to a safe, secure and affordable home and the right to a fair, transparent service. We have suggested a number of ways in which this Bill could be strengthened:

Summary of main points:

- **Unsuitable Accommodation Order:** Strengthen current legislation to make sure that households with children or expectant mothers have a right to challenge being placed in homeless temporary accommodation that is of a very poor standard of physical repair.
- **Section 5 referrals:** All referrals for settled accommodation for statutory homeless households from councils to registered social landlord (RSL) partners should be made through mandatory use of a 'Section 5' referral. This would make all housing allocations and partnerships transparent and measurable.
- **Electrical safety:** Shelter Scotland would like to see carbon monoxide alarms become mandatory in all privately rented property in Scotland. This could be achieved by an amendment to the Repairing Standard in the Housing (Scotland) Act 2006.
- **Right to buy:** Shelter Scotland supports the abolition of Right to Buy (RTB) in order to protect existing social rented housing stock and has long been campaigning for its end. We would, however, like to see a commencement date sooner than the proposed three years.
- **Social housing:** There are many proposals in this section, some of which will make detailed but important changes and improvements to the management and allocation of social housing. Some of the proposals however, could have serious unintended consequences, particularly:
 - **increased use of a SSST for antisocial behaviour**
 - **a simplified eviction process after a criminal conviction**
 - **taking age into account when allocating social housing**

Shelter Scotland's proposals for the Housing Bill

In addition to what is proposed in the draft Bill, Shelter Scotland believes that an opportunity has been missed to strengthen existing legislation, specifically around homeless accommodation to improve outcomes for those experiencing the crisis of homelessness, and safety in privately rented homes.

Proposal 1: Strengthening the Unsuitable Accommodation Order

Strengthen current legislation to make sure that households with children or expectant mothers have a right to challenge being placed in homeless temporary accommodation that is of a very poor physical repair.

The Unsuitable Accommodation (Scotland) Order 2004 was introduced to restrict the use of bed and breakfast (B&B) as temporary accommodation (TA) for households with children and pregnant women. This Order has been very successful in eliminating the use of unsuitable **types** of accommodation for these households, with a reduction of 92% in the use of B&B over the past 10 years. But the TA that is provided to these groups can still fall below an adequate physical standard of repair. Shelter Scotland regularly helps clients who come to us after being placed in TA which is in poor repair, damp and or with inadequate heating.

Shelter Scotland wants to see an additional clause added to the Unsuitable Accommodation Order that explicitly covers poor physical repair.

- **A legislative amendment to the existing Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2004 to add a clause(s) relating specifically to minimum physical standards for families with children or pregnant women in temporary accommodation.**

This change to existing legislation would seek to replicate the right to repair for those with a Scottish secure tenancy (SST) and those in private rented sector (PRS) have, but would be explicitly help households with children and pregnant women placed in temporary accommodation. It would help to ensure that families with children have the right to challenge being placed in TA which is of an unacceptable standard.

Proposal 2: Mandatory Section 5 referrals

All referrals for settled accommodation for statutory homeless households from councils to registered social landlord (RSL) partners should be made through mandatory use of a 'Section 5' referral. This would make all housing allocations transparent and measurable.

Section 5 of the Housing (Scotland) Act 2001³ introduced a system of referrals of homeless households by councils to RSLs. More than ten years after the commencement of that part of the legislation there is still mixed practice⁴. Although the overall percentage of homeless households are housed through a Section 5, the data shows that some RSLs/councils use Section 5 referrals in 100% of their allocations and some don't use section 5 referrals at all meaning there is very little consistency.

Shelter Scotland believes that the Housing (Scotland) Act 2001 should be amended to require a section 5 referral to be used in all instances where a RSL let is sought to meet a statutory homelessness duty. This would ensure greater transparency and make referrals easier to track and monitor which in turn, would improve partnership working.⁵.

Proposal 3: Mandatory carbon monoxide alarms for all private rented homes

Shelter Scotland would like to see carbon monoxide alarms become mandatory in all privately rented property in Scotland. This could be achieved by an amendment to the repairing standard in the Housing (Scotland) Act 2006.

Carbon monoxide (CO) gas is known as the 'silent killer' because it is invisible and has no smell. CO can be emitted by any faulty appliance which burns a carbon based fuel such as gas, petrol, oil, coal and wood, and as little as 2% in the air can kill within one to three minutes. Children, elderly people, pregnant women and people with respiratory problems are particularly at risk from carbon monoxide poisoning.

³ <http://www.legislation.gov.uk/asp/2001/10/section/5>

⁴ Data from 2012/13 shows that, of homeless referrals housed by RSLs, 65% are described as section 5 referrals with 29% described as 'LA nominations' and 8% described as 'other', which are generally informal nomination arrangements⁴ RSL statistics from Scottish Housing Regulator: <http://www.scottishhousingregulator.gov.uk/publications/benchmarking-tables>.

⁵ A briefing on this proposal to improve Section 5 referrals is available on the Shelter Scotland website http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/housing_scotland_bill_2013_policy_proposal_on_section_5_referrals

According to Department of Health figures for England and Wales, 50 people a year die from CO poisoning, and around 4,000 are taken to A&E⁶.

All private landlords in Scotland must provide a valid gas safety record and annual checks for the appliances in the property they rent out⁷, but there is currently no legal requirement for them to provide a carbon monoxide detector and alarm. From October 2013, building regulations in Scotland were changed to require CO alarms to be fitted whenever a *new or replacement* boiler, heater, fire or stove is fitted to residential property. Shelter Scotland would like to see carbon monoxide alarms become mandatory in *all* privately rented property in Scotland. This could be achieved by an amendment to the Repairing Standard in the Housing (Scotland) Act 2006⁸.

Shelter Scotland's position on the Draft Bill

Part 1: Right to Buy

Shelter Scotland supports the abolition of the Right to Buy (RTB) in order to protect existing social rented housing stock and has long been campaigning for its end. The Scottish Government estimate that removing the Right to Buy would retain 10,000 houses that might otherwise be sold in the period 2015 to 2020.

Given the current pressures on social housing, it is regrettable that the Scottish Government has set a 3 year delay before implementation. The process of legislating to end RTB will bring with it publicity and therefore plenty of opportunity for tenants who wish to purchase to exercise their right. We argue that abolition should take effect immediately from the date of commencement which might be, for example, 6 months or a year after the Bill receives Royal Assent. There is a need to balance the allowing of people to take time to properly consider the option of buying, with the potential for less-than-scrupulous commercial companies having the opportunity to persuade people to "buy before it is too late".

Part 2: Changes to social housing - allocation and management

This section of the Bill proposes a series of detailed changes to the allocation and management of social housing. These have been consulted on and discussed at the Scottish Government's Affordable Rented Housing Advisory

⁶ Reliable data for deaths from CO poisoning in Scotland is not available since inquests for unexplained deaths are not routinely held, unlike in England where the coroners system investigates all unexplained and sudden deaths.

⁷ Under the The Gas Safety (Installation and Use) Regulations 1998

⁸ Currently, a privately rented property will only meet the Repairing Standard if: it is wind and water tight; the structure and exterior are in a reasonable state of repair; water, gas and electricity and sanitation installations are in a reasonable state of repair; fixtures, fittings and appliances that the landlord provides are in a reasonable state of repair; any furnishings are capable of being used safely for the purpose for which they are designed; and the property has a satisfactory way of detecting fires and for giving warning in the event of a fire or suspected fire.

Group (ARHAG) of which Shelter Scotland is a member⁹. The full depth and breadth of this section and all the proposals will be responded to in detail through Shelter Scotland's full written evidence in February 2014.

Shelter Scotland agrees that more needs to be done to ensure that social landlords make best use of the limited supply of existing stock. While some of these proposals are welcome – enhancing tenants' rights and technical amendments to clarify existing legislation, other proposals, especially around eviction processes, have potentially negative consequences as currently drafted. It is important that responses to anti-social behaviour are strong, consistent and *effective*. But we do not want to see detrimental changes to housing law and tenancy rights which are a knee-jerk reaction to either the chronic lack of housing supply or a problematic minority of anti-social tenants. The proposed changes fall into two categories for Shelter Scotland:

- Proposals which amend current provisions or resolve anomalies in current legislation which Shelter Scotland fully supports. These proposals would help social landlords make best use of their stock and/or given the profile of people accessing social housing and existing legislation, will make a very insubstantial change to current practices, and are therefore positive improvements. Examples include: changes to 'reasonable preference' in allocations, property ownership in allocations, reasons for recovering a SSST and changes to assignation, subletting and joint tenancies.
- Other proposals we would like to see clarified during the parliamentary process to ensure they do not impact unfairly on certain groups. Some, we believe, could have extremely negative unintended consequences and penalise vulnerable tenants. It is absolutely critical that any changes which could mean someone loses their home, because of the action of anyone in or around their home, build in the correct evidence and proof mechanisms and the right to appeal.

Key concerns:

Increased use of the SSST for antisocial behaviour	
Bill proposal: This proposal would extend the circumstances when a social landlord can allocate or demote a secure	Shelter Scotland position: Shelter Scotland believes that antisocial behaviour which blights communities and causes misery and distress should be tackled quickly and effectively. We are

⁹ <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/16342/management/ARHAG>

<p>tenancy to a short Scottish secure tenancy (SSST) where applicants or tenants have acted anti-socially in or near their home within the past 3 years.</p>	<p>however, concerned about what constitutes 'anti-social behaviour' and what evidence would be required to result in someone losing their security of tenure. We need to ensure that there are sufficient checks and balances to make sure this legislation is used appropriately and does not unfairly penalise vulnerable tenants.</p>
<p>Simplified eviction process after criminal conviction</p>	
<p>Bill proposal: This proposal effectively simplifies the eviction process once a tenant has a conviction for an offence punishable by imprisonment, or for using the property for illegal purposes within the previous 12 months. This proposal would mean the court does not have to consider whether it is reasonable to evict: effectively an 'auto-eviction' in certain cases.</p>	<p>Shelter Scotland position: Shelter Scotland understands the frustrations that landlords have when they have to go through a lengthy court process for an eviction order, when the tenant has already been convicted of a serious offence. We have concerns about how this could be used to penalise tenants who have sought to change their behaviour since an initial conviction, or who were convicted of a low level offence which did not impact or harm other tenants. We believe this could have unintended consequences which should be examined at stage 1.</p>
<p>Taking age into account when allocating social housing:</p>	
<p>Bill proposal: This proposal seeks to remove the prohibition on taking someone's age into account when allocating housing.</p>	<p>Shelter Scotland position: This proposal was not in the original consultation and we feel the current allocations framework allows sufficient flexibility for landlords to allocate their homes appropriately and successfully. Therefore we do not see the need for this legislative change. We believe social housing allocations should be made based on a framework of need and circumstance, not the characteristics of a household. While not the policy intention behind this, Shelter Scotland is</p>

	concerned that this changes to allocation rules could be used in a discriminatory way.
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Part 3: Private Rented Housing

Shelter Scotland believes that greater security is the key to ensuring that private tenancies provide stable and secure homes for Scotland's private renters¹⁰. This is increasingly important as 12% of all households in Scotland now rent privately¹¹, double the number ten years ago, and 26% of households renting privately in Scotland have children¹². Greater security of tenure would also empower tenants to be active consumers and use their rights effectively. A review group established by the Scottish Government is currently considering possible changes to the tenancy regime in the private rented sector¹³. The group is expected to report in February 2014.

Establishing a Private Rented Sector Tribunal

This provision proposes taking civil housing disputes in the private rented sector – both eviction and non-eviction – out of the sheriff court, and into a dedicated private rented sector tribunal.

Shelter Scotland supports the creation of a private rented sector tribunal.¹⁴ We believe this will improve dispute resolution for private tenants and landlords, making dispute resolution more accessible, cheaper, less time-consuming and less intimidating for all parties. Decision-makers in a tribunal would also have a higher degree of specialisation, potentially giving a higher quality of decision.

Importantly, the tribunal should be free-to-access for vulnerable tenants and those on low incomes. It is also important that free legal advice and representation be made available for these groups through the Scottish Legal Aid Board, exploring the possibility of rolling out lay representation across the tribunal. This would ensure that everyone is able to navigate the dispute resolution process effectively. The panel should also be designed to encourage participation by tenants. We believe that a less adversarial

¹⁰ See our report, 'The case for greater security of tenure for private tenants in Scotland', September 2013, http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/the_case_for_greater_security_for_private_tenants_in_scotland

¹¹ Housing Statistics for Scotland, published 26th August 2013

¹² Scottish Government, 'Scotland's People, Annual Report: 2011, Scottish Household Survey'

¹³ As set out in the Scottish Government's strategy for the private rented sector: 'A place to stay, a place to call home' published in May 2013

¹⁴ Shelter Scotland, Consultation response: Better dispute resolution in housing, April 2013 http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/consultation_response_better_dispute_resolution_in_housing

approach to housing related disputes would encourage tenants to assert their legal rights.

➤ **Third party reporting to the Private Rented Housing Panel**

The Bill contains a provision for local authorities to make applications to the Private Rented Housing Panel (PRHP) where a landlord has failed to meet the repairing standard.¹⁵

Shelter Scotland supports this proposal; currently the PRHP is not working as an effective mechanism for tenants to force improvements in private properties. However, it must be implemented in such a way as to not create conflict between tenant and landlord which put the tenancy at risk.

The proposal allows local authorities to address poor conditions in private rented housing, without the need for private tenants to take forward applications. Shelter Scotland regularly advises private tenants experiencing problems with poor repair in their homes. Many who are unwilling to apply to the PRHP because they fear it will have a detrimental effect on their relationship with their landlord, putting them at risk of losing their tenancy. It is important that third party reporting to the PRHP does not in any way lead to a tenant fearing that their tenancy will be ended by their landlord. Tenants should be made fully aware of the implications of a third party application to the PRHP. To guarantee that private tenants' security of tenure is not affected, and to encourage more tenants to pursue their right to repair through the PRHP, the Scottish Government should act to increase security of tenure for private tenants.¹⁶

Part 4: The regulation of letting agents in Scotland

The Bill creates a requirement for letting agents to register as an agent, adhere to a statutory code of practice and sets up a dispute resolution process for landlords, agents and tenants.

Shelter Scotland supports this approach to regulating letting agents. We have long argued for regulation of this industry – alongside landlord and agent representative bodies.¹⁷ Regulation would benefit tenants, landlords and good letting agents. It is critical that any regulatory system has sufficient power to force positive changes in practice.

¹⁵ The full repairing standard is contained in s.13 Housing (Scotland) Act 2006

¹⁶ Shelter Scotland, 'The case for greater security of tenure for private tenants in Scotland', September 2013, http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/the_case_for_greater_security_for_private_tenants_in_scotland

¹⁷ Shelter Scotland, 'Regulating Letting Agents in Scotland', 2013, http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/regulating_letting_agents_in_scotland

Regulation is important to drive elements of poor practice out of Scotland's lettings industry, including: the charging of unlawful upfront fees to tenants¹⁸, the failure to register tenants' deposits and the failure to carry out important safety checks.

The code of practice must set a high standard for the conduct of lettings professionals, driving poor practice out of the market. It should be clear about what constitutes a failure under the code of practice and, where tenants and landlords believe they have been treated unfairly, it should be clear what action they can take under the code of practice.

The dispute resolution process must be easy to understand and access by both landlords and tenants. The cost should not be prohibitively expensive. Applications from vulnerable tenants or those on low incomes, should be free. This is particularly important where tenants or landlords have experienced a financial loss as a result of the actions of an agent – for example where unlawful pre-tenancy fees have been required.

Shelter Scotland
17 January 2014

LEGAL SERVICES AGENCY

WRITTEN SUBMISSION

The general view of the solicitors commenting on the Bill is that we have grave concerns concerning the balance of rights and powers adopted particularly to those accused, or guilty of, anti-social conduct or behaviour.

Very generally, we appreciate that it is important for neighbours, the community and, in the long, term, those guilty of anti-social behaviour, that that behaviour be controlled and the individuals and families concerned be rehabilitated.

However the route to that end entails a balancing of the rights and interests of all concerned including those who have committed, or are accused of, anti-social behaviour, their partners and children.

All are entitled to somewhere to live and should not be pushed into a homeless underclass. Where are they to go?

Whilst the allocation of housing and eviction, or the threat thereof, play a part in the control and ultimate cessation of anti-social behaviour they must be a last resort. Eviction followed by, in effect, removal of any further housing options for tenants and their families is a draconian step that will impact most on the youngest who of course will have been entirely innocent of any fault.

¹⁸ Shelter Scotland, 'The charging of Premiums in the private rented sector', 2011, http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/premiums_in_the_private_rented_sector

Your Committee will be fully aware, of course, that many of those who behave in an anti-social manner do so because of either highly stressed circumstances, mental disorder, learning difficulties or other difficulties. Many are motivated to change and do so. Whilst others are suffering an exacerbation in their mental ill health and require additional care to manage behavioural symptoms arising from the disorder. There can also be issues of neighbours who are acting in a discriminatory way towards those with mental disorder or learning difficulties.

We can hardly overstate the adverse impact mental health and addition problems can have on families, including children: for that to be exacerbated by eviction followed by the removal of further housing options is harsh indeed.

Some of the issues arising in the Bill to which these general comments are directed include the following (the numbers relate to the section numbers of the Bill).

Section 5 repeals earlier provisions concerning the allocation of housing and seeks now to permit social landlords to take into account the age of an applicant age 16 or over. As the proposed amendments comments, this does not alter the requirements to avoid unlawful discrimination on the grounds of age.

We are not comfortable with this provision and think that it will be difficult, in practice, for RSL's to manage lawfully and clearly. If the problem aimed at related to maturity and the ability to sustain a tenancy or needs that may arise as a result of mental or physical frailty or disability these factors should be highlighted rather than attempting to use age as a proxy

Section 7 (2) permits RSL's to impose a requirement that an application for housing must have remained in force for a minimum period before the applicant is eligible for the allocation of housing. We are not advised as to the period concerned: at the very least there should be a maximum time (3months?).

In any event, we have difficulty understanding why those in housing need should have to wait before they are even considered for housing as a matter of policy. In permitting RSL's to desist from housing tenants and their families with difficulties, policy makers do have to follow on by indicating their views as to precisely where such citizens (at fault though they may be on occasion) should live, whether temporarily or permanently. There is plainly already a major crisis in the provision of temporary accommodation.

We note that the proposed amendments state that a RSL may not impose a requirement (a minimum period of time)" if the landlord ... is a local authority and has a duty to an applicant" (a duty to secure accommodation where the applicant is homeless).

In passing it should, of course, be noted that local authorities are under limited duties to homeless persons if it can be said they are "intentionally homeless"

unless, of course, they suffer from a mental disorder in which other duties come into play.

Given that so much housing is now, of course, owned and let by RSL's, the protection given by this subsection to homeless persons is very limited. The protection should be extended to provide that it applies not only to local authorities but also to RSL's.

The proposed change goes on to provide that RSL's must have regard, in imposing a qualifying period for the allocation of housing, to any Guidance issued by Scottish Ministers on the maximum period preceding the application which should be considered in relation to a variety of circumstances (see below), including where the applicant has (been alleged) to have acted in an anti-social manner or pursued a course of conduct amounting to harassment.

The judgement as to whether the circumstances relating to anti-social behaviour apply or not, seems to be entirely in the hands of the RSL concerned and could be open to a variety of interpretations. We are not happy with the high level of discretion given.

Other grounds for the removal of eligibility for housing for undefined periods of time include "abandonment" by the tenant or joint tenant of a former tenancy. The new provisions include even a joint tenants interest having been terminated by the abandonment procedure – this could mean a couple separate, one leaves and then cannot access public sector housing for a period of time simply because they haven't informed the landlord that they have left. Recovery of possession through the abandonment procedure can occur owing to mental health problems, hospitalisation, imprisonment, a chaotic lifestyle or a range of difficulties: as well as, simply a mistake by the landlord concerned.

Whilst an applicant for housing may appeal by Summary Application to the Sheriff against a requirement that an application for housing must have remained in force for a minimum period of time before the applicant is eligible for allocation of housing, no criteria as such are given for how the Sheriff would reach his/her decision on the matter. Not even a test of "reasonableness".

Of course, human rights "proportionality" would apply: we would however very much prefer that it be stated that the RSL's decision on the requirement be subject to a test of statutory "reasonableness".

Such a statutory test would inform the policy of the RSL as well as give guidance as to the forms of argument to be expected as part of a summary application.

It should be noted that it would appear that quite tough procedural requirements would exist for such a Summary Application. The Court action would for instance, probably be required to be raised within 14 days of the decision complained of.

We would suggest that the timelimit for such an application to the Court be extended to a minimum of two months.

From our experience in dealing with “homelessness” cases we have found the Review procedure that is provided for, in terms of that legislation useful, (a Review by a more senior, independent

officer of the local authority) and would suggest that there might be much to be said for introducing such a procedure in these cases as well as an application to the Court.

We would also like RSL’s to be required to formally intimate by First Class and First Class Recorded Delivery any such decision which should include not only the decision, the reasons for the decision as well as the facts founded upon by the decision maker, as well as details of the Review and Appeal’s process.

Section 8 deals with the creation of a Short Scottish Secured Tenancy (SSST’s).

The Section develops the principles upon which a SSST can be created by, amongst others, permitting a landlord to serve a conversion notice on grounds that the tenant, a person residing or lodging with, or a subtenant of the tenant, or a person visiting the house has, within the period of three years preceding the date of service committed a range of anti-social conduct and behaviour.

We are concerned that the notice may be served on the basis of quite limited contact with the tenant (by visitors) and the premises and, that within a period of 3 years. This period is far too long and it may make it impossible for tenants to dispute a claim given that the landlord may have records but that the tenant may not have any records, or not even remember any incidents. The period should be reduced to a period of one year at the most.

The conduct upon which the service of a Notice creating the SSST can be based, is vague involving acting in an anti-social manner or pursuing a course of conduct. The change of a secure tenancy to a much more insecure SSST is a serious step concerning a tenant and his/her family’s home. The criteria upon which such a step is to be based should be as clear as possible with some indication in the statute requiring that the behaviour be of some significant objective seriousness.

We would also prefer that it be required that the landlord in deciding to serve the notice creating a SSST have regard to the overall “reasonableness” of the step.

Section 12 relates to recovery of possession of the SSST. We consider this step to be a major one given that as a result of it the tenant and his/her family may be evicted with considerable difficulty thereafter in obtaining accommodation elsewhere.

Section 12 provides that a ground for recovery of possession/seeking eviction from a SSST be, amongst others that an obligation of the tenancy has been broken.

We would suggest that it be made clear that an obligation of some substance requires to have been broken.

Section 13 relates to a “tightening up” of the rights that flow from secure tenancy status. (The “Tenants Charter”).

The change to the rights concerned would not appear generally to have a major impact on those in significant housing stress for whom we generally act.

However, we are concerned that the rights in relation to assignment and subletting and, in Section 14, succession all require notification that the house concerned was the applicant’s only or principal home before the application concerned.

This is contrasted to showing as a matter of fact that the house concerned was the applicant’s only or principal home.

We do not see how the landlord’s interest would be prejudiced in any way by requiring proof as a matter of fact and or notification as opposed to merely by notification.

Section 15 concerns grounds for eviction based on anti-social behaviour from a SSST.

Paragraph 31 of the Guidance states that this (Section 15) inserts new paragraphs to the 2001 Act to remove a requirement that the court considers whether it is reasonable to make an order for eviction in cases where another court has already convicted a tenant of using the house for immoral or illegal purposes or an offence punishable by imprisonment, committed in or in the locality of the house.

The Guidance goes on to state that the tenant would go on to retain a right to challenge the court action.

It should be noted that where there is no defence of “reasonableness”, the grounds to challenge a court action are limited to disputing whether the acts founded upon did, or did not, take place.

The additional test of “reasonableness” allows the court to take into account the seriousness of the facts as proven, the impact of the eviction on the tenant and his/her family as well as the benefit (if any) to the landlord, the neighbours and the community.

In general, the statutes relating to eviction provide for a requirement of reasonableness and, in any event, in some situations human rights “proportionality” will import such a requirement as a matter of law and principle anyway.

Insofar as Parliament chooses to change this area of law we would urge that a requirement of reasonableness be retained. We are reasonably confident that if Parliament were not to choose to do so, the Court would, as a consequence of human rights proportionality, in effect have to reinstate such a requirement to some degree.

We refer to *Orlic v Croatia* [2011] HLR 44 at paragraph 65:

“in this connection the court reiterates that any person at risk of an interference with his right to home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under art. 8 of the Convention, notwithstanding that, under domestic law, he or she has no right to occupy a flat

(see *mutatis mutandis McCann v United Kingdom* [50]).

Reliance on human rights proportionality is however not a substitute for the full assessment of reasonableness which entails looking at the circumstances of landlord and tenant as a whole and provides the court with an opportunity to look at all the facts.

Part 3 provides for certain recovery of possession/eviction actions currently raised through the Sheriff Court to be taken to the Private Rented Housing Panel.

This is a comparatively modest step and we do not as such have significant concerns about this currently given that the numbers involved are small and the grounds for disputing recovery of possession in the private sector are generally much more limited than in the social rented sector. We would however wish it to be made emphatically clear that whilst we are making no objection to the proposal, we should not be taken to in any way support a proposal, if it were made, for eviction actions in the public and socially rented sector to be taken out of the courts.

As regards the proposal in the Bill our main concern is that currently Legal Aid is not available for the Tribunal. (Private Rented Housing Panel). Where eviction, and all the technicalities of private rented sector law is concerned there will be many tenants who currently receive Legal Aid in the Courts who would not do so through the Panel system. An absence of Legal Aidp will infringe their Article 6 Rights and we would propose that some form of Legal Aid be made available for those threatened with eviction in cases before the PRHP (this is of course as usual subject to tests on the grounds of reasonableness and financial circumstances).

Summary

We are very pleased to have had the opportunity to have made written submission followed by verbal submissions albeit at a comparatively late stage in this Bill.

We would have much preferred to have had the opportunity to take part in the initial discussions upon which the Bill is based and have no doubt that Parliament would have ended up being better briefed on the range of views of relevant had that taken place.

Nonetheless, of course, we remain appreciative of the time provided to us for us to articulate our views.

Legal Services Agency
16 January 2014

Deputy First Minister
and Cabinet Secretary for Infrastructure, Investment and Cities
Nicola Sturgeon MSP



T: 0845 774 1741
E: scottish.ministers@scotland.gsi.gov.uk

Maureen Watt MSP
The Convener
Infrastructure and Capital Investment Committee
M 3.18
The Scottish Parliament
Edinburgh
EH99 1SP



Your ref:
Our ref:
31 December 2013

I undertook to write providing information in relation to a number of points discussed at the Committee session on 11 December 2013.

Civil society priorities for the Procurement Reform (Scotland) Bill

The annex to my letter sets out how each of the priorities is being addressed through the Bill. Although Sustainability is most clearly addressed through the proposed sustainable procurement duty, it is also addressed through many other provisions in the Bill, having regard to what is possible within the overarching EU legal framework and to what is both feasible and affordable for public bodies.

Health and Social Care

I undertook to write to the Committee to provide information in relation to the broader health and social care issues mentioned by Duncan McNeil at last week's Committee session.

The use of 15 minute care visits currently rests on decisions taken by social care professionals who draw up care plans and 'purchase', 'contract' or 'procure' home care in local authorities. For many clients this may be all that is required to ensure a person is safe and able to live independently, for instance checks to ensure medication has been taken.

Care services must be designed and delivered to reflect a person's needs and promote their rights. Any care delivered must be of a good quality and standard taking account of the person's circumstances, for example dementia or other health issues. The Cabinet

Secretary for Health and Wellbeing, Alex Neil MSP, has tasked Healthcare Improvement Scotland and the Care Inspectorate with developing a new inspection methodology for adult care. These new inspections will ensure that people get the level of support, through free personal care, that they have been assessed as needing delivered, and that the quality is no less than the people of Scotland deserve.

We are also gathering evidence through ADSW and COSLA to understand the extent to which this type of service has a positive impact on the personal outcomes for service users.

The UK Homecare Association care commissioning survey for 2012 shows that 58% of homecare visits in Scotland last longer than 30 minutes, compared to just 27% in England, and that 89% of homecare visits in Scotland last longer than 15 minutes.

We are doing many things to ensure people are treated with respect and dignity:

- Reshaping Care for Older People programme – which recognises people want to live in their own communities for as long as possible, with support;
- Effective care standards/ regulation and inspection;
- Strategic commissioning of care;
- Choice and control through self-directed support;
- Our commitment to Free Personal and Nursing Care – a universal benefit for over 65s;
- Integration of health and care to ensure seamless service for older people;
- Dementia strategy to ensure people are treated with consideration for their condition;
- Access to care information and advice via Care Information Scotland.

Equality and Human Rights Commission (EHRC) guidance on equalities in procurement for Scottish public bodies

I undertook to forward a copy of the Equality and Human Rights Commission (EHRC) guidance on equalities in procurement for Scottish public bodies. A hyperlink to the Procurement and Equalities web page can be found below; it has a link to a Policy Note on the Equality Duties and to the EHRC guidance. A copy of the guidance is attached for ease of reference.

<http://www.scotland.gov.uk/Topics/Government/Procurement/policy/corporate-responsibility/CSR/SSPAP/Equalities>

Living Wage – Letter from Commissioner Barnier

At the Committee session I promised to forward a copy of the letter from Michel Barnier, European Commissioner for Internal Market and Services to my predecessor Alex Neil. This letter is attached.

In his letter, Commissioner Barnier has confirmed that any requirement, as part of a procurement process or public contract, on contractors to pay their employees a living wage set higher than the UK's National Minimum Wage is unlikely to be compatible with EU law. The issue is not the procurement directive and regulations, but EU law on the movement of workers between countries and the freedom to provide services.

While we cannot make payment of the living wage a requirement in contracts, we do want to encourage good practice by employers and have looked at ways in which we can take a range of workforce related matters into account in the procurement process. So the Bill proposes that the Scottish Government should have the power to issue statutory guidance on workforce matters in procurement, including remuneration.

I hope this information is of assistance to the Committee.



NICOLA STURGEON

Civil society priorities for the Procurement Reform (Scotland) Bill

1) Statement of intent

Sustainability is at the heart of Scotland's public procurement reform programme and this is reflected through the aim of the Bill which is to establish a national legislative framework for sustainable public procurement that supports Scotland's economic growth by delivering social and environmental benefits including community benefits, supporting innovation and promoting public procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business-friendly.

2) Enshrining sustainability

We believe this is addressed through the proposed sustainable procurement duty which places a requirement on a contracting authority, before carrying out a regulated procurement, to consider how in conducting the procurement process it can –

- improve the economic, social and environmental wellbeing of the authority's area,
- facilitate the involvement of small and medium enterprises, third sector bodies and supported business in the process, and
- promoting innovation, and

in carrying out the procurement, act with a view to securing such improvements identified.

3) Reducing greenhouse gas emissions

Environmental wellbeing is part of the general sustainable procurement duty. Furthermore, part 4 of the Climate Change (Scotland) Act 2009 places climate change duties on Scottish public bodies.

Current procurement policy focusses on identifying and exploiting opportunities to maximise social, economic and environmental impact of public procurement, rather than in part duplicate duties already provided for in the Climate Change Act. In the Bill, we have suggested amending the Climate Change Act to promote resource efficiency in terms of procurement of goods, works and services with a view to increasing the proportion that are designed with a view to re-use, recycling etc. and that are actually re-used, recycled etc.

4) Person centred procurement

The package of measures within the Bill strike an appropriate in responding to specific issues whilst retaining the flexibility to cover the diverse range of goods, services and works that are procured by the public sector in Scotland.

For example, we recognise that contracts such as health and social care and related service contracts have special circumstances which are important to take account of

in respect of the quality of services and the need to ensure continuity of care provision.

That is why I gave a commitment at the Committee session on 11 December to bring forward an amendment to the Bill at Stage 2 which will exempt health and social care contracts from the provisions in the Bill which relate to advertising and competition. Where an authority does choose to hold a competition for such services it is important that some provisions in the Bill will continue to apply. It is also important that an authority's procurement strategy and contracts register cover health and social care contracts.

As you will no doubt be aware, the proposals being brought forward by the European Commission for changes to the EU public procurement directives recognise that certain categories of service continue by their very nature to have a limited cross-border dimension, namely certain social health and educational services. The proposals acknowledge the importance of the cultural context and the sensitivity of these services, and that Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The new directive proposes a need to only observe the basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers.

5) Scottish Living Wage

We have examined this issue very carefully, including writing to the European Commission and it is clear to us that making payment of the living wage a mandatory requirement for those bidding for public contracts is likely to be a breach of our obligations under wider EU legislation and Treaty principles.

While we cannot make payment of the living wage a requirement in contracts, we want to encourage good practice by employers and have looked at ways in which we can take a range of workforce related matters into account in the procurement process. So the Bill proposes that the Scottish Government should have the power to issue statutory guidance on workforce matters in procurement, including remuneration where such matters are likely to be relevant to the quality of service that will be delivered.

6) Blacklisting

This Government is opposed to blacklisting in any form. Through the Bill we are seeking enabling powers allowing the Scottish Government to make regulations regarding how a company's suitability to bid is to be assessed. In addition to that and the guidance the First Minister launched on 20 November 2013, we are committed to continuing our dialogue with the Trade Unions to ensure we are effectively tackling this issue.

7) Tax dodging

The Public Contracts (Scotland) Regulations 2012 requires public bodies to exclude a company from bidding where it has been convicted of one of the criminal offences

laid out in the Regulations. The Regulations also permit exclusion, where it is reasonable and proportionate to do so, if a company meets any of the specified criteria set out in the legislation. One such criterion is where a company has not fulfilled its obligations relating to the payment of taxes.

The Scottish Government's standard Pre-Qualification Questionnaire requires companies bidding for public contracts to disclose if they have failed to comply with their statutory obligations relating to the payment of taxes.

Through the sections on the selection of tenderers and our power to issue regulations that look at the grounds on which a public authority might exclude a tenderer from bidding, the Bill allows behaviour such as failure to fulfil their statutory obligations relating to the payment of taxes to be taken into account for the purposes of contracts that fall within the scope of the Bill.

8) Ethical and fair trade

The sustainable procurement duty should help encourage authorities to buy fairly traded goods where they are available. A range of further work needs to be undertaken to progress the uptake of fair and ethical trade. The Scottish Government has agreed to work with the Scottish Fair Trade Forum to achieve this.

9) Employment standards

High quality public procurement is not only dependent on good practice by contracting authorities and their purchaser, but suppliers to the public sector also need to play their part by delivering high quality, cost effective goods, services and works and by maintaining the highest possible business ethics and standards, particularly in relation to their workforce. As mentioned above, the Bill will include a provision enabling the Scottish Ministers to issue statutory guidance on how workforce related matters, such as a company's approach to recruitment and terms of engagement, should be considered when assessing the suitability of a company to bid for public contracts.

10) Promoting positive social outcomes

The Bill promotes positive social outcomes in a number of ways, some of which are mentioned in the responses to the earlier priorities. For example, establishing a sustainable procurement duty, taking powers that will enable the Scottish Ministers to issue statutory guidance on how workforce related matters, and secondary legislation on the use of technical specifications in regulated procurements.

In addition to these, the Bill places a requirement on contracting authorities to consider community benefits clauses in all major contracts and, where it does not intend to include any such requirements, include a statement of its reasons for not including any requirements in the contract notice.



EUROPEAN COMMISSION

Cabinet of Commissioner Michel Barnier
Head of Cabinet

Brussels, 07. 05. 2012
GR/aa Ares(2012)189990

Your Excellency, *Dear Jon*

Please find attached a letter from Commissioner Michel Barnier.

I should be grateful if you would arrange for its onward transmission to Mr Alex Neil, MSP.

Yours faithfully,

Olivier GUERSENT

H.E Jon CUNLIFFE
Ambassador and Permanent Representative
of the United Kingdom to the EU
10 avenue d'Auderghem
1040 Brussels

MICHEL BARNIER

Membre de la Commission européenne

Brussels, 07.05.2012
GR/aa – Ares (20112) 189990

Dear Mr Neil, *Alex*

Thank you for your letters of 7 December 2011 and 16 February 2012 regarding several public procurement issues of particular relevance to Scotland. I apologize for the late reply.

In your letter of 7 December 2011, you have asked the Commission's legal point of view on the possibility of requiring contractors, as part of the public procurement process, to pay their staff involved in delivering the public contract a 'living wage', higher than the minimum wage. By your letter of February 2012, you raise certain concerns regarding the concept of 'value for money' in public procurement, as well as the current thresholds of application of the public procurement directives and invite the Commission to reconsider these aspects during the negotiation of the recent legislative proposals¹ for the modernisation of the current public procurement directives.

First of all, as regards your question on the 'living wage', I would like to point out that the current EU public procurement rules allow contracting authorities to take into account social considerations in the award criteria and contract performance clauses of a public contract, provided certain conditions are met.² In general, social considerations must comply with the Treaty's principles (transparency, equal treatment etc) and with any other EU law that may be relevant.

If social considerations are taken into account in the award criteria, they must be linked to the subject matter of the contract, i.e. to the supply, services, works which are the object of the contract. If they are included in the contract performance clauses, they must be linked to the performance of the contract, i.e. to the tasks necessary for the delivery/provision/execution of the supplies/services/works of the contract.

Alex NEIL MSP
Cabinet Secretary for Infrastructure
and Capital Investment
Scottish Parliament
Edinburgh, EH99 1SP
Scotland

¹ Proposal for a Directive on public procurement/* COM/2011/0896 final - 2011/0438 (COD) and Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors/* COM/2011/0895 final - 2011/0439 (COD);l

² For additional details on these conditions, please see the sections "award criteria" and "contract performance clauses" of the Guide: "*Buying social: A Guide to taking account of social considerations in public procurement*": http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#social ;

A requirement regarding the payment of a 'living wage' would in practice most probably be linked to the tasks necessary for the performance of the contract, and therefore be used as a contract performance clause. Such clause would have to be non-discriminatory and known in advance by all candidates for transparency reasons.

In terms of other relevant EU legislation, it would have to comply inter alia with the Posting of Workers Directive³. The 'living wage' to staff involved in the performance of the contract would have to be set in accordance with one of the procedures laid down by Article 3 of Directive. It was the non-compliance with this requirement which led the Court of Justice to its decision in the Rüffert case⁴ to which you refer in your letter. In addition, the Court held in the Laval case⁵ that requirements regarding the level of wage payable to posted workers may not go beyond the mandatory rules for minimum protection provided for by the Directive. A 'living wage' set at a higher level than the UK's minimum wage is unlikely to meet this requirement.

Secondly, as regards your suggestion for the interpretation of the concept of 'value for money' in the award criteria, the possibility already exists in the procurement procedures to take into account various social considerations. Guidance can be found in the Commission's 2010 publication "Buying social – a guide to taking account of social considerations in public procurement". To further support the Europe 2020 strategy objectives, the Commission proposes the introduction of a life-cycle cost concept, which will encourage public authorities to consider the full life-cycle of products in their purchasing decisions. The life-cycle cost will include internal costs and monetised external environmental costs. Contracting authorities may take into account criteria linked to the production process of the goods or services to be purchased.

In addition, contracting authorities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics. This should enable authorities to make the most appropriate procurement choices for their communities, people and businesses. However, I do not believe that measures that would amount to affording an outright advantage to local tenderers and would thus discriminate against others irrespective of the merits and value of their offer would serve the objective of best value for taxpayers' money.

Thirdly, as regards your suggestion to increase the thresholds for publication of tenders, I believe that the application of the Directives has so far ensured a level playing field in the public procurement sector and thereby contributed to the reinforcement of the Single Market, creating multiple cross-border business opportunities in the public sector for companies from all Member States. Increasing the thresholds would lead to fewer public procurement procedures falling within the scope of the Directives. The procedures below the increased thresholds would be subject only to national rules, which are divergent and might not always ensure the same degree of transparency and non-discrimination provided for by EU law.

Moreover, the current thresholds are linked to the EU's international commitments, in particular under the WTO Agreement on Government Procurement. Increasing the thresholds would be a breach of our international obligations.


³ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services;

⁴ Case C-346/06;

⁵ The Court held in the Laval case that the "*level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.*" (point 80 of the Laval judgment).

Lastly, the proposed rules introduce several provisions aiming to facilitate access by SMEs to public contracts. For example, contracting authorities must accept self-declarations at the selection stage; annual turnover requirements may not exceed three times the estimated contract value, and contracting authorities are encouraged to split contracts into lots to allow more bidders to participate - if they do not, they must specifically explain why.

I hope this helps answering your concerns. I look forward to meeting with you to discuss these issues further as well as any other public procurement issues of particular relevance to Scotland.

Yours sincerely, 



Michel BARNIER

Copy: - Rt Hon Francis Maude MP, Minister for the Cabinet Office and Paymaster General
- Sir Jon Cunliffe, Permanent Representative of the UK to the EU