Public Procurement Reform
- a rapid evidence review

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EXECUTIVE SUMMARY

Aim and objectives

The aim of the evidence review is to examine existing material on procurement reform, drawing on policy and research evidence from Scotland, the UK and the EU, to help inform the development of the Scottish Government Procurement Reform Bill.

The objectives of the evidence review are threefold:

(i) to briefly outline the Scottish and EU strategic policy contexts in which the procurement reform agenda is located, underscoring the rationale for reform and its key components (Chapter 2);
(ii) to identify some developments in procurement reform in Scotland and the UK (Chapter 3);
(iii) to examine a range of evidence including Scottish, UK and EU policy documents, independent reviews of procurement and international comparative studies and surveys of procurement policy and practice (Chapters 4 & 5).

Scope of review and methodology

The scope of the review is to examine available evidence on the six themes of the Procurement Reform Bill Consultation – namely, transparency, SME and Third Sector access to public sector contracts, innovation and growth, social and environmental sustainability issues in procurement, tackling inappropriate conduct and poor performing suppliers and application and compliance (Scottish Government, 2012a).

A desk based evidence review was conducted covering a range of material including Scottish, UK and EU policy documents and legislation, independent reviews of procurement, international comparative studies, case studies and evaluations. It is not a Systematic Review and therefore, it is not comprehensive and does not attempt to critically analyse the methods used in all the studies reviewed or assess the quality of the evidence. It focuses on documentation from 2000 onwards (broadly taken as the commencement of the procurement reform process).

Scottish and EU procurement reform policy contexts

The Scottish Government Procurement Strategic Plan (2012-13) underscores its four main priorities in procurement reform:

- embedding sustainability in all we do;
- improving suppliers access to public contracts;
- maximising efficiency and collaboration;
- delivering savings and benefits (Scottish Government, 2012e).

The key components of the procurement reform agenda developed in response to critical reviews of procurement and can be categorised into two broad strands: (i) improving procurement systems and processes (especially e-procurement, e-commerce and standardising IT tools); and (ii) improving the profession (capacity,
expertise and capability building) both requiring resources, training and cultural change. Central to the procurement reform project at an EU level are: the themes of encouraging sustainability and community benefit clauses (environmental, economic and social); improving access to public contracts including access by the private and third sectors; and increasing collaboration at both contracting authorities and supply sides. This is set in the economic context of the need to ensure savings during a period of fiscal constraint.

**Key findings**

It should be noted that the findings in this review refer to evidence from across the EU unless stated otherwise. Where developments relate specifically to Scotland, it is stated in the text. It is important to highlight this context in order to avoid any assumption that all the findings relate specifically to Scotland.

**Support for the value and principles of the procurement reform agenda across the EU**

- A consensus exists at Scotland, UK and EU levels on the logic, value and principles of the procurement reform agenda and the value of utilising public procurement as a vehicle for achieving wider policy objectives (see above section on Scottish and EU procurement reform policy contexts). There is, however, still a need to effect cultural and behavioural change within organisations and for leaders to take a key role in driving change and providing strategic direction. This would suggest that there is a need to develop a mix of ‘softer’ (encouraging) and ‘harder’ (enforcing) approaches to continue to build reform momentum.

**Practice across the EU**

- Some EU member states (MS) are more advanced than others in encouraging and requiring environmental, social and economic benefit clauses in public contracts (Kahlenborn et al, 2011).
- The older MS tend to be more advanced in their use of environmental, social and innovation clauses and requirements than newer MS. The Netherlands, Sweden, Denmark and the UK tend to be the front runners in considering environmental, social and economic benefits in procurement (Kahlenborn et al, 2011 & European Commission, 2010b: 82).
- Practice varies across the EU with some countries enforcing above the EU threshold approaches and regulation to below the threshold contract values, and others devolving the management of contracts to local contracting authority level.
- The OECD (2010) found that, on the whole, the majority of MS regulate public procurement above and below EU thresholds within the same Act and require that contracts below the EU thresholds are based on open and fair competition procedures, although there is some variation in practice and a good degree of discretion at MS level (cf also European Commission, 26 October 2012).
- The centralisation and specialisation of public procurement varies across MS (European Commission, 26 October 2012: 26). MS with no regulation still use competitive tenders below the EU thresholds (OECD, 2010: 7).
The OECD found that publication procedures and processes vary across MS but on the whole, MS publish contract notices on national portals or websites (OECD, 2010: 16 & cf also European Commission, 26 October 2012). However, in terms of the limits of current data, the OECD highlights that, to date, a systematic review, of how MS have developed and designed their legal frameworks outside the scope of the EU Directives, has not been undertaken (OECD, 2010: 5).

**Developments in procurement reform in Scotland and the UK**

- Improvements have been made in terms of capability and capacity within procurement and there is a need for public sector organisations to continuously improve.
- The more systematic collection of consistent and reliable management and evaluation data would allow for a more detailed picture of procurement reform progress, the procurement landscape and the performance of organisations engaged in it.

**Effective project and contract management and systems development**

- Good, thorough and rigorous project and contract management can mitigate a range of problematic issues that might arise in the procurement process. For example, it can help reduce the likelihood of processes lacking in transparent, fair and inclusive procurement procedures, help monitor and tackle poor performing suppliers, help tackle the poor regulation of public sector contracts and help prevent the infiltration of crime in public procurement.
- Achieving good project management requires skilled and trained professionals in contracting authorities and effective systems capability.
- Mechanisms, techniques and systems need to be developed at every stage of the procurement and contract management process to prevent or reduce the opportunities for crime to occur.

**Lack of management and evaluation data on outcomes and impact**

- Across the EU, evidence suggests that there is limited information, monitoring and evaluation data in procurement, resulting in a lack of evidence of the outcomes achieved from public sector contracts spend across all EU MS. The European Commission recognises that this is an area for development.
- The lack of data needs to be tackled as it makes it difficult to be able to determine where and how to target limited resources. The evidence on lack of data would suggest the need to mandate consistent and comparable data gathering at EU MS national and sub-national levels.
- Undertaking process (formative) and outcome (summative) evaluations and cost benefit analyses of public sector contracts could help EU MS understand and identify progress within the reform agenda and its themes, for example, of sustainability and innovation (and ensuring VFM). A question is whether this should be an integral part of contracts.
Transparency and Proportionality

- There is less explicit evidence on the themes of transparency and proportionality. Some reference to these issues is made in relation to reducing the administrative burden, encouraging SME and Third Sector access to public sector contracts, tackling poor performance and compliance and promoting non-discrimination.

SME and Third Sector access to public sector contracts

- Evidence from across the EU suggests that barriers exist, which can prevent access to public sector contracts by SMEs and the Third Sector. Some barriers include: difficulties in obtaining information; administrative burden in preparing bids; the large size of public sector contracts; disproportionate qualification levels and certification requirements; and late payments by contracting authorities.
- Some suggestions for improving access include: promoting cultural change within contracting authorities; dividing contracts into lots and providing opportunities for sub-contracting; reducing bureaucracy; greater use of e-procurement; and offering feedback to SMEs and the Third Sector.

The return of demand side innovation policy – strategic drivers and challenges

- Evidence from across the EU suggests that innovation in public procurement or the public procurement of innovation has re-surfaced as a popular policy solution to driving economic growth and innovation and contributing to the achievement of wider socio-economic and environmental policy objectives.
- There is support for considering public sector procurement as a strong player in stimulating the market. There is, however, a mixed evidence base and some argue a lack of sufficient data on the effectiveness of demand side innovation policy.
- Evidence suggests that innovation in public procurement is often fused throughout wider policy objectives and arguably, innovation as a policy goal connects a number of themes within the Bill, in particular, the themes of sustainability and encouraging SME access.

Greater demands on public procurement to enable the achievement of wider socio-economic and environmental policy goals

- Evidence from across the EU acknowledges the progressive role that procurement can play in encouraging the collaboration and integration of linked policy objectives in the current context of diverse environmental, social and economic challenges and constrained budgets (through community benefit clauses).
- In order to realise the collaboration and integration of linked policy objectives, action and change are dependent on cultural, behavioural and systems change in the whole supply chain and across policy areas not just in public procurement policy and practice.
- If integrated, wider benefit clauses need to be: clearly stipulated in the tender specification (as early as possible in the process); clearly evaluated (and
weight (weighted) as part of the tender evaluation process; and relevant and proportionate to the nature of the work.

- Gathering data and evidencing impact and outcomes of public sector spend and contracts, including community benefit clauses, should be the responsibility of all the policy areas involved in commissioning and contracting out.

- The majority of the case study evidence reviewed on sustainability and community benefit clauses is descriptive with less data on outcomes and impact, which reinforces the need to gather outcomes and impact data. Some evidence from case studies demonstrates a range of ways in which sustainability and community benefit clauses can be incorporated into public sector contracts and provides useful ideas and suggestions to help contracting authorities explore ways of doing it.

**Developing preventative approaches to tackling inappropriate conduct and poor performing suppliers**

- Little evidence exists on this issue; however, suggestions regarding prevention can be drawn from wider evidence and international indexes of bribery and corruption.

- The sectors most prone to bribery and corruption include the public works and construction sector, utilities, real estate, property, legal and business services, oil and gas and mining (Transparency International, 2011). The complex and fragmented nature of the public works and construction sector make it a difficult sector to monitor and vulnerable to crime.

- Evidence suggests that success in tackling inappropriate conduct and poor performing suppliers and preventing criminal infiltration of the procurement process can be achieved through developing systems and processes to target more ‘at risk’ sectors and raise the bar for monitoring and managing suppliers’ delivery of services.

- Some evidence suggests that the following preventive approaches could help tackle inappropriate conduct and poor performing suppliers and protect against crime: (i) increasing transparency and publication of awards; (ii) improving data/information sharing between the police and procurement; (iii) placing increased accountability on public organisations to evidence action they have taken to reduce the risk of crime in public procurement; (iv) encouraging good corporate ethics and governance structures within public and private sector organisations; (v) strengthening national and international co-operation, laws and regulations; (vi) increasing scrutiny on the companies’ professional competence and financial stability through the whole procurement process and contractual period; (vii) rolling out voluntary accreditation schemes, for example, the Scottish Government’s (2010c) Use of the Security Industry; and (viii) requesting that procurers provide their judicial record from the Criminal History System at the Pre-Qualification Questionnaire stage (PQQ stage) (Mackenzie et al, 2012: 9).

**Application and compliance**

- Limited evidence exists on the specific topic of ensuring the compliance of both suppliers and contracting authorities. Some of the issues identified on
dealing with inappropriate conduct and poor performing suppliers link with this theme.

- The OECD (2010) highlights that, on the whole, EU countries apply similar remedies to below and above EU thresholds. The UK appears to be the exception in not having below threshold regulations for dealing with complaints but instead has guidance and informal mechanisms for handling complaints.

Compromise is likely to be necessary on the policy and legislative actions on the six themes of the Procurement Reform Bill

- In Scotland, compromise is likely to be necessary on policy and legislative actions on the six themes of the Procurement Reform Bill. It is clear from the literature and Procurement Reform Bill Consultation responses that proposed solutions in one area might create barriers (perceived and real) elsewhere, for example, there might be tensions between improving transparency and encouraging SME access.

The need for an inter-disciplinary approach to building the evidence

- Across the EU MS, the limited evidence on some of the themes of the procurement reform agenda suggests the (i) need for data development and gathering at public sector organisational levels across the EU, in addition, (ii) to exploiting wider, cross social science and business management bodies of evidence and (iii) conducting further research.
- A three pronged approach could be helpful in building the evidence base to inform policy intervention/direction of travel and uncover what, if any, evaluation data exists on policy interventions especially given the challenge that public procurement faces in achieving wider socio-economic and environmental policy objectives.
- Across the EU and in Scotland, primary research could involve conducting qualitative interviews with public sector organisations and quantitative surveys of the public procurement landscape, which could help shed some light on the level of progress made so far on structural, cultural and behavioural changes recommended in previous reviews of public procurement.

Conclusion

- Connecting the above points together, from the evidence available across the EU, arguably some of these mechanisms are in place but the challenges that remain relate to ensuring that the procedures and processes are watertight, fair, and transparent and that the mechanisms employed are effectively enforceable.
- In Scotland, improvements have been made in terms of capacity and capability within procurement and there is the need for public sector organisations to continuously improve.
- Across the EU, the evidence base on spend, process and outcomes needs to be developed. Evidencing outcomes is crucial in the economic context of fiscal constraint and reduced resources.
Across the EU, the current stage of reform is work in progress but the gaps that remain now need to be plugged and a balance needs to be struck between encouraging developments in some areas and enforcing where statements of intent or principle are not enough to ensure action, implementation and behavioural change.
Chapter 1: INTRODUCTION AND METHODOLOGY

Introduction

1.1 The aim of the evidence review is to examine existing material on procurement reform, drawing on policy and research evidence from Scotland, the UK and EU, to help inform the development of the Scottish Government Procurement Reform Bill.

1.2 The objectives are threefold: (i) to briefly outline the Scottish and EU strategic policy contexts in which the procurement reform agenda is located, underscoring the rationale for reform and its key components; (ii) to identify some developments in procurement reform in Scotland and the UK; and (iii) to examine a range of evidence including Scottish, UK and EU policy documents, independent reviews of procurement and international comparative studies and surveys of procurement policy and practice. The findings from the analysis of the Scottish Procurement Reform Bill Consultation is published separately, however, cross reference is made here to some of its main findings in an attempt to consider the implications of the wider research and the consultation response analysis, for policy and legislative development (cf Mulholland et al, 2013a & b). This evidence review combined with regulatory impact assessments (and the Starting Gate Review Process) forms part of the policy and legislative options appraisal process to help identify where intervention/action is justifiable (HM Treasury, 2003).

1.3 Stages 1 to 3 of the options appraisal process involve asking the following: Stage 1 - is there an identified need and is the proposed intervention likely to be worth the cost? What are the pros and cons of taking action and the risks of not acting? Stage 2 – what are the desired outcomes and objectives of an intervention? What full range of options might be available to enable them to be delivered? Stage 3 – what are the range of policy options available? Is there a ‘do minimum’ option? (HM Treasury, 2003). Utilising a range of evidence as part of the appraisal process should help identify what is necessary for the Bill, what is necessary for policy and where and how any interventions will bring additionality. Equally, drawing on a range of evidence should assist in establishing the resource and administrative implications of any legislative and policy changes. Arguably, there is a need to conduct a cost benefit analysis as part of estimating the costs and risks of intervention and action and this is beyond the scope of this evidence review.

Scope and structure of the evidence review

1.4 Chapter 2 covers the strategic policy and legislative context of the procurement reform agenda. Chapter 3 explores some of the evidence from financial data, systems capability development and audit reviews in examining developments in Scotland and the UK on procurement reform. Chapter 4 outlines some key findings from the Scottish Procurement Reform Bill Consultation analysis with cross reference to connected themes from the wider evidence. Chapter 5 explores the existing evidence structured around the six themes of the Procurement Reform Bill and Chapter 6 outlines conclusions from the review.
1.5 The themes identified in the evidence are structured around the six themes in the Scottish Government Procurement Reform Bill Consultation. Where gaps in the evidence exist, this is identified and discussed. The six themes are: (i) Public Procurement processes are transparent, streamlined, proportionate, standardised and business friendly; (ii) Making it easier for business, particularly, newer businesses, SMEs and the third sector, to access public contract opportunities and sub-contracting opportunities; (iii) Smarter use of public procurement to encourage innovation and growth; (iv) Taking account of social and environmental sustainability issues through public procurement; (v) Dealing with inappropriate conduct and poor performing suppliers; and (vi) Application and compliance (Scottish Government, 2012a).

### Methodology

1.6 A desk based evidence review was conducted covering a range of material including Scottish, UK and EU policy documents and legislation, independent reviews of procurement, international comparative studies, case studies and evaluations. In gathering material for Chapter Three on systems, discussions were held with five colleagues in the Scottish Government working in the area of capability and the Single Point of Enquiry (SPOE) to gain a broad understanding of the aims of the systems and processes. The review of the evidence is not exhaustive and focuses more specifically on documentation from 2000 onwards (broadly taken as the commencement of the procurement reform process).

1.7 The review does not attempt to detail the procurement processes and systems of EU Member States as this type of descriptive content is documented elsewhere (Bianchi & Guidi, V (eds), 2010; European Commission, 26 October 2012; Kahlenborn et al, 2011; OECD, 2010; PWC, 2011). Instead, the review draws on existing and emerging evidence on policy and best practice in relation to the parameters of the policy and legislative proposals within the Scottish procurement reform context. It is not a Systematic Review and, therefore, it is not comprehensive and does not attempt to critically analyse the methods used in all the studies reviewed or assess the quality of all the evidence. It is out with the scope of this exercise to attempt to critically assess qualitatively and quantitatively progress on the reform agenda by examining procurement systems, processes, capability and professional capacity and their efficiency and effectiveness. The evidence review was conducted between November 2012 and March 2013.

### Definitions

1.8 In terms of definitions, some discussion is made in the relevant sections on the contestation surrounding innovation, demand side innovation and sustainability.

### Context setting and highlights from the evidence

#### Scottish and EU procurement reform policy contexts

1.9 In terms of objective (i) of the evidence review – regarding strategic policy contexts, there is congruence between the Scottish, UK and EU policy drivers and
objectives. The Scottish Government Procurement Strategic Plan (2012-13) underscores its four main priorities in procurement reform:

- embedding sustainability in all we do;
- improving suppliers’ access to public contracts;
- maximising efficiency and collaboration;
- delivering savings and benefits (Scottish Government, 2012e).

1.10 The key components of the procurement reform agenda can be categorised into two broad strands: (i) improving procurement systems and processes (especially e-procurement, e-commerce and standardising IT tools); and (ii) improving the profession (capacity, expertise and capability building) both requiring resources, training and cultural change.

1.11 Central to the procurement reform project at an EU level are: the themes of encouraging sustainability and community benefit clauses (environmental, economic and social); improving access to public contracts including access by the private and third sectors; and increasing collaboration at both contracting authorities and supply sides. This is set in the economic context of the need to ensure savings during a period of fiscal constraint. Evidence suggests that all EU member states (thereafter, MS) are aware of the broad reform principles and the value of utilising public procurement as a vehicle for achieving wider policy objectives. Some countries are more advanced than others in encouraging and requiring environmental, social and economic benefit clauses in public contracts (Kahlenborn et al, 2011). The older MS tend to be more advanced in their use of environmental, social and innovation clauses and requirements than newer MS. The Netherlands, Sweden, Denmark and the UK tend to be the front runners in considering environmental, social and economic benefits in procurement (Kahlenborn et al, 2011 & European Commission, 2010b: 82). However, practice varies across the EU with some countries enforcing above the EU threshold approaches and regulation to below the threshold contract values, and others devolving the management of contracts to local contracting authority level.

1.12 The OECD (2010) found that, on the whole, the majority of MS regulate public procurement above and below EU thresholds within the same Act and require that contracts below the EU thresholds are based on open and fair competition procedures, although there is some variation in practice and a good degree of discretion at MS level (cf also European Commission, 26 October 2012). The centralisation and specialisation of public procurement varies across MS (European Commission, 26 October 2012: 26). MS with no regulation still use competitive tenders below the EU thresholds (OECD, 2010: 7). The OECD also found that publication procedures and processes vary across MS but on the whole, MS publish contract notices on national portals or websites (OECD, 2010: 16 & cf also European Commission, 26 October 2012). However, in terms of the limits of current data, the OECD highlights that, to date, a systematic review, of how MS have developed and designed their legal frameworks outside the scope of the EU Directives, has not been undertaken (OECD, 2010: 5).
Procurement reform – some developments in Scotland and the UK

1.13 Regarding objective (ii) of the evidence review – some developments in Scotland and the UK on procurement reform - improvements have been made in terms of capability and capacity within procurement. There is, however, still room for improvement in terms of cultural change, systems and data development and management. These issues are discussed in Chapter 3.

Effective project and contract management

1.14 An emerging theme from the evidence that connects all the six themes is that good, thorough, rigorous project and contract management processes are crucial. Strict procedures at the PQQ stage (the screening stage before full invite to tender) could provide solutions to some of the challenges/problems regarding improving transparency, increasing access of SMEs and Third Sector and including community benefit clauses, regulation and compliance. Equally, good project and contract management could help hold suppliers to account and thorough monitoring of contract criteria could help capture outcomes of contracts.

Lack of management and evaluation data on outcomes and impact

1.15 Bringing objectives (i) and (ii) above together in considering objective (iii) of the evidence review - a considerable volume of material exists at the strategic policy level within Scotland, the UK and the EU outlining and reinforcing the policy direction of travel (see references list). Equally, there are a number of EU wide studies and surveys charting and comparing the procurement systems and approaches to managing and regulating above and below EU threshold level contracts. These studies, on the whole, are descriptive (and often MS self-reported) with varying levels of detail on the systems, allowing the reader a brief snapshot of the procurement systems but with little or no detail on the effectiveness, outcomes and impact of differing approaches. Some of the literature (policy and research) highlights the dearth of management data and evaluation data on outcomes and impact at national and EU levels (Audet, 2002; Audit Scotland, 2009 & 2012a; Edler & Georghiou, 2007; Edler et al, 2011; Edler et al, 2012; European Commission, 2010b; European Commission, 26 October 2012; Georghiou, 2007; Izsak & Edler, 2011; Kahlenborn, 2011; McClelland, 2006; McFarlane & Cook, 2008a & b & 2008; OECD, 2011; Westminster Sustainable Business Forum, 2008).

1.16 As long as ago as 2002, Audet (2002) pointed to the lack of reliable data and the existence of only a few studies within and across member states. He noted that the lack of detailed and consistent measurements by governments have created information gaps making it difficult to measure and compare public procurement activities and markets across member states (Audet, 2002: 150 – 153 & 171). Audet argues that this gap needs to be addressed and that there is a need to ensure that national data is gathered on the basis of harmonised procedures across the EU (Audet, 2002: 153). Some responses from the Procurement Reform Bill Consultation Analysis also capture this point regarding lack of data on outcomes (Mulholland et al, 2013a & b).
1.17 Where some case study material has been identified, there is more descriptive content than critical appraisal of the processes and outcomes of utilising various procurement systems and processes. Therefore, it is difficult to determine the utility and feasibility of translating and replicating policy measures from one context to another.

The need for an inter-disciplinary approach to building the evidence base

1.18 Specifically on the six themes of the Procurement Reform Bill Consultation, more evidence was uncovered on themes (2) SME and Third Sector access, (3) smarter use of public procurement to encourage innovation and growth, (4) taking account of social and environmental sustainability issues through public procurement, and (5) dealing with inappropriate conduct and poor performing suppliers. Less information was found on (1) transparency and (6) application and compliance. Although (5) and (6) overlap and theme (1) is often implicit within the other themes. Across the EU MS, the limited evidence on some of the themes of the procurement reform agenda suggests the (i) need for data development and data gathering at public sector organisational levels, in addition, (ii) to exploiting wider, cross social science and business management bodies of evidence and (iii) conducting further research.

1.19 All six themes are substantive topics and could merit further exploration individually and to examine the inter-connections between all six. The aforementioned three pronged approach could be helpful in building the evidence base to inform policy intervention/direction of travel and uncover what, if any, evaluation data exists on policy interventions especially given the challenge that public procurement faces in achieving wider socio-economic and environmental policy objectives.

1.20 The evidence search could be broadened out to include literature/established bodies of work, for example, within criminology for suggestions on themes (5) and (6) for improving regulation, monitoring and compliance and material from sociological and economic studies on employability/employment for suggestions on (4). I have touched upon a body of evidence within economics that has provided material for theme (3) on innovation but this could also be expanded. Another disciplinary area for exploration could be business management and in particular, business management on sustainable procurement and wider procurement practitioners’ journals. Of course, covering this wider range of literature will be unable to demonstrate the direct impact of public procurement unless specific independent evaluations of public sector contracts and processes are uncovered in the literature. Primary research could involve conducting qualitative interviews with public sector organisations and a quantitative survey of the public procurement landscape could help shed some light on the level of progress made so far on structural, cultural and behavioural changes recommended in previous reviews of public procurement.
Chapter 2: POLICY AND LEGISLATIVE CONTEXTS - SCOTLAND, UK AND EU

The justification for procurement reform

Inefficiencies in spend and lack of data on spend

2.1 Within the last fifteen years, reviews of procurement have identified inefficiencies in spend and lack of data on spend. Audit Scotland (2009) argued that, “Effective purchasing can lead to the release of cash and help the delivery of high quality public services” (Audit Scotland, 2009: 3).

2.2 Amongst other issues identified including those of lack of capability and capacity within the procurement profession, data on purchasing and procurement performance were found to be very poor and often inaccurate in public procurement. Evidence from the National Audit Office (2005), McClelland (2006 & 2012), Audit Scotland (2009), Scottish Government (2009), Scottish Government (2010b) to the Sir Phillip Green Review (Cabinet Office, 2010) identified gaps in data capture, the need for monitoring and evaluation of outcomes and examining impact in order to be able to detect where savings could be made. McClelland argued the need for good consistent, reliable management information in order to assess progress and also identified the lack of cost benefit data (McClelland, 2006: 29). As McClelland pointed out – trying to measure efficiencies in internal procedures and the effectiveness of procurement in achieving desirable outcomes were hampered by the data gaps (McClelland, 2006: 30).

2.3 There are a number of areas that McClelland (2006) identified for development that relate to improving data capture. To determine whether these areas have been developed successfully would require conducting a qualitative and quantitative review and evaluation of all public sector procedures and processes and this is out with the scope of this review. These recommendations, inter alia, included: to develop formal programmes of procurement internal efficiency measurement and management; the development of a standard set of key performance indicators to be used across the public sector; and the development of National Benchmarking and Best Practices Forum to help co-ordinate a procurement benchmarking programme (McClelland, 2006). McClelland also argued that information and performance data should be exchanged and shared across the public sector.

2.4 Examining Whitehall Departments, Sir Phillip Green’s review was very critical of UK Government inefficiencies in spend and in holding spend data (Cabinet Office, 2010). Sir Phillip Green’s review re-emphasised that good procurement should not be fixated on lowest cost as it should achieve an appropriate balance between cost, quality and sustainability (Cabinet Office, 2010). The Scottish Government’s value for money triangle reflects this concept (Scottish Government, 2010b: 1 & 6-7). Two significant issues identified by Green and relevant to the Procurement Reform agenda more broadly were the issues of lack of centralised procurement systems and inconsistent commercial skills across Whitehall Departments (Cabinet Office, 2010: 5). Green found that there were significant price differences across government for the same product and this applied to a whole range of products from
paper to laptops and property management (Cabinet Office, 2010 13-14 & 28). Hence, a range of recommendations for the UK Government arising from the Green review included: the need for centralised procurement; the need to produce accurate spend and consumption data; the need to price common items at the same level for all central departments; the need to manage down demand and specifications; and the need for civil servants to focus on cash when purchasing and apply the same principles as if the money was their own (Cabinet Office, 2010: 20). Equally, Green recommended that UK Departments adapt their budgeting method as they are not incentivised to spend less than the cash budgeted (Cabinet Office, 2010: 31).

Professional skills, capacity and capability

2.5 In 2006, despite the fact that McClelland identified that there had been some significant improvements in the previous three years, he argued there were still,

“[…] in many areas, weaknesses in resources, skills, organisation structures and practices which adversely impact upon achievement of minimum standards and obviously do not provide a good foundation for pursuit of Best Value and further cost savings through enhanced performance. These weaknesses are inconsistent with good governance and the strict accountability requirements of the public sector and need to be addressed urgently. As a result an investment in skills and resources is required” (McClelland, 2006: 7).

McClelland (2006) concluded that the public structures, people and technology were not in place to ensure good purchasing and that improvements were necessary (Audit Scotland, 2009: 3 & McClelland, 2006: 7-9 & 63).

Leadership, cultural change, standardisation and centralisation of procurement functions

2.6 Reviews of procurement also concluded that good leadership mattered and that cultural change and more standardised, centralised approaches to procurement within the public sector were needed to respond seriously to all the issues regarding corporate social responsibility (McClelland, 2006: 35; Cabinet Office, 2010).

Scottish policy context – procurement reform in the context of developing sustainable, economic growth and public service reform

2.8 The Sustainable Procurement Action Plan for Scotland (Scottish Government, 2009) emphasised the need to build sustainable procurement into corporate cultures and procurement activity. It recognised the need for appropriate staff training and clear governance of the action plan to monitor and measure whether the actions were being achieved (Scottish Government, 2009: 3). The Scottish Government Sustainable Procurement Delivery Plan emphasised sustainability as one of the key strategic objectives of the reform programme capturing economic, social and environmental policies and underscored the need for a whole organisation approach, which would require leadership, commitment and capability (Scottish Government, 2010a: 5).

2.9 The Programme for Government (Scottish Government, 2012b) outlined the legislative plans for the forthcoming year and noted that,

"Securing economic recovery and creating jobs, reforming our public services and promoting fairness are at the heart of this Government’s plans - and these objectives are central to this year’s legislative programme" (Scottish Government, 2012: 5).

Of particular relevance to procurement reform is the recognition that reforming public services is a central aspect of government policy and this will involve more local, community and third sector involvement in service delivery to meet increasing demand for services with less resources (Scottish Government, 2012b: 13). Influenced by the recommendations of the Public Services Commission (2011) report, the Scottish Government highlights that it,

"[…] is creating the conditions for local action. Effective place-based partnership is key to creating financially and environmentally sustainable, effective public services which meet local needs" (Scottish Government, 2012b: 13).

2.10 The challenge presented to the public sector as part of wider efficiency drives is to deliver efficiency savings through organisational headcount reduction, LEAN management and through procurement reform (cf Walker, 2010 for a discussion of this context in relation to sustainable procurement). In essence, there is a need for more efficient systems, improved technology, sharing best practice and collaboration. The Public Services Commission sets out clearly the economic context and the challenges for the funding and delivery of public services in a mixed economy of service provision (Public Services Commission, 2011). It highlighted the following areas for action: (i) the need for community involvement and empowerment in decision making and in the delivery of public services; (ii) ensuring efficiency savings; (iii) the need to shift towards tackling the causes of social problems and moving away from 'reactive spend' to 'preventative spend' (and to address failure demand); (iv) the need for public services to become outcomes focussed; and (v) improve data on outcomes and collaborative working and shared service provision (Public Services Commission, 2011: x, vi, 7, 18, 21-22, 30, 54 & 65-66). The Public Services Commission concluded,

"Addressing these systemic defects [within public sector delivery] will require a fundamental overhaul of the relationships within and between those
institutions and agencies – public, third sector and private – responsible for designing and delivering public services” (Public Services Commission, 2011: viii).

2.11 The Public Services Commission noted that it may take until 2025-26 for the Scottish budget to return to its 2009-10 levels in real terms – an adjustment period of 16 years, meaning that a shortfall over that period is approximately £39 billion (Public Services Commission, 2011: 14). As the OECD argued, “Effective evaluation of policies and programmes to stimulate innovation has become increasingly important for policy makers given constraints on discretionary public spending, a greater focus on accountability and transparency in policy, and the desire to minimise distortions arising from government actions, while maximising their impact” (OECD, 2011: 56).

The procurement reform process is set within this economic context and these socio-economic challenges and thus, underscores the need to continue to build momentum with the reform agenda.

Key components of the procurement reform agenda

2.12 The key components of the procurement reform agenda developed in response to critical reviews of procurement and can be categorised into two broad strands: (i) improving procurement systems and processes (especially e-procurement, e-commerce and standardising IT tools); and (ii) improving the profession (capacity, expertise and capability building) both requiring resources, training and cultural change.

2.13 Central to these aspects are the principles of sustainability, transparency, equity and fair access to public sector contracts, non-discrimination and ensuring best value (Scottish Government, 2010b). It is now a well-established part of the procurement reform agenda that public procurement should be used as a vehicle for achieving wider environmental, social and economic policies (through community benefit clauses). The Scottish Government (2008b), Cabinet Office (2012), Public Services (Social Value) Act 2012 and the Local Government Association (2011) are all supportive of trying to achieve economic growth, wider social, economic and environmental benefits through good procurement. This aspect of the reform agenda acknowledges the progressive role that procurement can play in encouraging the collaboration and integration of linked policy objectives in the current context of diverse environmental, social and economic challenges. Constrained budgets have raised the importance of encouraging flexible resourcing, shared service provision, improving opportunities for better collaboration, identifying and sharing best practice and enabling continuous improvement (Public Services Commission, 2011).

The Strategic Plans of the four Scottish Procurement Centres of Expertise

2.14 Building on reform progress to date, the Scottish Government’s four main priorities in procurement reform are:

- embedding sustainability in all we do;
improving suppliers’ access to public contracts;  
maximising efficiency and collaboration;  
delivering savings and benefits (Scottish Government, 2012e, & Scottish Government, February 2012 Refresh).

2.15 The current strategic plans of the four Scottish Procurement Centres of Expertise are very similar in terms of strategic priorities with no significant departures regarding direction of travel. National Procurement, Scotland Excel and APUC are all supportive and recognise the need for continuing with the procurement reform agenda, improving access to public contracts, maximising efficiency and collaboration and delivering savings and benefits (namely the actions embedded within the Scottish Government’s four key priorities). Both NHS National Procurement and APUC make reference to working within the context of the Scottish Government’s seven Cs (capability, competitiveness, capturing savings and benefits, coverage, collaboration, corporate social responsibility and communications) (APUC, 2012; NHS National Procurement, 2012; Scottish Government, 2012; Scotland Excel, 2012).

2.16 All four plans underscore the need for collaboration and finding procurement solutions within the context of reduced resources, greater demand for services, the mixed economy of service provision and the drive for greater community involvement in the delivery of services (cross reference with the Public Services Commission, 2011). In particular, Scotland Excel discusses the importance of building community resilience and community involvement to help develop solutions to current social and economic challenges (in the context also of Scottish Government’s Community Empowerment and Renewable Bill). Within all four plans, there is some indication of what successful outcomes would involve (in terms of systems improvements and savings) but little detail on how to measure, monitor and evaluate outcomes/effects of activities (that is, how will we know what is working and why?) (APUC, 2012; NHS National Procurement, 2012; Scottish Government, 2012; Scotland Excel, 2012).

### Scottish legislation

2.17 The Public Contracts (Scotland) Regulations 2012 transpose the EU Directive into Scottish domestic law. See Zero Waste Scotland (19 April 2012) for a discussion of existing and proposed Scottish, UK and EU legislation and regulations, which might have an impact on the development of the Scottish Procurement Reform Bill.

2.18 The Scottish Government Procurement Policy Note ‘Equalities – Duty to consider award criteria and conditions in relation to Public Procurement’ outlines the need for Scottish public authorities “[…] to have due regard to the inclusion of award criteria and contract performance conditions which will help them to better perform the general equality duty” (Scottish Government, 2012j). The Procurement Reform Bill will need to consider this public procurement specific duty in mainstreaming equalities as the Bill develops.

2.19 The current Community Empowerment and Renewable Bill might have implications for public procurement processes within the constraints of the Public Contracts (Scotland) regulations given the focus on the role of communities to
decide priorities for the delivery of services. The Public Services Commission argues that,

“Reforms must aim to empower individuals and communities receiving public services by involving them in the design and delivery of the services they use” (Public Services Commission, 2011: vi & 30-60 – see detail in report on involving communities).

2.20 A question for central and local government is - how to allow ‘communities’/service users (as entities and in what form) to access public service contracts and to be involved in the delivery of services (See also Scott et al (2012) for an analysis of the responses to the Community Empowerment and Renewal Bill Consultation)? The Public Services Commission (2011) is not exactly clear on what would be involved to achieve community empowerment and what resources would be needed. It states that in terms of improving procurement and commissioning, organisations should be,

“[…] reorienting commissioning further towards outcomes and away from tight specification of service volumes (e.g. hours of activity) and costs; and improving transparency around comparing competing providers” (Public Services Commission, 2011: 65).

Audit Scotland (2013a) argues that the Community Empowerment and Renewal Bill will require greater participation by citizens including decision making about local services. Community planning partnerships might have to procure local services and this will require them to consider the ability of local communities and third sector organisations to deliver services (Audit Scotland, 2013a: 14).

EU policy context

2.21 All MS operate within the EU Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of the procedures for the award of public works contracts, public supply contracts and public service contracts. The EC Treaty applies to all public procurement activity irrespective of value, including contracts below the thresholds (above threshold levels requires publication in OJEU) and contracts exempt from the EC Procurement Directives (Scottish Government, 2008a: 15). The fundamental principles applying to procurement include: transparency; equal treatment and non-discrimination; proportionality and mutual recognition (Scottish Government, 2008a: 15 & cf also Aiton et al, 2012).

2.22 The EC is currently revising its Directives on public procurement and procurement in the Utilities sectors and creating a new Directive on the award of concession contracts as part of its modernisation agenda (European Commission, 2011a, b & c). The EC’s key proposals are outlined in the Scottish Government Procurement Policy Note (Scottish Government, September 2012 & cf European Commission, 2011a, b & c). Some proposals (inter alia) include: shorter deadlines for submitting expressions of interest and tenders; reducing the length of the procurement process; mandatory use of electronic communication; a lighter regime for public bodies out with central Government; a new procedure to encourage innovation; division of contracts into lots; use of references to demonstrate
experience; changes to the rules on excluding suppliers; changes to contract award criteria and ability to require specific labels certifying environmental, social or other characteristics. All of these proposals could potentially impact on the Scottish policy and legislative context in relation to the six themes around which the Procurement Reform Bill is constructed (Scottish Government, September 2012). As discussed later, some of these issues could present solutions or barriers/more challenges to trying to act on the six themes of the Bill.

2.23 The Scottish Government outlined that agreement on the new EU Directives would not likely be reached until early 2013 at the earliest and that the current proposals require Member States to transpose the agreed texts into national legislation within 18 months of their publication in the OJEU (Scottish Government, September 2012: 3-4). Recent EU developments suggest a later timeline, with the new EU Directives more likely to be reached by late 2013 and an additional two years for transposition into national legislation.
Chapter 3: PROCUREMENT REFORM – SOME DEVELOPMENTS IN SCOTLAND AND THE UK

Chapter 2 outlined why reform is necessary. This chapter outlines some developments in practice in Scotland and the UK and explores where gaps and challenges still exist.

Some developments in procurement reform in Scotland and the UK

3.1 Drawing on secondary management data only, some financial evidence (between 2009-12) within the Scottish public sector context suggest that ‘significant progress’ has been made in the first three years (2006 to 2009) with estimated savings of £800m and £312m in 2009-10 alone (Scottish Government, 2010b: 1 & 2010a & cf Audit Scotland, 2009). The Scottish Government’s Programme for Government 2012-2013 states that £1.2 billion in efficiency savings have been achieved through Public Sector Procurement Reform (Scottish Government, 2012b: 35). It outlines that the Scottish Government will continue to pursue savings through procurement activity, increase access of SMEs and the third sector to public sector contracts and will continue to build on its shared service approach to eCommerce systems, citing the increasing use of Public Contracts Scotland (PCS) portal (Scottish Government, 2012b: 35, paras 29-30). In 2010, the Cabinet Secretary for Finance and Sustainable Growth underscored the “[…] importance of procurement as a key strategic enabler of service design and service delivery […]” (Scottish Government, 2010b: 1).

3.2 The Scottish Government (2009) found that some evidence suggests that cultural change is needed within the public sector and there is the need to build sustainability into corporate cultures. Other evidence identified the issue of poor levels of data and systems for monitoring and capturing performance, spend and savings and that there is a clear need to improve data capture in public procurement (Audit Scotland, 2009: 4-5 & cf Audit Scotland, 2012a; McFarlane & Cook, 2002a &b, 2008; Westminster Sustainable Business Forum, 2008). With specific reference to local authorities, Audit Scotland (2012a) outlined why good cost data is necessary for understanding performance at local authority level. It argued the need for cost information plus a focus on monitoring and measuring outcomes for service users and communities (Audit Scotland, 2012a: 3 - 5). The Scottish Government (February 2012 Refresh) outlined some achievements regarding the Scottish Government’s seven Cs including improved procurement capability, competitiveness and collaboration.

Developing systems capability and data collection in Scotland

3.3 In Scotland, a number of systems and processes for data collection in the Scottish Government have developed in recent years in response to recommendations of procurement reviews and as part of the reform programme. Some systems are briefly outlined here as part of considering the ways in which data are currently collected and to explore ways of exploiting existing data sources and to consider areas for development.
3.4 Some areas recommended by McClelland (2006) and subsequently developed in Scotland included, inter alia, the creation of Centres of Expertise, the Scottish Procurement Policy Handbook, a single public sector electronic portal, a Single Point of Enquiry (SPOE), and the development of the Scottish Pre-Qualification Questionnaire (PQQ). It was also recommended that public sector organisations should develop an advanced procurement plan (see later in this chapter reference to Procurement Capability Assessments (PCAs) conducted annually across the Scottish Public Sector and designed to capture the stage of procurement capability development of each organisation) (McClelland, 2006: 45-47 & cf the Scottish Procurement Policy Handbook, 2008a: 2 & 4).

The Scottish Procurement Information Hub

3.5 The Scottish Procurement Information Hub (thereafter SPIH) collects management information and analyses spend by organisation, type of goods, services or works procured and geographical location of suppliers (Scottish Government, 2008a: 32). One hundred and twenty two (122) public sector organisations have a licence to use the SPIH and the data published on it is only accessible by all 122 organisations, the four Scottish Centres of Expertise, the police serious crime squad and the Improvement Service. Six Scottish Local Authorities have signed up to it. The Contracts Register is held in the SPIH, is updated daily and links with the Public Contracts Scotland database. Information on the Public Contracts Scotland database can be accessed externally by all.

3.6 In terms of information on the SPIH, the existing data allows us to identify (from data provided by the 122 organisations) public sector spend on SMEs, local spend, by geographical boundaries and by collaborative suppliers. It is also possible to analyse spend by supplier age (that is, by age of business). The data reveal that the public sector is only, very rarely contracting with suppliers less than three years old and that the larger value contracts are with older suppliers (that is, over three years old). For example, 38 out of 1300 suppliers, who are currently in receipt of public sector contracts are less than three years old (Scottish Procurement Information Hub, 2013). Equally, suppliers under three years old and micro suppliers tend to obtain lower value contracts than older and larger suppliers. The biggest areas of public sector spend are in construction and social care and anecdotal evidence suggests that these two areas could be better resourced in terms of procurement expertise and that there is possible room for improving the controls and governance of these sectors in receipt of public sector contracts. This would also support the argument that concentrating on tightening up the PQQ and specification stages, in addition, to the full project management process could, be preventative in managing risks of unsuccessful processes and outcomes for any given contract (and I return to this point later).

3.7 In terms of SME access to public sector contracts, the SPIH notes that spend on SMEs has stayed at around 45/46% over the last five years across the whole of the public sector (Scottish Procurement Information Hub, 2013). There has been a slight improvement in spend on ‘micro’ businesses, which is positive given that at the European level, evidence suggests that ‘medium’ size businesses tend to do well regarding public sector spend but the challenge that remains is for ‘micro’ businesses to win public sector contracts (European Commission, 2008). One
limitation of the data is that it only indicates spend data, at an aggregate level, and does not hold sub-contracting data. Therefore, it might be the case that more SMEs actually access public sector contracts as sub-contractors.

3.8 A core set of Best Practice Indicators (BPIs) have been developed in an attempt to measure progress of the reform programme in a consistent way across contracting authorities (Scottish Government, 2008a: 32). The BPIs are designed to capture annual cash savings made by the organisations in the SPIH. The BPIs variously capture cash and non-cash savings, spend with collaborative and contracted suppliers, demographic data on procurement staff with appropriate procurement qualifications, the number of people in training, and the range of electronic procurement in operation. Guidance exists on a calculation method to determine cash savings.

3.9 There is now approximately seven years of data in the SPIH and it is possible to identify some patterns/trends in spend data as outlined in paragraph 3.6 above. However, it is impossible to explain why patterns are occurring and as originally conceived, the database does not attempt to capture information on impact and outcomes associated with public sector spend.

Public Contracts Scotland

3.10 Public Contracts Scotland (thereafter PCS) is an online procurement advertising portal, which was introduced in 2008 and can be accessed externally. Its aim was to raise visibility in advertising public sector procurement opportunities and reporting award notices. Although there is a requirement to advertise in OJEU for public sector procurement opportunities above EU threshold levels, there is no obligation to advertise below or above EU threshold levels opportunities in PCS. The majority of public sector purchasers do, however, use the portal as there are benefits to doing so, including reducing costs and gaining access to the supplier base. There is no penalty if public sector organisations do not advertise.

3.11 Over 400 organisations advertise on the portal and over 800 have registered as a buying organisation (although their status is not vetted and verified). The portal gives us data on suppliers and the makeup of suppliers and SMEs. Information from the portal does not reveal the value of contracts. There are over 60,000 suppliers registered on the system. Of the contracts awarded (contract opportunities and quick quotes) on PCS during the calendar year 2012, 82% of contracts were awarded to SMEs and 68% were awarded to Scottish SMEs (Scottish Government, 2013d: 3-4). These figures are aggregate data and do not indicate which SMEs (and how often) are winning public sector contracts via PCS.

3.12 For lower value contracts, the Scottish Government operates a system of Quick Quotes whereby purchasers can invite quotes from three or more potential suppliers. In the majority of cases, a purchaser then chooses a supplier and awards the contract. There is no requirement to advertise Quick Quotes. Quick Quotes was introduced in 2009. The publication of award notices and award notices for Quick Quotes was introduced in 2010. This helps capture spend data but only for those purchasers and suppliers who use it. This information is pulled across to the Scottish Procurement Information Hub (SPIH) data.
3.13 PCS is not; however, a full and representative picture of the public sector procurement and supplier landscapes. It is self-reported data from purchasers and suppliers and data is not verified or checked for accuracy. Furthermore, the actual number of suppliers is not clear with the potential for double counting to occur given that individuals within organisations can register as suppliers as opposed to only allowing one organisation to register once and having one contact for the organisation. One suggestion that might help reach a more accurate figure for suppliers and avoid double counting is that the Dun and Bradstreet number, used on the portal as a unique identifier for companies, could be made mandatory\(^1\). There is no cost attached to suppliers obtaining a Dun and Bradstreet number.

**Public Contracts Scotland (PCS – Tender)**

3.14 The Public Contracts Scotland-Tender (PCS-Tender) electronic (e-sourcing) system was introduced in November 2011. The intention is to roll out the e-sourcing system across the whole of the Scottish public sector. The system is used by purchasers and suppliers to manage the procurement process and it stores all procurement tender process information and documentation including PQQ data for Routes 2 and 3 of the Procurement Journey. The aim is to build useful management information and for example, to check if purchasers are using consistent PQQ questions in a standardised template. Suppliers will be able to store their PQQ answers for future usage from June 2013. Approximately, fifty organisations have been trained so far in the e-sourcing system.

**The Procurement Journey**

3.15 The Procurement Journey provides online national guidance for all purchasers. It outlines guidance on three possible routes (1 to 3) dependent on level of risk and contract value with 3 being highest risk and offering more detailed guidance at this stage including information on contract and supplier management. The number of hits on the Procurement Journey can be identified, which indicates level of usage (cf Scottish Government, 2013b for a description of the Procurement Journey and PCS - Tender).

**Procurement Capability Assessments**

3.16 Procurement Capability Assessments (PCAs) were introduced in 2009. PCAs are assessments conducted by representatives of one of the four Scottish Centres of Expertise and involve Scottish public sector organisations being assessed annually, evidencing progress on a range of issues regarding capability (one of the core themes of the procurement reform agenda). Assessment is categorised according to four levels - 0 to 3 (Level 0 - non-conformance, Level 1 - conformance, Level 2 - improved performance and Level 3 - superior performance). These four category levels were adopted from McClelland’s recommended schema (McClelland, 2006). In 2012, a total of 118 organisations were assessed. The completed score sheets are

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\(^1\) “A Dun and Bradstreet DUNS Number is a unique nine-digit sequence recognised as the universal standard for identifying and keeping track of over 210 million businesses worldwide” (Dun & Bradstreet, 2013, [http://www.dnb.co.uk/dandb-duns-number](http://www.dnb.co.uk/dandb-duns-number), accessed on 30 April 2013).
returned to the Scottish Government from the Centre of Expertise and the findings from the PCA process are reported to the organisations’ Chief Executives (for their own organisation), the Public Procurement Reform Board (PPRB) and the Procurement Reform Delivery Group (PRDG).

3.17 The Flexible Framework Assessment Tool is outlined in the Scottish Sustainable Procurement Action Plan and it recommends that organisations conduct initial and periodic self-assessments against the flexible framework in order to assess levels of performance (based on 1 to 5) and areas for improvement. There is a question in the PCAs on the Flexible Framework Assessment Tool. The PCA findings are used as part of informing continuous improvement within the organisations involved. The findings from the PCA process are not published or reported externally; however, organisations within sectors do share ideas/best practice at sector specific capability events. The next step in progressing the sharing of best practice would be to encourage high scorers in the PCAs to share information on their best practice as part of helping all sectors improve their performance. At an aggregate level, Scottish Government has identified that all sectors involved in the assessment process have improved in terms of their procurement capability over the last four years (Scottish Government, 2013e unpublished).

3.18 As part of the assessment process, organisations should be gathering data throughout the year to evidence progress and improvement. The assessment itself is one day in duration. It is emphasised that it is an assessment and not an audit. An important caveat is that the information gathered is self-selected evidence from assessed organisations and it is conducted by the Centre of Expertise for their sector. Therefore, potential bias might exist in the process, in terms of the information selected to demonstrate progress and potential assessor bias might exist across sectors. In this respect, the accuracy of the data cannot be verified. One also needs to ask how success or progress is actually measured at an organisational level as it is unlikely to be measured consistently across all organisations, although perhaps across sectors, there will be more consistency. Furthermore, the assessment questionnaires have now been administered over four years but the content of the questionnaires has changed slightly over the first three years and significantly in year four (2012). This makes it difficult to compare data over the four years and to accurately measure progress as the change of questions and structure will have resulted in different responses. The PCAs methodology for assessing progress and questionnaires can be accessed online at http://www.scotland.gov.uk/Publications/2012/09/3651 (Scottish Government, 2013c).

**Single Point of Enquiry (SPOE)**

3.19 The Single Point of Enquiry (thereafter SPOE) was established in 2008 and is an informal service which aims to provide suppliers to the Scottish public sector with advice and guidance on public procurement regulations and practices. It can also be used to help broker resolution of disputes (cases) relating to tender exercises undertaken by public bodies in Scotland (Scottish Government, 2012i: 3).

3.20 In addition to providing on-going advice and guidance, the SPOE has seen a total of 163 cases, across a wide range of business sectors, since its introduction.
Data emerging from the cases processed highlights themes and patterns being raised by suppliers over time. Some issues raised over the previous four years concern all aspects of procurement tendering but three primary themes have emerged: visibility of contract opportunities; appropriateness and proportionality of assessment criteria; and effective post award feedback to suppliers. Clearly this feedback is useful in informing improvement activities and, in particular, the development of the PCS portal, standardised PQQ and the procurement journey (buyer best practice guidance) all focus on these three areas of concern.

3.21 However, key challenges for the SPOE are continued promotion of the service and definition of how it measures success. For example, do more or less enquiries to the SPOE signify success of the service and how does one attribute cause and effect to improved procurement practice? These areas are being addressed by the SPOE Champions Group as it continues to promote and develop the SPOE activity.

3.22 For example, in terms of taking action on PQQs, Rahman and Horner (2013) estimated the cost to the Scottish Public Sector of preparing and assessing PQQs for construction contracts. They calculated the cost to be approximately £1 billion per year (Rahman & Horner, 2013: 2). However, extreme caution should be exerted over the figures and conclusions reached as they are based in the findings of a survey distributed to 135 public sector construction clients with only 9 out of the 135 having responded. This is a very poor response rate. The findings are then combined with figures from another study conducted in 2006, of which the method employed and calculations deduced are not discussed and explicated (Rahman & Horner, 2013).

Where do gaps and challenges still exist?

Gaps exist in management, cost and evaluation data

3.23 Spanning the last ten years, a range of evidence suggests poor levels of data and systems for monitoring and capturing performance, spend and savings at Scotland, UK and EU levels (Audit Scotland, 2009: 4-5, Audit Scotland, 2012a; Kahlenborn et al, 2011; McFarlane & Cook, 2002a, b, 2008; Westminster Sustainable Business Forum, 2008). To date, no systematic research review has been undertaken on the procurement reform agenda at national and EU levels and its progress.

3.24 With specific reference to local government in Scotland, Audit Scotland (2012a) outlined why good cost data is necessary for understanding performance. The relevance for the procurement reform agenda is the current fiscal context of reductions in public sector spending. In this context, there is the need for a good understanding of both the cost and quality of services if public sector buyers are to demonstrate good value for money and the need to monitor suppliers’ performance. Audit Scotland (2012a) noted that there is a need for cost information plus a focus on monitoring and measuring outcomes for service users and communities at each local authority level (Audit Scotland, 2012a: 3 - 5). Audit Scotland (2013a) echoed the previous point in its report on ‘Improving community planning in Scotland’, which drew on three recent audits set within the context of public sector reform in Scotland.
Although Audit Scotland (2013a) referenced examples of good partnership working across Scotland, it found that there was a lack of evidence on the outcomes and impact of community planning partnerships. Audit Scotland (2013a) argued that it was difficult to demonstrate that community planning partnerships have had their intended effects. Linked to this point, Audit Scotland concluded that community planning partnerships have not been focused enough on identifying local priorities and taking action on priority areas (Audit Scotland, 2013a: 6). It also found that lack of consistent leadership and poor governance and accountability issues hampered the performance of community planning partnerships (Audit Scotland, 2013a).

3.25 Audit Scotland (2012a) indicated that there is the need for local authority councils to be transparent about cost information in order that communities can be informed (Audit Scotland, 2012a: 3). This is important as the community empowerment agenda grows and as government policy encourages communities to be active decision makers and implementers of service delivery (Scott et al, 2012). This could have implications for public procurement. Audit Scotland concluded that the use of cost information amongst local authority councils is fairly undeveloped, thus, “[…] we are not advocating the immediate adoption of a comprehensive and detailed costing measurement system” (Audit Scotland, 2012a: 9). As Audit Scotland (2012a) argued a focus on outcomes, needs to be supported by a good understanding of costs – what is termed as ‘outcomes focused budgeting’ and that there is a role for Community Planning Partnerships to understand how the collective spend of public bodies affects the delivery of their shared outcomes (Audit Scotland, 2012a: 12). Reference is made later in this evidence review (Chapter 5, Theme 5) to the argument for increasing transparency in administrative and cost data as part of a strategy to help prevent crime in public procurement.

3.26 Cuthbert and Cuthbert (2012) presented a critical account of procurement in Scotland. As noted earlier in this evidence review, whilst it is recognised that procurement reform is still work in progress, there is a broad consensus on the need for procurement reform and its current direction of travel at EU, UK and Scotland levels. Cuthbert and Cuthbert (2012) depart from that general consensus and contend that the current approach to procurement supports large, foreign businesses, hinders economic development in Scotland and fails to emphasise social, economic and environmental objectives in procurement but their argument is based on very limited evidence. Their reference to the procurement “[…] process not working satisfactorily in Scotland’s interests” and “[…] that apparently irrational decisions are often taken, with firms with local expertise and locational advantage being passed over for large enterprises which may not be located in Scotland at all” do not appear to be based on objective evidence (Cuthbert and Cuthbert, 2012: no page number). Equally, Cuthbert and Cuthbert seem to take a protectionist view, that is, that all Scottish businesses should be always prioritised and favoured despite the fact that Scotland and the UK exist within the single EU internal market and that EU rules on Procurement and State Aid are designed to avoid distortion of competition.

3.27 It is unclear, methodologically how Cuthbert and Cuthbert (2012) gathered their evidence. The material used is partial with specific examples and strong statements being used to defend their argument as opposed to being based on a balanced, range of evidence. Their review is not a full scale review of contracts
awarded and therefore, is unrepresentative and selective in its presentation of cases. In this respect, extreme caution should be exerted over their conclusions.

3.28 The Royal Incorporation of Architects in Scotland (RIAS) (2011), whilst acknowledging that some progress had been made under the procurement reform agenda and underscoring its support for reform highlighted a number of areas for concern with specific reference to the construction sector. RIAS (2011) identified the following issues: (i) the increasing barriers to SME access to public sector contracts; (ii) the lack of capability and expertise in construction in the public sector; (iii) “the design quality of new buildings and their fitness for purpose”; (iv) “the pricing, reliability and value for money of services provided through the public sector procurement process” (RIAS, 2011: 3). RIAS recommended tackling the identified issues, in addition, to reducing the administrative burden on the private sector by improving the PQQ process, giving feedback to tenderers, tackling the tendency to aggregate projects, shifting to a focus on quality of outcomes as opposed to quality of procurement processes and place a greater focus on quality and whole life value for money. RIAS also called for greater public sector in-house construction expertise, however, it is unclear from the evidence provided, what evidence exists to substantiate their argument that there is a lack of public sector in-house capability in procurement. RIAS recommended the creation of an independent and expert panel to advise on these issues and how to resolve them. Although wider evidence exists on some of the issues identified, caution should be exerted over some statements and conclusions as limited and anecdotal evidence is provided to support them. For example, the claim in paragraph 2.2.3 of the RIAS (2011) report regarding “[...] Scottish procurement policies and processes which sit under the Directive and Regulations are not fit for purpose...” would need to be unpacked and evaluated in order to determine its validity (RIAS, 2011: 6).

Leadership, partnership working, adapting and developing performance and management data

3.29 Audit Scotland (2013b) offered an overview of the ways in which local government in Scotland is responding to challenges and change in the current economic context. In the context of public sector reform, it presented four key recommendations for local authorities: (i) develop good leadership and governance through building positive working relationships and ensuring financial accountability and monitoring service performance; (ii) work in partnership especially in the area of community planning to improve outcomes; (iii) adapt with ongoing changes to public policy and service provision and rigorously appraise options for delivering services; and (iv) develop performance and management information (and promote self-evaluation within organisations) to help assess impact and outcomes as part of service improvement and assessing value for money (Audit Scotland, 2013b: 4). Audit Scotland noted,

“CPPs (Community Planning Partnerships) must demonstrate that they are improving local outcomes but this can be difficult. It requires good local data and meaningful comparisons to track progress over time” (Audit Scotland, 2013b: 14).
3.30 Reference is made in Audit Scotland’s (2013b) report to a summary of legislative changes that might impact on local government, however, no reference is made to the forthcoming Procurement Reform Bill (Audit Scotland, 2013b: 8, Exhibit 3 & 12). Brief reference is made to Procurement Capability Assessments (PCAs), which are conducted annually and Audit Scotland reported that the PCA score for councils has been improving and is now at “[…] 48% per cent, just short of the Scottish Government’s target for all sectors of 50 per cent by the end of 2012” (Audit Scotland, 2013b: 23).

3.31 The Scottish Government Procurement Reform Delivery Plan set two targets in relation to Procurement Capability Assessments – (i) that all relevant organisations should be in the conforming category by the end of March 2012 and (ii) that 60% of relevant organisations should reach improved or greater status by the end of March 2012 and that all/100% of organisations should achieve this by the end of March 2013 (Scottish Government, 2012k, para. 6, bullet 3). Current analysis shows the following for organisations by sector in the Improved category or above: 82% of organisations nationally; 100% Central Government Family; 81% Health Family; 100% Higher Education/Further Education; 100% of Full PCAs; and 56% Local Authorities (Scottish Government, 2013e unpublished: 9 and cf with paragraphs 3.16 to 3.18 above describing procurement capability assessments).

Evidence from the management of ICT projects in Scotland

3.32 Audit Scotland (2012b) conducted an audit of three Scottish public sector ICT programmes and highlighted some lessons learned for public bodies running ICT programmes in the future. The main lessons learned regarding effective management of ICT contracts include: (i) the importance of having skilled staff with project management skills; (ii) the importance of good governance arrangements; (iii) the need for staff with risk management knowledge and expertise and knowledge of the subject to avoid over-reliance on suppliers’ knowledge; (iv) the need to conduct a whole life costing of any given project; and (v) the importance of monitoring and evaluating ICT contracts – their progress, outcomes and impact (Audit Scotland, 2012b). The themes identified in this Audit Scotland (2012b) report are similar to those themes highlighted in this evidence review and can be useful for thinking about areas for continual development in the broader programme of procurement reform.

Evidence from Commissioning social care in Scotland

3.33 Audit Scotland (2012c) provided an overview of the local government landscape on commissioning social care. It is set within the wider context of socio-economic and demographic change in Scotland, public sector reform and the challenges posed by these changes when operating within a mixed economy of service provision in the social care sector. Audit Scotland (2012c) highlighted a number of areas that need attention to ensure good strategic commissioning of social care services. These included: (i) strong leadership and commitment to a joint long term strategic planning for commissioning social care; (ii) strategic vision; (iii) the importance of cultural and behavioural change; (iv) the right skills, capability, capacity and risk management expertise in both procurement and social care; (v) partnership working; (vi) a focus on performance and improvement and as part of this, the use of analysis and evidence to develop services based on users’ needs.
and monitor impact; and (vii) the importance of user engagement in commissioning social care to ensure needs based analyses (Audit Scotland, 2012c: 12-13, Exhibit 5).

3.34 Audit Scotland also concluded that many local authorities and NHS Boards had not fully implemented commissioning strategies although guidance existed on commissioning and procurement (Audit Scotland, 2012c:16). Audit Scotland identified a weakness in procurement capability arguing that local councils perform worse than other sectors in their Performance Capability Assessments (PCAs) with social care procurement being weaker than other areas of procurement activity (Audit Scotland, 2012c: 21). Audit Scotland argued that the reason for this was, "This is often because social care has not been following corporate policies and procedures or the policies do not take sufficient account of users’ personal dependence on the services" (Audit Scotland, 2012c: 21).

As outlined above, the themes are similar to the themes outlined in this evidence review - for example, Audit Scotland identifies the need to understand due diligence checks before awarding contracts (for example, at the PQQ stage), the importance of good project management skills and the importance of monitoring, gathering evidence and assessing the impact of services on people’s lives (Audit Scotland, 2012c: 30). This reinforces the argument for the need to continue with the procurement reform agenda as it is still work in progress. Other linked issues raised include the need to involve users and carers in the commissioning of contracts for service provision in order to ensure that services are user based and user friendly, the need to improve the support to carers and to develop consistent and comparable measures to improve the evidence base. The themes set out in this report are very similar to those themes discussed in the aforementioned Audit Scotland reports and all set in the wider context of public sector reform in Scotland.

Developments in England and Wales

3.35 The National Audit Office (NAO) (2013a) ‘Improving Government Procurement’ provided an overview of the procurement reform strategy, governance and accountability procedures and progress to date with the specific focus on the UK government. The NAO (2013a) provided a critical account of some recent procurement developments, the newly created Procurement Government Service (thereafter GPS) and Whitehall Departments. It recognised that some positive progress had been achieved, for example, the creation of the spend analysis tool is an improvement in data collection. However, limitations remain with some smaller arm's length bodies not providing data and problems exist with cleansing data and identifying individual suppliers (NAO, 2013a: 19 & 46-47, Appendix Three on Data coverage).

3.36 One of NAO's (2013a) main findings was that, despite the policy drive to centralise the procurement function in the formation of the GPS and to mandate Whitehall Departments to use central contracts, government departments are often still operating independently in terms of procurement and gathering and calculating spend data at a departmental level. This makes it difficult for the centralisation of public procurement to take full effect and for comparable and accurate estimates of spend and efficiency savings to be calculated. It also results in government not
maximising the potential for savings through centralised procurement. Having said that, the NAO stated that it had confidence in GPS’s reported £426 million savings for central government in 2011-12 (NAO, 2013a: 2).

3.37 Other findings outlined in the NAO’s (2013a) report included: (i) poor quality data collection in terms of spend on SMEs making it difficult to measure whether the government is meeting its target to achieve 25 per cent of spending with SMEs by 2015; (ii) lack of analysis or consultation with departments in setting targets and checking how departments would move towards central contracts; (iii) operational issues exist with GPS’s management of central contracts and tensions exist between operational and cultural norms at both GPS’s level and within and across departments making the standardisation, simplification and centralisation of procurement processes difficult to implement and the freeing up of procurement resources difficult to achieve; (iv) lack of foresight and planning with respect to capability and skills required following the reforms; (v) inadequate mechanisms exist for all departments and GPS to hold each other to account regarding expenditure and operational risk (and given that the mandate to use central contracts is not enforced and no sanctions exist, this does not encourage behavioural change at a departmental level); (vi) linked to this is the issue that governance structures have grown organically with the purpose and remit of GPS groups and boards being unclear; and (vii) the aforementioned is “[…] exacerbated by gaps and inconsistencies which remain in data management systems at the centre of government” (NAO, 2013a: 8).

3.38 The NAO (2013a) concluded that whilst there has been some progress, for example, common goods and services are more centralised, SME participation has increased and the GPS is an improvement on its predecessor, there is still much room for improvement. The NAO (2013a) argued that the Cabinet Office will need to lead the way in the fostering cultural and behavioural change across Whitehall Departments to help tackle the problems that remain, namely, “[…] ineffective governance structures, unrealistic targets, incomplete data, and weaknesses in the management of the central contracts” (NAO, 2013a: 8). The NAO (2013a) recommended improving the definition of roles and accountability, in addition, to Cabinet Office setting “more sophisticated” procurement targets and strengthening the quality and consistency of data that it collects “[…] to improve its oversight of procurement expenditure, and to ensure the data is useful to departments” (NAO, 2013a: 9).

3.39 The NAO (2013a) also recommended that GPS “[…] should provide robust evidence to departments, to give ongoing assurance that the central contracts provide value for money” and that “[…] GPS should be accountable to departments for underperformance, and should address a number of weaknesses in its management of the central contracts” (NAO, 2013a: 10). With regards to Departments, NAO argued that departments should comply with the mandate to sign up to central contracts, that is, they should “[…] remodel their procurement functions to adapt to a centralised model” and should improve the quality and consistency of their procurement data (NAO, 2013a: 10). In order to monitor progress of the reform strategy, the NAO recommended that government improve its management information and develop effective targets (NAO, 2013a: 17 & 19).
3.40 The NAO (2013b) reviewed five UK government reform initiatives on ICT as part of the ICT strategy and procurement reform and reported shorter term and longer term savings through ICT contracts (NAO 2013b: 4). The NAO (2013b) found that negotiating with the largest ICT suppliers as a single customer has helped departments reform their supplier relationships (NAO, 2013b: 7). Equally, it found that leadership and cross profession collaboration have been important enablers in the progression of the reform initiatives (NAO, 2013b: 9). Despite some reported savings, the NAO (2013b) identified some outstanding issues still requiring further development including: (i) the need to build a stronger evidence base on ICT expenditure and improve accurate data capture; (ii) the need to address the insufficient resource for the ICT spend control process; (iii) tackling the complex governance arrangements; and (iv) the need to improve capacity and capability across central government (NAO, 2013b: 9). The lack of accurate data on ICT spend results in a lack of accurate baselines for comparative analysis of spend across all ICT suppliers and also makes it difficult to evaluate and report the impact of ICT initiatives beyond solely ICT savings (NAO, 2013b: 8 & 10). Locating ICT and procurement reforms within wider public sector reform, the NAO argues the need for strong leadership in civil service reform beyond the ICT profession (NAO, 2013b: 11).

3.41 Drawing on the evidence from across the EU and the information available from current systems, there is a need to gather more data in a consistent and comparable manner across the public sector and the need to mandate the collection of that data. Progress has been made in the creation of different systems but more could be done to strengthen those systems to allow for the more systematic collection of reliable data, which would allow for a more detailed picture of procurement reform progress, the procurement landscape and the performance of organisations engaged in it.
Chapter 4: SCOTTISH PROCUREMENT REFORM BILL
CONSULTATION ANALYSIS

Key Findings

4.1 Mulholland et al (2013a & 2013b) detail the main findings from the Procurement Reform Bill Consultation. A brief discussion is made of the consultation analysis in this chapter in order to draw out some findings that allow policy makers and practitioners to consider identifiable areas for improvement and some proposed solutions. A total of 251 consultation responses were received - 48 from individuals and 203 from organisations across the public, private and third sectors. It is important to note that the Consultation responses are not representative of all the bodies and sectors involved in procurement, that is, the consultation is conducted in a way that individuals and organisations self-select to respond. The Consultation is not research employing methods to select a representative sample of the population and therefore, these findings cannot be generalised to the wider population. It is also important to highlight that for a considerably large number of questions in the Consultation, a large number of respondents did not respond and this could be for a range of reasons, for example, lack of understanding of the questions, a sense amongst respondents that answers have been provided under other questions and/or lack of relevance to the respondent/s.

Broad support for the proposed aim of the Bill and the reform agenda

4.2 The headline findings indicate a good level of support for the proposed aim of the Bill and the main principles of the procurement reform agenda, including support for a general duty to conduct procurement in an effective, transparent and proportionate manner. Some respondents questioned the need for Scottish legislation and some argued that there is a need to ensure that Scottish legislative developments are aligned with EU legislative developments.

Broad support for the focus on sustainability

4.3 There was broad support for the need to focus on sustainability (environmental, social and economic factors) and outcomes.

Broad support for greater use of supported businesses

4.4 Respondents, on the whole, agreed that the Bill should be used to support greater use of supported businesses by the public sector but disagreed that it should be a statutory requirement that public bodies have at least one current contract with a supported business².

² In The Public Contracts (Scotland) Regulations 2012 – “supported business’ means a service where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market” (The Public General Acts, 2012b: 13).
Support for encouragement rather than enforcement of provisions

4.5 The responses suggested support for encouragement rather than enforcement but argued the need for an independent ombudsman and the importance of audit and monitoring (Mulholland et al, 2012a & 2012b). It is unclear what balance is desired between these different approaches and in what capacity an independent regulator would function if the preferred approach is to encourage and not to enforce. Some raised the Single Point of Enquiry (SPOE) as having a potential role in relation to enforcement of the provisions of the Bill, although responses were mixed regarding whether the SPOE should have an enforcement role on a statutory basis. The question to consider is how this could be achieved, if it is at all desirable?

Support for tackling barriers to SME access but mixed views on solutions

4.6 In relation to improving SME access, some suggestions were given, for example, the “[…] provision of training and support in how to tender for work from public bodies” and greater use of lotting strategies (Mulholland et al, 2013a & b). These suggestions are also supported in the evidence as one way to improve access. However, suggestions of dividing into lots could increase costs. There are clearly some tensions within the various proposed solutions with suggestions for improving SME and Third Sector access being countered by the view across sectors that some proposals could lead to greater administrative burden. In this respect, the challenge of SME and Third Sector access appears to be one of the most difficult issues as the proposed solutions can, in some cases; result in creating other potential difficulties/barriers. Another example of these tensions might be the suggestion of giving SMEs preferential weighting in the tender process whilst simultaneously, acting in a non-discriminatory manner to avoid distorting competition. The issue of dividing into lots could help improve access but might lead to an increase in the administrative burden and increase the opportunities for organised criminal groups to infiltrate public procurement (cf Mackenzie et al, 2012).

Reducing administrative burdens

4.7 It was recognised amongst respondents that debriefing unsuccessful tenderers can be useful to improve their future performance but it could create a potential administrative burden on the public, private and third sectors (Mulholland et al, 2013a & b). One possible solution to the administrative burden might be to have a template of standard debrief information with a specific level of detail required. However, contracting authorities could miss giving feedback to a range of bidders, most likely SMEs if a specific threshold is set, above which only feedback information can be given. This approach, arguably, might not help to improve SME access to public sector contracts. Most of the barriers to SME access and facilitating access raised by respondents can also be identified in the wider evidence discussed in the section on improving SME access.

Improving transparency in the procurement process

4.8 Linked to the issue of improving transparency in the procurement process - more respondents disagreed than agreed that the Bill should place a duty on public
bodies to publish contract documentation. There was, however, majority support for the publication of contract registers (Mulholland et al, 2013a & 2013b). However, as Mackenzie et al (2012) and Transparency International (2011 and 2012) argue, there is a need for greater transparency in the process including the requirement for businesses to be more open.

**Supporting innovation and growth**

4.9 On encouraging innovation and growth, respondents felt that flexible approaches to procurement and outcome based specifications would help encourage innovative solutions. In addition, a number of respondents, mainly from representative bodies commented that innovation should be included in the tender evaluation criteria. An overwhelming majority of respondents disagreed that the Procurement Reform Bill should make it a requirement that purchasers must permit the submission of variant bids.

**Good practice**

4.10 In terms of good practice guidance, toolkits and codes of practice – many suggested the need to ensure that the public sector had these in place but it would be worth establishing what is already in place before more action/intervention.

**Health and social services**

4.11 Regarding health and social services, there were mixed views (although more agreed than disagreed) on whether all of the proposals discussed in the Bill Consultation should apply to the procurement of health and social services.
Chapter 5: KEY FINDINGS FROM THE EVIDENCE

What evidence exists on the six key themes in the Bill?

5.1 A considerable amount of material exists on political and policy drivers and statements. There is significantly less evidence from the material reviewed on outcomes, monitoring and evaluation data across the EU. In terms of the six themes, there is more information on themes (ii) SME and Third Sector access, (iii) smarter use of public procurement to encourage innovation and growth, (iv) taking account of social and environmental sustainability issues through public procurement, and (v) dealing with inappropriate conduct and poor performing suppliers. There is less evidence on (i) transparency and (vi) application and compliance. Themes (v) and (vi) overlap and theme (i) is often threaded through and implicit within the other themes. In this chapter, the key findings from each theme are discussed.

<table>
<thead>
<tr>
<th>Theme 1 - Public Procurement processes are transparent, streamlined, proportionate, standardised and business friendly</th>
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<tbody>
<tr>
<td>• There is less explicit evidence on the themes of transparency and proportionality. Some reference to these issues is made in relation to reducing the administrative burden, encouraging SME and Third Sector access to public sector contracts, tackling poor performance and compliance and promoting non-discrimination.</td>
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5.2 On Theme 1, there is less explicit evidence. There is some reference to these issues in the evidence with respect to reducing the administrative burden and making it easier for all sectors to access public sector contracts including the Third Sector. Equally, there is some reference to Theme 1 in relation to the themes of tackling poor performance and compliance and the need for greater transparency to hold suppliers to account (Mackenzie et al, 2012; Transparency International, 2011 & 2012). This is discussed later in the section on tackling poor performing suppliers.

5.3 There is also support from respondents to the Scottish Government Procurement Reform Bill Consultation on this topic including support for a general duty to conduct procurement in an effective, transparent and proportionate manner (Mulholland et al, 2013a and 2013b).

5.4 Some economic literature exists on discriminatory public procurement dating back to the 1970s exploring some of the challenges surrounding protectionist policies, international specialisation and trade (cf Audet, 2002: 153-158 for a brief discussion of the issues. For example, ensuring against lack of transparent procedures and discriminatory tender processes that can lead to the exclusion of bidders. In addition to the need for greater understanding of several related aspects such as transparency and non-discriminatory provisions).
Theme 2 - Making it easier for business, particularly, newer businesses, SMEs and the third sector, to access public contract opportunities and sub-contracting opportunities

- Evidence from across the EU suggests that some barriers can prevent access to public sector contracts by SMEs and the Third Sector. Some barriers include: difficulties in obtaining information; administrative burden in preparing bids; the large size of public sector contracts, disproportionate qualification levels and certification requirements and late payments by contracting authorities.
- Some suggestions for improving access include: promoting cultural change within contracting authorities; dividing contracts into lots and providing opportunities for sub-contracting; reducing bureaucracy; greater use of e-procurement; and offering feedback to SMEs and the Third Sector.

5.5 The existing evidence highlights that some barriers can prevent access to public sector contracts by SMEs and the Third Sector (Aiton et al, 2012; European Commission 2008; GHK and Technopolis, 2010; Glover et al, 2008; Scottish Government, 1 April 2009; Zero Waste Scotland, undated; Mulholland et al, 2013a & b).

5.6 The European Commission (2008) based on a study in 2007, estimated that in 2005 the proportion of the value of public procurement above EU thresholds secured by SMEs was 42%, which corresponds to 64% of the number of contracts. These figures relate to public contracts above the threshold level and do not take account of subcontracts of all sizes awarded to SMEs (European Commission, 2008: 4). The share of contracts for medium sized businesses was found to be very positive but the situation differed across all member states, for example,

“[…] SME’s share of public procurement above the EU thresholds range from 78% and 77% in Slovenia and Slovakia to 35% and 31% in France and the UK” (European Commission, 2008: 4).

Cross reference can be made here to paragraph 3.11 of this review relating to contracts awarded to SMEs via Public Contracts Scotland (PCS). It is worth noting that figures from the Small Business Survey Scotland (2012) indicate that 99.3% of all businesses in Scotland (approximately 339,100) are SMEs (defined in this survey as having fewer than 250 employees) (OCEA, 2013: 1). The Small Business Survey Scotland (2012), drawing on a sample of 1,002 SMEs (across a range of sectors and size bands) based in Scotland and using the sampling frame of the Dun and Bradstreet database, found that,

“The majority of SMEs had neither expressed an interest in, or bid for, contracts advertised by the public sector (84%). 7% expressed an interest but did not bid and 9% bid for public contracts in the 12 months prior to the survey, up from the 2007 SBS figures; 2% expressed an interest but did not bid and 6% bid for public contracts” (OCEA, 2013: 5-6).

From the findings, it is not possible to determine the relevance of public sector contracts and the nature of the business to the SMEs sampled in this survey (OCEA, 2013: 3).
5.7 The European Commission (2008) consulted a variety of stakeholders and found a range of barriers to SME access. These included: difficulties in obtaining information due to lack of capacity in organisations to obtain information; lack of knowledge about tender processes; administrative burden of tender processes; large size of contracts; too little time to prepare the tenders; high cost of tender preparation; disproportionate qualification levels and certification requirements; excessive requirements for financial guarantees; discrimination against foreign tenders/favouring local or national enterprises; finding partners abroad with whom to collaborate and co-operate; and late payments by contracting authorities (European Commission, 2008: 5).

5.8 Glover et al (2008) found similar issues in their examination of SME access to public sector contracts in England with some cross reference to the UK devolved administrations. Although Glover et al (2008) found that some progress had been made since the 2003 Better Regulation Task Force and Small Business Council report ‘Government: Supporter and Customer’, small firms still face difficulties in accessing and securing public sector contracts (Glover et al, 2008: 3). Glover et al (2008) contend that this means that Government loses out on innovative approaches and value for money that small firms can offer (Glover et al, 2008: 3). Glover et al asked a sample of SMEs and public authorities what they preferred in terms of government having a goal/target for percentage of SMEs winning public sector contracts. The overwhelming view of small businesses, business organisations and public authorities was that Government needed to tackle the three issues of transparency, simplicity and making procurement strategic as opposed to establishing a target (Glover et al, 2008: 3). Public authorities were of the view that, “[…] because of the variation in goods and services bought by different public bodies there could be no single “optimal level” of procurement from SMEs and also, that a goal risked either distorting markets or develop into a “tick box” process” (Glover et al, 2008: 3 & cf also 37-39).

Glover et al also recognised that having a “set-aside” or “quota” would not be compatible with the European Treaty principles or EU rules on procurement (Glover et al, 2008: 38). Glover et al concluded that public sector bodies should be required to report on the value of contract spend with SMEs, to help monitor the success of measures designed to improve SME access and help provide evidence for future policy making (Glover et al, 2008: 4). Glover et al raise an important point regarding the difficulty of mandating certain behaviours across the whole public sector given the devolved nature of some areas but suggest that Government needs to engage actively with these areas to promote best practice and incentivise both contracting authorities and small businesses (Glover et al, 2008: 4).

5.9 The European Commission highlighted the need for cultural change within the contracting authorities and for improvement of their professionalism in procurement (European Commission, 2008: 13). Effecting cultural change within the procurement profession and contracting authorities is an on-going part of the reform process.

5.10 A range of suggestions and opportunities exist to improve SME access. These include the following: divide contracts into lots; provide opportunities for sub-contracting; offer better access to information; have less bureaucracy; offer personalised assistance to SMEs; give feedback and debriefs to tenderers; give
training and guidance to contracting authorities; alleviate the administrative burden; place emphasis on value for money rather than price; allow sufficient time to draw up tenders; and have greater use of e-procurement. The European Commission (2008) found that e-procurement is considered progressive but its practice is highly variable (European Commission, 2008: 11). PWC (2011) also found that most EU countries do not practice e–procurement. In 2012, the European Commission found that “[…] e-procurement is still used in only 5 to 10% of e-procurement procedures carried out across the EU and that, the ambitious political targets set in the main Manchester Declaration in 2005, have not yet been achieved” (European Commission, 26 October 2012: 23). Only a few MS have made significant progress including Portugal which has made e-procurement mandatory law (European Commission, 26 October 2012: 23). The European Commission, however, argues that the increasing number of electronic platforms and portals demonstrates that e-procurement capacity is available in the EU, suggesting the potential for future development (European Commission, 26 October 2012: 24).

5.11 Glover et al (2008) argue that four areas need to be prioritised and developed: (i) transparency; (ii) simplicity; (iii) strategic procurement; and (iv) measurement. On transparency, they argue that by 2010, contract opportunities above £20k should be advertised electronically through a single, easy to access online portal (Glover et al, 2008: 5). They also argue for greater use of e-procurement, the publication of contract awards and for procurers highlighting suitable tendering opportunities for SMEs and consortia of SMEs (Glover et al, 2008: 5). Equally, they highlight the need for communication and feedback to SME tenders and suppliers and the importance of training and tools for both procurers and SMEs (Glover et al, 2008: 17).

5.12 On simplicity, Glover et al argue for standardised PQQs, reducing bureaucracy, improving clarity of language and questions deployed in tender documents, and businesses being able to reference wider business experience (other than just public sector contract experience and that this should be taken into consideration in the tender evaluation stage) (Glover et al, 2008: 5 & 21-24). They also argue for flexibility in the accreditation scheme/s that procurers use to allow businesses to give evidence that they can meet contract standards (Glover et al, 2008: 5).

5.13 On strategic procurement, Glover et al (2008) make the connection between improving SME access and promoting innovation (a theme of the procurement reform agenda). They argue that government departments should use their Innovation Procurement Plans to set out how procurement aligns with their long term commercial and innovation strategies, should encourage wider use of outcome based specifications as a vehicle for promoting innovation and that main contractors should be enabled to make their sub-contracting opportunities accessible through a single online portal (Glover et al, 2008: 5 & 25-30 for reference to some of the issues discussed later in this evidence review on innovation). Glover et al found that public procurers thought that small businesses could make a positive contribution but felt pressured to incorporate a range of policy priorities in their procurement processes, for example combining sustainability, social and environmental issues and SME engagement (Glover et al, 2008: 31). Glover et al argue that these priorities should be stipulated specifically and weighted in the tender evaluation
process and should be proportionate to the contract (Glover et al, 2008: 31). Equally, Glover et al emphasise the importance of good contract and risk management skills for procurers, for example, in the management of prompt payment to SMEs and sub-contractors and argue that the procurement capability review process can provide an opportunity for promoting the SME agenda (Glover et al, 2008: 32 & 35).

5.14 On measurement, Glover et al argue that all central government departments should report annually on the value of their contract spend with SMEs and that a “[...] reliable single source of quantitative data” should be created to enable measurement and evaluation of success and to inform future policy development (Glover et al, 2008: 6). Glover et al argue that data on public sector procurement and on SMEs is poor and that effective measurement is necessary (Glover et al 2008: 39). The data gaps mean that monitoring and measuring impact is difficult. Some of these issues regarding data gaps are explored in more detail in the section on Theme 3 - innovation in this evidence review.

5.15 At a UK level, some potential proposals could also result in excluding some suppliers who are newly established, for example, in the case of supplier selection information and the suggestion that three years accounts should be provided. The recent UK Government Procurement Policy Notice proposes, as part of applying minimum standards for reliability of suppliers based on past performance, that certificates of performance for the last three years be provided (Cabinet Office, 2012c). This might, in some cases, lead to the exclusion of newly established undertakings.

5.16 Demonstrating technical and professional ability is not the same as demonstrating past performance of achieving the aims of contracts. To build reputations, bidders need to win contracts in order to demonstrate past performance and to complete performance certificates. What are the implications for consortia and collaborative public procurement? Bidders would need to be aware of and be clear of the past performance of all co-bidders and subcontractors, both new and old entities. The verification of information provided by bidders needs to be done in a number of ways and Cabinet Office is setting up a central repository for holding information on suppliers (Cabinet Office, 2012c, para 34). Cabinet Office (2012c) does remind public bodies that they need to ensure transparency and fairness in the public procurement process and to assess risk of future performance being good or bad. It also notes that public bodies should consider the administrative burden placed on bidders to provide this information. In terms of tackling poor performers and potential organised crime group infiltration, Mackenzie et al (2012) argue the need for rigour at the beginning of the process. So, here again, a possible solution for one issue might create a barrier to access.

5.17 The Scottish Government (1 April 2009) has produced guidance and a checklist for buyers in order to encourage awareness amongst public sector buyers of the challenges that might be faced by SMEs in accessing public sector contracts. The checklist reflects the good practice echoed in the European Commission (2008) ‘European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts’. It contains a range of good practice suggestions from division of contracts into lots to providing feedback to help companies improve their
performance (Scottish Government, 1 April 2009, Part 13: Checklist for Buyers). The guidance makes the case for improving SME access to public sector contracts arguing that, in some cases, SMEs might be able to offer a range of advantages over larger organisations, for example, better levels of service, lower overheads, innovative business solutions, greater flexibility, specialism and increased competitiveness in the longer term (Scottish Government, 1 April 2009).

### Theme 3 - Smarter use of public procurement to encourage innovation and growth

- Evidence from across the EU suggests that innovation in public procurement or the public procurement of innovation has re-surfaced as a popular policy solution to driving economic growth and innovation and contributing to the achievement of wider socio-economic and environmental policy objectives.
- There is support for considering public sector procurement as a strong player in stimulating the market. There is, however, a mixed evidence base and some argue a lack of sufficient data on the effectiveness of demand side innovation policy.
- Evidence suggests that innovation in public procurement is often fused throughout wider policy objectives and arguably, innovation as a policy goal connects a number of themes within the Bill, in particular, the themes of sustainability and encouraging SME access.


5.19 HM Treasury (2007) and DBIS (2009) emphasise the key aspects of the procurement reform agenda including the need for efficiency savings, ensuring whole life costing in the procurement process, strengthening procurement capability (including centralising and professionalising procurement to achieve consistency in practice – Gershon Review). It also underscores the need to ensure that all components are included in the specification without being overly prescriptive, the need to search for innovative solutions plus the need to “[...] consider using an output or outcome based specification” (HM Treasury, 2007a: 1-7 & 5; DBIS, 2009: 3). The UK Government’s procurement vision is congruent with the Scottish Government’s strategic priorities. The Scottish Government argues that contract documents, specifications, publication of contract notices should all be expressed in terms of outputs, outcomes and performance in order to encourage tenderers to develop innovative solutions (Scottish Government, 2008a: 30). Reference to innovation is made with respect to driving innovation in public sector delivery, Value for Money (VFM) and adopting outcome based approaches to procurement, in addition to, using innovative procurement tools, having more collaboration and better scrutiny (HMT, 2007a).
The historical neglect of demand-side innovation, its return and current popularity

5.20 Despite the recurrence of demand-side innovation, little discussion or evidence exists regarding what the public procurement of innovation means or how this will be developed and achieved (Kahlenborn et al, 2011). Kahlenborn et al (2011) suggest that innovation as an end objective tends to be implicit within the other policy objectives, for example, using procurement as an enabler for achieving environmental, social and economic policies (cf also Beise & Rennings, undated; Edler, undated, the Public Services Commission, 2011, Cabinet Office, 2012a: 3; Edler & Georgiou, 2007: 957; Edler et al, 2011: 33; OECD, 2011). The OECD (2011) suggests that, in the context of greater fiscal constraint, OECD countries and other developing economies, for example, China and Brazil are using demand-side innovation policies to try to tackle existing socio-economic and environmental challenges (OECD, 2011: 10 & cf European Commission, 2010b: 77).

5.21 The OECD outlines that the notion of fostering innovation through procurement is not new especially amongst some countries that have “[…] pursued active technology procurement policies for decades” and Edler argues that demand side policy is back and it is “[…] strongly lopsided to Public Procurement” (OECD, 2011: 34 & DIUS, 2008a & b; Edler, undated: 12; cf also Izsak & Edler, 2011; Aschhoff & Sofka, 2008; HMT, 2007a; Uyarra & Flanagan, 2009: 2-5; Edler & Georgiou, 2007: 949 – 952 & 961 for a succinct introduction to the background to public procurement and innovation policy development and an argument for including demand more concretely in innovation policy making).

5.22 It has been recognised in recent years that supply side innovation policies are insufficient to stimulate competitiveness, hence the return of demand side innovation policy, although many recognise the need for a combined approach (Edler & Georgiou, 2007: 952). Public procurement has actually spurred the development of high technology sectors and so it is recognised as having the potential to affect the market by becoming an early adopter (Cunningham, 2009; Izsak & Edler, 2011: 2 & 7; OECD, 2011: 34-5; Uyarra & Flanagan, 2009: 5).

5.23 Georghiou (2007) argues that demand side innovation is not a new insight and dates back to a pioneering study in 1957. The study, inter alia, emphasised the important role of government and public procurement for the success of “[…] innovative electronics and instruments firms” (Georghiou, 2007: 4 & cf Cunningham, 2009 & Izsak & Edler, 2011: 2). It is, however, as Georghiou (2007) and others argue a largely neglected area and it is only now being resurrected as a policy solution designed to increase productivity and the effectiveness of our public services (Georghiou, 2007: 4 & 14 & cf Cunningham, 2009; Edler & Georgiou, 2007: 949). Edler and Georgiou highlight that one argument that has been posited regarding the reason for this neglect is that more stringent EU competition rules have led to the declining use of this instrument (Edquist et al, 2000 in Edler & Georgiou, 2007: 950). Georghiou argues that given the scale of public procurement it should not be ignored as a vehicle for driving innovation, as public procurement expenditure is greater than all measures aimed at the supply side of innovation (Georghiou, 2007: 20).
The rationale for employing public procurement to drive innovation

5.24 The OECD outlines that the rationale for using public procurement to support innovation is that government has purchasing power and can, therefore, directly and indirectly shape innovation (OECD, 2011: 37 & cf DIUS, 2008a: 36; Georghiou, 2007: 14-15). It identifies that several levels of public procurement can be separated out but are not usually treated separately in the literature (OECD, 2011: 35). The first level is that of regular public procurement for ready made products but where no Research and Development (R&D) is required. Innovation, in this case, can be encouraged in the tender process. The second level is that public procurement can be strategic when governments request specific technologies or services for the delivery of public services. Usually there is the demand for the creation of new technologies/services that are sectorally specific but do not yet exist (OECD 2011: 36 & cf Uyarra & Flanagan, 2009 for a specific discussion of ‘regular’ and ‘public technology’ procurement and their four-fold typology of procurement). On the third level, the public sector directly procures R & D “[…] to support the activities and decisions of government and public authorities” (OECD, 2011: 36). A fourth level is what the OECD terms ‘catalytic procurement’ whereby the state buys, not only for its own purposes, but also to support private purchasers’ decision to buy (OECD, 2011: 37). So, here one can see that innovative public procurement is fused throughout other reform agenda objectives such as sustainable public procurement and community benefits (OECD, 2011: 37). Cunningham outlines Edler’s (2009) explanation of the rationale for demand based policies as being based on four pillars: “(i) innovation policy; overcoming system failures; (2) societal goals and policy needs; (3) industrial/economic policy: (a) modernisation; (4) industrial/economic policy: (b) pushing local innovation production and creating Lead Market potential” (Edler, 2009 in Cunningham, 2009: 2 & 3, Table 1 – Typology of demand-oriented measures adapted from Edler, 2009).

5.25 Considering more specifically, innovation in public services, innovation is viewed as important given that the public sector is a major employer in the economy and has the potential to stimulate growth and innovation as part of improving its delivery of public services (DIUS, 2008a: 25).

5.26 The OECD argues that public procurement, regulation and standards can be used as vehicles to foster innovation. One could argue that there could be a cross over between solving some innovation and growth challenges and tackling regulation and compliance issues and poor performing suppliers - several of the key themes in the Procurement Reform Bill agenda (OECD, 2011: 12-13). In this respect, stimulating innovation and growth is at the core of the reform agenda and could provide solutions/help with some of the other challenges including embedding sustainability in all its forms in procurement practice.

Defining the procurement of innovation and demand-side innovation

5.27 Although no consensus exists on defining innovation, some definitions of demand-side innovation have been suggested. The OECD notes,
“While there is no single definition of a demand-side innovation policy, it is often understood as a set of public measures to increase demand for innovations, to improve conditions for the uptake of innovations or to improve the articulation of demand in order to spur innovations and allow their diffusion (Edler, 2007)” (OECD, 2011: 27 & Edler, 2009 in Cunningham, 2009: 7).

As Cunningham points out, Edler (2009) indicates that this broad definition of innovation implies twin rationales – that is, to promote and stimulate innovation and to increase the diffusion of innovation and that the latter implies that innovation need not only be equated with ‘new’ (Cunningham, 2009: 1 & Uyarra & Flanagan, 2008: 8). As Cunningham, however, notes there is still no generally accepted definition.

5.28 Demand for innovation can mean that the users are signalling to the market and producers that there is a need to acquire new products. It can involve “demand triggering innovation” asking for new products/services and more efficiency and “demand being responsive to existing innovation”, which involves absorbing, adopting, using and accepting innovations. Users can be a source of innovation and the co-production of ideas (cf Edler, undated & von Hippel, 1986 in Edler, undated; Izsak & Edler, 2011: 3 & 5). As Edler et al (2012) highlight innovation can mean different things in different countries and can be at different stages of development (Edler et al, 2012: 37). There is also some question within the debate about whether innovation should be a primary or secondary objective of public procurement (Uyarra & Flanagan, 2009).

5.29 The European Commission (2010b) defines the procurement of innovation as including the procurement of products or systems that might not actually exist at the time but will be developed in the future. It goes beyond technology to address non-technological innovation and complex systems that might still be in the course of development (European Commission, 2010b).

5.30 The European Commission (2010b), drawing on case study research and insight from incumbents at expert group meetings, identifies five types of risks in the procurement of innovation, which can be useful for policy makers when deciding to develop strategies for procuring innovation. These include: (i) technological risks where the innovation might not be realised due to the early stage of its development; (ii) organisational and societal risks where the organisation might fail in its procurement or there might be a lack of acceptance in society of new products or ways of delivering services; (iii) market risks on both the supply and demand sides; (iv) financial risks in terms of inability to meet costs; and (v) turbulence risks meaning potential unforeseen events (European Commission, 2010b: 6 & OECD, 2011). Two relevant findings from this work for the procurement reform agenda are: (i) the need for procurers to develop “[…] a new culture and deal with procurement of innovation without carrying ‘personal’ risks” and (ii) help procurers develop skills and capabilities (European Commission, 2010b: 9-13). The European Commission argues that one of the main reasons for low public procurement of innovation is risk aversion hence the need to develop systematic risk management procedures.

5.31 In a wider context, it is recognised that public procurement in general is concerned with risk management. Therefore, developing it with innovation in mind should be possible and good risk management (as part of good project and contract
management) should increase the likelihood of success (European Commission, 2010: 15; 20; 24 & 32). I cover the issues of good project management later in this evidence review. The European Commission’s (2010b) study is helpful in debunking two preconceptions about public procurement and innovation: (i) that the EU Directives on Public Procurement hinder innovation as some evidence suggests that innovation procurement can occur in the current legal framework; and (ii) that procurement of innovation will be biased towards the local and favour local suppliers as again evidence suggests that it can be good for encouraging cross border competition (European Commission, 2010b: 81). However, the European Commission highlights that there is still a long way to go before an European internal market for the procurement of innovation is created and that cultural and behavioural change is necessary (European Commission, 2010b: 81).

Data and evaluation evidence gaps

5.32 The OECD (2011) ‘Demand-side Innovation Policies’ report provides a depth analysis of the theoretical underpinnings of demand side innovation policies, drawing on case studies from OECD countries. It draws on a rich academic literature base and has a good level of discussion regarding evaluation methods, making a strong case for evaluation studies of policy in order to identify what works, why and in which policy contexts. A key finding of their study is that there is a dearth of evaluation data on outcomes and impact in relation to public procurement (and the risk management of it), regulation, standards and innovation and growth, making evidence based policy making, difficult to put into practice (OECD, 2011: 12 & 17 & cf Izsak & Edler, 2011: 7). This finding is echoed in a range of studies analysed for this review (Aschhoff & Sofka, 2008; Audet, 2002; Cunningham, 2009; DIUS, 2008a: 2, 14 & 25-26 on the lack of systematic evidence of the prevalence or characteristics of innovation in the public sector and the lack of consistent measures to capture innovation across the OECD; European Commission, 2010b: 16; Edler et al, 2012; Georghiou, 2007: 26; Izsak & Edler, 2011; OECD, 2002; Uyarra & Flanagan, 2009: 23).

5.33 Izsak and Edler (2011) however, point out that the lack of evaluation data might also be explained by the fact that there is a lack of demand side innovation policy to evaluate at this stage. They argue that although innovation is a strong policy driver, it is not evidence based (Izsak & Edler, 2011). Edler et al (2012) highlight that the evaluation of innovation policy has tended to be evaluation of supply side innovation policies. Edler et al (2012) argue that that previous innovation policy, for example, R & D policies in the 1980s emerged more as a leap of faith/based on the beliefs of policy makers as opposed to being evidence based. They contend that this currently is the case with the development of demand side innovation policies, therefore, evaluation practitioners are presented with a number of challenges in trying to evaluate and develop a body of evidence (Edler et al, 2012: 34 and see their paper for a depth discussion of potential evaluation challenges and methods including the need for ex ante and ex post evaluations). As Edler et al (2012) put it,

"Without a better understanding of the potential impact of policies, on market and system failure they address and on the mechanisms by which policies can define and achieve goals, demand-side policies remain an elusive concept where policy development follows intuition and is characterized by
policy imitation rather than evidence, reasoning and informed learning” (Edler et al, 2012: 34).

5.34 Edler et al raise important questions about what evaluations need to establish with a central question being – “[...] how and (by how much) did the policy measures alter behaviour and have those new behaviours continued over time?” (Edler et al, 2012: 36). Drawing on the evaluation of the Lead Market Initiative (LMI), Edler et al (2012) point out that this evaluation was ex post and did not allow for an evaluation of process of the entire initiative and the types of interactions and activities that would have been involved in a complex demand side initiative (Edler et al, 2012: 36). Edler et al (2012) highlight the way in which the policy agendas of innovation and sustainability go together at the EU level and can be seen in the LMI (Edler et al, 2012: 38). Edler et al develop a logic chart/model, which highlights that in order to achieve final outcomes, structures and behaviour need to change in any given initiative (Edler et al, 2012: 39-41). They also suggest the need to use a combination of evaluation methods and the need to improve data gathering (Edler et al, 2012: 44).

5.35 DIUS (2008a) argues the case for improving evidence and understanding in a number of areas - firstly, in the area of the relationships between innovation and productivity at the whole economy and firm levels. DIUS references the value of data linkage through the Office of National Statistics (ONS) Virtual Micro-data Laboratory - that is, analysis should be possible once the results of more innovation surveys can be compared over time (DIUS, 2008a: 38). Secondly, in the area of building better measures of business innovation, especially in areas, which do not involve R & D but could involve other forms of innovation. Thirdly, there is a need to devise measures to capture the non-economic effects of innovation, for example, health and environmental outcomes. Fourthly, there is a need to devise measures to capture the innovative performance of the public sector as a whole as it is difficult to assess current performance due to lack of systematic data collection. Fifthly, there is a need to understand more about consumers and users and they need to be included in innovation measurement and research through surveys and data collection. Importantly, there is the need to identify the barriers to user-led innovation and demand driven innovation. Sixthly, there is the need to understand the connections between skills and innovation and where there might be the need for future analysis and data gathering. Seventhly, there is a greater need to understand the factors that encourage and discourage innovation especially on firms’ perceptions of barriers to innovation and any links between internal factors (strategy and capability) and external factors (market structures, regulations) (DUIS, 2008a). This would help identify where policy interventions could bring additionality.

Evidence from some case studies on public procurement and innovation

5.36 Cunningham (2009) provides a useful synopsis of findings from survey data provided by the INNO-Policy TrendChart Network of National Correspondents on the level and range of demand side innovation policies across a number of countries. Responses were categorised into four main groups – from countries where there was little or no debate on demand side policies to those countries where there is a strong and on-going debate on linking demand side policies to innovation policy. The countries with strong and on-going debate included: Finland; Germany; France;
Ireland; the Netherlands; Norway; Spain; Sweden; and the UK (Cunningham, 2009: 4). In terms of demand side policies, there was a strong focus on sustainability, including green procurement, transport and construction and ICT (e.g. e-commerce) (Cunningham, 2009: 4). Interestingly, in Norway, demand side innovation policies have been in place for several decades, in particular, in the form of the Public and Industrial Research and Development Contracts (Cunningham, 2009). These schemes aim to improve the effectiveness and efficiency of public services and enhance the relationship between public bodies and private companies (Cunningham, 2009: 6). From the survey data, only a limited number of good practice examples of demand side policies were self-reported by countries. These ranged from the Danish wind energy industry to France’s SME pact to innovation policy in the area of environmental protection in Germany and R & D in Spain (Cunningham, 2009: 11-12). It is unclear from the text how success has been measured in these examples.

5.37 The Lead Market Initiative (LMI) for Europe is referenced throughout a range of evidence and it aims to foster the emergence of lead markets, that is, markets with potentially high economic and societal value. Six markets have been identified as part of the LMI: eHealth; protective textiles; sustainable construction; recycling; bio-based products and renewable energies (Cunningham, 2009: 2). As Cunningham concludes the debate on lead markets and demand side policies is growing and already established by a number of the EU’s innovation leaders with environmental technologies, ICT, health, transport and construction being the main areas for demand side policies (Cunningham, 2009: 11). In terms of outcomes, the LMI has had limited impact on encouraging new initiatives at the national level, however, its progress is being monitored.

5.38 Izsak and Edler (2011) also utilise data from the INNO Policy TrendChart database (it is based on 31 European countries self reporting (27 EU member states and Norway, Iceland, Switzerland and Leichtenstein) and therefore, data do not constitute a fully representative survey of all countries) (Izsak & Edler, 2011:1). As Cunningham (2009) and Izsak and Edler (2011) highlight EU member states and associated countries can broadly be divided into three categories of countries in terms of development of innovation policies with the UK situated within the most advanced group in terms of development of innovation policies. The categories are: group (i) countries with strong policy discourse and experience; group (ii) relevant policy discourse and experimentation; group (iii) limited policy discourse and/or actions. Geographically (although, there are exceptions), they broadly fall into group (i) north west European countries, group (ii) southern European countries and group (iii) east central European countries (Izsak & Edler, 2011: 11-14, Figure 2 for detail of some innovation policy developments in different countries).

5.39 Izsak and Edler identify drivers and barriers to influencing the momentum of demand side innovation policies, in particular, a tension between on the one hand, a drive to use innovation policy to tackle societal and economic challenges and on the other, “[…] perceived economic and fiscal barriers to the wider use of demand-side innovation policies” (Izsak & Edler, 2011: 16). Other barriers include – fragmented systems of governance and administration in public procurement and lack of skills/capability in public procurement (Izsak & Edler, 2011: 19). Izsak and Edler (2011) reference another study by Edler (2011), which concluded that there was not
much advancement in the development and application of innovation policies within and across both old and new EU member states, although the recent OECD (2011) report highlights some innovation policy developments at the early design and implementation stages (Izsak & Edler, 2011: 8).

5.40 As Izsak and Edler (2011) indicate the scarcity of demand led innovation policy developments over the last twenty years might partly explain the lack of systematic evaluations or impact assessments. The drive to develop innovation policy is not supported by evaluations of such initiatives (Izsak & Edler, 2001: 9). Izsak and Edler (2011) reference some older studies that focused on demand side diffusion policies as opposed to measuring impact and outcomes. The limit of some of the studies was that,

“[…] they highlighted the time lag between measures and effects, concluding that each evaluation of demand based measures faces time lag problems and thus runs the risk of under-estimating the overall effect of the measure” (Izsak & Edler, 2011: 10).

5.41 In short, Izsak and Edler (2011) conclude that there are, as yet, no systematic evaluations of public procurement of innovation. The case studies that do exist tend to focus on the success factors for innovation to occur but less on the actual effect of those procurement activities on markets and public services (Izsak & Edler, 2011: 10 & 22 & cf also European Commission, 2010b: 34 on the existence of more assertion, assumption and even speculation as opposed to research evidence in the area of risk and public procurement of innovation). Izsak and Edler argue that it is still too early to determine whether demand side type of activities will meet policy expectations and whether and in what form they will be continued in the future (Izsak & Edler, 2011: 37). There is a need to evaluate, share lessons and practice from early examples of demand side innovation policy developments to avoid rolling out prematurely demand based measures (Izsak & Edler, 2011: 37).

5.42 The OECD (2011) reports that there are relatively few evaluations of demand side interventions and policies, perhaps due to the complex nature of trying to evaluate such interventions (often with a policy mix) to determine cause and effect (OECD, 2011: 57). The OECD explores the value of different evaluation methods and indeed the value of multi methods to explore the effect/s and impact of interventions (OECD, 2011: 59). As the OECD indicates one important aspect of evaluation is to explore ‘additionality’ – that is, to consider to what extent the desired outcomes would have occurred without the intervention (that is, what is termed the ‘counterfactual’). The question of ‘additionality’ is well established in evaluation research and should be an integral question for any evaluation in order to be able to identify if a policy intervention is absolutely necessary. This is crucial for policy makers to determine how to target limited resources. For example, taking two themes for the Bill - encouraging transparency or improving access of SMEs to public sector contracts – would the desired outcomes occur without legislating or intervening for these issues? The OECD provides a useful table outlining some evaluation questions for innovation-oriented public procurement, regulations and standards (OECD, 2011: 61, Table 1.4).
5.43 Aschhoff and Sofka (2008) explore two major research questions – “Is public procurement an effective instrument to provide public support for innovation compared to other options and if so, for which firms does it work?” (Aschhoff & Sofka, 2008: 16). They compare the effects of four different instruments – public procurement, regulation, research institutions and universities and public R & D subsidies. They find that there is a lack of evidence of the effectiveness of demand side innovation instruments and that there is mixed evidence on whether these four instruments contribute to innovation (Aschhoff & Sofka, 2008: 6). Their suspicion is that these mixed results might be attributable to “[…] structural characteristics which influence their reactions to different policy instruments” and explore two factors – firm resources and geographic and industry opportunity (Aschhoff & Sofka, 2008: 7).

5.44 Aschhoff and Sofka’s study, based on self-reported survey data of 1,149 German companies, found some positive evidence of the effect of public procurement on innovations, but other policy instruments/interventions were also found to play a role (Aschhoff & Sofka, 2008: 14). In terms of the effect of supply and demand side policies, public procurement as a demand side approach is found to have a positive effect on innovation success but so too is supply side policies (Aschhoff & Sofka, 2008: 16). They also found that the effect of each policy instrument might depend upon firm characteristics with public procurement having some positive effect on SMEs (Aschhoff & Sofka, 2008: 16-17). The findings from their study, however, are limited in that they do not have data on the quantitative input provided by government or longitudinal panel data to reveal the effects of the interventions over longer periods of time (Aschhoff & Sofka, 2008: 17).

What are the challenges to developing demand-side innovation policies?

5.45 The OECD (2011) identifies five main strategic challenges to developing a demand-side innovation policy framework. These include: (i) government needs to identify the rationale for the policy intervention (for example is there a societal need, market or system failure); (ii) the need to deal with the complex nature of the supply chain and all the stakeholders and resources involved in ensuring a smooth process; (iii) the uncertainty attached to innovation activities makes it difficult to plan for existing and future needs; (iv) promoting innovation might encounter “technological lock-ins” (Arthur, 1989) and “dominant designs” (Utterback and Abernathy, 1975) – that is – innovative designs might be locked out by other designs or considered inferior (in addition to the challenge of ‘larger player dominance’); and (v) as noted previously, evaluating demand side innovation and determining cause and effect is difficult (OECD, 2011b: 70-71 & 73-74). A key governance challenge is that demand side innovation policy assumes a greater role for government to lead change (OECD, 2011b: 71). As the OECD indicates,

“This requires investment in skills and competencies in public administrations, as well as changes to organisation and culture to allow the public administration to play its role as an innovation champion” (OECD, 2011: 71).

5.46 DIUS (2008a) identifies low risk taking and lack of skills to innovate amongst public sector staff as working against innovation. Drawing on the procurement review evidence, it notes that professional capability needs were identified as an area in need of strengthening. It highlights that some of the evidence suggests that
knowledge and experience of how to stimulate and innovate might be lacking amongst employees (DIUS, 2008a: 27 - 28). DIUS also suggests that spreading and replicating good practice tends to occur more in the private sector than in the public sector, due, inter alia, to the private sector’s incentive to compete and attract business in the open market (DIUS, 2008a: 27). DIUS identifies a number of skills necessary for innovation: technical knowledge; cognitive and creative skills required to solve problems; managerial skills required to innovate and the basic skills, competencies and attitudes required by a flexible and adaptable workforce (DIUS, 2008a: 28).

5.47 One of Uyarra and Flanagan’s (2009) main concerns is the limited and restricted nature of the debate on innovation and public procurement resulting in a lack of meaningfully informed public procurement strategies. The main limits of the debate are: (i) it downplays the nature of public procurement in terms of the wide range of types of goods and services procured; (ii) it downplays the varied nature of innovation; (iii) it downplays the multiple potential innovation effects of public procurement (Uyarra & Flanagan, 2009: 3). The limited set of examples deployed to demonstrate the innovation effect of public procurement is also unrepresentative (Uyarra & Flanagan, 2009: 3). In addition to this, Uyarra and Flanagan argue that there is a definitional issue within the current debate, namely,

“Widely-used definitions of ‘innovative procurement’ as ‘the purchase of goods or services that do not yet exist’ exclude many categories of innovation and may be of doubtful relevance to many public procurers, who could find this agenda difficult to respond to. The prevailing definitions do not account for innovation through the recombination of existing goods or services, innovation in the delivery of existing services, and exclude most process innovations. In addition, emphasis is placed on the direct effects of procurement on innovation whilst the possibility of indirect impacts and wider spillover effects are downplayed” (Uyarra & Flanagan, 2009: 3).

As Uyarra and Flanagan (2009) point out, procurement is increasingly called upon to deliver a range of policy objectives. The addition of innovation places sometimes a range of conflicting policy objectives on procurement (Uyarra & Flanagan, 2009: 4). This observation is important for development of the Bill in thinking strategically and realistically what demand should be placed on public procurement to deliver a range of policy objectives.

5.48 There is much debate over the alleged positive effects of demand pull policies and many argue the need for a combined supply and demand approach to encouraging innovation and economic growth (Nemet, 2009: 702). Nemet argues that there is little useful evidence on how to split/allocate public funds between the two approaches (Nemet, 2009: 702). Nemet highlights that critics of demand pull argue broadly three issues: (i) the definition of demand in empirical studies has been too broad and often inconsistent to be useful; (ii) ‘demand explains incremental technological change far better than it does discontinuous change’ and by this he means that demand pull theses can miss the highly innovative developments; (iii) and that demand pull theses have a certain set of assumptions about firms/organisations ability and capabilities to meet needs and demands (Nemet, 2009: 701). Nemet concludes that policy makers should not rely alone on demand-pull policy approaches and need to combine them with other policy instruments in
order to effect ‘non-incremental technical change’ (Nemet, 2009: 708 & cf also Aschhoff & Sofka, 2008 for a similar view). In contrast, Nemet (2009), using case study material, argues that there was no evidence to suggest that demand side policy encouraged non-incremental technical change and in fact, it had the opposite, negative effect (Nemet, 2009: 700).

**Key messages for policy makers in developing demand-side policies**

5.49 Evidence suggests that demand-side policy measures need to be clearly targeted and consideration needs to be made of the market and sector (OECD, 2011: 76). Sector targeted demand led innovation could prove the most promising to implement as it is easier to match demand led innovation with supply side policies in specific sectors. There is the need for good governance (OECD, 2011: 76). However, there is a lack of data and lack of evaluation of demand led innovation policy measures, making evidence based policy making difficult (OECD, 2011: 77). The OECD found that although public procurement accounts for approximately 16% of GDP in average in OECD countries, only a very small aspect of procurement considers innovation (OECD, 2011: 80). The OECD cites the UK as an example of where regulation and guidance can make public procurement more ‘innovation friendly’ and the way in which requiring government departments to produce Innovation Procurement Plans and the development of technologies such as e-procurement can foster innovation (OECD, 2011: 80-81).

5.50 As the OECD indicates there is a need to strike a balance between innovation strategies and the need for competition, transparency and accountability in public procurement to avoid monopolies by large companies, discrimination against SMEs and protectionism (OECD, 2011: 81).

5.51 Edler et al (2011) in ‘Closing the Procurement Gap – the Costly Failure to Mobilise Sustainable Procurement for Innovation’ make a strong case for bringing together the two strategic policy drivers of sustainability (in this document, they refer only to environmental sustainability) and innovation in procurement. They argue that both areas have not, until now, really been connected, despite the fact that there are strong efficiency and economic reasons for joining them together (Edler et al, 2011). Edler et al (2011) argue that in terms of innovation in the current economic crisis, it has been much less in the spotlight and has even been viewed as “[…] going against the cost savings agenda” (Edler et al, 2009: 7). In this respect, they argue to join up not only the sustainability and innovation but also the current efficiency agenda (Edler et al, 2011: 8). They argue that it is important not to lose the opportunity to connect these areas and argue for a ‘step change’ not least because some evidence suggests that there is still much more progress to be made with respect to achieving sustainability in public procurement (Edler et al, 2011: 8 & 5).

5.52 Edler et al (2011) conclude that whole life cycle costing with inbuilt sustainability is not really occurring very often in public procurement. Equally, there is very little consideration of innovation in meeting sustainability targets and innovation is absent from strategic documents in sustainable procurement (Edler et al, 2011: 5). As they note the challenges for sustainability and innovation are the same – for example, tackling risk aversion to finding solutions to environmental challenges, skills/capability development and developing clear leadership, in
addition, to developing techniques and measures to determine the long term impact and success of different cases (Edler et al, 2011: 8). Edler et al argue that stimulating ‘eco-innovation’ can create lead markets in the UK with the benefit of giving companies a competitive edge (Edler et al, 2011: 8).

5.53 Edler et al note that some evidence suggests that companies with general strategic procurement plans and those with sustainable supply chain management are more successful in the market place (Edler et al, 2011: 6). They also identify that one of the strongest enablers of sustainable procurement is collaboration between purchasers and suppliers (Edler et al, 2011: 6). Edler et al conclude that there are eight key actions that would help develop the effectiveness of procurement as a policy instrument as follows:

“1. For the step change needed across government and within firms, sustainability procurement must be open to innovative solutions; 2. A more strategic approach to efficiency should be taken to create a win-win situation; 3. Centralised procurement needs to preserve and regain the intelligent customer characteristics found at lower levels of aggregation; 4. Business also needs to take on the eco-innovation as it procures from the supply chain; 5. Government should develop ways in which private procurement can be stimulated to demand more eco-innovation; 6. Government should consider radical new ways to support demand for innovation in the private sector including an insurance guarantee scheme for private buyers of socially desirable eco-innovations; 7. There should be much more systematic reflection on, as well as, sharing and roll out of good practice across the public and private sectors such as interesting models of pre-commercial procurement and forward commitment procurement in the public sector or advanced eco-innovation approaches of firms; 8. To improve procurement of eco-innovation, the government should support awareness and clarity in the procurement and user community by outlining more clearly what is possible within the regulatory framework. This also extends to influencing the wider regulatory framework e.g. by having a clear position vis-à-vis the on-going EU Green Paper on Modernisation of Procurement” (Edler et al, 2011: 10-11).

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**Theme 4 - Taking account of social and environmental sustainability issues through public procurement**

- Evidence from across the EU acknowledges the progressive role that procurement can play in encouraging the collaboration and integration of linked policy objectives in the current context of diverse environmental, social and economic challenges and constrained budgets (through community benefit clauses).
- In order to realise the collaboration and integration of linked policy objectives, action and change are dependent on cultural, behavioural and systems change in the whole supply chain and across policy areas not just in public procurement policy and practice.
- If integrated, wider benefit clauses need to be: clearly stipulated in the tender specification (as early as possible in the process); need to be clearly evaluated (and weighted) as part of the tender evaluation process; and any clauses need to be relevant and proportionate to the nature of the work.
Gathering data and evidencing impact and outcomes of public sector spend and contracts, including community benefit clauses, should be the responsibility of all the policy areas involved in commissioning and contracting out.

The majority of the case study evidence reviewed on sustainability and community benefit clauses is descriptive with less data on outcomes and impact. Some evidence from case studies demonstrate a range of ways in which sustainability and community benefit clauses can be incorporated in to public sector contracts and provide useful ideas and suggestions to help contracting authorities explore ways of doing it.


5.55 It is worth noting at the outset - as McFarlane and Cook (2002a, b & 2008), Scottish Government (2008b), Westminster Business Forum (2008) and Markie (2012) argue - the inclusion of wider community benefit clauses does not breach the EU Directive and could be included in a way that still takes account of value for money (VFM). They all argue that it is important to dispel this myth as the EU Procurement Directive has often been viewed as a barrier to incorporating community benefit clauses into public procurement contracts.

5.56 The Scottish Government defines community benefits as,

"[…] contractual requirements which deliver a wider social benefit in addition to the core purpose of the contract. In particular, requirements in relation to targeted training and employment outcomes" (Scottish Government, 2008b: 1).

Essentially, the drive to include wider benefit clauses in public procurement can be set in the aforementioned economic context and can be viewed as a way to maximise economic and social value from public expenditure (Public Services Commission, 2011 & Markie, 2012). In principle, utilising public procurement to encourage or even mandate suppliers to include wider benefit aspects to their contract is recognised as progressive. It is, however, also acknowledged in the literature that wider benefit clauses need to be clearly stipulated in the tender specification (as early as possible in the process), need to be clearly evaluated (and weighted) as part of the tender evaluation process and any clauses need to be relevant and proportionate to the nature of the work (Glover, 2008; McFarlane & Cook, 2008; Westminster Sustainable Business Forum, 2008).

5.57 Equally, the evidence suggests that it is crucial to consider how wider benefits will be measured throughout the contract (Markie, 2012; McFarlane & Cook, 2008,
Therefore, it is necessary to require the development of performance management data and undertake process and outcome evaluation in order to obtain outcome data. In a nutshell, the more clauses and criteria included in the contract, the more the contracting authority and supplier need to be able to follow through and measure developments. Markie (2012) argues that robust monitoring procedures need to be in place from the outset to capture the community benefits element of the contract (Markie, 2012: 8). Markie emphasises, “Councils may even be open to legal challenge from bidders that lost out on the winning contract if procedures are not in place to monitor the winning contractor’s performance on the TRT (Targeted Recruitment and Training) element of the contract” (Markie, 2012: 8).

Evidence from some case studies – integrating community benefit clauses

5.58 Markie (2012) in her work on Targeted Recruitment and Training Clauses in Procurement found that since 2008, there has been an increasing use of Targeted Recruitment and Training (thereafter TRT) clauses in Scottish Local Government contracts especially in construction contracts (Markie, 2012: 6-7). Markie captured what lead officers in Local Government identified as success factors for Targeted Recruitment and Training clauses as follows: the need for corporate and political support for TRT; that having a community benefit lead officer matters (although resource for this varies across councils); the need to support the contractor and to have a single point of contact; the importance of information sharing and learning lessons from examples of including TRT in public procurement (Markie, 2012: 8-9). Markie (2012) outlines some case studies/feedback from ten Scottish Local Authorities on using TRT clauses – with a range of examples demonstrating progress amongst Councils’ approaches. The case studies are self-reported information from the lead officers; therefore, they have not been independently evaluated. However, they provide material to suggest some positive outcomes (for example, evidence of jobs created and training received) and lessons learned (from problems experienced) from the various projects and contracts (Markie, 2012). Some of these projects are still underway and it might be useful to check if these cases could be followed up to identify any further outcomes, impact and lessons for developing good practice.

5.59 The Zero Waste Scotland’s (undated) – Sustainable Procurement in Scotland – A Collection of eight Case Studies showcases examples using the Marrakech Approach. All case studies are outlined as positive examples of utilising the Marrakech Approach including life cycle impact mapping, opportunity/risk analysis and challenging the need to procure anything at all and including sustainability criteria in the contract. The detail is descriptive with some evidence of outcomes (for example, job creation) and some lessons could be drawn out of these accounts for considering the value of using the Marrakech Approach. The

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3 “The Marrakech Process is a global multi-stakeholder process to support the implementation of Sustainable Consumption and Production (SCP) and the elaboration of a 10-Year Framework of Programmes on SCP (10YFP)” (UNEP (2013), Marrakech Process on Sustainable Consumption and Production, http://www.unep.fr/scp/marrakech/pdf/MP%20Flyer%202019.02.10%20Final.pdf, accessed on 30 April 2013).
information is slightly limited in that there is little or no exploration of barriers or challenges to using this approach. However, in some case studies, it is noted that there is a need to monitor the performance of the suppliers in delivering all the contract requirements to help identify outcomes.

5.60 Two central aspects of the Marrakech approach to processing and managing public procurement are the concepts of ‘whole life costing, life cycle impact mapping and applying a risk based approach to considering all components in public procurement (Zero Waste Scotland, undated: 2 & Westminster Sustainable Business Forum, 2008: 14). Indeed, the Scottish Government in its Procurement Policy Handbook emphasises the life cycle approach, whole life costing, achieving VFM and the need for clear and thorough project and contract management (Scottish Government, 2008a: 13 & 18 & cf also Walker, 2010 on the importance of project management). The Marrakech Approach training materials cover a range of material from economic and political context setting in terms of the aforementioned public sector challenges and priorities to addressing sustainability issues in the procurement process, the Scottish Government’s seven Cs and the value for money triangle (UNEP & Zero Waste Scotland undated, Modules 1 & 2). As the Westminster Sustainable Business Forum outlines ‘whole life costing’ is a contested term and debate exists over what should be included in applying the methodology (Westminster Sustainable Business Forum, 2008: 23). They argue that ‘whole life costing’ is not a panacea in itself (that is, in itself, it cannot guarantee sustainable procurement) (Westminster Sustainable Business Forum, 2008). They contend that central to the problem of applying whole life costing is the lack of benchmark data to base assumptions about costs and lack of ‘post occupancy’ evaluations of construction and refurbishment projects. Therefore, it is difficult to determine outcomes (Westminster Sustainable Business Forum, 2008: 23).

5.61 The importance of applying a risk based approach to considering all components of public procurement and their potential impact is at the heart of the Marrakech Approach (UNEP & Zero Waste Scotland, undated, Modules 1 & 2 & Westminster Sustainable Business Forum, 2008). The Marrakech Approach appears to be essentially about good, thorough project and contract management that involves identifying and managing all the risks in the procurement process. For example, good project management is needed from the specification stage of the process right through to supplier management, delivery of services and clear identification of impact and outcomes. Equally, the Marrakech Approach advocates that contracting authorities ensure that organisational objectives (and wider policy drivers) are reflected in tender specification documents (UNEP & Zero Waste Scotland, undated, Modules 1 & 2; Westminster Sustainable Business Forum, 2008).

5.62 As highlighted also in the wider evidence, UNEP and Zero Waste Scotland point to the potential to use the PQQ (Pre-qualification questionnaire) and the qualifying criteria for determining if potential bidders are environmentally and socially responsible (UNEP & Zero Waste Scotland, undated, Modules 1 & 2). They argue that it is important to give weight to sustainability and innovation in the tender assessment process (and possibly where relevant reward these aspects) (UNEP & Zero Waste Scotland, undated, modules 1 & 2). UNEP and Zero Waste Scotland also point to using the Government Buying Standards as a set of sustainable specifications for a range of commonly purchased products as they consist of both a
set of mandatory minimum standards and best practice specifications which can be used by contracting authorities.

5.63 UNEP and Zero Waste Scotland underscore that there are ten steps to sustainable procurement: commitment within the organisation; making the commitment public; organisational buy in; benchmarking and progression; prioritising; specifying sustainably; sustainability in the procurement process; working with suppliers; measuring performance and publicising your successes (UNEP & Zero Waste Scotland, undated, Modules 1 & 2). Equally, the importance of leadership is identified as crucial to embedding and mainstreaming the message of sustainable procurement within organisations (Westminster Sustainable Business Forum, 2008: 7 & 30 & cf also Walker, 2010 for an exploration of similar issues).

5.64 The Westminster Sustainable Business Forum (2008) examined sustainable procurement in construction and public buildings. One of its key findings was that there is lack of clear guidance on sustainable procurement and lack of examples of best practice on sustainable public procurement for Local Authorities and the material that exists is sometimes contradictory (Westminster Business Forum, 2008: 7 & 31). Similar to the wider evidence, the Westminster Sustainable Business Forum (2008) argued the need for ensuring that the right targets, bodies and standards are in place to measure success and that there is a shift from commissioning for outputs to commissioning for outcomes. It emphasised that the specification stage is critical to ensuring that all the requirements are clearly explicated and that sustainability can be evaluated. It also argued that it is important to establish good contractor-client relationships and ensure that sustainability is a focus throughout the whole contract (Westminster Sustainable Business Forum, 2008: 34 & Chapter 11 & cf also Scottish Government, 2008a: 25).

5.65 Walker (2010) provides a comprehensive account (drawing from mainstream business management, supply chain management and public administration references) of the relationship between strategic, sustainable procurement within businesses and business success. Exploring the experiences of businesses, Walker (2010) asks what lessons for sustainable public procurement can be drawn from successful businesses. Walker concludes with “[…] moderate certainty that strategic purchasing and supply has a positive impact on a firm’s performance” (Walker, 2010: 7).

5.66 Walker (2010) identifies a number of lessons for policy makers (which she argues concerns governmental reputation), echoing a number of issues prevalent in the wider literature. Firstly, Walker discovers that all the studies that she reviewed on strategic purchasing and sustainable procurement performance have been in the private sector and that there is a need for studies in the public sector (Walker, 2010: 8). Secondly, Walker suggests that policy makers should work with business and industry bodies as they develop codes and guidance in the areas of greening construction, energy and ICT (Walker, 2010: 8). Thirdly, Walker argues that there is “[…] a gap between the rhetoric of corporate environmental policies and the reality of their environmental supply chain practices” (Walker, 2010: 8). Fourthly, Walker suggests that regulation plays an important role in the development and encouragement of sustainable supply chain management (Walker, 2010: 9). Fifthly, Walker argues that policy makers need to consider developing guidance on the three
areas of sustainability – social, economic and environment and how they should be integrated into sustainable procurement (Walker, 2010: 9). Sixthly, Walker points to the need for policy makers to consider how sustainable procurement policy links with the SME agenda and to be clear on if there is a role for government to encourage sustainable supply chain management (Walker, 2010: 9). Seventhly, Walker suggests that policy makers need to work with industry partners and NGOs in a global context to develop policy on sustainable supply chain management and procurement policy on fair trade (Walker, 2010: 9 & see full text for some suggestions for practitioners).

5.67 Walker’s (2010) text is useful for suggestions for further reading in this area and research, demonstrating the potential for further analytical work. Some areas for future research include: work on estates and facilities management; ICT; commodities; research on social and economic aspects of sustainable procurement (which are underdeveloped) as opposed to only work on environmental aspects; research on the links and how to balance the three elements of sustainable procurement (social, economic and environmental); the need for research on the public sector as currently more material exists on the private sector; the need for studies on sustainable procurement in developing and newly industrialised countries; a comparative analysis of sustainable procurement policy in different countries; a study of the effects of the recession on sustainable procurement; and importantly, as Walker suggests,

“Research could refine a set of outcome measures for both sustainable procurement and its impact on organisational performance. Such metrics seem crucial to understand whether the UK’s performance on sustainable procurement is improving” (Walker, 2010: 9-10).

5.68 EFTA’s (2010) Fair Trade Public Procurement: case studies in Europe provide a descriptive account of case studies (with varying levels of detail) with fair trade components. The products discussed include food, clothes, actions against child labour exploitation and slavery and all are pitched as Fair Trade. In terms of the utility of this information for policy transfer, the German examples could be useful where there is a drive to check that products being procured have not been produced by exploitation through applying social minimum criteria in the procurement process. For example, could more states ratify the International Labour Organisation’s (ILO) (1999) Convention 182 on eliminating the worst forms of child labour? Could it be stipulated in all public sector contracts that companies bidding and companies in the whole supply chain need to demonstrate that they have not used exploitative child labour in the production process? And could Fair Trade criteria be included in the technical specifications?

5.69 United Nations Environment Programme (UNEP) (2012) describes eight case studies concerned with embedding sustainability (economic, social and environmental) in the procurement process from Brazil, Costa Rica, France, Hong Kong, Italy, England, Scotland and the USA. The accounts are mainly descriptive, and therefore, it is unclear why (and if) a particular approach worked and the challenges encountered. However, the evidence from these case studies would suggest two important issues for the procurement reform agenda: (i) that legislative and policy commitments pave the way for encouraging the public sector to consider
sustainability in the public procurement process; and (ii) there is a lack of available data on the impact of existing sustainable public procurement studies/projects (UNEP, 2012: 6-7).

5.70 In the UNEP (2012) study, the eight case studies were predominantly environmentally focused covering paper, waste and tyre recycling to organic food for children, construction and a project to encourage SME access. In terms of extracting the lessons learned for embedding sustainability in public procurement, some relevant issues include: (i) the need for appropriate training in sustainable public procurement for employees as they play a crucial role in integrating sustainable considerations into public procurement; (ii) the need to build a range of relationships with suppliers; (iii) the importance of knowing the market and developing knowledge of sustainable and innovative solutions; (iv) awareness that upfront costs can seem greater when investing in a sustainable approach but can lead to longer term savings in terms of financial resources, environmental and social costs; and (v) recognition that collaboration between suppliers and more subcontracting can help increase SME access to public sector contracts (UNEP, 2012).

5.71 McFarlane and Cook (2008) underscore the key principles underpinning the reform agenda. Exploring the experiences of five contracting authorities, they argue that there should be a way of validating outcomes to ensure that contractors deliver Community Benefits (McFarlane & Cook, 2008: 19 & McFarlane & Cook, 2002a & b & cf also Scottish Government, 2008). Over ten years ago, McFarlane and Cook (2002a & b) argued that supply side actions matter and that contracting authorities cannot just include the community benefit requirements in a contract and then ignore the process and outcomes. They argued that contracting authorities need to take action to: “[…] facilitate the delivery of the requirements; progress chase and tackle emerging problems; monitor and report on outcome” (McFarlane & Cook, 2002b: 4). In essence, they argued that evaluation and monitoring is an essential part of the process (McFarlane & Cook, 2002a: 42). The Scottish Government argues that if, community benefit clauses are to be included in public procurement exercises, then there is the need to ensure that,

“Bids should be compared in a standardised format and community benefit clauses judged solely on objective and measurable outcomes. Once in place, the monitoring of deliverables needs to be robust with clearly defined detail” (Scottish Government, 2008b: 4).

5.72 Similar to other evidence outlined here, McFarlane and Cook (2008) argue that critical success factors in incorporating community benefit clauses are that: (i) a combination of commitment and dedicated resources need to exist with collaboration and partnering being important; (ii) cultural change is necessary; (iii) ‘champions’ of change/reform are required alongside a range of players in the supply chain; (iv) the inclusion of TRT as core requirements of contracts can be delivered without detriment to VfM (and must be in line with Best Value in Local Government); and (v) there is a need to stipulate clearly the contracting authorities’ needs throughout all stages of the tender process (McFarlane & Cook, 2008: 28-31 & cf Scottish Government, 2008b: 4-5). As McFarlane and Cook (2002a & b) highlight when using community benefit clauses, direct and indirect discrimination of non local contractors
and peoples/areas must be avoided and must not contravene the then equal opportunities legislation (now Equalities legislation), data protection and competition legislation (McFarlane & Cook, 2002a: 4 & Scottish Government, 2008a & 2008b). They argue that although the position is slightly ambiguous, it appears that the recruitment of local labour need not be discriminatory (McFarlane & Cook, 2002a).

5.73 A Scottish Government initiative entitled Public-Social Partnerships (PSPs) is designed to encourage public and third sector collaboration in the design and delivery of public services (Scottish Government, 2012g, unpublished). Ten projects were supported under the 2009-11 Contract. The current Developing Markets for Third Sector Providers contract (2012-14) includes support for developing, at least three strategic Public-Social Partnership contracts with the potential for another two - (i) Low Moss Prison programme to help short term prisoners reduce their reoffending; (ii) Royal Edinburgh Hospital – concerned with development of the hospital and mental health services in the community; and (iii) Review and redesign of supported living models in East Renfrewshire CHCP improving services for people with learning disabilities. Regarding the issue of capturing and measuring the outcomes, the intention of this initiative is for the public sector to potentially commit to the delivery of the service in the longer term if the pilot projects meet their outcomes. If outcomes are achieved, future tendering processes could include community benefit clauses (Scottish Government, 2012g unpublished). It might be useful to follow up these cases to identify whether any outcome and impact data exists.

5.74 Drawing together the above case study evidence, the majority of it is descriptive, with less data on outcomes and impact. These case studies do, however, demonstrate the range of ways in which sustainability and community benefit clauses can be incorporated into public sector contracts and provide useful ideas and suggestions to help contracting authorities explore ways of doing it.

Theme 5 - Dealing with inappropriate conduct and poor performing suppliers

- Little evidence exists on this issue; however, suggestions regarding prevention can be drawn from wider evidence and international indexes of bribery and corruption.
- The sectors most prone to bribery and corruption include the public works and construction sector, utilities, real estate, property, legal and business services, oil and gas and mining (Transparency International, 2011). The complex and fragmented nature of the public works and construction sector make it a difficult sector to monitor and vulnerable to crime.
- Evidence suggests that success in tackling inappropriate conduct and poor performing suppliers and preventing criminal infiltration of the procurement process can be achieved through developing systems and processes to target more ‘at risk’ sectors and raise the bar for monitoring and managing suppliers’ delivery of services.
- Some evidence suggests that the following preventive approaches could help tackle inappropriate conduct and poor performing suppliers and protect against crime: (i) increasing transparency and publication of awards; (ii) improving data/information sharing between the police and procurement; (iii)
placing increased accountability on public organisations to evidence action they have taken to reduce the risk of crime in public procurement; (iv) encouraging good corporate ethics and governance structures within public and private sector organisations; (v) strengthening national and international co-operation, laws and regulations; (vi) increasing scrutiny on the companies’ professional competence and financial stability through whole procurement process and contractual period; (vii) rolling out voluntary accreditation schemes, for example, the Scottish Government’s (2010c) Use of the Security Industry; and (viii) requesting that procurers provide their judicial record from the Criminal History System at the Pre Qualification Questionnaire stage (PQQ stage) (Mackenzie et al, 2012: 9).

5.75 There is little evidence on this issue from material reviewed so far and I outlined earlier the need for a wider review of a range of evidence from different disciplines. Some cross reference can be made to Bianchi and Guidi’s (eds) (2010) survey of PPN countries, which explored the following three areas: the legislative framework for procurement in each country; the institutional framework for procurement in each country (that is, which bodies are responsible for public procurement) and the review system for procurement in each country. Bianchi and Guidi’s (eds) (2010) report provides some descriptive insight (although, some of the detail is now out of date in the case of the UK description) into systems of review, support and compliance across countries. Some PPN countries have designated bodies to provide legal advice to contracting authorities and most countries have internal and external audit bodies tasked with supervising public procurement procedures, in addition, to the existence of judicial and non-judicial review bodies (Bianchi & Guidi (eds) 2010: xix –xxiii).

5.76 In the Scottish Government Procurement Bill Consultation, there was support amongst respondents on the need to deal appropriately with poor conduct with views ranging from the need to enforce both finite and infinite exclusion penalties (Mulholland et al, 2013a & b). The Public Contracts (Scotland) Regulations 2012 outlines a range of offences, where bidders if they have been convicted of those offences, can be excluded from participating in public sector contract tendering (The Public General Acts, 2012b).

5.77 Some ideas for tackling poor performance by suppliers can be drawn from work conducted by the civil society organisation Transparency International (2011). It conducted a survey in 30 countries with a sample of 3,016 business executives, exploring which types of business relationships they have with 28 countries, with which sectors and how often businesses in any of the 28 countries engage in bribery with their own country. The 2011 survey report represents the fifth Transparency International Bribe Payers Index and for the first time includes bribery amongst companies – private to private bribery (Transparency International, 2011: 2). The 28 countries in the Bribe Payers Index were selected based on the value of their Foreign Direct Investment (FDI) outflows, value of their exports and includes all of the G20 countries (Transparency International, 2011: 4). The report makes some recommendations for both the private and public sector to help them develop strategies to reduce the prevalence of foreign bribery.

5.78 It is important to note that the survey findings are based on individuals’ self-reported perceptions and not necessarily evidence based in reported crime or
prosecutions. However, this form of survey, as demonstrated, in national and international self-reported victimisation surveys, often reveals higher levels of crime than reported and recorded crime data reveal. The survey asks questions about firms/businesses, for example, one question asks – ‘how often do firms headquartered in that country engage in bribery in this country’? But it also asks about relationships with different sectors and some of the questions ask about bribing the public sector, politicians and political parties. The findings indicate that there is a perception that none of the 28 countries are behaving completely legitimately with companies in the Netherlands and Switzerland perceived as the most law abiding and China and Russia having the worst reputations with considerably lower scores than the other countries surveyed. In 2011 in both China and Russia, anti-bribery legislation has been passed with the aim of effecting changes in culture and practice in both public and private sectors (Transparency International, 2011: 12-13).

5.79 Key findings include: (i) evidence exists of bribery between private companies across different sectors and is viewed just as common as bribery between firms and public officials; (ii) on average, there has been no improvement in perceptions of the frequency of foreign bribery by country and business sector since the last Bribe Payers Index published in 2008 and importantly, the UK saw a deterioration in its score; (iii) there is a correlation between perceptions of business and government/public sector integrity at home and perceived likelihood of companies from a given country to bribe abroad; (iv) China’s and Russia’s very poor reputations call for urgent action given that they are strong players in international trade; and (v) lastly, the perception exists that bribery is prevalent across all business sectors but is considered most prevalent in public works contracts and the construction sector (Transparency International, 2011: 3 & 4).

5.80 Transparency International argues that government action matters and that mapping the findings from the Corruption Perception Index and Bribery Payers Index indicates a strong correlation between perceptions that governments at home are taking action to prevent and regulate corruption and bribery/foreign bribery by its companies (Transparency International, 2011: 8). Transparency International (2011) notes that there are a number of international conventions that include anti-bribery requirements – OECD, UN Convention against Corruption, the Council of Europe’s Criminal Law Convention on Corruption and that they must be transposed into national law and be effectively enforced by governments. However, significant variations exist in adopting international conventions across countries (Transparency International, 2011: 9). Transparency International argues that governments need to improve their anti-bribery efforts, commencing with the ratification of key international conventions (Transparency International, 2011: 9). Equally, it argues that companies with good corporate ethics and governance structures tend to promote a business culture of non-offending and help prevent foreign bribery (Transparency International, 2011: 10). Transparency International (2011) has produced a benchmark code entitled ‘Business Principles for Countering Bribery’ upon which, they argue, firms should base their anti-bribery programmes (at www.transparency.org).

5.81 In terms of the different business sectors explored, the survey examined perceptions of bribery in 19 business sectors and found that agriculture and light manufacturing are perceived to be the least bribery prone sectors (Transparency International, 2011: 3 & 4).
International, 2011:14). In contrast, the public works contracts and construction sector was found to be the most likely to experience bribery (Transparency International, 2011: 14). Other sectors performing poorly and ranked lower include – “[…] utilities; real estate; property; legal and business services; oil and gas; and mining” and as the report notes these sectors often involve high investment and the involvement of private and public sectors posing both opportunities and incentives for corruption (Transparency International, 2011: 14). As indicated in Figure 5, the most common form of bribery found amongst the three types surveyed was bribery of high ranking officials intended “[…] to secure influence over policy, regulatory and/or legislative decisions” (Transparency International, 2011: 19). It was the first time that the Bribe Payers Survey asked about bribery of businesses by businesses and found that corruption is as nearly as prevalent amongst the business community as it is between business and the public sector (Transparency International, 2011: 19). The report notes that private to private corruption can be just as damaging to the economy and the fair functioning of the market and that it is important that this type of corruption is included in anti-corruption legislation. It highlights that,

“[…], the UK Bribery Act, which came into force on 1 July 2011, includes bribery between firms as an offence. Its clause on corporate liability extends this to any company incorporated overseas that carries out business or part of its business in the United Kingdom, and therefore, sets a new global standard” (Transparency International, 2011: 19).

5.82 The poor score of the public works contracts and construction sector, is perhaps, unsurprising, as Transparency International argues, the sector is complex, fragmented and projects are often unique, it is difficult to benchmark costs and therefore, easier to manipulate and obfuscate costs (Transparency International, 2011: 20). Bribery in this sector can result in the misuse of taxpayers’ money, potentially poor quality engineering and outcomes in construction threatening safety standards for the public (Transparency International, 2011: 20). Scottish Public Sector spend areas include construction (biggest spend), social community care, healthcare, information communication technology, public transport, financial services, utilities, facilities and management services, environmental services and vehicle management. It is, therefore, worth considering what can be done to regulate specific sectors that are more susceptible to corruption (UNEP & Zero Waste Scotland, undated, Modules 1 & 2 from the Scottish Information Hub, 2013).

5.83 Transparency International’s (2011) recommendations to governments include: the need to strengthen national and international co-operation, laws, regulation and enforcement on anti–bribery; and use fora such as the G20, EU, UN and OECD to take action. All national legislation should outlaw bribery between firms in the private sector and all countries should ratify the UN Convention against Corruption (Transparency International, 2011: 22- 23).

5.84 Transparency International’s (2011) recommendations to companies include the need to strengthen, monitor and report anti-corruption policies, procedures and transparency commitments. For example, conducting due diligence in evaluating prospective contractors, publishing contractual commitments, financial details, ensuring company reporting meets international standards on anti-corruption programmes, assessing risks across companies’ whole supply chains and improving
5.85 Transparency International (2012) also produces a Corruption Perceptions Index, which measures the perceived levels of public sector corruption in countries worldwide. It notes,

“Based on expert opinion, countries are scored from 0 (highly corrupt) to 100 (very clean). Some countries score well, but no country scores a perfect 100. Two thirds of the 176 countries ranked in the 2012 index score below 50, showing that public institutions need to be more transparent, and powerful officials more accountable” (Transparency International, 2012: 1).

The United Kingdom scores 74 out of 100 and is ranked 17th out of 176 countries with Denmark, Finland and New Zealand scoring the highest and Afghanistan, North Korea and Somalia the lowest and most corrupt.

**Preventing organised crime in the procurement process through improving administrative procedures and systems**

5.86 Some substantive material for considering methods for tackling poor performance and regulating public procurement can be drawn from criminological studies. For example, Mackenzie and Hamilton-Smith’s report (thereafter Mackenzie et al, 2012) ‘Organised crime in the procurement process’ provides a review of existing literature and findings from primary research including interviews with Scottish Procurement officials and police officers, in addition to experts in the field from the European academic community. Similar, to Transparency International (2011 & 2012), Mackenzie et al (2012) suggest that the problems that exist in this area are similar across EU member states and “[…] sustainable progress in tackling serious organised crime in this area will be achieved through pan European collaboration” (Mackenzie et al, 2012: 1).

5.87 In terms of the extent of the problem – Mackenzie et al note the precise trend figures are not available but the National Audit Office’s 2010/11 survey of fraud against local authorities in England found that procurement fraud increased from being the,

“[…] third most important Fraud type in terms of value of losses in the 2009/10 survey, to accounting for the highest losses in 2010/11. The value of reported fraud cases in this time period increased by over 400% from under £3 million in 2009/10 to over £14 million in 2012/11” (National Audit Office, 2001, p.7 in Mackenzie et al, 2012: 3).

Evidently, these findings would suggest that there is a need for action to tackle this problem.

5.88 The crux of the issue identified by Mackenzie et al (2012) is that the EU Directive 2004/18/EC, Article 45 only allows for the exclusion of tenders, where the contract is above EU threshold level, on the basis of certain types of concluded criminal convictions by individuals who control the company. Tenders cannot be excluded if no criminal conviction has occurred (even if a case is underway) even if other police data or intelligence exists as contracting authorities could run the risk of
being challenged for acting illegally (Mackenzie et al, 2012: 3-4 & cf this position transposed into Scottish legislation – The Public & General Acts, 2012b: para 23 – criteria for the rejection of economic operators). Also, some commentators have argued that Directive 2004/18/EC does not refer to convictions outside of the EU and therefore, exclusion of a bidder would not be legal (Dorn et al, 2008 in Mackenzie et al, 2012: 4). This limitation would suggest that tackling corruption, bribery and other forms of organised criminality in public procurement becomes even more difficult when engaging with wider global markets.

5.89 Mackenzie et al note that the EU Directive does not oblige MS to actively check about previous convictions of potential contractors and sub-contractors and that co-operation across MS to actively tackle this, is limited with organised criminal groups having ‘clean’ companies to front the organised criminality (Mackenzie et al, 2012: 4-5). In this respect, many writers expose the weaknesses within the EU Directive in terms of the ability to use it to help detect, deter and enforce (Mackenzie et al, 2012: 5). This situation strengthens the view propounded by Transparency International (2011 and 2012), that international organisations need to work with national governments to improve and enforce collaboration and co-operation (in addition to ratifying international conventions) in fighting bribery and corruption. Some have suggested the need for the creation of an EU data base of excluded companies across MS to be managed and maintained by Eurojust and Mackenzie et al suggest that a similar system or data base could be useful at a Scotland wide level (The Corner House, 2005; Curtol et al, 2007 in Mackenzie et al, 2012: 4).

5.90 Mackenzie et al (2012) suggest that given this limitation for utilising criminal justice intelligence in the procurement process, there is a need to shift focus away from individual criminality to increasing scrutiny on the companies’ professional competence and financial stability (Mackenzie et al, 2012: 1 & 4 & 9). This is of particular relevance to the procurement reform agenda in terms of tackling poor performing/potentially offending suppliers and increasing scrutiny could be applied at the PQQ stage, in addition, to throughout the whole contractual period. As Mackenzie et al suggest wider evidence indicates that monitoring throughout the whole process can be effective in disrupting criminality (Mackenzie et al, 2012:1 & 4). Mackenzie et al found that there is strong evidence to suggest that success can be achieved through developing systems and processes to target more ‘at risk sectors’ and raise the bar for monitoring and managing suppliers’ delivery of services (Mackenzie et al, 2012:1 & 4). This would suggest that tightening up the project management process for all contracts would go some way to deter infiltration by organised crime and hold poor performers to account. Equally, tightening up the PQQ stage to ensure rigorous methods are employed to check all potential contractors, might be more effective than criminal investigations involving courts (Mackenzie et al, 2012: 8).

5.91 Some writers contend that increased transparency and publication of tender awards would help protect against crime (Mackenzie et al, 2012: 10). Mackenzie et al also suggest that there could be merit in sharing data/information between the police and procurement in terms of information developed as part of a "wider sector vulnerability approach" designed to share awareness of potential high risk sectors likely to offend (Mackenzie et al, 2012: 11). Some sectors include – “Transportation (particularly private hire taxis); Security; Cleaning; Provision of child and adult care;
Vehicle maintenance; Landscaping; Catering; Building trade; Property development/management; Licensed premises” (Mackenzie et al, 2012:11).

They recommend commissioning research to “[…] investigate the state of the art internationally in sector vulnerability scanning tools” or technology, which they argue are an emerging science in the field of organised crime (Mackenzie et al, 2011:11). They suggest that identifying high risk areas/sectors would allow resources to be targeted effectively at high risk areas and avoid excessive controls of low risk areas (Mackenzie, 2012; 12). They also argue that buyers could develop PQQ matrices that require bidders to complete information on anti-crime and anti-fraud standards in the bidding firm and if they fail to complete they could be excluded at the outset (Mackenzie et al, 2012: 13).

5.92 Mackenzie et al (2012) identify from the evidence that both direct and indirect infiltration of the procurement process by organised crime groups can occur as some features of the procurement landscape make it possible. They point to the greater existence of contracting out to the private sector, the complexity of contracts and their division into lots/sub-contracting, “[…] patchy capacity and expertise amongst public sector bodies to procure, and then manage, projects” or indeed the sub-contracting of the procurement function and the focus on cost/price of the contract over other criteria such as capacity, technical expertise, quality control systems make it difficult to deter bids from “rogue companies” (Mackenzie et al, 2012: 3).

5.93 Evidently, there appears to be room for strengthening existing processes and data capture to be able to utilise existing provisions. For example, Mackenzie et al found that, despite the fact that exclusion of individuals with previous convictions is permissible within domestic procurement regulations; there is currently no common process for the exchange of information regarding previous convictions (cf The Public General Acts, 2012b & Mackenzie et al, 2012: 9). They suggest that there is the need to introduce “[…] a formal validation process accessible by all public bodies” (Mackenzie et al, 2012:1). Mackenzie et al suggest that the use of Security Industry Authority Approved Contractor Scheme (SIA ACS) accreditation has proved successful in excluding criminal enterprises (Mackenzie et al, 2012: 2). They argue that there would be merit in rolling out voluntary accreditation schemes across other at risk areas but firstly, there is a need to consider if the scheme complies with stringent EU procurement rules (Mackenzie et al, 2012: 2). ‘Whitelisting’ (whereby companies certify compliance with anti-bribery laws) is also considered by many across Europe as an alternative measure – “Such options as ‘voluntary self-regulation’ ‘sector agreements’ and integrity pacts’ are suggested by counter fraud and bribery experts” and should be published to enhance transparency (Mackenzie et al, 2012: 2 & 8). Mackenzie et al argue that rolling out similar schemes to the SIA ACS could be one potential solution, especially for high risk sectors (Mackenzie et al, 2012: 6).

5.94 Scottish Government’s (2010c) Use of the Security Industry Authority Approved Contractors Scheme for Security Industry Services policy note outlined that a schedule had been introduced for use within Scottish Government contracts for,

“[…] a. The provision of security industry services; or b. Services comprising an element of security industry service provision for example, a Scottish Government contract where security industry services will be provided by sub-
contractors; requiring those providing the service to be registered with the Security Industry Authority’s SIA Approved Contractor Scheme for the category of service being provided. 2. To encourage other public bodies to adopt equivalent provisions for relevant contracts” (Scottish Government, 2012c: 1).

The aim of this policy action is to ensure that public sector money is not received and used by serious organised crime groups. As noted above, Mackenzie et al argue that rolling out similar voluntary accreditation schemes for other ‘at risk sectors’ could be valuable but would need to be in line with the parameters of the EU Directive (Mackenzie et al, 2012: 2). They note the Italian anti-mafia certification scheme, which is a more centralised scheme of accreditation which requires authorities to investigate the background of potential contractors for contracts over the EU threshold of 150,000 Euros meaning that high value contracts are less prone to OC infiltration in Italy but some argue that this process is fallible as front companies are often used (Mackenzie et al, 2012: 6-7). The key issue is that it would useful to explore how licenses and permits can be used to help prevent crime (Scottish Government, 2012: 7).

5.95 Another issue identified by Mackenzie et al (2012) is that there is currently no accountability placed on public organisations in terms of evidencing what they have actioned to reduce the risk of serious organised crime entering the procurement process (Mackenzie et al, 2012:2). The question is – what mechanisms are in place to check that a potential contractor does meet any of the criteria for the rejection of economic operators as set out in paragraph 23 of The Public Contracts (Scotland) Regulations 2012 (The Public and General Acts, 2012)? How feasible is it for buyers to check all these aspects? Mackenzie et al found that minimal checks are undertaken to verify the truth of statements made on the PQQ return, making it easy for bidders to falsify information (Mackenzie et al, 2012: 12). Transparency International (2011) argue for the importance of developing and inculcating business ethics and integrity as part of deterring the development of a culture within organisations that permits corruption, although as Mackenzie et al argue, “A reputation for business rigour and competence may be no guarantor of either probity, or, in fact, competence” (Mackenzie et al, 2012: 14).

5.96 One other proposed solution from the Scottish Crime and Drugs Enforcement Agency is that procurers could request tenderers to request their judicial record from the Criminal History System and require that this is provided at the PQQ stage (Mackenzie et al, 2012: 9). Responses from procurement officials in their study suggested that they did not view themselves as performing a policing role in checking records of tenderers (Mackenzie et al, 2012: 9). This is arguably unsatisfactory as a way to view procurers’ roles as the EU Directives and national regulations stipulate exclusion if the contractor is convicted of a range of offences, therefore, it could be argued that it is incumbent on all procurers to act on this issue at all stages of the procurement process.

5.97 In terms of increasing the monitoring of the procurement process, Mackenzie et al cite the example of the Northern Irish system called Construction Contract Monitoring (CCM) used by the Central Procurement Directorate, which involves the contracting authority employing specialists to monitor continued probity of a contractor and cost of doing this are met by the contracting authority (Mackenzie et
al, 2012: 14). As they argue, one can use the contract management process to control suppliers to detect irregularities whilst the contract is underway (Mackenzie et al, 2012: 14).

5.98 There was some appetite amongst interviewees for some form of blacklist to be produced by the Scottish Government and they suggest it might be one solution (Mackenzie et al, 2012: 14-15). However, how legal would this be? Essentially, they argue that central government needs to take the role of “[…] proactively policing the integrity of the regulatory system as a whole” (Mackenzie et al, 2012: 16).

### Theme 6 - Application and compliance

- Limited evidence exists on the specific topic of ensuring the compliance of both suppliers and contracting authorities. Some of the issues identified on dealing with inappropriate conduct and poor performing suppliers link with this theme.
- The OECD (2010) highlights that, on the whole, EU countries apply similar remedies to below and above EU thresholds. The UK appears to be the exception in not having below threshold regulations for dealing with complaints but instead has guidance and informal mechanisms for handling complaints.

5.99 There was little evidence on the specific topic of ensuring the compliance of both suppliers and contracting authorities from material reviewed so far. The issues identified in the previous section with respect to dealing with inappropriate conduct and poor performing suppliers interconnect with questions surrounding regulation and how to ensure compliance by contracting authorities and suppliers in accordance with EU and national policy and legislation.

5.100 Cross reference can be made here to Bianchi and Guidi’s (eds) (2010) study as outlined in paragraph 5.75 of this review. Some of the descriptive material in their report can be useful for thinking about systems of review, support, compliance and dealing with complaints across the PPN (Bianchi & Guidi’s (eds), 2010 & cf also the European Commission, 26 October 2012: 28-37 for a brief review of detected infringements at EU level including incorrect transposition and wrong application. Sectors most affected by procurement problems included: health; IT services; infrastructure; sewage and waste management services; and to some extent, energy). The OECD (2010) outlines briefly the remedy, complaints and review procedures across the EU and highlights that on the whole, EU countries apply similar remedies to below and above EU thresholds (OECD, 2010: 19, para. 1.11). The UK appears to be the exception in not having below threshold regulations for dealing with complaints but instead has guidance and informal mechanisms for handling complaints, for example, the Single Point of Enquiry (SPOE) in Scotland and the Supplier Feedback Service in England (OECD, 2010: 19, para. 1.11 & cross reference to paragraphs 3.19 to 3.21 of this review, which outlines the Single Point of Enquiry). As the European Commission indicates the EU procurement law does not stipulate the duration of review procedures on MS, although it argues that swifter procedures are likely to be more beneficial to both tenderers and contracting authorities (European Commission, 26 October 2012: 35).
5.101 The Scottish Government's (2008a) Scottish Procurement Policy Handbook sets out the rules, behaviours and ethical standards expected of organisations involved in public procurement. It does not replace organisations' policy manuals nor guidance prepared by Centres of Expertise but as the Scottish Government states, any sector specific policy guidance prepared by the Centres of Expertise should be consistent with the Handbook (Scottish Government, 2008a: 4). Compliance with the principles in the Handbook is considered mandatory and internal and external auditing should check whether contracting authorities have been compliant and ensured appropriate levels of governance within their organisations (Scottish Government, 2008a: 5). The Handbook suggests different levels of governance in the procurement process to ensure legality and achievement of Best Value. The Scottish Government suggests that it should be conducted on an annual basis internally and also that Audit Scotland’s review provides a means of monitoring performance (Scottish Government, 2008a). In terms of suppliers, the Handbook outlines the standards expected of suppliers in relation to legislative and policy requirements covering environmental, equality issues, health and safety, employment and taxation. Exclusion of suppliers can occur if bidders are found to not have complied with the legal obligations (Scottish Government, 2008a: 23).

5.102 In terms of preventing the corruption of public officials, the Handbook notes that gifts and hospitality should not be accepted by officials and that guidance should be available for staff involved in the commissioning of tenders/contracts (Scottish Government, 2008a: 23).

5.103 HM Revenue and Customs (2013) has outlined new guidance,

"[...] requiring potential suppliers to confirm their tax compliance as part of the procurement process. The new guidance is compatible with the existing procurement process, providing a useable framework to ensure that procuring departments are able to apply it consistently and fairly" (HM Revenue & Customs, 2013: 4).

The policy is designed to promote tax compliance through the public procurement process and requires potential suppliers to self-certify their recent tax compliance history when bidding for above EU threshold procurements for both Part A and Part B services. It applies to all government departments, executive agencies and NDPBs. The policy allows the contracting authority to terminate a contract if non-compliance is uncovered. Failure by the supplier to keep the contracting authority informed of any changes to their tax compliance could also result in remedies being applied including termination of contract (HM Revenue & Customs, 2013: 4). The policy will apply to UK and foreign suppliers, sub-contractors, individuals, partnerships and companies bidding for above the EU threshold procurements. A time limit will apply allowing earlier non-compliance to be disregarded. Although not yet confirmed, a ten year time limit is being proposed (HM Revenue & Customs, 2013: 6). The definition of non-compliance and taxes to which the new policy applies are set out in the discussion document and covers also the application of foreign tax rules to ensure that non UK companies/potential suppliers are also held to account (HM Revenue & Customs, 2013).
Chapter 6: CONCLUSION

6.1 Several themes are evident and repeated in the evidence, which suggest areas for possible development and improvement but also raise the question as to whether legislation or policy is the appropriate means to achieve change. The following paragraphs outline the main findings.

Support for the value and principles of the procurement reform agenda across the EU

6.2 The key components of the procurement reform agenda can be categorised into two broad strands: (i) improving procurement systems and processes (especially e-procurement, e-commerce and standardising IT tools); and (ii) improving the profession (capacity, expertise and capability building) both requiring resources, training and cultural change.

6.3 Central to the procurement reform project at an EU level are: the themes of encouraging sustainability and community benefit clauses (environmental, economic and social); improving access to public contracts including access by the private and third sectors; and increasing collaboration at both contracting authorities and supply sides. This is set in the economic context of the need to ensure savings during a period of fiscal constraint and also in Scotland, within the context of public sector reform.

6.4 A consensus exists at Scotland, UK and EU levels on the logic, value and principles of the procurement reform agenda and the value of utilising public procurement as a vehicle for achieving wider policy objectives, however, there is still a need to effect cultural and behavioural change within organisations and for leaders to take a key role in driving change and providing strategic direction. This would suggest that there is a need to develop a mix of ‘softer’ (encouraging) and ‘harder’ (enforcing) approaches to continue to build reform momentum.

Practice across the EU

6.5 Some EU member states (MS) are more advanced than others in encouraging and requiring environmental, social and economic benefit clauses in public contracts (Kahlenborn et al, 2011).

6.6 The older MS tend to be more advanced in their use of environmental, social and innovation clauses and requirements than newer MS. The Netherlands, Sweden, Denmark and the UK tend to be the front runners in considering environmental, social and economic benefits in procurement (Kahlenborn et al, 2011 & European Commission, 2010b: 82).

6.7 Practice varies across the EU with some countries enforcing above the EU threshold approaches and regulation to below the threshold contract values, and others devolving the management of contracts to local contracting authority level.
6.8 The OECD (2010) found that, on the whole, the majority of MS regulate public procurement above and below EU thresholds within the same Act and require that contracts below the EU thresholds are based on open and fair competition procedures, although there is some variation in practice and a good degree of discretion at MS level (cf also European Commission, 26 October 2012).

6.9 The centralisation and specialisation of public procurement varies across MS (European Commission, 26 October 2012: 26). MS with no regulation still use competitive tenders below the EU thresholds (OECD, 2010: 7).

6.10 The OECD found that publication procedures and processes vary across MS but on the whole, MS publish contract notices on national portals or websites (OECD, 2010: 16 & cf also European Commission, 26 October 2012). However, in terms of the limits of current data, the OECD highlights that, to date, a systematic review, of how MS have developed and designed their legal frameworks outside the scope of the EU Directives, has not been undertaken (OECD, 2010: 5).

**Developments in procurement reform in Scotland and the UK**

6.11 Improvements have been made in terms of capability and capacity within procurement and there is a need for public sector organisations to continuously improve.

6.12 The more systematic collection of consistent and reliable management and evaluation data would allow for a more detailed picture of procurement reform progress, the procurement landscape and the performance of organisations engaged in it.

**Effective project and contract management and systems development**

6.13 Good, thorough and rigorous project and contract management can mitigate a range of problematic issues that might arise in the procurement process. For example, it can help reduce the likelihood of processes lacking in transparent, fair and inclusive procurement procedures, help monitor and tackle poor performing suppliers, help tackle the poor regulation of public sector contracts and help prevent the infiltration of crime in public procurement.

6.14 Achieving good project management requires skilled and trained professionals in contracting authorities and effective systems capability.

6.15 Mechanisms, techniques and systems need to be developed at every stage of the procurement and contract management process to prevent or reduce the opportunities for crime to occur.

**Lack of management and evaluation data on outcomes and impact**

6.16 Across the EU, evidence suggests that there is limited information, monitoring and evaluation data in procurement, resulting in a lack of evidence of the outcomes achieved from public sector contracts spend across all EU MS. The European Commission recognises that this is an area for development.
6.17 The lack of data needs to be tackled as it makes it difficult to be able to determine where and how to target limited resources. The evidence on lack of data would suggest the need to mandate consistent and comparable data gathering at national and sub-national levels.

6.18 Undertaking process (formative) and outcome (summative) evaluations and cost benefit analyses of public sector contracts could help EU MS understand and identify progress within the reform agenda and its themes, for example, of sustainability and innovation (and ensuring VFM). A question is whether this should be an integral part of contracts.

**Transparency and Proportionality**

6.19 There is less explicit evidence on the themes of transparency and proportionality. Some reference to these issues is made in relation to reducing the administrative burden, encouraging SME and Third Sector access to public sector contracts, tackling poor performance and compliance and promoting non-discrimination.

**SME and Third Sector access to public sector contracts**

6.20 Evidence from across the EU suggests that barriers exist, which can prevent access to public sector contracts by SMEs and the Third Sector. Some barriers include: difficulties in obtaining information; administrative burden in preparing bids; the large size of public sector contracts; disproportionate qualification levels and certification requirements; and late payments by contracting authorities.

6.21 Some suggestions for improving access include: promoting cultural change within contracting authorities; dividing contracts into lots and providing opportunities for sub-contracting; reducing bureaucracy; greater use of e-procurement; and offering feedback to SMEs and the Third Sector.

**The return of demand side innovation policy – strategic drivers and challenges**

6.22 Evidence from across the EU suggests that innovation in public procurement or the public procurement of innovation has re-surfaced as a popular policy solution to driving economic growth and innovation and contributing to the achievement of wider socio-economic and environmental policy objectives.

6.23 There is support for considering public sector procurement as a strong player in stimulating the market. There is, however, a mixed evidence base and some argue a lack of sufficient data on the effectiveness of demand side innovation policy.

6.24 Evidence suggests that innovation in public procurement is often fused throughout wider policy objectives and arguably, innovation as a policy goal connects a number of themes within the Bill, in particular, the themes of sustainability and encouraging SME access.
Greater demands on public procurement to enable the achievement of wider socio-economic and environmental policy goals

6.25 Evidence from across the EU acknowledges the progressive role that procurement can play in encouraging the collaboration and integration of linked policy objectives in the current context of diverse environmental, social and economic challenges and constrained budgets (through community benefit clauses).

6.26 In order to realise the collaboration and integration of linked policy objectives, action and change are dependent on cultural, behavioural and systems change in the whole supply chain and across policy areas not just in public procurement policy and practice.

6.27 If integrated, wider benefit clauses need to be: clearly stipulated in the tender specification (as early as possible in the process); clearly evaluated (and weighted) as part of the tender evaluation process; and are relevant and proportionate to the nature of the work.

6.28 Gathering data and evidencing impact and outcomes of public sector spend and contracts, including community benefit clauses, should be the responsibility of all the policy areas involved in commissioning and contracting out.

6.29 The majority of the case study evidence reviewed on sustainability and community benefit clauses is descriptive with less data on outcomes and impact, which reinforces the need to gather outcomes and impact data. Some evidence from case studies demonstrates a range of ways in which sustainability and community benefit clauses can be incorporated into public sector contracts and provides useful ideas and suggestions to help contracting authorities explore ways of doing it.

Developing preventative approaches to tackling inappropriate conduct and poor performing suppliers

6.30 Little evidence exists on this issue; however, suggestions regarding prevention can be drawn from wider evidence and international indexes of bribery and corruption.

6.31 The sectors most prone to bribery and corruption include the public works and construction sector, utilities, real estate, property, legal and business services, oil and gas and mining (Transparency International, 2011). The complex and fragmented nature of the public works and construction sector make it a difficult sector to monitor and vulnerable to crime.

6.32 Evidence suggests that success in tackling inappropriate conduct and poor performing suppliers and preventing criminal infiltration of the procurement process can be achieved through developing systems and processes to target more ‘at risk’ sectors and raise the bar for monitoring and managing suppliers’ delivery of services.

6.33 Some evidence suggests that the following preventive approaches could help tackle inappropriate conduct and poor performing suppliers and protect against
crime: (i) increasing transparency and publication of awards; (ii) improving data/information sharing between the police and procurement; (iii) placing increased accountability on public organisations to evidence action they have taken to reduce the risk of crime in public procurement; (iv) encouraging good corporate ethics and governance structures within public and private sector organisations; (v) strengthening national and international co-operation, laws and regulations; (vi) increasing scrutiny on the companies’ professional competence and financial stability through whole procurement process and contractual period; (vii) rolling out voluntary accreditation schemes, for example, the Scottish Government’s (2010c) Use of the Security Industry; and (viii) requesting that procurers provide their judicial record from the Criminal History System at the Pre-Qualification Questionnaire stage (PQQ stage) (Mackenzie et al, 2012: 9).

Application and compliance

6.34 Limited evidence exists on the specific topic of ensuring the compliance of both suppliers and contracting authorities. Some of the issues identified on dealing with inappropriate conduct and poor performing suppliers link with this theme.

6.35 The OECD (2010) highlights that, on the whole, EU countries apply similar remedies to below and above EU thresholds. The UK appears to be the exception in not having below threshold regulations for dealing with complaints but instead has guidance and informal mechanisms for handling complaints.

Compromise is likely to be necessary on the policy and legislative actions on the six themes of the Procurement Reform Bill

6.36 In Scotland, compromise is likely to be necessary on policy and legislative actions on the six themes of the Procurement Reform Bill. It is clear from the literature and Procurement Reform Bill Consultation responses that proposed solutions in one area might create barriers (perceived and real) elsewhere, for example, there might be tensions between improving transparency and encouraging SME access.

The need for an inter-disciplinary approach to building the evidence

6.37 Across the EU, the limited evidence on some of the themes of the procurement reform agenda suggests the (i) need for data development and data gathering at public sector organisational levels across the EU, in addition, (ii) to exploiting wider, cross social science and business management bodies of evidence and (iii) conducting further research.

6.38 A three pronged approach could be helpful in building the evidence base to inform policy intervention/direction of travel and uncover what, if any, evaluation data exists on policy interventions especially given the challenge that public procurement faces in achieving wider socio-economic and environmental policy objectives.

6.39 Across the EU and in Scotland, primary research could involve conducting qualitative interviews with public sector organisations and quantitative surveys of the public procurement landscape, which could help shed some light on the level of
progress made so far on structural, cultural and behavioural changes recommended in previous reviews of public procurement.

**Conclusion**

6.40 Connecting together the points in this chapter, from the evidence available across the EU, arguably some of these mechanisms are in place but the challenges that remain relate to ensuring that the procedures and processes are watertight, fair, and transparent and that the mechanisms employed are effectively enforceable. In Scotland, improvements have been made in terms of capacity and capability within procurement and there is the need for public sector organisations to continuously improve. Across the EU, the evidence base on spend, process and outcomes needs to be developed. Evidencing outcomes is crucial in the economic context of fiscal constraint and reduced resources. Across the EU, the current stage of reform progress is work in progress but the gaps that remain now need to be plugged and a balance needs to be struck between encouraging developments in some areas and enforcing where statements of intent or principle are not enough to ensure action, implementation and behavioural change.
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APPENDIX 1: GLOSSARY OF TERMS

EU – European Union
BPI – Best Practice Indicator
GPS – Government Procurement Service
ICT – Information and Communication Technology
OJEU – Official Journal of the European Union
PCAs – Procurement Capability Assessments
PCS – Public Contracts Scotland
PCS-Tender – Public Contracts Scotland-Tender
PPRB – Public Procurement Reform Board
PRDG – Procurement Reform Delivery Group
PPN Countries – Public Procurement Network Countries
PQQ – Pre-Qualification Questionnaire
PSPs – Public-Social Partnerships
R & D – Research and Development
SIA ACS – Security Industry Authority Approved Contractor Scheme
SMEs – Small and Medium Sized Enterprises
SPIH – Scottish Procurement Information Hub
SPOE – Single Point of Enquiry
TRT Clauses – Targeted Recruitment and Training Clauses
VFM – Value for Money