



House of Commons
Scottish Affairs Committee

**Blacklisting in
Employment-Update:
Incorporating the
Government's
Response to the Sixth
Report of Session
2013-14**

Thirteenth Report of Session 2013–14

Report, together with formal minutes

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The Scottish Affairs Committee

The Scottish Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Scotland Office (including (i) relations with the Scottish Parliament and (ii) administration and expenditure of the offices of the Advocate General for Scotland (but excluding individual cases and advice given within government by the Advocate General)).

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The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via www.parliament.uk.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/scotaffcom. A list of Reports of the Committee in the present parliament is at the back of this volume. The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Rebecca Davies (Clerk), Rhiannon Hollis (Clerk), Phil Jones (Committee Specialist), Alasdair Mackenzie (Committee Specialist) Tom Barker (Assistant Policy Analyst), Helena Ali (Senior Committee Assistant) and Rosie Tate (Committee Assistant).

Contacts

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was to identify ways of moving forward, both by addressing the crimes of the past and by identifying rules and structures to prevent such widespread and systematic exclusion of workers from employment from ever happening again. It focused on two key areas: First, we considered the historical practice of blacklisting and assessed how those who had participated in this practice should make amends for what they had done, and how victims of blacklisting should be compensated. Second, we set out examples of best practice in both the public and private sectors in attempting to eradicate blacklisting in the construction industry once and for all. In conclusion, we briefly raised the question of whether legislative reform or new legislation is required to eradicate blacklisting, and indicated that this question would be the focus of the next phase of our continuing inquiry.

4. We received the Government's response to our second interim report, in the form of a letter from Jenny Willott MP, Minister for Employment Relations and Consumer Affairs, on 30 April 2014.⁶ We also received a response from the Scottish Government, in the form of a letter from Nicola Sturgeon MSP, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, on 17 March 2014,⁷ and from Jane Hutt AM, Minister of Finance, Welsh Government, on 7 May 2014.⁸ These letters are appended to this report.

Addressing the crimes of the past

5. As noted in our previous report, the Construction Workers Compensation Scheme (TCWCS) for blacklisted workers has been launched by eight of the companies that used the services of TCA, but negotiations about the scheme are ongoing, and to date, the final details of the scheme have not been announced. While we welcomed the steps taken by the eight construction companies who have set up this scheme, we emphasised our expectation that the key principles of apology, adequate compensation and employee assistance for those still of working age, would form key parts of any agreed scheme.⁹ We strongly opposed any unilateral introduction of a compensation scheme.¹⁰ We are therefore pleased to note that the UK Government Minister agreed that the compensation scheme "would only represent an effective sign of reform if it is voluntary".¹¹ Ms Willott continued that "it will be for the parties involved to agree on what form this should take and how it can be administered".¹²

6 This is attached as Appendix 1 to this report.

7 This is attached as Appendix 2 to this report.

8 This is attached as Appendix 3 to this report.

9 Para 16

10 Para 18

11 Appendix 1

12 *ibid*

Towards best practice: procurement in the public sector

Self-cleaning

6. In our report, we welcomed the Welsh Government’s pioneering approach to tackling blacklisting through public procurement.¹³ One of the key elements of the Welsh Government’s approach is that companies who have participated in blacklisting should undertake self-cleaning before being allowed to bid for future public contracts.¹⁴ We concluded that self-cleaning was an important step as it places responsibility on contractors to demonstrate how they have changed, and to make amends for their past blacklisting activity. We not only recommended that firms that have been involved in blacklisting should be required to demonstrate how they have self-cleaned before being allowed to tender for future public contracts, we were also of the view that firms which do not participate fully in an agreed compensation scheme after having been caught using the blacklisting service of the TCA or any similar conspiracy, should be deemed not to have ‘self-cleaned’.¹⁵ We are therefore disappointed with Jenny Willott’s statement that it was “unlikely” that the UK Government would be able to require compensation as an automatic pre-condition of ‘self-cleaning’.¹⁶ During the next phase of our inquiry, we will consider this matter further.

Procurement

7. In our previous report, we concluded that the UK and devolved Governments should recognise the absolutely crucial role that they play as client or funders of the vast majority of construction work in the UK; and that the role of the client, properly exercised, allows enormous control, not only over the construction companies but also their subcontractors and suppliers.¹⁷ As noted above, we recommended that firms that have been involved in blacklisting should be required to demonstrate how they have self-cleaned before being allowed to tender for future public contracts, and those who have not self-cleaned should not be allowed to tender for public contracts.

8. Jenny Willott welcomed the fact that our proposed changes to procurement and legislation form part of a wider package of proposed measures to eradicate blacklisting. She highlighted the fact that banning certain contractors from procurement processes would be subject to European rules on procurement, and that the Government is required to operate within this framework. She wrote: “this includes the need for evidence before excluding and exclusion can only be used as a way to force companies to address past misdemeanours if they are not doing so. It cannot be used as a punishment”.¹⁸ She also noted that current UK legislation (The Public Contracts Regulations 2006) provides that an economic operator may be treated as ineligible to bid where it has committed an act of

13 Para 30

14 See paras 28-32 of HC543

15 Para 31

16 Appendix 1

17 Para 54

18 Appendix 1

grave misconduct in the course of its business or profession. She commented that blacklisting “may arguably fall within this definition”.¹⁹

9. Nonetheless, in her response to the Committee, Nicola Sturgeon, Deputy First Minister, noted that the Scottish Government had undertaken to make regulations under the Procurement Reform Bill (Scotland), which had its stage three debate in Holyrood on 13 May 2014, to cover the circumstances in which a company could be excluded from bidding for contracts, including when it been found to have engaged in blacklisting, but has not taken appropriate remedial action.²⁰

10. Furthermore, in her response, Jane Hutt, Minister for Finance, noted that the Welsh Government was “exploring the options” to legislate on procurement matters in Wales. She added that she was “looking forward to the new EU Procurement Directives”, which would be coming into effect later this year. She explained that the new Directives contain “strengthened provisions around social considerations and compliance with labour laws” and that she would be “exploring the opportunities these bring to further strengthen our procurement policy”.²¹ It is evident from the responses of both the Scottish and Welsh Governments therefore that there are means to blacklist the blacklisters which are within existing EU procurement rules.

Towards best practice: employment contracts in the private sector

11. One of the key factors we identified as a means to eradicate blacklisting was to replace agency working in the construction industry with direct employment.²² We therefore recommended that direct employment and transparent recruitment practices should be standard for all public sector contracts in the construction industry.²³ We are extremely disappointed with the UK Government’s response, which rejected this out of hand. Ms Willott stated that the Government: “supports the use of flexible employment structures in the labour market and as such cannot agree with the recommendations for requiring direct employment only. This would effectively be a ban on the use of agency staff in the construction sector, which is likely to be unfair to agency workers. Our view is that an effective regulatory regime along with the promotion of the benefits of best practice and a culture of transparent and responsible businesses should guard against individuals being blacklisted from the outset”.²⁴ Jenny Willott noted that the Government would “welcome the Committee taking further evidence from businesses in the construction sector on how they can better protect agency workers whilst still offering a range of employment opportunities”.²⁵ We are also disappointed that the Scottish Government’s immediate response to our report made no comment on this issue. **While we will of course take further evidence during the next phase of our inquiry, we remain of the view that direct and transparent recruitment practices are by far the best way of eradicating blacklisting**

19 Ibid

20 Appendix 2 See also <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/68170.aspx>

21 Appendix 3

22 Para 42-48 of HC543

23 Para 45

24 See Appendix 1

25 Ibid

in the construction industry and have presented clear evidence to this effect. We urge the Government to keep an open mind and to address the evidence fully when we publish our final report.

Legislative framework

12. While the best practice examples we outlined in our previous report, (both in terms of guidance for public procurement and the Common Framework Agreement between EDF Energy and the trade unions), provide an exemplary model for future contracts and procurement practices, they are entirely based on voluntary agreements. We concluded that construction workers should not be dependent on the good will of clients to ensure their safety at work, nor indeed their future employment free from blacklisting, and undertook to investigate whether legislative reform or new legislation is required to eradicate blacklisting.²⁶

13. The main focus of the responses of both the UK and Scottish Governments to our report was on issues relating to potential changes in legislation and procurement. With regard to the potential for changes to legislation, Jenny Willott noted that the Government “remains committed to reviewing the Blacklists Regulations should any new evidence of this practice continuing be found”.²⁷ She also noted the Government’s commitment to “consider carefully the final recommendations by your Committee when they are made, and the outcome of relevant court and tribunal cases”.²⁸ She also highlighted, however, that the Government response to the consultation on the Employment Relations Act 1999 (Blacklists) Regulations 2010 was clear then that “a new criminal sanction was not regarded as being appropriate or proportionate. We do not have a reason to change this view and most employment law is enforced through civil sanctions”.²⁹ We will consider the Government’s position during the next phase of our inquiry.

Conclusion

14. We welcome the significant progress which has been made in both revealing the practice of blacklisting, and in seeking redress for the victims, and families of the victims, of this odious practice. We will continue to explore what more could be done to redress the crimes of the past and to ensure that reform in the industry to eradicate this practice is genuine, effective and comprehensive in its effects.

26 Para 52

27 See Appendix 1

28 See Appendix 1

29 See Appendix 1

Appendix 1: UK Government Response

The Scottish Affairs Committee reported to the House on *Blacklisting in Employment: addressing the crimes of the past; moving towards best practice in its Sixth Report of Session 2013-14, published on 14 March 2014. The Government response to the Report was received on 2 May 2014.*

Letter from Jenny Willott MP, Minister for Employment Relation and Consumer Affairs, Department for Business, Innovation and Skills, 30 April 2014

I write regarding the recent publication of the second interim report 'Blacklisting in Employment: addressing the crimes of the past'. I welcome the report, and the transparency this brings to this important debate.

I would first like to commend the efforts of the Scottish Affairs Select Committee to date, to investigate the abhorrent and illegal practice of blacklisting, and to explore what more could be done to redress the crimes of the past and ensure reform in the industry is genuine and effective. I also thank MSP Nicola Sturgeon for her prompt reply to these issues, as attached.

I would also like to share my comments on the initial recommendations made in this report. In particular I want explain our approach to a potential review of legislation and the key issues of compensation, self-cleaning, agency workers. I hope this will inform the further considerations and recommendations on how to address the concerns of the Committee.

Review of legislative framework

I particularly welcome the approach to include a package of measures as proposed by the report, not solely focusing on legislative reform, which can be costly and may not always be the best solution to the problem faced.

As you know, there has been much speculation and allegation but as yet, Government has not seen any new evidence of the practice of blacklisting ongoing, despite repeated invitations to unions and the Opposition to submit it. There is also nothing to suggest that the changes made to the regime since the Consulting Association case are not acting as an effective deterrent to blacklisting. I am grateful to the SAC for contacting Government directly, with concerns and information arising from your inquiry. This has resulted in the current Information Commissioner's Office (ICO) investigation, which we are following closely and await the outcome.

With regard to the potential for changes to legislation, this Government remains committed to reviewing the Blacklists Regulations should any new evidence of this practice continuing be found. We will also consider carefully the final recommendations

by your Committee when they are made, and the outcome of relevant court and tribunal cases. I should highlight that the Government response to the consultation on the Employment Relations Act 1999 (Blacklists) Regulations 2010 was clear then that a new criminal sanction was not regarded as being appropriate or proportionate. We do not have a reason to change this view and most employment law is enforced through civil sanctions.

Direct employment

The Government supports the use of flexible employment structures in the labour market and as such cannot agree with the recommendations for requiring direct employment only. This would effectively be a ban on the use of agency staff in the construction sector, which is likely to be unfair to agency workers. Our view is that an effective regulatory regime along with the promotion of the benefits of best practice and a culture of transparent and responsible businesses should guard against individuals being blacklisted from the outset. We would welcome the Committee taking further evidence from businesses in the construction sector on how they can better protect agency workers whilst still offering a range of employment opportunities.

Compensation

I agree with the view that a compensation scheme would only represent an effective sign of reform if it is voluntary. I am interested to see how the Construction Workers Compensation Scheme announced by several major contractors in the industry in October 2013 develops. It is currently being negotiated with representatives of the individuals affected and it will be for the parties involved to agree on what form this should take and how it can be administered. Courts and tribunals can be both a costly and stressful route to redress for those involved and we encourage the fair resolution of disputes where this can be achieved by other means.

Government agrees that any compensation which is due, either from employment tribunals, as part of an agreed settlement, or under any voluntary scheme, should be paid promptly and in full. Where there is evidence this has not been done, especially when there has been a failure to comply with a Tribunal or Court judgement, the public sector can take this into account when deciding if a contractor meets the relevant standards to participate in any tender for public contracts. It is unlikely however that we will be able to require compensation as an automatic pre-condition of 'self cleaning', and particularly where there has been no legal finding or other admission of liability, and/or no compensation has been ordered by the courts.

Self cleaning

Banning contractors from procurement process would be subject to European rules on procurement, and Government is required to operate within this framework. This includes the need to evidence before excluding and exclusion can only be used as a way

to force companies to address past misdemeanours if they are not doing so. It cannot be used as a punishment. As your report states, at the time the Consulting Association blacklist was in use, the practice was not illegal.

Current UK legislation (The Public Contracts Regulations 2006) provides that an economic operator may be treated as ineligible to bid where it has committed an act of grave misconduct in the course of its business or profession. Blacklisting may arguably fall within this definition. This would need to be decided on a case by case basis.

You may also be aware that The UK Contractors Group, the trade body for the main contractors has supported the introduction of a code of good vetting practice, led by the Chartered Institute of Personnel and Development (CIPD). The Construction Industry Joint Council (CIJC) Working Rule Agreement also now contains a clear commitment that the practice of 'blacklisting' is unacceptable and contains grievance procedures that can deal with any allegations of this practice. UCATT announced this as a "major breakthrough" in the campaign against blacklisting. The CIJC agreement is negotiated between major UK construction associations and construction unions and covers pay and conditions.

Government would be pleased to assist in any further way we can with the considerations you will make next. I am grateful in particular for the advice of officials in Cabinet Office who have input to this response.

I am copying this letter to: Rt. Hon Alex Salmond MSP, MSP, Nicola Sturgeon, MSP, Rt. Hon Carwyn Jones AM, Rt. Hon Francis Maude MP, Stephen Farry MLA, Simon Hamilton, MLA and David Smith of the Information Commissioner's Office.

Jenny Willott MP
Minister for Employment Relations and Consumer Affairs

Appendix 2: Scottish Government Response

The Scottish Affairs Committee reported to the House on *Blacklisting in Employment: addressing the crimes of the past; moving towards best practice in its Sixth Report of Session 2013-14, published on 14 March 2014*. The Committee received a response from Nicola Sturgeon MSP, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, on 17 March 2014

Letter from Nicola Sturgeon MSP, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, 17 March 2014

I was interested to note the publication of the Scottish Affairs Committee's recent report, *Blacklisting in Employment: addressing the crimes of the past; moving towards best practice*.

I am keen to ensure that there is no doubt whatsoever that the Scottish Government regards the practice of blacklisting as totally abhorrent, and that we are committed to continuing the work we are already undertaking with the Scottish Trades Union Congress, and individual trades unions, including GMB, Unite, UCATT and Unison, to ensure blacklisting is eradicated once and for all in Scotland.

I am pleased that the committee's report acknowledges that the Scottish Government has already gone further than the Welsh Government in tackling blacklisting, through the introduction not only of guidance and new pre-qualification questions, but also a new contract condition which would provide for termination of the contract in the event that the contractor was found to have engaged in blacklisting. You may also be interested to know that I have recently written to all local authorities in Scotland encouraging them to also adopt these measures.

The report recommends that guidance on tackling blacklisting should be put on a statutory footing. I am sure, therefore, that the committee will be pleased to recognise the commitment given by the Scottish Government last year to take the power to make regulations under the provisions of the Procurement Reform (Scotland) Bill, which is currently before the Scottish Parliament, to cover the circumstances in which a company could be excluded from bidding for contracts, including when it has been found to have engaged in blacklisting, but has not taken appropriate remedial action.

While the committee is right to recognise that purchasing power can bring influence to bear, it is important that it understands that a purchaser's ability to take action is dependent on the legislation, currently reserved to Westminster, and its enforcement. I am, therefore, concerned that in appearing to focus its attention on purchasers and the role of the client, the committee may be focussing on the wrong priorities. In this context I note the concerns expressed to the committee by various trades unions regarding the effectiveness of the legislation and its enforcement, and would urge the

committee, in its future consideration of this important matter, not to lose sight of those concerns.

I am copying this letter to the Rt. Hon. Francis Maude MP, Jane Hutt, AM, Simon Hamilton MLA, and to Maureen Watt MSP, Convener of the Infrastructure and Capital Investment Committee of the Scottish Parliament, which is currently considering the Procurement Reform (Scotland) Bill.

Nicola Sturgeon

Appendix 3: Welsh Government Response

The Scottish Affairs Committee reported to the House on *Blacklisting in Employment: addressing the crimes of the past; moving towards best practice in its Sixth Report of Session 2013-14, published on 14 March 2014. The Committee received a response from Jane Hutt AC / AM, Minister for Finance, on 8 May 2014*

Letter from Jane Hutt AC / AM, Minister for Finance, 8 May 2014

I have read with interest the Scottish Affairs Committee report 'Blacklisting in Employment: addressing the crimes of the past; moving towards best practice' published on 14 March.

I am pleased that the report highlights as best practice the Welsh Government's pioneering approach to tackling blacklisting through public procurement, commending us on the political leadership shown on this issue. The Procurement Advice Note which I issued in September 2013 - hailed in the report as the first guidance of its kind to be issued at government level in the UK - coupled with the firm stance we took on the matter, paved the way for other governments to follow suit and I am pleased that Scotland then emulated our approach.

The Welsh Government will continue its efforts to end the abhorrent practice of blacklisting and support the Trade Unions in this matter. It is important that the way we carry out procurement sends a clear message to suppliers that we want to deal with professional businesses that comply with the law and treat their workers with respect and that this principle flows down the supply chain.

The Committee's recommendation that consideration be given to devolving the appropriate legislative powers to enable the Welsh Government to put its guidance on a statutory footing is welcome. I am currently exploring the options to legislate on procurement matters in Wales and this will help to further strengthen our position.

I am looking forward to the new EU Procurement Directives coming into effect later this year. They contain strengthened provisions around social considerations and compliance with labour laws and I will be exploring the opportunities these bring to further strengthen our procurement policy.

I support your efforts to improve the construction sector in terms of ensuring robust health and safety monitoring and reporting procedures, transparent recruitment processes and direct employment. The Common Framework Agreement that EDF Energy has developed in conjunction with the Trade Unions sounds like a good model from which to work and my officials will review that further.

The Welsh Government recognises the positive influence we can bring to bear on the construction industry given the substantial percentage of public sector spend it accounts

for. I understand you will be giving further consideration to these matters in future meetings and I look forward to receiving an update on that in due course.

We have made great strides in Wales in improving construction procurement, ensuring best practice and consistency by embedding our key procurement policies. The Construction Strategy I launched last year recommends use of the SQuID (Supplier Qualification Information Database) approach. This simplifies and standardises the selection stage of procurement comprising a common question set and risk-based approach. In addition, the Sustainable Risk Assessment (SRA) which is completed for all public sector contracts in Wales, including construction, ensures ethical procurement is undertaken with responsible suppliers. This means that for construction contracts in Wales, by fully utilising the SQuID and SRA, the public sector will effectively have addressed blacklisting.

I am copying this letter to the Rt. Hon. Francis Maude MP, Nicola Sturgeon MSP, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities in the Scottish Government and Simon Hamilton MLA, Minister of Finance and Personnel in the Northern Ireland Assembly.

Yours Sincerely,

Jane Hutt AC / AM
Y Gweinidog dros Cyllid
Minister for Finance

Formal Minutes

Wednesday 14 May 2014

Members present:

Mr Ian Davidson, in the Chair

Mike Crockart
Jim McGovern
Graeme Morrice
Pamela Nash

Sir Jim Paice
Mr Alan Reid
Lindsay Roy

Draft Report (*Blacklisting in Employment-update: incorporating the Government's response to the Sixth Report of Session 2013-14*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 14 read and agreed to.

Appendices to the Report agreed to.

Resolved, That the Report be the Thirteenth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned until Tuesday 10 June at 2.00pm]

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

First Report	Postal Services in Scotland	HC 669 (HC 884)
Second Report	Video Games Industry in Scotland	HC 500 (Cm 8067)
Third Report	UK Border Agency and Glasgow City Council	HC 733
Fourth Report	The Scotland Bill	HC 775
Fifth Report	Student Immigration System in Scotland	HC 912 (Cm 8192)
Sixth Report	The Referendum on Separation for Scotland: Unanswered Questions	HC 1806
Seventh Report	The Crown Estate in Scotland	HC 1117
Eighth Report	The Referendum on Separation for Scotland: Do you agree this is a biased question?	HC 1942

Session 2012–13

First Report	A Robust Grid for 21 st Century Scotland	HC 499
Second Report	The Referendum on Separation for Scotland: making the process legal	HC 542
Third Report	The Referendum on Separation for Scotland: a multi-option question?	HC 543
Fourth Report	The Referendum on Separation for Scotland: Terminating Trident—Days or Decades?	HC 676 (HC 861)
Fifth Report	The Future of HM Coastguard in Scotland	HC 583
Sixth Report	The Referendum on Separation for Scotland: The proposed section 30 Order—Can a player also be the referee?	HC 863
Seventh Report	The Referendum on Separation for Scotland: Separation shuts shipyards	HC 892
Eighth Report	The Referendum on Separation for Scotland: How would Separation affect jobs in the Scottish Defence Industry?	HC 957 (HC 257)
Ninth Report	Blacklisting in Employment: Interim Report	HC 1071

Session 2013–14

First Report	Remploy Marine Fife	HC 454
Second Report	The Referendum on Separation for Scotland: The Need for Truth	HC 828
Third Report	The Referendum on Separation for Scotland: A Defence Force for Scotland—A Conspiracy of Optimism?	HC 842
Fourth Report	The impact of the Bedroom Tax in Scotland: Interim Report	HC 288

Fifth Report	The Crown Estate in Scotland: follow up	HC 889
Sixth Report	Blacklisting in Employment: addressing the crimes of the past; moving towards best practice	HC 543
Seventh Report	Referendum on Separation for Scotland: the impact on higher education, research and tuition fees	HC 1144
Eighth Report	Land Reform in Scotland: Interim Report	HC 877
Ninth Report	The Impact of the Bedroom Tax in Scotland: Plan B – charges, arrears and refunds; incorporating the Government Response to the Committee’s Fourth Report of Session 2013-14	HC 937
Tenth Report	Zero Hours Contracts in Scotland: Interim Report	HC 654
Eleventh Report	Power Outages and Extreme Weather Conditions in the West of Scotland	HC 484
Twelfth Report	The Referendum on Separation for Scotland: Scotland’s Membership of the EU	HC 1241