

# **EQUAL OPPORTUNITIES COMMITTEE**

Tuesday 6 October 2009

Session 3

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## CONTENTS

Tuesday 6 October 2009

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE.....	1271
BUDGET PROCESS 2010-11 .....	1272

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### **EQUAL OPPORTUNITIES COMMITTEE** **14<sup>th</sup> Meeting 2009, Session 3**

#### **CONVENER**

\*Margaret Mitchell (Central Scotland) (Con)

#### **DEPUTY CONVENER**

\*Marlyn Glen (North East Scotland) (Lab)

#### **COMMITTEE MEMBERS**

\*Malcolm Chisholm (Edinburgh North and Leith) (Lab)

\*Willie Coffey (Kilmarnock and Loudon) (SNP)

\*Bill Kidd (Glasgow) (SNP)

Hugh O'Donnell (Central Scotland) (LD)

\*Elaine Smith (Coatbridge and Chryston) (Lab)

\*Bill Wilson (West of Scotland) (SNP)

#### **COMMITTEE SUBSTITUTES**

Jackie Baillie (Dumbarton) (Lab)

Mary Scanlon (Highlands and Islands) (Con)

Margaret Smith (Edinburgh West) (LD)

Shirley-Anne Somerville (Lothians) (SNP)

\*attended

#### **THE FOLLOWING GAVE EVIDENCE:**

John Matheson (Scottish Government Health Finance Directorate)

Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Health and Wellbeing)

#### **CLERK TO THE COMMITTEE**

Terry Shevlin

#### **ASSISTANT CLERK**

Rebecca Lamb

#### **LOCATION**

Committee Room 4



## Scottish Parliament

### Equal Opportunities Committee

*Tuesday 6 October 2009*

[THE CONVENER *opened the meeting at 10:00*]

### Decision on Taking Business in Private

**The Convener (Margaret Mitchell):** Good morning. I welcome everyone to the 14<sup>th</sup> meeting in 2009 of the Equal Opportunities Committee and remind all those present to switch off their mobile phones and BlackBerrys, as they interfere with the sound system even when switched to silent. We have received apologies from Hugh O'Donnell.

The first item of business is to decide whether to discuss in private at future meetings our draft report to the Finance Committee on the Scottish Government's draft budget. Are members agreed?

**Members** *indicated agreement.*

## Budget Process 2010-11

10:00

**The Convener:** Agenda item 2 is evidence on the Scottish Government's 2010-11 draft budget. The session, which will focus on equal pay in the national health service, is based on a very interesting and informative round-table discussion that we held on the issue at our previous meeting on 22 September.

Without further ado, I welcome the Cabinet Secretary for Health and Wellbeing, Nicola Sturgeon; John Matheson, who is the director of finance in the Scottish Government health finance directorate; and Clare Hicks, who is the head of pay and reward in the Scottish Government health workforce directorate. Do you wish to make an opening statement, cabinet secretary?

**The Deputy First Minister and Cabinet Secretary for Health and Wellbeing (Nicola Sturgeon):** Yes, convener. First of all, I am very grateful to the committee for its scrutiny of the Scottish Government's draft budget. I fully understand the committee's desire to examine equal pay in the context of the NHS, following on, as it does, from its scrutiny last year of equal pay in local government. I have paid very close attention to the written submissions and to the evidence that the committee received at its round-table discussion on 22 September.

I hope that that the committee will find it helpful if I provide some background and context to the issue of equal pay in the NHS and, given the amount of discussion on the matter at the previous meeting, if I provide, in particular, some clarity on the relationship between equal pay and agenda for change. Agenda for change is more than a pay system: its introduction in October 2004 was the culmination of a five-year process that aimed to streamline and harmonise a morass of terms and conditions; to improve equality and diversity in the NHS, particularly with regard to career and training opportunities; to develop new ways of working to deliver services as efficiently as possible; and to modernise an ancient pay system. The modernised pay structure was underpinned by the principle of ensuring equal pay for work of equal value. The committee will be aware of the result of the recent *Hartley v Northumberland Healthcare NHS Foundation Trust* employment tribunal case, which will provide substantial assurance that agenda for change has achieved that aim.

As the committee will know, NHS boards started receiving equal pay claims in 2005. At the moment, 12,600 cases have been lodged against boards in Scotland, almost 9,000 of which are supported by Unison and relate to the period

before agenda for change, which was covered by the Whitley council agreements. At this stage, we do not know whether any of the 12,600 claims can be substantiated. I fully understand the committee's frustration at the apparent lack of progress in dealing with these claims since 2005; however, despite significant developments such as the Hartley ruling, the claims have not progressed beyond case management discussions and claimants have not yet provided the evidence that is required in order to determine whether their claims are likely to be upheld.

As a result, prior to its being established that the former pay system was vulnerable under equal pay legislation and that liability exists, I feel that it is premature for the Scottish Government or, indeed, for NHS boards to enter negotiations on a financial settlement. The committee has heard evidence from Audit Scotland on the risk that pay claims pose to NHS boards' budgets, but I must point out that auditors have approved the action that boards have taken up to this point. The boards have identified equal pay claims as a potential liability in their accounts and Audit Scotland has acknowledged that not enough progress has been made with the claims to determine the likelihood of their success or failure, or to estimate their value.

As committee members know, the Scottish Government's budget is fixed, so to make provision for potential equal pay liabilities at this stage would require that funds be set aside, which would divert resources from front-line services. I hope that the committee agrees that that would not be appropriate.

I believe strongly in the principle of equal pay and I do not rule out a negotiated settlement on equal pay, but discussions on such a settlement would be inappropriate until the legal issues that are currently under discussion have been further tested and established.

That is a brief introduction to the Scottish Government's position. I am happy to answer members' questions and to explore issues in greater detail.

**The Convener:** Thank you. As a scene-setting exercise, will you define the role and responsibilities of some of the key players, such as the Scottish Government's health directorate's equalities action group, NHS Scotland, the NHS National Services Scotland equal pay unit and central legal office?

**Nicola Sturgeon:** That is a big question, which I will try to answer as simply as possible. NHS boards are the key players, in that they are the employers of NHS staff, including the people who have made claims under equal pay legislation. There is the management steering group, which

brings together NHS boards as employers. The equal pay unit was set up by the management steering group to manage equal pay claims; its employees are employed by NHS National Services Scotland, which is a special health board. The Scottish Government gives some funding to the equal pay unit, but it is 75 per cent funded through the management steering group. The central legal office gives legal advice to NHS boards as employers and works in a legal capacity with the equal pay unit.

The Scottish Government has oversight of all that. We are not the direct employers of the staff who have made equal pay claims, but if liability were to be established—I do not want to get too hypothetical at this stage—the Scottish Government would have a role to play in determining how the requirement for equal pay claims would be met financially.

**The Convener:** Who is taking charge and trying to resolve the issue? That is what I am trying to establish. We know from experience of local government that the longer the equal pay issue goes on the more it costs, which diverts resources from front-line services, as you said.

**Nicola Sturgeon:** Health boards in Scotland are the employers of the staff concerned and so, in that respect, are the key players. The issue is—as the committee knows from the evidence that it took at its most recent meeting—that we have not yet reached a stage at which liability for equal pay claims has been established. That is because not enough information is available yet on the posts that claimants would use as comparators in determining whether there was equal work with unequal pay, what the pay differential was and whether the difference was down to gender or other genuine material factors. Without that information, it is not possible at this stage first to establish whether there is liability, and secondly to quantify the claims.

All those matters are currently under the overview of the employment tribunal and the issues are being considered in case management discussions. People who are acting for claimants—principally the unions, although some cases are under the aegis of a contingency fee lawyer, as members know—have been asked to provide the additional information that we judge is required in order to establish liability and to quantify claims. To some extent, the ball is in the court of the people who are acting for the claimants, although within the employment tribunal NHS employers are working with unions to reach the point at which we can establish the legal basis of the claims.

**The Convener:** I want again to draw a parallel with local government. Many local government equal pay cases seem to be stuck at the tribunal

stage, regardless of the case management that is going on and the background. Has the Scottish Government attempted to facilitate matters, to mediate or to resolve any outstanding issues by holding joint meetings with NHS boards and trade unions?

**Nicola Sturgeon:** No. That has not happened because it would not be appropriate at this stage, given that the issues are being discussed in the employment tribunal and in case management discussions—the most recent of which took place last week, I understand. Active discussions are taking place to try to get the information that will allow the issues that I have spoken about to be dealt with.

I understand where people are coming from—it is easy to ask why things are taking so long and why all the sides are not simply getting together to try to thrash out a settlement. As I said in my opening statement, I certainly do not rule out a negotiated settlement or being willing to try to reach such a settlement, but claims have been made, and we lack the evidence and the information that are required to judge whether those claims can be substantiated. Until we have that information, it is impossible to go to what many people might see as the next stage, which may be—I stress the words “may be”—an attempt to negotiate a settlement.

**The Convener:** We will tease out a little bit more about the evidence and information that may be required and how we can make progress on getting that.

In general, do you consider that progress must be made in resolving outstanding equal pay claims in the rest of the United Kingdom before we can move on in Scotland, or are the claims significantly different? Can we make progress without taking cognisance of equal pay claims in the rest of the United Kingdom?

**Nicola Sturgeon:** The answer to your first question is, “Not necessarily.” During the round-table discussion, members heard evidence, chiefly from Unison, that indicated that England is not necessarily much further ahead of Scotland in these matters, and that the issues are not identical. There are different issues north and south of the border. It is not necessarily the case that we require progress to be made south of the border in order to make progress in Scotland. Progress depends, first and foremost, on getting the information to deal with the claims that have been made in Scotland. That said, we will of course be cognisant of developments in England and other parts of the UK that have implications for claims in Scotland. If there were further tribunal judgments in England that would have a bearing on claims in Scotland, they would be taken into account.

**The Convener:** That is helpful. Thank you.

**Bill Kidd (Glasgow) (SNP):** I thank the cabinet secretary for coming to the meeting.

Earlier, the cabinet secretary stated that a purpose of agenda for change was to deliver pay equality in the relevant parts of the NHS, which Unison also said in its written evidence. That suggests that a significant number of NHS staff suffered from pay inequalities prior to agenda for change. I am talking about equal pay for work of equal value. As the cabinet secretary has stated, a lot of people are still in dispute, so their anguish and feelings of discrimination continue. What is your opinion of the manner in which agenda for change was established? Was it predicted that such a situation might occur?

**Nicola Sturgeon:** Others around the table may be more able than I am to answer questions about the history of agenda for change. However, it would be wrong to blame it for any equal pay claims that may or may not be substantiated from the previous system. Because agenda for change was intended to be an equal-pay-proofed system—there is, in the light of the Hartley judgment, confidence to suggest that it is that—it does not automatically follow that the previous system was vulnerable under equal pay legislation, although I can see the superficial argument that can be made in that respect. That still has to be established by reference to the evidence of comparator posts under the previous system. Examination of that information will enable us to establish that there was equal work that was not equally paid, and that the reason for the difference was gender. That has to be established, agenda for change notwithstanding.

My second point is that the Hartley judgment gives us a significant degree of confidence that agenda for change is equal-pay proofed, although members might want to ask questions later about what we can do to ensure that it remains so. However, I do not think that it is right to say that the fact that agenda for change is an equal-pay-proofed system means that the system that went before it was not. That must be established with reference to the different posts and pay rates under the old system.

10:15

**Bill Kidd:** I am aware of your track record of support for equalities for people in the workplace, which is why I am pursuing the point.

It seems to be obvious that the people who suffered pay inequalities before agenda for change—women and lower-paid workers—are still at the bottom of the pay scales, although as you say, we will have to wait until the information that you mentioned is examined before we can be sure

about that. I accept that you did not push through agenda for change, but it seems to me that the situation demonstrates that it had an agenda other than equality of pay and that it did not take cognisance of the people who were at the bottom of the pay scales, which is where it should have been targeted.

**Nicola Sturgeon:** That is different from the equal pay claims that we are talking about today. I think that agenda for change is a pay system that has, at its heart, the principle of equal pay for work of equal value. I think that unions such as Unison would agree with that. We have, as yet, no evidence that agenda for change does not deliver that.

On the basis of principle, I believe that, where it can be established that someone was doing work that was equal to work that was being done by another person, but was not paid the same as that other person, and the reason for the difference was their gender, there is a right to recompense. Our difficulty is that it has not yet been established, in respect of the claims that have been made, that that was the case, although it might be established in the future. We do not yet have enough detail about the posts that the claimants would compare their pay to. Until we have that, we cannot say whether there was equal work that was not attracting equal pay and that the difference was down to gender. Once we have that information, it might be possible to reach conclusions on those points, but we are not yet at that stage.

**Malcolm Chisholm (Edinburgh North and Leith) (Lab):** Your comprehensive opening statement has answered some of the questions that I was going to ask. We should move quickly to comparators, which is probably at the heart of the matter this morning. Before we do that, however, I would like to recap briefly.

You referred to the case management discussions and to the contingency fee lawyer who we were told was going to write to his clients to say that he will no longer represent them. Do you have an update of the current number of equal pay cases?

**Nicola Sturgeon:** I do not. The lawyer has not yet indicated whether the cases that were lodged by him on behalf of claimants will be withdrawn or continued. He has still to come back to us with that information. I can provide the committee with that information as soon as it is available.

**Malcolm Chisholm:** How many of the claims related to agenda for change?

**Nicola Sturgeon:** I do not have the precise numbers—I am not sure whether we can get them.

As I said earlier, 9,000 of the total 12,600 claims have been lodged by unions—principally Unison—and the majority relate to the situation that pertained before agenda for change. I am not sure what the breakdown of the remaining claims is in terms of which came before agenda for change and which came after. I do not want to promise the committee that I can give you information that we do not have, but if we can get that information to you, we will.

**Malcolm Chisholm:** The Government's equality statement refers to the outstanding claims, at page 33, and it raises questions about comparators. I have a long quotation from it in front of me, but I will not read it out, as you have covered what it says. It refers to the view of the central legal office, which I think is identical to the view that you have presented to us this morning. My general question is whether you are satisfied with progress in respect of the pre-agenda for change cases. Could things be speeded up?

**Nicola Sturgeon:** I will answer that question as frankly as possible. I will not say that I would not like us to get to an end point as quickly as possible, whatever that may be—it is not possible for me to speculate on that at this stage. The sooner the matter can be progressed and concluded, the better. The difficulty is that how we reach that end point is not at all within my gift, because the information that needs to be provided must come from the claimants, or those acting for them. I am not making any criticism of them, but we need that information in order for some of the issues that we are discussing today to be further clarified.

**Bill Wilson (West of Scotland) (SNP):** I am confident that you are aware of the considerable debate about comparators and the single-source issue—whether individuals use only their own NHS board for comparisons, or whether they can use the whole NHS. I have a few questions stemming from that, and the first is a preliminary one. I want to get an idea of how important the issue is. How many jobs are not found in every single NHS board? In how many cases will somebody have a job in an NHS board that is not found in other boards? If we restrict the comparators to claimants' own NHS boards, how many individuals are likely to lose out? Do you have any idea? I suspect that you do not, but will any effort be made to ascertain that?

**Nicola Sturgeon:** Forgive me, but my answers will be quite general in relation to some of those questions. Let us deal with the territorial boards, as the position of special health boards will be different, as they carry out particular functions that are not equivalent to those of, say, NHS Greater Glasgow and Clyde. I do not imagine that many posts exist in one territorial board but not in



another, although there will be some specialist posts. The bigger boards do some specialist heart and brain surgery that the smaller ones might not do, for example, so there will be some such posts there. Generally, however, the type of post will be the same, although there could be differences in the responsibilities and functions of a particular post between one health board and another.

On the issue of single source versus NHS boards as employers, the issue has not been tested legally. Our position is that the employer is the NHS board. Therefore, the starting point is that the comparator will come from within the NHS board. My view is that NHS boards in Scotland are big enough to provide the comparators that would be needed by claimants in order to provide the information that we have been discussing.

**Bill Wilson:** Do you have any extra information about the single-source question that might help to inform our scrutiny of that option for identifying comparators? Will the NHS, on a wider scale, examine whether boards can provide appropriate comparators?

**Nicola Sturgeon:** My view is that it should be possible for most claimants to provide comparator information from within the NHS board in question. That is the position.

On the broader question about whether NHS boards are separate employers or the NHS in Scotland is a single-source employer, that has not been legally tested, as I understand it. As I said, our position is that an NHS board is an employer, and that it is possible to find comparator information from within boards.

**Bill Wilson:** Do you have any concern that that will turn out not to be the case? You have mentioned the specialist boards, and I imagine that there might be circumstances in some of the specialist organisations where it will be more difficult to find comparators.

**Nicola Sturgeon:** I have no information to suggest that that is the case at the moment. Referring to my previous comments about the lack of information that has been provided at this stage with regard to comparators, I say that it is difficult to answer that question definitively.

**Elaine Smith (Coatbridge and Chryston) (Lab):** I have a registered interest as a member of Unison.

Good morning. My question comes on the back of what Bill Wilson asked you. I am finding this rather confusing. In an answer to the convener, you said that you have a unit looking at the overall issue, but we talk about individual boards being the employers, within whose boundaries comparators must be found. If an individual board decided that, rather than go down the route of

tribunals and courts, it would resolve the matter more quickly, it could do that by finding its own comparators, discussing the matter, negotiating it and getting on with it. In the round-table session concern was expressed that the longer this goes on, the more people there might be who will, in the long run, lose out or not receive any compensation if they have been unfairly treated, as they might no longer be with us by the time the dispute is resolved. Can boards do that, or do you expect that legal cases will have to be concluded first and that that will be the sign for what the whole NHS has to do?

**Nicola Sturgeon:** I am sympathetic to the view that you express about the length of time that the process is taking and the implication of that for individuals. I am sure that everybody around the table is. Nevertheless, I stress that, in Scotland, we do not yet know whether any of the 12,000 or so claimants has an established case.

**Elaine Smith:** Will that need to be established legally?

**Nicola Sturgeon:** I stress the need to get information. I said earlier that I do not rule out a negotiated settlement at some stage, but the decision to attempt a negotiated settlement cannot be taken until we have sufficient information to make a judgment about what claims may be successful and what claims may be unsuccessful. At the moment, I cannot say whether the claims will require to go through the entire legal process right up to the decisions of tribunals or whether a judgment will be taken that, because the claims are likely to succeed, we will try to negotiate a settlement to avoid having to go through the legal process. I appreciate that it is frustrating for the committee not to be able to get more definitive answers to such questions, but it goes to the heart of the issue that we are dealing with. Until the claimants or their representatives provide more information, it is not possible to say whether we can reach a negotiated settlement.

You asked whether individual health boards could settle cases legally. In theory, they could because they are individual employers. However, health boards have chosen to deal with the issue collectively through the management steering group and the equal pay unit, to ensure that cases are dealt with consistently and—although I appreciate that this may not appear obvious, given the length of time that we are talking about—in the most streamlined way possible.

**Elaine Smith:** Does that mean that comparators should be chosen from throughout Scotland rather than from within individual boards?

**Nicola Sturgeon:** At the moment, no information is being put forward to us on comparators, so that is not something that we can

judge. Our starting point is that, because NHS boards are individual employers, the comparators should be chosen from within individual health board areas. Should a claimant produce a comparator from another health board area, either a judgment would have to be made on the validity of that comparator or, ultimately, the matter would be tested legally. Our fundamental problem at the moment is that we are talking in a vacuum because we have no information on the comparator posts that claimants are seeking to rely on. Until we have that information, the discussion is, to some extent, hypothetical.

I have received no cases of claimant X, who is a cleaner in a hospital, putting forward a comparator post of a male cleaner who is doing a slightly different job and getting paid more. We do not have that level of information, so some of the questions cannot be answered beyond the hypothetical. When we have that information, the situation could change quite dramatically.

**Malcolm Chisholm:** You have stated your position clearly. I merely draw attention to what Fiona Kordiak, from Audit Scotland, said. Fundamentally you are disagreeing with her. She said:

"Should"

the employer

"be proved to be the NHS in Scotland as a whole, individuals will have a wider range of comparators against which to compare themselves".—[*Official Report, Equal Opportunities Committee*, 22 September 2009; c1252.]

Your view seems to be that that is unlikely to be the case and that it would not make any difference, and is almost irrelevant, because there are similar jobs in all boards.

10:30

**Nicola Sturgeon:** It is very likely that claimants would be able to find comparators within their own health board. If a claimant were to come forward with a comparator from another health board, the question whether that would be valid and the issue of single-source employment would come into scope, but we are not at that stage. I do not disagree with Fiona Kordiak. To some extent, she was speaking as hypothetically as I am. Audit Scotland has agreed with the position of health boards and the Scottish Government with regard to the lack of information that would allow the claims to be quantified on NHS board or NHS Scotland accounts.

**Malcolm Chisholm:** Would individual boards reject, as a matter of principle, a comparator from outside? Would the matter then have to be resolved in a tribunal?

**Nicola Sturgeon:** Until we have an example of that, it is not—well, I would not say no to that question in a blanket in-principle way, but we do not have an example to answer it that refers to a real as opposed to a hypothetical case. It may be an entirely hypothetical situation, because it may be possible for all the claimants to provide comparators from within their own boards; we do not know that yet.

**The Convener:** I want to tease the issue out a little. Would it be possible for NHS Scotland, rather than individual boards, to act as the employer? If so, who gives that direction? Is it you?

**Nicola Sturgeon:** NHS Scotland is not an employer; individual NHS boards are the employers.

**The Convener:** For the purposes of equal pay, moving NHS pay on and trying to resolve the issue, could NHS Scotland assume the position of employer, albeit that we know that there are individual boards? I am puzzled as to what the health directorates equalities action group is doing if it is not taking action on an issue such as this.

**Nicola Sturgeon:** The fundamental point that the committee needs to understand is that NHS Scotland is not a legal entity—it is not an employer. The employers are the NHS boards. For the purposes of dealing with equal pay claims, NHS boards have decided to operate collectively through the management steering group and the equal pay unit in order to try to get consistency in how they deal with claims. That is not to say that NHS Scotland, in the form of the Scottish Government, does not have an interest and a potential future role in the matter. If we reached a position in which liability was established, and equal pay claims were quantified so that we knew what the overall cost to the NHS would be, the Scottish Government would of course have a role and an interest in determining with NHS boards how that would be settled. However, the employers are NHS boards—that is not a matter of opinion but a matter of law.

**The Convener:** So in no circumstance, in order to move the issue on, could NHS Scotland be the employer as the representative from Audit Scotland suggested? She said:

"the single-source issue, concerns whether the employer is the NHS in Scotland as a whole or individual boards".—[*Official Report, Equal Opportunities Committee*, 22 September 2009; c 1252.]

You are saying that individual boards have decided that they are the employers. Is that laid down in statute? Is it something that can be changed?

**Nicola Sturgeon:** NHS boards are the employer. I will try to explain the single-source issue a little more. If we accept that there is a

single source, it does not mean that NHS Scotland legally and contractually becomes the employer of NHS staff. It means that pay policy is sufficiently consistent across all NHS boards, and there is not sufficient flexibility for different NHS boards to have different pay policies, for it to be deemed that there is one single pay policy. It does not make NHS Scotland as a single entity the legal employer of all NHS staff. The boards are still the employers, but the single-source issue means that there is one pay system across the whole of NHS Scotland.

**The Convener:** So, just to be absolutely clear, there is no circumstance in which we could move on and try to find the single-source comparator, with NHS Scotland rather than the individual boards, within which we know not much progress is being made, taking the lead.

**Nicola Sturgeon:** To an extent, the single-source issue is a red herring at this stage, because it might or might not become an issue. There is a desire for progress on all sides but, for that to happen, the claimants must provide information about comparator posts. If every claimant provides a comparator from within their NHS board, the single-source issue will not arise—it will become completely hypothetical and academic. On the other hand, some claimants might say that there is no comparator in their NHS board, that they believe that the NHS is a single-source employer—because there is one pay system—and that therefore they will provide a comparator from another NHS board. At that point, either through negotiation or through the legal process, the single-source issue would have to be resolved one way or the other. However, as far as I am aware, it is not the single-source argument that is holding up the process; it is simply that we do not yet have the comparator information from the claimants.

**The Convener:** Because it is difficult to find that information in every individual board, we are asking whether the issue can be considered on a more national basis, so that we have one comparator to establish a case.

**Nicola Sturgeon:** The claims cover a range of posts. Every claim or group of claims will need to have its own comparator. No single comparator can be used for all the claims. As I understand it, the claims involve domestic and nursing staff, for example, so a range of comparators will be used. I cannot speak for the trade unions but, as I understand the issue, the difficulty in providing comparator information is not related to the single-source argument. From Unison's evidence at your round-table discussion last week, I got the impression that it was close to being able to present the comparator information. I am not saying that the single-source issue will never

arise; I am saying clearly that resolving that issue is not the first thing that we must do to move on.

**The Convener:** I am conscious that Bill Wilson and Elaine Smith have questions, but I have one final question on the issue. Is it only Unison that is trying to find the comparator, or does the equal pay unit, or the health directorates equalities action group, have responsibility for that?

**Nicola Sturgeon:** The responsibility lies with claimants to provide the evidence to substantiate their claim, but the equal pay unit and employers are working hard to help Unison and the other representatives of claimants to establish comparator information. Although the issue is in the early stages of a legal process, a lot of joint working is being done to try to find the information that will allow progress. Nobody who is involved is trying to slow down the process; we are trying to work with Unison and the other representatives to establish the information that gives us the ability to make judgments on the cases.

**Bill Wilson:** I realise that our questions are possibly rather frustrating for you. I appreciate that the issue is hypothetical and I accept that the single-source issue is not what is holding up progress, but I am sure that you will appreciate the concern about natural justice. Most people would accept that if there is a comparator in a board, it makes sense to use it, but you touched on the point earlier that somebody might be left without a comparator if we restrict the process to within boards. As the boards are working to seek consistency, it might be helpful, in the interests of natural justice, if they acknowledged that, should someone not be able to find a comparator within a board, one would be sought outwith it. That would reassure people that the boards were working not only within the law, but within the interests of natural justice.

**Nicola Sturgeon:** A point that should not be lost is that some claimants might not have comparators anywhere, because they might not have a valid equal pay claim. It might be that nobody else is doing work of equal value but getting paid more than them. We should not assume that there will be valid comparators for every claimant—that is one of the points that we have to establish.

I am not aware that claimants are saying that the reason why they cannot provide the information is that they cannot find comparators from within their boards. However, it might turn out that some claimants are in that position. As I said, that would need to be resolved at that stage. At present, the ball is very much in the court of those who are acting for the claimants to provide the information. Attempts are being made through the equal pay unit to be as co-operative as possible in helping to establish that information. I am not saying that it is

fine for people to be paid unequal pay for work of equal value and that we will not compensate people—that is not the issue that is at stake.

If we establish either through negotiation or through the legal process that people were doing work of equal value and getting paid less than others because of their gender, they will have a right to be compensated for that. However, we have still not got to the stage of establishing that that is the case. Until we have established that, we cannot enter into negotiations about settling because we do not know whether there are cases and what they might be worth. As well as potentially using public resources to give out money that is not justified, we could end up short-changing claimants. We have to get the information so that we can establish what the next steps will be.

I know that that is frustrating for the committee, but it is the situation that we are in.

**Elaine Smith:** I want to try to pin down the issue, because of some of the evidence that we received at the round-table discussion. What you have said sounds fair enough. If people have claims, in most cases they should be able to find comparators within their board. You seem to be quite confident that that is the case. However, you also recognise that if that is not the case, we could think about looking more widely for comparators. The problem is that, at the round-table evidence session, Ian Reid from NHS Greater Glasgow and Clyde said:

“We are separate employers and the legislation provides that an individual can use a comparator only from within their own employer”.—[*Official Report, Equal Opportunities Committee*, 22 September 2009; c 1253.]

His evidence seemed to be that there is no possibility of a person looking for a comparator outwith their own employer.

**Nicola Sturgeon:** I am possibly not making myself clear. That is the legal position: NHS boards are separate employers and the law says that comparators have to come from within the same employer. As I have said repeatedly, that is the starting position.

We are talking hypothetically here. If a claimant does not have a comparator within their own NHS board but they believe that there are comparators in other NHS boards, the issue of whether there is a single-source employer comes into play. Unless NHS employers are prepared to concede that collectively as part of a negotiated settlement, which they have not done, that will have to be tested through the legal process.

**Elaine Smith:** But the boards cannot concede something that is in legislation. Ian Reid said that the legislation provides—

**Nicola Sturgeon:** The legislation says that the comparator has to be found within the person's employer, but—to go back to the convener's argument—because we have a national pay and conditions system, the issue is whether the NHS can be viewed collectively as one employer as opposed to individual boards for the purposes of pay.

Again, frustrating though this is—and it is becoming frustrating for me as well—until we have the information on the table, the issues cannot be resolved. That is why gathering information about comparators is the way to move the situation on, because it will allow us to make judgments or to test examples through legal processes, instead of talking hypothetically, which is what we are doing at the moment.

**The Convener:** Given that the comparator issue is so huge, how is it resolved in agenda for change?

**Nicola Sturgeon:** That is a completely different issue. Agenda for change is a whole new pay system that starts with a job evaluation system, so posts are evaluated and then attached to a pay band that depends on the outcome of the job evaluation. It is about looking at the job's content based on the job description and deciding what should be its pay band.

**The Convener:** Can nothing be taken from agenda for change and how it addresses equal pay to resolve the comparator problem?

**Nicola Sturgeon:** Not necessarily. Just because two people go on to the same pay band under agenda for change when they were on different pay bands under the Whitley council arrangements does not automatically mean that there was an equal pay issue.

10:45

**Marlyn Glen (North East Scotland) (Lab):** The situation is extremely frustrating. I am sure that we all—you and the committee included—look forward to swift progress being made. In the meantime, there is the matter of on-going costs. Glyn Hawker of Unison pointed to the cost of the outstanding cases in respect of the financial poverty of complainants, the cost of litigation and the personal cost in respect of health and wellbeing. Can you give us some information on those costs?

**Nicola Sturgeon:** No. That goes back to the heart of the issue. I will try to make this as simple as possible. We have people who have made claims who are saying, “We did a job that was equal to other jobs, but we were paid less.” However, we do not yet have the information on what those other jobs that were paid more were,

and we do not know whether they were jobs of equal value. Because we do not know what the other jobs were, we do not know what the pay differential was. The claimant might have been paid £12,000 a year, but because we do not have the information on the comparator posts, we do not know whether those comparator posts were paid £13,000 or £20,000 a year, so we cannot quantify the individual claims, which means that we cannot quantify the total potential liability to the NHS. That point—this is really important—is accepted absolutely by Audit Scotland. We do not yet have enough information to quantify the costs to the NHS that might or might not arise.

**Marlyn Glen:** Do you not at least have an idea about the litigation costs for individual boards or for NHS Scotland?

**Nicola Sturgeon:** Not at this stage—we are at an early stage in the legal process. I stress a point that I have made today repeatedly: I do not rule out a negotiated settlement being made at some stage. You can take that comment more generally than just in relation to this matter. In many different scenarios where there are disputes, it can often be in everybody's interest to negotiate a settlement rather than go through the court process or, in this case, the tribunal process. I do not rule that out by any manner of means, but we just do not have the information that would allow us to go into the negotiating room and negotiate a settlement. I cannot remember which Bill I said this to—I think it was Bill Wilson—

**Bill Wilson:** There are many Bills here.

**Nicola Sturgeon:** Without that information, we could end up negotiating a settlement that was too high, which would be an unjustified use of public resources. Equally, we could end up negotiating a settlement that was too low and which sold short the claimants. We need that information before we can judge whether we should try to reach a negotiated settlement.

**Marlyn Glen:** Can I close that off? When we looked at equal pay in local government, the cost of defending claims was quantified for us. Would you say that there are no litigation costs for boards at the moment?

**Nicola Sturgeon:** If a full employment tribunal were gone through, of course there would be litigation costs.

**Marlyn Glen:** What about up until now?

**Nicola Sturgeon:** At the moment, we cannot tell how many of the 12,600 claims that have been made are likely to go to a full tribunal. We have been talking about the potential for 3,000 of them to be withdrawn by the contingency fee lawyer. We do not know how many claims would in theory be able to proceed to a full tribunal. Please do not

think that I am sitting here saying that there would be no litigation costs should the claims proceed. That might be a key factor—at some stage when we have more information—in deciding whether to go for a negotiated settlement rather than go through the full process.

Although there are superficial parallels between the NHS and local government, there are also big differences between the two situations, not the least of which is the fact that we have a degree of confidence that any equal pay liability that might be established against the NHS would be time-limited in the sense that, since October 2004, we have had what we think is an equal-pay-proofed system in the form of agenda for change. Local government did not have that and does not have that to this day.

**Marlyn Glen:** Thank you.

**Willie Coffey (Kilmarnock and Loudoun) (SNP):** As a relatively new member of this committee and the Parliament, I find it interesting to note from the briefing papers that the Equal Pay Act 1970 came into force in 1975, yet 34 years later we are at a committee of the Scottish Parliament trying to resolve issues of equal pay for women in the NHS. In your opening remarks, you said that agenda for change came in in 2004, at the end of a five-year process. We are five years on even from that point, so you will recognise that there is a lot of frustration in the committee. We have had a period of time within which to bring the matter to a conclusion.

My question relates to contingent liability, which you covered extensively in your opening remarks, and dealt with some of the issues that I wanted to raise. When might it be prudent to think about having some kind of financial set-aside? Would that be done if some cases were successful or some cases failed? Is progress likely to be made on the matter in the current financial year?

**Nicola Sturgeon:** I hope that progress on the issue can be made. You asked at what point it would be prudent—I would rather use the word “possible”—to quantify a potential liability. The issue is not that we do not think that it is prudent to do that; it is that, at the moment, it is not possible to do that. Audit Scotland has accepted that point.

The answer to your question takes us back in the discussion. When we start to get some of the information that will allow us to form judgments on the likely success of claims and, more important, to quantify them, the current situation may start to change. It may become possible and, therefore, prudent for the NHS to look to make specific provision. However, as Audit Scotland said, we are not yet at that stage.

**Willie Coffey:** When it last gave evidence to us, Audit Scotland made clear that it accepted that, at

the moment, it is appropriate to declare an unquantified contingent liability in the accounts. Nevertheless, it expressed concern about the issue for the coming years. If there is no set-aside, ultimately there may be an impact on consolidation into the main Scottish Government accounts. Do you foresee any difficulties at that stage if the matter is not resolved?

**Nicola Sturgeon:** I hope that the issue will be resolved. I have no doubt that Audit Scotland and committees such as the Equal Opportunities Committee will retain a close interest in the matter.

I cannot say at the moment when it will be possible to quantify any potential liability. The most fundamental problem with estimating the quantum now is that we would be making a complete stab in the dark. We could overestimate it or considerably underestimate it, because we do not have the information to make that judgment. In addition, if in NHS accounts we set aside a particular amount for a contingent liability, we cannot use that money for front-line services. It would not be appropriate for us to do that at this stage, when we are not able to quantify the liability accurately. We could end up depriving front-line services of a much bigger sum of money than turns out to be required.

**Marlyn Glen:** Audit Scotland's evidence seemed to run counter to the evidence of NHS boards, which said that it was extremely unlikely that they would be able to tell what the liability would be. Audit Scotland said that, over the coming year, it expected much more progress to be made on quantifying the potential liability and spoke about providing a qualified audit opinion on the accounts of each board. Would you like to comment on that evidence?

**Nicola Sturgeon:** John Matheson will keep me right, but Audit Scotland's position is that it will not provide a qualified audit opinion on the NHS accounts for 2008-09. We hope that progress on the quantification of the liability will be made over the next financial year. I cannot say more than that at the moment.

**John Matheson (Scottish Government Health Finance Directorate):** I proactively took the issue to Audit Scotland, because my style is to ensure that we discuss potential issues with the auditors at the earliest possible opportunity. Audit Scotland colleagues and I reached an agreed position in respect of the 2008-09 accounts. Discussions will continue as part of the preparation for the 2009-10 accounts.

We will reflect on what progress has been made, and I expect that we will again come to a joint agreement about how the matter will be treated in the accounts. That is all predicated on the level of progress that we make. We are now six months

through the financial year 2009-10 and I share the keenness to move the matter forward. We will continue our discussions with the auditors, reflect on where we are at the end of the financial year and come to a view on the appropriate treatment in line with agreed accounting standards.

**Marlyn Glen:** I recognise that everybody is working on the matter. I just wanted a comment on what your reaction would be to a qualified audit opinion. How serious would that be?

**John Matheson:** A qualified audit opinion would be extremely serious. I have never had a qualified audit opinion in my 32 years of working in the public service. We will make every effort, working together with the auditors, to ensure that that does not happen and that we reflect on the progress that has been made in the period of the audited accounts.

**Marlyn Glen:** Thank you.

**Nicola Sturgeon:** The key point is that we are working closely not just with the unions in trying to move the matter on but with Audit Scotland to ensure that the issue is treated appropriately in NHS boards' accounts. The fundamental point on where we are currently is that Audit Scotland accepts that it is not possible to quantify the liability at present. The position might be different this time next year, but obviously we do not know that at present.

**Elaine Smith:** Changing the subject slightly, I have a question on procurement policies and contracting out. Page 29 of the equality statement tells us:

"Equality Impact Assessment (EQIA) continues to be an important vehicle through which we can deliver on equalities ... To support further progress on EQIAs we have established a Health Directorates Equalities Action Group".

Given that, has an equality impact assessment been carried out on the contracting out policies of NHS boards? If so, what were the outcomes? If not, why not?

**Nicola Sturgeon:** I think that the answer to your question is no, there has been no equality impact assessment of NHS boards' contracting out policies. However, with your permission, convener, I will come back to the committee in writing with clarification on that point.

More generally, the committee will know that I am not a big fan of contracting out NHS services. Indeed, I have made it clear that that will not happen in future for cleaning and catering services. I happen to think that that, rather than some of the other approaches, is a better way of dealing with the issue. Of course, that does not mean that we do not have contracted-out services

at present, although I hope that, in time, some of them will come back into the NHS.

The committee will be aware—I know it was discussed at the previous meeting—of the 2007 agreement that was put in place to try to ensure that staff who work for companies that deliver services on a contracted-out basis are paid no less than agenda for change rates. That is an important agreement, but for the future it is more important that NHS services are delivered by NHS staff.

**Elaine Smith:** Although I agree with the cabinet secretary on that issue, if we consider the matter as a whole, certain things will require to be contracted out because the NHS is unable to do them in-house. My question was about the potential for differential impacts on women when the NHS enters such agreements. I accept that you will write to us but, given the gender equality duty, the committee wonders whether you might consider giving direction to boards on those issues.

**Nicola Sturgeon:** I will certainly consider that point and come back to the committee. Elaine Smith is absolutely right: notwithstanding the Government's policy position on contracting out certain services, we have contracted-out arrangements in some areas, and that situation is not likely to end completely in the near future.

Two points are relevant. The first is the point that I made about the 2007 agreement and agenda for change rates. The second point is one that Elaine Smith referred to, which concerns the equalities action group that has been set up in the health directorates. The group is considering the impact on equality of policies throughout the health sphere. If the issue of contracted-out services is not already within the group's sphere, I am happy to consider whether it should be included.

11:00

**Marlyn Glen:** On 27 October, the committee will take evidence from the Minister for Housing and Communities on the equality statement. However, I wish to ask a couple of broad questions now. The Finance Committee's budget adviser, Professor David Bell, prepared an analysis of the draft budget, which discusses the Scottish Government's equality statement and its carbon assessment, both of which I welcome. Professor Bell says:

"the equalities statement focuses on listing particular events or initiatives that are promoting equality. It does not link these to policy initiatives that relate specifically to new proposals contained in the 2010-11 Draft Budget."

He goes on to say:

"their utility would be enhanced if they could be more focused on the measures being proposed in the draft budget that they accompany."

Will the cabinet secretary comment on that, with particular reference to the health and wellbeing budget?

**Nicola Sturgeon:** I broadly agree with Professor Bell. As Marlyn Glen indicated, it is an enormous step forward that, for the first time ever, we have an equality statement that sets out the actions that the Government has taken and is planning to take to ensure that its budget contributes to greater equality in Scotland.

I am sure that the equality statement can be enhanced in future years in order to make the more direct linkages to which Marlyn Glen refers. The process will evolve. However, we should not lose sight of the fact that we have never before had an equality statement. The equality statement signals the Government's intention and determination to ensure that our budget decisions contribute to the objective of greater equality in Scotland.

**Marlyn Glen:** As I said, the equality statement is very welcome, although there is a dispute about whether it is the first equality statement, as there was one in 2004.

**Nicola Sturgeon:** I stand to be corrected, but I believe that it is the first equality statement in connection with the budget. However, whether or not that is the case, it is a step forward. I am sure that as the committees scrutinise the budget, they will all comment on how the equality statement can evolve to become the powerful tool that it is intended to be.

**Marlyn Glen:** The committee is very keen on precisely that.

Have all the priorities outlined in the health and wellbeing section of the equality statement been equality impact assessed?

**Nicola Sturgeon:** We are committed to doing that. I am happy to provide more information to the committee on the specific areas of the budget that have been or will be equality impact assessed.

**Marlyn Glen:** That would be helpful. However, while you are doing that, could you give us an example of any policy changes as a result of equality impact assessment?

**Nicola Sturgeon:** I am more than happy to come back to the committee with that information. The committee will see—Marlyn Glen has already referred to it—that the equality statement in respect of the health and wellbeing portfolio refers to the importance of equality impact assessment to ensure that we deliver equality through the

breadth of activity and spending decisions that are taken within the portfolio.

**The Convener:** That completes our questions. Cabinet secretary, is there anything that you would like to add?

**Nicola Sturgeon:** One issue that we have not covered today, which came up in the committee's round-table discussion on equal pay reviews, is one of the duties under the gender equality duty. It was indicated that advice had been given to NHS boards not to perform equal pay reviews to ensure that agenda for change remains equal-pay-proofed. I want to clarify that that is not the case. There remains an issue about the extent to which such reviews can be carried out while agenda for change reviews are under way, but there is a clear expectation that all boards will get on and complete those reviews as quickly as they can, and that they will go beyond the letter of the law to ensure that they are exemplary employers that live up to all the duties required of them.

**The Convener:** Thank you for that clarification. You have been very supportive of attempts to resolve the issue, but it is good to know that no spokes are being put in the wheel that would stop payments coming forward. We are all fairly frustrated by the lack of progress.

**Nicola Sturgeon:** Equal pay reviews are separate from local pay claims.

**The Convener:** I understand that, but there was a lot of concern prior to our last meeting about legal issues. Boards had advised that perhaps they should not appear at committee, and we were still 100 miles away from getting anywhere. That rang some alarm bells with the committee, so your clarification is very welcome. Thank you for attending.

11:05

*Meeting continued in private until 12:58.*



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