

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

Wednesday 28 May 2008

Session 3

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LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

16th Meeting 2008, Session 3

CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

DEPUTY CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

COMMITTEE MEMBERS

*Alasdair Allan (Western Isles) (SNP)

*Bob Doris (Glasgow) (SNP)

*Patricia Ferguson (Glasgow Maryhill) (Lab)

*Johann Lamont (Glasgow Pollok) (Lab)

*David McLetchie (Edinburgh Pentlands) (Con)

*Jim Tolson (Dunfermline West) (LD)

COMMITTEE SUBSTITUTES

Robert Brown (Glasgow) (LD)

Rhoda Grant (Highlands and Islands) (Lab)

Tricia Marwick (Central Fife) (SNP)

Margaret Mitchell (Central Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

Professor John Baillie (Accounts Commission)

Caroline Gardner (Audit Scotland)

Professor Christopher Himsworth (University of Edinburgh)

Professor Richard Kerley (Queen Margaret University)

Professor Alan Page (University of Dundee)

Gordon Smail (Audit Scotland)

CLERK TO THE COMMITTEE

Martin Verity

SENIOR ASSISTANT CLERK

Jane-Claire Judson

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 2

Scottish Parliament

Local Government and Communities Committee

Wednesday 28 May 2008

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

Decision on Taking Business in Private

The Convener (Duncan McNeil): Welcome to the 16th meeting this year of the Local Government and Communities Committee.

Under agenda item 1, I invite members to agree to take agenda item 4 in private. The item concerns consideration of the committee's approach to the child poverty inquiry, and such items are usually taken in private. Do we agree to do so in this case?

Members *indicated agreement.*

Local Authority Audits 2007

10:00

The Convener: Under item 2, we will take evidence from the Accounts Commission and Audit Scotland on the "Overview of the local authority audits 2007" report. We welcome Professor John Baillie, the chair of the Accounts Commission; Caroline Gardner, the deputy auditor general, from Audit Scotland; and Gordon Smail, the portfolio manager of local government audit in Audit Scotland.

I invite Professor Baillie to make some brief opening remarks.

Professor John Baillie (Accounts Commission): Thank you for inviting us to brief the committee on our overview report.

Each year, the Accounts Commission requests a report from Audit Scotland on the main issues arising from the audit of Scottish local authorities. The report covers 32 councils and the 41 related local authority organisations such as the police and fire boards. Together, those bodies spend about £16 billion a year.

The overview report brings together all aspects of the commission's work—that is, the financial and governance audits, the audits of best value and community planning, the statutory performance indicators and our in-depth studies of services—and draws on them to highlight strengths and areas for improvement.

This year, the report highlights progress on services and the need for an increased focus on key areas to meet the challenges that are coming. I have six key messages that I want to mention briefly before making three specific points about the Accounts Commission itself.

The first message is that there is improved performance in a number of areas in councils. For example, further improvements were noted in council tax collection and waste recycling, where the trends remain encouraging. The proportion of council tax due and collected in the year to March 2007 was just under 94 per cent, which represents a relatively small increase on the previous year and on the year previous to that. We are now into the 90 per cents, where improving the collection rate gets that bit trickier, but the trend is still upwards, which is encouraging. Another area of improvement is the amount of waste that is recycled or composted, which was 28.4 per cent. Two years ago, it was only 17 per cent, so, again, that is an encouraging trend.

The second point involves the major changes that we said last year were likely as a result of the 2007 council elections, which used a new voting

system and featured multimember wards. The early signs are that the transition has gone and is going well. Almost half—I think the figure is 47 per cent—of Scotland's 1,222 councillors are new, and they are bringing fresh ideas and impetus. However, they need to be supported in their new and developing roles, particularly in areas such as strategic leadership and scrutiny.

The third point is that councils need to significantly improve performance management so that they can show that they are improving services for local people. That is also essential to support the shift towards an outcomes-based approach, as set out in the concordat between the Scottish Government and the Convention of Scottish Local Authorities.

The fourth point is that financial accounting and reporting remain sound. Audit qualifications are rare—only Shetland Islands Council's accounts were qualified last year. Likewise, the commission's drive for better information about reserves has been successful. I am pleased to say that all councils now have policies in place that set out why reserves are held and their intended use. Reserves increased in the year to March 2007, but unallocated reserves—those for contingencies—represented less than 2 per cent of the net cost of services. We have said that the amounts that councils hold and what they do with those amounts are for councils to decide on, but they must take account of local circumstances. That remains the case.

The fifth point is about pressure on finances. For example, the implementation of single status agreements and above-inflationary increases in energy costs underline the importance of robust long-term planning, which must be risk based and sustainable.

The sixth point is that councils need to demonstrate the net benefits of community planning, other partnership working and sharing business support services.

I will finish with three points about the work of the Accounts Commission. Joint study reports that have been published in recent months, such as those on waste management and on free personal and nursing care, provide examples of our cross-cutting work with the Auditor General for Scotland. We jointly examine topics that affect local government and other parts of the public sector, including the Scottish Government. Our work on those major policy matters shows how the commission and the Local Government and Communities Committee can work together.

The commission welcomes the work that Audit Scotland does with the inspectorates and the other scrutiny agencies to minimise duplication and reduce the burden on the organisations that we

audit. The Crerar report highlights the need for more streamlined scrutiny that is based on robust self-assessment and a sharper focus on service users' needs. We support that approach and welcome the role that is envisaged for the Accounts Commission in realising that aim. To that end, we arranged a meeting that was held only on Monday with the chairs and chief executives of the other major scrutiny agencies. The meeting was interesting and convivial and lots of wishes for co-operation were expressed. I was delighted that the Cabinet Secretary for Finance and Sustainable Growth took up my invitation to attend that meeting and gave us two hours of his time to participate in the discussion.

Our programme of best-value audits is contributing to better governance in councils. We have reviewed how we go about that work in advance of the next round of best-value audits, which starts in mid-2009. That should ensure that our processes remain fit for purpose and continue to contribute to improving services and governance in local government.

In aggregate, the Accounts Commission is encouraged by the progress that councils are making and looks forward to working with councils through audit to deliver greater improvements.

The Convener: Audit Scotland's report emphasises the fact that local authorities will have to increase their focus on several key issues, such as integrating finance, workforce and asset planning. Do you have examples of the benefits that you believe councils would derive from such closer co-operation?

Professor Baillie: In relation to financial planning, pressures on costs arise from single status agreements and equal-status agreements, demands on services such as social care and the need to make efficiencies. Unless councils not only recognise those pressures immediately as they fall due, but plan in the medium to long term to take care of them, councils could find themselves in difficulty. One of our concerns is that there should be a proper assessment of expected efficiencies—a no-kidding review of the future—that will produce some kind of plan against which progress can be monitored.

It is also important to co-ordinate all resources and make sure that everyone is marching to the beat of the same drum. It is important that the asset management is in place and co-ordinated with the financial planning and, likewise, it is important that the workforce planning is in place. A difficulty with workforce planning at the moment is that council human resource departments have to spend so much time dealing with single status arrangements that they cannot spend as much time as they would like on strategic planning for

the workforce—how many people will be needed in future and for what purposes.

At this stage, it would be useful for me to hand over to Caroline Gardner:

Caroline Gardner (Audit Scotland): I can offer a specific example that highlights why such integration is so important. A couple of months ago, the Accounts Commission and the Auditor General for Scotland published a report on the school estate in Scotland, which found that good progress had been made in investing in schools to make them fit for purpose for 21st century education. It highlighted, however, that much better information about the current condition of schools is now available than was four or five years ago, which means that local authorities need to review their strategies and priorities for investing money to replace or refurbish schools for the future.

The report also showed that councils that have already entered into large-scale private finance initiative deals sometimes have difficulty in looking ahead at the revenue consequences of those contracts. The Scottish Government makes a significant contribution towards the revenue costs of PFI contracts, but that contribution is pegged in terms of real-terms costs, which go up with inflation each year. The commission therefore highlighted the fact that councils need to look ahead in a more evidence-based way than they have so far, and that they need to look ahead for the life of the PFI contract to make sure that they plan for and can cover the associated revenue charges.

The Convener: Single status agreements have been mentioned a couple of times, and the committee is interested in their scale and the challenge that they present. How many councils have implemented the agreements and what costs are associated with them? Are you satisfied that the councils are aware of and have planned to meet those costs?

Professor Baillie: Approximately one third of councils have now settled their single status agreement arrangements, so quite a lot has still to be done.

So far, the costs run at about 1 to 8 per cent—quite a wide range—of employee costs. The significance of that is that employee costs are about 40 per cent of each council's annual aggregate expenditure, so that 1 to 8 per cent is quite a big figure.

The Convener: Are you confident that those who have not implemented the arrangements are making plans on which they will be able to deliver?

Professor Baillie: Caroline Gardner might have a point to make here, but I think that a residue of hard-core cases will be very difficult to settle.

Caroline Gardner: That is absolutely fair. The councils that made an early start on their arrangements have been able to implement a single status agreement. We know that a number of them are still involved in difficult negotiations with their employees and staff, and some knotty issues are emerging in some councils. One of the problems is that case law keeps changing and councils have to reflect that changing situation as they are negotiating with their employees. That is making it very difficult for them.

The Convener: A significant number of cases are at tribunal. Can we calculate how many hearings are sisted and the potential liability of councils for legal costs?

Caroline Gardner: You are absolutely right that a large number of cases are at tribunal across the United Kingdom, not just in Scotland. That reflects the fact that, as well as unions representing their members, an increasingly large number of individual cases are being taken up by employment lawyers. At this stage, we do not know what the legal cost will be to councils, and it is very difficult to estimate their overall liability because the terms of the negotiated agreements change as negotiations continue.

The Convener: We do not know what councils' liability will be.

Caroline Gardner: The councils do not know, and we do not know either.

The Convener: There may be cases at tribunal in England, but is there not a big difference because English councils contracted out many of their public services many years ago, so there will be a bigger impact in Scotland from the single status agreement agenda?

Caroline Gardner: That is the case for some councils in England, but it is certainly not universally the case. I suspect that the overall impact will be proportionately larger in Scotland, but reliable figures are not available.

Professor Baillie: Current settlements are running at just under £0.25 million a year in aggregate.

10:15

Kenneth Gibson (Cunninghame North) (SNP): Paragraphs 112 and 113 in part 3 of the report are on sickness absence. Paragraph 113 states that sickness rates in Scotland's councils increased from 5.1 per cent in 2005-06 to 5.3 per cent in 2006-07, which means that around 13,700 council staff were off sick on any given day. Have you

considered the reasons for that sickness absence rate and why there are variations in rates across the local authorities? What steps is Audit Scotland taking to help councils develop best practice and performance indicators to address the problem?

Professor Baillie: Again, Caroline Gardner is close to the work on that, but there is something that I want to say. The sickness absence rate is one of the targets for making efficiency savings in the future. Tremendous efficiency savings could be gained if the figure was attacked and dealt with in a way that employees and councils were content with. Some 3.1 million days a year are being lost because of sickness absence, according to the report. It is clear that there is scope for efficiency savings to be made if the figure is attacked properly.

Caroline Gardner: We have considered the issue using the statutory performance indicators and best-value audits of individual councils. It is clear that there is not a single reason or set of reasons behind the figure in the report. We want to understand the problem better, so we are proposing to carry out a detailed study of sickness absence and its management in the joint programme of studies that Audit Scotland carries out for the Accounts Commission and the Auditor General for Scotland. We will consult on the matter over the summer. We expect to consider what councils are currently doing and where there is room to improve. Such an approach takes account of the fact that council services are different in different areas. The issues that teachers face are very different from those that manual workers face, and councils must ensure that their strategies reflect those differences.

Kenneth Gibson: I know that the figures are different for different employment categories, but we are also talking about a geographical spread. I am sure that you would agree that such differences are much less easy to explain. Will you consider how health boards deal with sickness absences and what happens in the private sector to find out whether anything can be learned to manage the problem?

Caroline Gardner: Very much so. The aim of our studies will be to look for good practice from elsewhere, whether from councils, other parts of the public sector, or the private sector.

Gordon Smail (Audit Scotland): I confirm that we have proposed a cross-cutting study. We are responsible for almost all parts of the public sector, and we will look across it. We will consider what is happening in central Government, the national health service and local government to find out where best practice exists. How sickness absence is measured is an issue, of course; how it is measured in the public sector varies. There will

be scope in our work to consider what is happening elsewhere and find out best practice.

David McLetchie (Edinburgh Pentlands) (Con): I want to revert to the single status agreement and equal pay claims. My questions follow on from those that the convener asked.

Am I right in thinking that there are two cost implications? First, single status in the new pay grades, structures and so on will result in on-going revenue costs for councils. Professor Baillie, you mentioned that implementing the single status agreement arrangements has cost 1 to 8 per cent of staff costs to date. Secondly, perhaps as a result of the research on single status agreements, there are potential costs resulting from equal pay claims, which are fundamentally back claims and would therefore have to be financed either from councils' reserves or from a special supplementary payment on top of the existing grant. Is that broadly correct?

Professor Baillie: It is. The single status agreement is an agreement with the unions to have everybody who does the same work on the same level of pay. Sometimes that will mean adjusting people's pay downwards over a period of five years and sometimes it will mean adjusting people's pay upwards—of course, there are people in the middle whose pay will not change. That is essentially what the single status agreement is. It is a UK-wide attempt to standardise things.

David McLetchie: You said that the cost of that process is 1 to 8 per cent. I took it from that that it is not cost neutral but that the experience to date of councils that have reached agreement is that the overall salary bill has increased by as little as 1 per cent in at least one instance and as much as 8 per cent in another. Is that correct?

Professor Baillie: There is an element of that, but there is also a goodly chunk of back pay for those whose settlements are now being implemented but dated back to the time when the single status agreements were reached.

David McLetchie: I see. So there are three dimensions: current pay, back pay and equal pay claims, which are another issue.

Professor Baillie: Yes, that is correct.

David McLetchie: On current pay and back pay, if 40 per cent of councils' expenditure is salaries and they spend £16 billion, that probably means that £6 billion to £7 billion is spent on salaries. As 8 per cent of that is £480 million or thereabout, the cost could be as little as £60 million to £70 million—1 per cent of £6 billion to £7 billion—or as much as £500 million. Is that a fair range?

Professor Baillie: Yes. I hazard a guess that it is unlikely to run out at 8 per cent, which is why I pointed out that 1 to 8 per cent was the range and that the cost was somewhere in between. Caroline Gardner has the detail of the figures.

Caroline Gardner: There is a great deal of variation in the stage that each council has reached at the moment, which is why we do not think that it is possible to put a reasonable estimate on the final cost of resolving single status.

There is a particular risk that it is worth being aware of. Councils that resolve single status early generally use that as an opportunity to tackle the equal pay issues as well, but councils that still have not resolved single status have growing liabilities for equal pay rolling up as we speak. Therefore, simply letting the situation run carries a risk over and above any elements of back pay that may be required and the fact that reaching a settlement is getting more difficult because the scale of the equal pay liability is also growing over the period.

David McLetchie: Is there enough money in the funding allocation that the Government is giving to councils for this year and over the next couple of years of the comprehensive spending review to meet the anticipated claims?

Caroline Gardner: The councils that have already settled—as Professor Baillie said, that is around a third of them—have managed to do it within the resources that are available to them. In general, there is no reason why other councils should not be able to do that with the significant caveat that we know that it is getting more difficult because of the extent and complexity of the case law. Therefore, it is difficult to give a firm assurance either way.

Jim Tolson (Dunfermline West) (LD): Professor Baillie, it was interesting to hear some of your comments about the changes post May 2007. I think that you said that 47 per cent of elected councillors are new. You made the good point that they bring new ideas, enthusiasm and impetus to many of our local authorities. Has the significant turnover in local authorities been beneficial overall? It may be too early to determine that. Has the support that is in place for new members been sufficient to enable them to hit the ground running? Most of the changes came about because previous elected members were offered a one-off redundancy package. Would it be helpful if the Scottish Government were to determine that there should be a redundancy package with each election to even out any inequalities that occurred with the major change in 2007?

Professor Baillie: I will take the points in the order in which you raised them. I could not

comment on the quality of the councillors who have retired. We had fears that new councillors would arrive and not know what to do and that there would be a real risk of councils being managed less well than they ought to be, but we have been pleasantly surprised at the enthusiasm and fresh approach that the new councillors are bringing with them. They do need support, particularly on scrutiny processes, because it is important that councils have those processes properly in place as part of their governance. The councils that perform better and deliver best value more effectively have effective governance arrangements, of which good scrutiny arrangements are part. That means that people who are elected have to be on the ball in scrutinising policy decisions and considering whether the use of resources is sensible and economic. That takes training as well as experience.

Most councils are offering training. One of our concerns from time to time is the extent to which members are taking it up. The difficulty with training, wherever it is held, is that it can be offered and people can have it, but its effectiveness, which is the important thing, can be measured only by their subsequent performance. Nevertheless, the initial training is there. We would like to see all new councillors going along to training courses, because it is important and it keeps their minds open on a number of things. It is important that experienced councillors go on training courses, too—after all, nobody has a monopoly on wisdom.

I will ask Caroline Gardner to answer your question about redundancy.

Caroline Gardner: Jim Tolson is absolutely right that as part of the changes that were introduced for the elections last May, there was a one-off offer of a redundancy payment for councillors who undertook not to stand again. The Accounts Commission does not have a role in relation to policy. The issue that Jim Tolson raised is very much a policy issue for Government, rather than an issue for the commission.

Johann Lamont (Glasgow Pollok) (Lab): I want to raise one brief point before I turn to the more substantial issues that I want to cover in relation to single outcome agreements and community planning partnerships.

I am quite surprised that you referred to fresh ideas and impetus in councils, because I would have thought that they were hard things to test. My impression is that your organisation is all about technical testing. Is there a technical definition of the distinction between an efficiency and a cut in service?

Professor Baillie: There is indeed—and there has been much debate and argument about it. Caroline Gardner can talk about the detail of it.

Caroline Gardner: Since the beginning of the efficient government initiative three or four years ago, the commission has been clear that an efficiency is either getting more for the same expenditure or the flipside of that, which is getting the same for less expenditure. We are looking for councils to be able to demonstrate that, where they are planning and making efficiency savings, they can demonstrate the relationship between the input and what they get for it. A cut is different: it is where you simply spend less on something and get less for what you spend. Sometimes that is necessary, but it is not an efficiency saving—it is a cut.

Johann Lamont: If a local authority contracted work out with a tight specification, which meant that, in effect, the cut was being borne by the service provider, would you monitor that? Would you deem that to be an efficiency, because the council was getting more for less money in the contract, although the service provider might have to cut into what it could bid in that contract? Would that come up anywhere in your measurements?

Caroline Gardner: It would not come up in the short term, but it would come up in the long term. If the effect on the service provider was not sustainable, it would show up as being a cut—a reduction in the quality or amount of service that was provided. Again, we would expect councils to monitor that themselves.

Johann Lamont: Do you monitor the quality of service delivered by a contracted outlet?

Caroline Gardner: We expect councils to do that themselves.

Johann Lamont: You talked about governance and scrutiny. I refer to single outcome agreements and community planning partnerships. We know that the funding for community planning partnerships remains ring fenced for the next two years. What is your understanding of where the plans should be? How are they supposed to be scrutinised and what are the reporting mechanisms for them? Do you have a particular role in relation to the plans?

Professor Baillie: That is one of the concerns that we have about community planning partnerships and other external organisations. The accountability for outcomes is going to have to be defined more closely so that we know who does what and when and who is responsible for what and when. We are alive to that issue and we will be looking at it. We will need to look more closely at the general issue of governance in respect of community planning partnerships. Community partnerships will continue to develop so it is

important that the governance arrangements ensure that the council's view prevails.

10:30

Johann Lamont: As I understand it, Audit Scotland was involved in devising single outcome agreements, which raises the question about how independent Audit Scotland can be in monitoring their impact. You said that local councils should understand how you scrutinise and that you should be able to scrutinise spend across the public sector. How do you envisage that happening with the single outcome agreements? For example, the single outcome agreements seem to be between central Government and local government, but there are obvious implications for health board funding, community planning partnerships and so on. What should a single outcome agreement look like? Who devised it and who will monitor it? How will councillors scrutinise it and how will it be transparent to others who have an interest in it?

Caroline Gardner: You are right that Audit Scotland is represented on the high-level group that is developing the approach to the outcome agreements; I sit on that group on behalf of the commission and the Auditor General. Our role is not to be involved in the agreement of the individual outcome agreements, but instead to make sure that the guidance that is being used meets our expectations of accountability arrangements, performance management and public performance reporting to ensure that questions of the sort that you touched on can be answered satisfactorily both by politicians in the council and the local area and by local people.

There are two important points. First, the commission has been clear that the move towards single outcome agreements and the reporting against the 15 outcomes and 45 indicators does not in any way change councils' existing responsibilities under best value for good performance management and good public performance reporting. The commission is currently considering how the SPIs need to develop to ensure that good information about the quality, value for money and accessibility of services is reported to local people. The commission feels strongly that that element needs to be retained and developed alongside the single outcome agreements.

Secondly, the package of reporting around the outcome agreements and council-level public performance reporting are the starting point for the Accounts Commission's thinking about what the second round of best-value audits should consider. We will be looking for councils and their partners to be able to scrutinise and challenge that performance management information and the

way in which it is made available to local people so that, in turn, they can hold their council and its partners to account for what they are doing.

Johann Lamont: You are saying that there will be some process whereby there will be a check along the lines of what you have just described before a single outcome agreement can even be signed off. However, the agreements are supposed to be with the Government just now.

Caroline Gardner: We are not involved in that process. The outcome agreements are very much agreements between the Government and local government. We have been involved in developing the guidance and the expectations around performance management and public reporting, but we are not involved in the agreement of outcome agreements, in order to protect the commission's independence, as you would expect. Best-value audits will look at the way in which councils and the Government are monitoring performance against the outcome agreements and more widely, and how they report that to the public.

Johann Lamont: So basically you will not be able to intervene unless the agreements fail and there is a problem.

There has been a lot of concern among equality organisations that there are no compulsory elements in the single outcome agreements. We know about the problems with equal pay. Although we have had an auditing process for a long time, nobody flagged up—perhaps 20 years ago—that if someone pays their women workers a different amount of money from the amount that they pay their men workers, it will come back to haunt them.

As regards equality proofing single outcome agreements to ensure that people understand the way in which services are delivered, does your guidance specify elements that should appear in the agreements? One of the current dangers is that the agreements are like a pick and mix, so councils can pick what they want to do and will measure performance against that, but their responsibilities to other parts of the population do not feature at all.

Caroline Gardner: The Accounts Commission is dealing with that through the best-value audit process. You will know that equality is one of the 10 characteristics of a best-value council under the guidance. In the first round of audits, we have taken a relatively low-key approach to equalities and sustainability, as councils have been developing their own approaches to mainstreaming those issues.

The second round of audits will ramp up expectations and will take a much closer look at how equalities are handled across the piece, partly through the outcome agreements but also through

a range of management processes and outcomes such as the relative rates of pay of different groups of staff in various equalities groups. We do not see the outcome agreements as being the only way for things to happen, and the Accounts Commission's—

Johann Lamont: But your advice would be that, given the history of equal pay, it would be advisable for local authorities to ensure that the single outcome agreements that they are currently devising are properly equality proofed.

Caroline Gardner: Mainstreaming leads us to that logic anyway. Each of the outcomes and indicators to which a council commits itself should take account of equalities issues. That is a statutory duty for councils, as it is for all public bodies. The Accounts Commission will approach the matter through the second round of best-value audits of all 32 councils.

Patricia Ferguson (Glasgow Maryhill) (Lab): You mentioned the guidance that is being produced for local authorities. Is that guidance public?

Caroline Gardner: Yes. It is on the Scottish Government's website.

Patricia Ferguson: I return to a point that Professor Baillie made about community planning partnerships, in which I have a particular interest. I want to clarify whether I picked up one of your comments correctly, as I might not have done. I took you to say that the council's view prevails.

Professor Baillie: No—I rather short-circuited my thought process. I was speaking about best value, which Caroline Gardner subsequently touched on. We tend to look at the review of best value from the council's point of view. That is what I was getting at. We are assessing the effectiveness of community partnerships and their work with councils from the standpoint of how the arrangements deliver for the councils. I rather short-circuited my earlier explanation, for which I apologise.

Patricia Ferguson: That clarification is helpful. I am also interested in the cross-cutting work that you do. It is not just local authorities that have an interest in the work of community planning partnerships and in the outcomes of that work. Will you examine the relationships of other bodies with community planning partnerships? I am thinking about health boards, the police service, the fire service and other organisations.

Professor Baillie: The short answer is yes. You will be aware of our evidence to the Justice Committee on the police planning framework and the tripartite arrangements. Caroline Gardner will wish to fill in the detail on that answer.

Caroline Gardner: That element will be very much strengthened in BV 2. In the first round of best-value audits, we conducted a baseline assessment of how well community planning was working, starting with the council and working out to its partners. We know that we only started to scratch the surface, however. In the overview report, the Accounts Commission finds that community planning processes are becoming better developed.

We think that the focus needs to move on to partnerships demonstrating their impact on local people. As we develop the second round of best-value audits, we are considering how to move out and get under the skin of the question of how well councils are working with their partners. We are also considering how we can take advantage of the joined-up system of public audit in Scotland, in which Audit Scotland works for both the Accounts Commission, in relation to local government, and for the Auditor General, in relation to the rest of the public sector. We need to get the best out of that joined-up approach.

Patricia Ferguson: I very much welcome that element of your work, as you check what impact community planning partnerships are having on the ground, where they matter and where they were designed to have an impact. How deep might the research go? Will you go into communities and talk to people, or will you just consider the evidence that is brought to you either by the community planning partnerships for particular areas or by local authorities? Will you talk to people who are involved in the process and to people who might like to be involved in the process?

Caroline Gardner: The principles that the commission has approved for conducting the next round of best-value audits have service users and local citizens front and centre among the people whose perspectives are of interest. That is easy to say, but it is a lot harder to achieve in practice. Over the next six to nine months, we will be exploring how the audits should take on people's perspectives in that way, but without cutting across what councils and their community planning partners should be doing to engage with local people and to ensure that their views are taken into account in the planning and delivery of services. The commitment is absolutely clear.

Professor Baillie: That is something that we really must do—it is an element that we must explore and implement. However, we are concerned that it is inevitably quite expensive to achieve such an approach. The challenge is to find the means of getting a reliable answer, but without spending too much public money.

Patricia Ferguson: It is a job worth doing.

Professor Baillie: I agree.

The Convener: The report identifies that the number of staff employed in local government is around 258,000, which represents a reduction of 1.5 per cent on the figures in the 2006 report. It mentions evidence that councils are achieving efficiencies by freezing recruitment and so on. How is that consistent with workforce planning? Are you confident that the opportunity is not being taken to cut the wage bill willy-nilly?

Professor Baillie: I do not know whether the report touches on it, but part of the reason for the cut is that some employees have been transferred to organisations that work for councils.

The Convener: Following housing stock transfer, for example.

Professor Baillie: That kind of thing.

The Convener: How many staff does that amount to? Is the figure significant?

Gordon Smail: We do not have the numbers. Some staff have been transferred to the new arm's-length organisations that councils have set up. Glasgow is a good example—it has set up a trust to run all its cultural activities.

Professor Baillie: Your question was related to—

The Convener: It was related to consistency with workforce planning. We know from today's evidence and from previous evidence that a substantial cost to local government is its workforce, which is an area that is ripe for efficiency savings. Despite people transferring over, do you expect the local government workforce to be reduced year on year?

Professor Baillie: I touched on that issue in my introduction. At the moment, HR departments in councils are so tied up with getting the single status agreements settled that they are unable to give the proper time and attention to medium and long-term workforce planning. We are not necessarily advocating that that workforce planning goes up, down or sideways; it is simply something that has to be done in order to meet each council's demands for services in future. Like any other core activity, one would expect efficiencies as part of that. Such efficiencies do not necessarily involve a cut in the number of people; there can be different ways of working.

The Convener: Do we know how many care workers and social workers we have in local government, and how many we will need in five years' time? We have experienced the same situation in the health service. We were unable to deliver the services that people wanted because we did not plan. Is there an audit of the workforce? Have the gaps been identified? Who would do that

work? Would the role be taken by individual councils through community planning or by COSLA?

Professor Baillie: That is precisely our point. If you want to look five years ahead and beyond, you need to plan in detail and try to estimate the extent to which services, such as social work services, will be in demand.

Caroline Gardner: Quite detailed workforce figures are available—that is where our figures come from. Our concern is that it is not clear that councils are consistently doing what is needed—the health service has been trying to do this—which is to look ahead five, 10 and 20 years and say, “This is what we expect to happen in the population that we serve, and here are the different ways of working that we need to take into account.” It is not just about efficiency savings or cuts; it is about saying, for example, “This is the way we provide social care now.”

In the future, if there are going to be much larger numbers of older people, who may expect to be able to stay in their homes for longer, how do we shift the work that care staff do and how do we work more closely with the health professions? What does that mean for professional training and development? That is another area on which we will consult over the summer; it is an area that is worthy of study so that we can get into the detail and understand what good practice looks like and how councils throughout Scotland measure up against that good practice. We know that there is a lot of variability but we do not know what the overall picture looks like.

10:45

The Convener: But we are not prepared for the demographic trends in five years’ time. We do not know how many social workers or care workers we will need or how they will be funded. In an area such as Inverclyde, where there are a disproportionate number of elderly people, the Government could decide that we need X number of social workers and X number of care workers but not be able to plan for that because the funding is currently being used to deal with the crisis that exists at the moment. Not only workforce planning but financial planning needs to take place around that.

Professor Baillie: I started by saying that financial planning must be integrated with workforce planning and asset management planning.

The Convener: Are you aware of any work that is being done in that area with the Scottish Government?

Professor Baillie: I am not aware of any specific work on that.

The Convener: Are you aware of any work that is being done by COSLA on the issue?

Professor Baillie: Work is certainly being done by COSLA on all sorts of issues just now. Caroline Gardner knows the detail of that.

Caroline Gardner: The Scottish Government’s work on the Scottish futures project, which goes back a couple of years, has been examining the impact of the demographic changes that have occurred both on the demands on public services and on the questions that are thrown up about how we provide them. The fact that there is a growing number of older people and a decreasing number of younger people means not only that more older people need services, but that there are fewer young people available to become care workers, health professionals and so on.

The commission has identified a concern at a level down, at the point at which individual councils, working together or on their own, can start to put their plans in place. They should be identifying the money that they expect to have available over the next period, the staff that they think that they will need and the training, development and recruitment that they need to put in place for them, as well as the people that they may need to attract into their areas to provide services. We think that that is not happening consistently enough so far.

The Convener: So we will probably have to depend on imported workers because we have not planned ahead.

Caroline Gardner: That has certainly been the trend so far. We know from our best-value audits that some councils are already doing good work to grow their own workforce locally. There are some strong examples of that in individual best-value audits. We would like that work to be done much more consistently and, as Professor Baillie said, we would like it to be linked to the other elements of the business that councils need to manage. Gordon Smail may want to add to that.

Gordon Smail: I will just add a point of detail. The convener asked specifically about what is being done. Paragraph 121 of our report reflects the work that COSLA is doing with the Society of Local Authority Chief Executives and Senior Managers, the Scottish Government and the Society of Personnel Directors in Scotland around the crucial issue of effective planning for the future. There is some work going on there.

Kenneth Gibson: One person’s efficiency saving is another person’s cut. To an Administration, it is almost always an efficiency saving, whereas, to an Opposition, it is almost

always a cut. What level of variance is there in efficiency savings? What incentives, if any, exist to encourage local authorities to make greater efficiency savings while, at the same time, maintaining or enhancing the level of service delivery?

Caroline Gardner: As you will know, we have seen a shift this year towards local authorities being able to retain the efficiency savings that they make and reinvest them in services. Councils would argue that that gives them a greater incentive to ensure that efficiency savings are made as well as the ability to make some of the bigger-scale changes that we have been talking about—to identify priority areas and genuinely reinvest in them. However, the commission's view is that councils' plans for doing that must be transparent and must take account of the longer-term implications that Ms Lamont talked about earlier. That is not easy to do—we know that—but it is important to be able to demonstrate that councils are investing in priorities. That must not be lost sight of.

Kenneth Gibson: Local government welcomes the fact that it can reinvest the efficiency savings of 2 per cent instead of having 1.5 per cent top-sliced, but is there any incentive for councils to exceed the 2 per cent target? Local authorities might think that they have to make a saving of 2 per cent year on year and that, if they made a 3, 4 or 5 per cent saving in one year, which could be reallocated to front-line services, they would get chased if, because of that, they did not make a further efficiency saving in the following year. What mechanisms are in place to ensure that councils do not think that and that they secure real improvements as soon as those can be delivered, rather than delaying them for the reason that I have suggested?

Caroline Gardner: There are two points to make. First, we know that councils are facing a number of financial pressures. We have talked a lot this morning about single status agreements. There are also rising fuel prices, which affect a range of aspects of services, and other things that councils need to take account of within relatively constrained resources. That is the case across the public sector. There is an incentive for councils to consider ways of taking out money that is not spent on essential services, or which can be spent better, and reinvesting it.

Secondly, the commission's work on the best-value audit process is picking up centrally the theme of the use of resources. The commission is looking at councils' overall plans for ensuring that they get the best from their money and that they can demonstrate that to the citizens and taxpayers to whom they are accountable.

Johann Lamont: I return to the question of efficiencies. Is it not a contradiction to say that although efficiencies are about providing a better quality of service for less money, local authorities must make blanket 2 per cent efficiency savings across all their departments? If councils are saying to every department that they must make 2 per cent efficiency savings, they are not assessing the quality of the service against how much it costs—they are presuming that there must be a saving. Is it bad practice to have a blanket 2 per cent efficiency savings target across all departments?

Caroline Gardner: We certainly think that it is more effective for a council to consider, service by service and area by area, where there is the most potential to make efficiency savings. The potential for such savings will not be the same across the piece. Councils will know the areas where they have already made a lot of efficiency savings or significant changes.

Johann Lamont: If a local authority sent out a memo to all its departments to say that, given that authorities are now particularly incentivised to find efficiencies, departments are obliged to find 2 per cent savings, would that be deemed bad practice?

Caroline Gardner: Which approach to take is a policy decision for each council, but the more effective ways of finding savings that we have seen in best-value audits involve councils considering where there is likely to be the most scope for savings, rather than making a blanket cut.

Johann Lamont: Earlier you made the distinction between an efficiency and a cut. With an efficiency, you get the same for less money or more for the same amount of money. It cannot possibly be acceptable to insist that individual departments all have to find the same level of efficiencies. If they do not find such efficiencies, there is a cut in their budget from the centre, which they have to find a way of managing.

Caroline Gardner: It is not the commission's role to set policy on how councils find efficiencies, but I agree that it is likely to be much more effective to find efficiencies by looking at the areas where there is likely to be more scope for them.

In the past two or three best-value reports that the commission has considered, there have been a number of services that have not had their competitiveness benchmarked for 14 years or so. Those services might be as efficient as they can be, but, by looking at what is required, there might be scope to do things differently and make savings that are real efficiencies and do not affect either the quality of the service or the terms and conditions of the workers. The commission thinks that that would be the better way of finding and achieving efficiency savings.

Patricia Ferguson: My questions are an extension of Johann Lamont's. We have heard that local authorities are incentivised to make efficiency savings. I realise that there are definitions of cuts and efficiency savings, but what is to prevent local authorities from saying that they are just going to make cuts, because they will get to keep the money anyway and will carry on within the framework that they have? How can you ensure that local authorities are differentiating in the way that your definition of cuts and efficiencies leads you to think that they should differentiate?

Caroline Gardner: The best-value audit includes a strong element on the use of resources, which we are beefing up for round two, which starts next year. We ask whether local authorities understand how much money they have to spend over the next period, what pressures they need to manage within that money and where there is scope to make efficiency savings. Equally important, we ask whether they are making that information transparent through their duty of public performance reporting to the local people who pay for and depend on services. That is what the best-value audit is looking for. How councils achieve the efficiencies is a matter for them, but they must be accountable for that to local people.

Patricia Ferguson: Will people who use council services—as we all do—be able to make that distinction? If a service just does not get provided any longer, will they know whether that is a cut or whether it involves an element of efficiency savings? How would a lay person know?

Caroline Gardner: That is part of the overall duty of public performance reporting, which is not consistently done well enough, as the commission says in the report. It is a critical counterpart to the single outcome agreements.

David McLetchie: I have a couple of questions on the issue of free personal and nursing care, which is highlighted on pages 36 and 37 of your report. On the vexed question of assistance with food preparation, you refer to

“Ambiguities in both the legislation and guidance”.

I am with you on the guidance that has been issued, but the interpretation of the legislation, which is the governing matter, is another question. When councils such as the City of Edinburgh Council and West Lothian Council took independent legal advice from counsel, they were given unequivocal guidance that led them to stop charging and to pay out substantial amounts of money in refunds.

Professor Baillie: What is the question?

David McLetchie: Are you aware of the independent legal advice that councils such as the

City of Edinburgh Council and West Lothian Council received?

Professor Baillie: Yes.

David McLetchie: They received unequivocal advice that led them to stop charging and to pay money back to people.

Professor Baillie: Yes.

David McLetchie: Are you aware of any council having taken similar independent legal advice that came to a different conclusion?

Caroline Gardner: We will come back to the committee on that point. The team that worked on the issue is not part of the panel that is before the committee today, and I do not want to mislead the committee. We will drop the clerk a note in response to the question that Mr McLetchie has asked.

Professor Baillie: It is a little while since the report on free personal and nursing care was published but, if I remember rightly, councils' different views on the issue that the member has raised were considered in our discussions.

David McLetchie: I understand that. My concern is whether the legislation is ambiguous. I made the point that those councils that took independent legal advice on it were given such unequivocal answers that they paid money back to people instead of charging.

Professor Baillie: Both councils came to the same view in light of the legal analysis that they received.

David McLetchie: Exactly. I would like you to clarify whether other councils have received a different legal opinion.

I have a related question. Are you aware that some councils refused to take independent legal advice because they feared the outcome?

Caroline Gardner: We are aware that some councils chose not to take legal advice, as you indicate. We do not know the reasoning behind that decision.

David McLetchie: No, but we can make a good guess. Are you aware that COSLA refused to take independent legal advice on the matter on behalf of all councils, although the rules are exactly the same throughout Scotland?

Caroline Gardner: Again, you are right factually.

David McLetchie: Are you aware that COSLA refused to sponsor a test case that would have had the matter decided definitively by the courts?

Caroline Gardner: Factually, that is correct.

David McLetchie: Basically, certain councils that have taken independent legal advice have been advised unequivocally that charging is wrong. On the basis of that advice, they have ceased charging and paid money back to people who have been wrongly charged, which is perfectly proper and correct. As far as we are aware, everyone else is burying their head in the sand and hoping that the issue will go away.

Professor Baillie: That is one summation of the position.

David McLetchie: I would very much like to hear an alternative summation, but it would probably not be appropriate for me to ask you to give it.

Caroline Gardner: The Accounts Commission and the Auditor General chose to conduct a study of free personal and nursing care because of the difficulties to which David McLetchie has referred. They have made recommendations to Government for resolving the ambiguities and differences of view that exist.

David McLetchie: The report that you published in January was good on the inconsistencies in the guidance that has appeared. At issue is whether there are any inconsistencies in the law.

The Convener: I thank the witnesses for their time this morning.

10:59

Meeting suspended.

11:02

On resuming—

Local Income Tax

The Convener: Agenda item 3 is oral evidence on issues that relate to local income tax. I welcome Professor Christopher Himsworth, who is a professor of administrative law at the University of Edinburgh; Professor Richard Kerley, who is the vice-principal with responsibility for international strategy and commercialisation at Queen Margaret University; and Professor Alan Page, who is a professor of public law at the University of Dundee. Members have seen the submissions. Rather than invite brief introductions from each witness, it might be more useful to go directly to questions.

Kenneth Gibson: I welcome such eminent visitors to the committee. Given that the session is all about the legality—or not, as the case may be—of the proposed local income tax, will the witnesses comment on the Presiding Officer's statement of 11 November 2004 on the proposed Scottish service tax? He said:

"In my view, the provisions of the Council Tax Abolition and Service Tax Introduction (Scotland) Bill would be"

well

"within the legislative competence of the Scottish Parliament."

As the witnesses know, that tax would have been set nationally.

Professor Alan Page (University of Dundee): The obvious comment, which is highly relevant to the issue that is being discussed, is that although the Presiding Officer is required to express an opinion on whether any legislative provision would be within the Parliament's competence, that opinion is not definitive and does not even bar discussion of an issue by the Parliament. Such a statement is simply an expression of a view by the Presiding Officer.

Kenneth Gibson: So you do not necessarily think that the Parliament—I am sorry; I should allow the other gentlemen to speak.

The Convener: Do the other witnesses broadly agree with Professor Page's view?

Professor Christopher Himsworth (University of Edinburgh): I do not have sufficient notice of the content of the Council Tax Abolition and Service Tax Introduction (Scotland) Bill or the reasoning behind the opinion. Otherwise, I share Alan Page's view about the status of that statement.

Professor Richard Kerley (Queen Margaret University): As I am not a lawyer, I would take a

view based on the practice that I observe or read about elsewhere, which is that although Presiding Officers may be very impressively qualified people—all the Scottish Parliament's Presiding Officers have been such—they do not have the final word on whether what may ultimately become legislation is either within the competence of this Parliament or challengeable by others in a court. Were that the case, we would not see some of the discussion that is currently going on at the Westminster Parliament.

Kenneth Gibson: Do you agree that, given the importance of such legislation and of the proposal that we are discussing, the Presiding Officer would have recourse to expert legal opinion on the matter, which he could rely on to advise him whether it would be legally competent?

Professor Page: Absolutely.

Kenneth Gibson: If there was a nationally set local income tax—if you want to call it that—and local authorities could not exceed a rate of 3p in the pound but could vary the rate up to that level, what would be your view on the competence of such legislation?

Professor Page: That is an interesting question. There is no question but that the Scottish Parliament could legislate to replace the council tax with, for example, a local income tax of the kind that you describe. The objection that is taken at the moment is to the form of the tax and the fact that it would be set centrally in Edinburgh rather than by councils around Scotland. The implications of that are very interesting. Let us take your scenario, in which the legislation is framed in such a way that local authorities have discretion over how much they levy, and let us assume that that would be within the bounds of the legislation. Let us also assume that, as happens in other countries, all local authorities agree to levy up to the maximum rate, which in effect achieves the same result. Is that illegal?

Kenneth Gibson: That is what I am asking you. You are the experts.

Professor Page: It is a genuinely fascinating question.

Professor Kerley: I would tend to agree. I came to the matter with a cautious view on the powers of the Parliament to legislate in the terms proposed by the Cabinet Secretary for Finance and Sustainable Growth. Now that I have examined the issue more closely and thought about related legal matters and decisions, particularly the capping regime that could still exist, I have come round to the view that I think it would be possible for the Parliament to legislate to enable each of the 32 local authorities to set a rate of local income tax—that would result in 32 different rates. As happened with the decisions on council tax this

year, the councils might all come to the same view, but I assume that they would have to reach it separately rather than have it determined by someone else. Whether such a patchwork of arrangements is desirable in a relatively small country is a separate matter.

Kenneth Gibson: Members are champing at the bit to get in, but I have a final question.

In the second bullet point under the heading "Some contextual comments", Professor Kerley's submission states:

"It is possible, for example, that a substantial proportion of pensioner households will incur costs under any proposed 'LIT' scheme as great or greater than current CT costs and it is pensioner households that have been most vocal about the Council Tax."

Can you expand on that? How did you come to that conclusion?

Professor Kerley: My broad proposition is that you can model in aggregate. Indeed, the consultation paper makes it clear that the examples given reflect a general position, in which assumptions are made about the household in terms of level of income, number of people, other forms of income—there are many and various forms—and the age of the people, whether together or separately.

Age Concern Scotland is doing some work on that and I believe that it will submit evidence to the committee or observations in response to the consultation. Its work appears to suggest that there are a number of pensioner households, whether single or two person—there are unlikely to be more than two people in such households—for which the cost of a local income tax would be greater than what is paid currently in council tax. One can find everywhere idiosyncratic examples of people about whose circumstances we do not know.

Kenneth Gibson: Are there figures to which you can refer us?

Professor Kerley: The figures from Age Concern Scotland surprised me, because I read them as suggesting that 100,000 pensioners would pay more in local income tax. That struck me as a very high figure. I have not had time to ask Age Concern Scotland where the figures came from. It is extremely difficult to work out such figures, especially when one moves beyond salaried income and includes people who receive state pensions, superannuation through a defined benefits scheme and/or pension income through a money purchase scheme. It is entirely possible for people to have all three forms of income simultaneously, although they are treated differently for taxation purposes. To obtain a detailed answer, it is necessary to consider individual circumstances. Some of the letters from

pensioners that I have seen in the newspapers and some of the interviews with pensioners on the radio suggest that the complexity of the issue is greater than even we can imagine. Some pensioners make claims that, *prima facie*, do not add up—in the broadest sense, rather than in a technical sense.

Jim Tolson: The issue has become especially polarised in political terms in Scotland. In my view, the Conservatives want to retain the present unfair tax system and to tinker with it to help pensioners and other well-off groups, but the system will still be unfair. In some ways, I am surprised that Labour members are happy to retain the current system when a change might help those who are not so well off. At least the SNP has seen that there is a fairer system that can be introduced—local income tax. Today we must address the legality of introducing such a system. The Government must acknowledge that it must abandon its plans for a nationally set local income tax and join the Liberal Democrats in supporting a local income tax that is set locally. That is both a legal and a much fairer way of introducing such a tax.

Professor Himsworth, in your submission you state that article 9 of the European Charter of Local Self-Government

“seeks to protect the access of local authorities to ... financial resources”.

You conclude that the Scottish Government's proposals for a local income tax would be in breach of that article. Why is that so? In your opinion, what would be the legal competence of a local income tax that varied in different local authorities? Would it be legally competent under the charter for any form of local income tax to have a fixed rate for an introductory period and, after a certain time, to change to a variable rate, with each local authority setting its own rate within a specified band?

11:15

Professor Himsworth: Thank you for your question; I will deal with it in stages. To assist me, I will refer back to the previous question. The issue of competence relates to the Scotland Act 1998. Perhaps annoyingly, I share Alan Page's view that the question whether a nationally prescribed tax would be incompetent under the 1998 act is an interesting one. I have not come down definitively on either side of the argument. My only reaction to the specific question that was put is that, if a local income tax gives local authorities a measure of freedom to fix the rate, it is bound to be a move in the right direction. I stress the point about legality and competence that arises in that context, because one has to be careful about the status of

the charter that I invoke for other purposes in the rest of my submission.

With regard to your question on article 9, it is worth bearing in mind that its principal requirement is that, irrespective of whether the money comes entirely from central Government grant or from other forms of locally raised income, local authorities must have adequate resources.

My submission does not address the question whether a local income tax would meet such a requirement. It might well do; however, there will always be differences of view over whether local authorities have adequate resources now or will have them under the new regime. I was alighting in particular on the requirement in article 9 for “Part at least”—which, I admit, is rather ambiguous—of local authorities' financial resources to derive from income that is locally fixable. If one reached a point at which local authorities in Scotland had no discretion whatever over the total funds that they raise each year, one would be bound to be in breach of both the spirit and the letter of article 9. That is why I am concerned about having a nationally fixed tax rate that appears to give no discretion.

That said, the argument on the other side is that other fees and charges are locally fixable enough to give local authorities a little bit of wiggle room, which means that an approach might not need to be sought through a local income tax. My submission refers to that, but I should say that I have not done the work on it. However, if you rely on that tax as the principal means of conferring a degree of local autonomy in fixing tax rates but do not give local authorities that chance, you will on the face of it be in breach of the charter to which the UK is party.

Jim Tolson: I mentioned the political polarisation that has occurred. There is a real danger that, if no agreement is reached on this matter, it will have to be settled in the courts. Would that be advantageous or disadvantageous to Scotland?

Professor Himsworth: For the courts to resolve the lawfulness of the tax?

Jim Tolson: Yes.

Professor Himsworth: I have no strong views either way. I suppose that any Parliament—indeed, any Government—that steers in a direction that might invite legal challenge has to bear in mind that such a problem is a possibility. The extent of that problem is part of the political calculation that must be made when one embarks on that track.

Professor Page: I readily understand—and share—the preference for such matters to be decided politically rather than judicially. However,

because the Scottish Government and Parliament work within a framework of limited powers, this whole question arises. Given the devolution settlement, any change to the existing system will unavoidably and inevitably raise questions of legality and therefore lead to judicial involvement.

Professor Kerley: In pragmatic terms, it seems that not simply in Scotland but in the United Kingdom as a whole, we have an increasingly activist judiciary that reviews legislation, usually at the plea of people much affected by it, and it has taken different views even on the interpretation of single words in the legislation. As part of my evidence, I make the point that there are specific single words in the Scotland Act 1998 that I consider to be significant and meaningful, rather than just thrown in arbitrarily by the people who drafted the act.

As one of your number found out the other week, even the single word "provided" can be subject to interpretation by a court, albeit a very local court. I would always prefer that legislatures and decision-making bodies expressed their views crisply and competently so that they are not open to continued debate and discussion. Surely your earlier evidence-taking session turned on just that point about what legislation actually means.

Jim Tolson: I thank the gentlemen for those answers, with which I agree. It is my strong view that it would be preferable to find a solution to that issue and many others through the democratic process rather than by judicial means. I hope that political colleagues can be flexible enough to find such a solution.

The Convener: We might want to explore that further.

Professor Page, you are aware that we operate within limited powers. The objective is to secure continuity and raise local government finance. If there were a big political division and questions about legality and implementation, how likely is it that this would end up in the courts? How would we deal with the situation in the interim, when I presume that we would have introduced and agreed the bill by one vote or whatever, however difficult that process had been? Would local government have no finance or means of raising it in the interim, while we transferred to the new system?

Professor Page: It is inevitable that the matter would end up in the courts; it is unavoidable and, indeed, it is desirable for the reasons that you have just given. The question of legality will cast a long shadow over the proposal until it is settled one way or another.

The nightmare scenario would be that we ended up in a poll tax situation, in which people would refuse to pay, saying that the Scottish Parliament

has no power to impose a local income tax. The question of legality needs to be got out of the way. There are mechanisms by which that could be done before the practical matters of collecting the tax and the change from one regime to another arise.

Alasdair Allan (Western Isles) (SNP): Professor Himsworth, you mentioned in your submission a concern that a local tax for local services should not be set nationally if it is to comply with the Council of Europe's treaty, which is known as the European Charter of Local Self-Government. Is that a fair summary of your concern in that area?

Professor Himsworth: Yes, all other things being equal. As I said in response to an earlier question, if there were other means whereby at least a part of local spending could be under the control of local authorities, any tax that was not a part of that part, so to speak, could be centrally devised without running into difficulties. However, there has to be an element somewhere or other in the totality of local authority spending that derives from locally fixed taxes or charges.

One looks to the proposed local income tax part of the system to provide that element, simply because the history of the emergence of the proposal leads us there. The systems of domestic rates, then the community charge, then the council tax and now the proposed local income tax, have been the principal device whereby local authorities have had a residual power to fix the level of revenue that they gather each year, albeit subject to lots of constraints.

Alasdair Allan: So even though business rates are fixed nationally and pay for local services, you would exempt them from your criticism of the proposed new local income tax.

Professor Himsworth: The criticism can be made only when one takes a view across the system. One does not criticise a reliance on grants from the Scottish Government for coming entirely at the determination of the Government, or possibly in negotiation with COSLA. Basically, the decision on how much to give to each local authority is for the Government and one does not criticise that element, because it does not give local authorities the possibility to regulate the amount that they get overall. Let us consider the situation hypothetically. If we are to rely on that element to provide the discretionary element for local authorities, but that is not forthcoming, that is the point at which one says that it is in defiance of the relevant requirement of the European Charter of Local Self-Government.

Alasdair Allan: To be clear, when we speak about that requirement, it is a Council of Europe treaty, not European Union law.

Professor Himsworth: Absolutely.

Alasdair Allan: Does that charter form any part of Scots law that could be justiciable in a Scots court?

Professor Himsworth: No. I do not spell that out in great detail in my submission, but I say that there is a distinction to be drawn between, for instance, the European convention on human rights, which has been justiciable for a long time, at least in Strasbourg—latterly, by virtue of the Human Rights Act 1998 and the Scotland Act 1998, it has been justiciable, in a sense, in the courts of Scotland—and the European Charter of Local Self-Government. The charter is different. It is an international obligation of the state, which is policed and monitored by other means. That does not mean that we cannot say that something happening in the UK is contrary to the charter, and it does not mean that criticisms may not be made by the Council of Europe—through its political mechanisms, its monitoring and its scrutiny—of the member state. In this case, the member state is the UK rather than Scotland, because the UK has undertaken the obligation. I am not saying, however, that a citizen or anybody else could simply go along to the Court of Session and challenge the legality of the proposed new law.

I have been quoted as using the word “illegal”, but I do not think that I used it. The question at what point we can say that the proposal is incompetent and therefore testable in the courts of Scotland arises with reference to the Scotland Act 1998 and the legislative competence of the Parliament; it does not derive from the status of the charter.

The Convener: Does Professor Kerley or Professor Page wish to say anything about any aspect of that question or answer?

Professor Page: There is nothing that I wish to add.

David McLetchie: I wish to ask about two points concerning the interpretation of the Scotland Act 1998. The issue seems to be about whether the proposed tax comes under the heading of

“Local taxes to fund local authority expenditure”.

Presumably, the first use of the adjective “local” has to have some meaning—it was not just thrown into the Scotland Bill capriciously. Would it be fair to say that the use of the phrase “Local taxes” does not refer simply to the purpose of the tax—that is, the funding of local authority expenditure—but must somehow relate to the nature, characteristics and structure of the tax? There must be some local elements present in it. Is that a fair interpretation of the legislation?

Professor Page: It is certainly one interpretation, and it is one with which I have some

sympathy. However, I would urge against the adoption of too literal an approach. The distinction in the legislation is between local and national—national not in the Scottish sense, but in the UK sense. We are talking about local taxes as opposed to income tax, corporation tax or capital gains tax, all of which are reserved. Fiscal policy is reserved—the act mentions “taxes and excise duties”, and “local” means in contrast to them.

Secondly, the legislation urges that, when determining whether a provision is within the powers of the Parliament, regard must be had to its purpose, taking into account its effect in all circumstances. In other words, it requires us to take a purposive approach to the question of competence. There is no question but that the Parliament has the power to replace the existing council tax with something. The issue is whether the setting of the local income tax rate in Edinburgh, by the Scottish Government, rather than by local authorities, deprives it of a local character.

11:30

David McLetchie: Are you saying that a proposed tax that had no local characteristics—by which I mean no local government-style characteristics—and that was not defined with reference to a local government area, set by a council, collected locally or assessed locally for value could be still be regarded as a local tax?

Professor Page: It could nevertheless be a local tax.

David McLetchie: In this context, does “local” mean Scotland?

Professor Page: I am not saying that that is the case, but it is arguable. I am wary of the argument that such a tax would be illegal or beyond the competence of the Parliament simply because, on the face of it, there would be no local connection, other than the purposes for which the money was to be used. Without question, the Parliament has the power to replace the existing arrangements. It could frame any new arrangements in a variety of ways. It could do so in such a way that the objection that has been made was addressed but, as I hinted earlier, in practice there was no variation whatever in Scotland, because all local authorities had agreed the rate at which they would levy the tax. Mr Gibson’s question was about precisely that issue.

David McLetchie: Would the other witnesses like to comment on whether it is possible to devise a replacement tax that has no local characteristics in the terms that I have described but is still competent?

Professor Kerley: I am getting lost in both the

question and Alan Page's answer, but I can answer your initial question directly. My answer is yes.

David McLetchie: There have been so many negatives and double negatives that I have forgotten what the question was. It will save a great deal of ambiguous interpretation in the future if you will indicate for the record what you are saying yes to.

Professor Kerley: The ambiguity may be caused by the fact that you are a lawyer and I am not. My view is that the double use of the word "local" in section A1 of part II of schedule 5 to the 1998 act is intentional and is not a drafting error. I interpret it as meaning that some variation should be available in whatever we define as local. I take the view that currently in Scotland only the boundaries between the 32 local authorities are recognisably local. There may be other interpretations on which I am not competent to comment—sheriff court boundaries might be regarded as local—but health service boundaries clearly mean nothing. Traditional county boundaries also mean nothing, except in ceremonial terms, so "local" must refer to the boundaries that are defined in the Local Government etc (Scotland) Act 1994. I think that that is what was intended in the 1998 act.

Professor Himsworth: The question of what is meant by "local" is the test of whether the proposal is competent. Once again, I share Alan Page's position. It is perfectly possible to read schedule 5 to the 1998 act in the way in which Professor Kerley describes and to say that a disaggregated meaning must be placed on the first use of the word "local" in section A1, to distinguish it from "local authority expenditure". Another view—for which the Lord Advocate, on behalf of the Scottish Government, will no doubt argue, if the matter ever goes to court—is that no such disaggregated meaning should be given to the word "local", that the entire provision relates to local authority expenditure and that the fact that the proposed tax produces money for local authorities gives it its local character.

I am afraid that it would be for a judge to decide. A point that I did not stress in my submission is that, as you know, you ask a question that remains hypothetical until we have the text of a bill. One is bound to be cautious—it is one of the reasons for the caution that I express in my paper—until one sees the text. Only then would any lawyer begin to commit him or herself to an interpretation against the Scotland Act 1998. We are all engaging in a form of speculation about what we might do if the bill came out more or less as we suppose from the consultation document that it will.

David McLetchie: That is a fair point. In that context, it might be worth noting that Mr

Sheridan's Council Tax Abolition and Service Tax Introduction (Scotland) Bill, which was mentioned, placed the legal responsibility for collection of the Scottish service tax on local authorities, although Mr Sheridan envisaged that it might be subcontracted to the Inland Revenue. Would it be fair to say that Mr Sheridan's bill had a local characteristic because he placed the legal responsibility for collection on the local authorities? That would validate the Presiding Officer's judgment on its competency.

Professor Himsworth: I am not sufficiently familiar with the text of that bill to comment. What I say in my observations on the local income tax proposal is that I would not expect the question whether a tax is local to be determined exclusively by its mode of collection. It does not seem to me to be wholly offensive for the means of collection to be not wholly local or not local at all. On the other hand, that does not rule out the possibility that its localness should be achieved through the mode of collection. As these things go, although I may be wrong, collection is much less important than the locus of decision making on the rate.

David McLetchie: I will ask about the issue of the vires of any legislation and the possibility of a challenge in the courts, to which the convener referred in his question. Professor Himsworth's submission states:

"Only if it is manifestly clear that the power to impose the tax in the manner proposed has been conferred should a court rule in favour of the law's competence."

I would interpret your submission as meaning that the court should err on the side of any challenging taxpayer.

If a bill that abolished council tax and introduced a local income tax without any of the local characteristics that we have been discussing were ruled ultra vires by the court, would the court be ruling ultra vires only the local income tax that was introduced? In other words, would the court strike down only the sections of the bill that introduced the local income tax and not the sections that abolished the council tax?

Professor Himsworth: That is a good question. Others might address the second question when they have had a moment to reflect.

Your first question was about my observations that it would have to be "manifestly clear" that the power had been conferred. Commentators have struggled since the beginning of devolution with the problem that no cases based on the reservation of powers under the Scotland Act 1998 have hit the courts. That is probably a good thing from many points of view, but it is a shame from the point of view of deriving any guidance as to how the courts will react to the act in particular circumstances. The situation is not a complete

novelty, as legislative powers have been devolved to Northern Ireland for many years and the courts had a limited opportunity to say how the provisions of the Government of Ireland Act 1920 should be interpreted, but the courts in Scotland have not had such an opportunity. In my submission, I try to put together some thoughts, some of which have been referred to already, which derive from the Scotland Act 1998 and the guidance that it gives.

It is also known that in other contexts—not in the context of the Scottish Parliament because it has no track record on this—taxing powers will, on the whole, be construed strictly against the taxation authority. Normally, for example, courts will be inclined to construe against the use of delegated legislation by ministers to tax in ways that are not authorised under the authorising statute. My hunch is that a court might be induced to take a similar line on this aspect of interpretation and to construe strictly against the Government. On the other hand, the argument from the other side would be that we are talking about a Parliament with general devolved powers, not a mere minister. People could argue, “This is as near as we get in the UK to a constitutional statute, as opposed to merely a defined statutory power.” Those considerations would then outweigh the considerations that would be invoked on the taxpayer’s behalf, which would tend towards strictness.

I am afraid that I cannot be much more helpful than that. A balance would simply have to be struck in interpreting the 1998 act.

David McLetchie: If we assume for the purpose of the question that a local income tax was construed as *ultra vires*, could we end up with the courts striking down only the sections of the bill that are *ultra vires*—that is, those sections relating to the local income tax—and the *intra vires* sections of the bill being kept on the statute book? Repealing the council tax clearly must be *intra vires*.

Professor Page: I think that the legislation caters for that possibility. However, the truth is that the proposal would be dead in the water if that happened. The status quo ante—the position as it was before an attempt was made to enact the legislation—would have to be reverted to.

David McLetchie: In the meantime, would a lacuna not exist? Would there be no legislation and no valid taxing power? Some £2 billion of money would not be raised for councils.

Professor Page: I presume that the authority to collect council tax would not be repealed until the question of legality was definitively settled. I do not think that we would end up in a position in which no local tax of any form whatsoever was raised.

David McLetchie: So the Government needs to include a just-in-case section in the bill that

eventually emerges, just in case the local income tax is pronounced illegal. We had better not replace the other tax first.

Professor Page: That is why I said earlier that the question has to be gone into and authoritatively settled before anything is replaced.

David McLetchie: Indeed.

Professor Himsforth: There might be a solution within the interpretation of the effect of the annulment. Alternatively, it would take the Parliament a very short time to pass legislation to reinstate the council tax if that was necessary. Well, one would hope that it would want to do that.

11:45

Professor Kerley: I hesitate to be a good person found among three lawyers, but it seems to me that fascinating and complex matters are involved. I have been interested in the manner in which the proposed local income tax has been presented as if it were a hypothecated replacement for the council tax in respect of the value of moneys that might be raised by it. I do not see that that is the case. If the proposed local income tax does not raise the amount of money that represents the gap between council expenditure and aggregate financial support from central Government, central Government support will require to go up or councils will be required to reduce their expenditure. Councils must balance their budgets each year, even if in notional terms they say that they will receive more income and achieve greater efficiencies than most people believe that they will.

I agree whole-heartedly with my colleagues when they say that the actions of a Parliament must be treated with more respect by the courts than the actions of, say, a statutory non-departmental public body or another agency doing something that it is not entitled to do. One is democratically elected; the other is not. The only other instance that we have of democratic election is that of local authorities. There have been various instances over the years when local authorities, some years after the legislation in question has been passed, have been determined to be acting *ultra vires*. One example was the Borough of Hammersmith and Fulham and Allerdale Borough Council judgment on interest rate swapping; another is the Borough of Hillingdon judgment on the power of individual councillors. Local authorities were left with a vacuum and simply had to stop doing things that they had previously assumed they could do. Alternatively—and we are talking about UK-wide provisions in both the cases that I mentioned—several hundred local authorities could have continued to do the thing that had been

determined to be ultra vires in the case of Hammersmith and Fulham and simply been slapped by the courts on each occasion.

I accept what members were saying in the earlier discussion about charging for food preparation—I assume that that is what you were talking about. Most authorities take the view that a test case that is definitively settled is sufficient for them to decide, “Whoa, we’re not going to do that any more.” They will have pretty good evidence that they can no longer do something. That leaves a gap, however. I am not so confident that reinstating the council tax, even if it could be achieved in 24 hours of legislating, would be a good way to enhance the respect of citizens for government at all levels.

Bob Doris (Glasgow) (SNP): Good morning, gentlemen. Thank you for coming today. Perhaps I can take us back down to earth, and away from the fantasy and speculation that Opposition politicians who want to defend the council tax wish to bring to the committee. Perhaps we can get back down to some facts.

Section A1 of part II of schedule 5 to the Scotland Act 1998, “Fiscal, economic and monetary policy”, lists

“Fiscal, economic and monetary policy, including the issue and circulation of money, taxes and excise duties, government borrowing”

as being reserved. Built into that, however, is an exception, which we have spoken about today:

“Local taxes to fund local authority expenditure”.

In speaking about that, we have heard a lot of wordplay about what we mean by “local taxes” and “local authority expenditure”. That line of the act goes on to say

“(for example, council tax and non-domestic rates).”

It is only fair to focus on non-domestic rates, but we should bear in mind that it does not say “specifically, council tax and non-domestic rates”; other taxes could emerge. Would the witnesses agree with me that non-domestic rates are currently a national tax to fund local services? I ask that before continuing with my line of questioning.

Professor Himsforth: I have put something about this in my written submission. I acknowledge that part of the trick of interpreting that bit of the 1998 act is to give meaning to that phrase. There is a reference to non-domestic rates, and I refer in my submission to the fact that, because non-domestic rates are currently centrally prescribed, they are not much of an example of local decision making as to tax levels. That is an argument on the side of suggesting that local taxes to fund local expenditure do not absolutely have to be locally determined.

I am sorry about this—I am trying to sit on the fence to a degree, and I am trying to provide the arguments that seem to be rather obviously against the competence of the tax. However, there are one or two other arguments that tend in the direction of supporting it. If I were paid to be in court on the side of supporting it, those would be the arguments that I would use. The issues would have to be canvassed. If the example of a local tax that is given is, at least for the time being, a centrally prescribed business rate, that indeed tends in the direction that you suggest. However, I do not think that it conclusively determines the meaning of “local taxes”. There are other arguments besides that one.

Professor Kerley: I see the point in the question, and I have quite a lot of agreement with it, but there is a further element of the non-domestic rates arrangement that is pertinent. Whereas the rate is struck nationally—it is different in Scotland from in England—the assessment is carried out locally. The forms of taxation for non-domestic rates are based on a number of different forms of assessment. I forget what they are, but they are things like the contractor principle, the replacement principle, the membership flow of golf clubs and so on. Clearly, valuations vary dramatically. There is an instance of one university, where I had discussions recently, whose estate’s entire capital value is so much that it is hesitating about what to do to balance its reporting standards for the capital value as opposed to the everyday level of activity. There is an element of localism there.

It is worth bearing in mind why non-domestic rates are set centrally. It is because, over the years, it was not simply citizens who were complaining about the levels of taxation that they observed through rates and so on; businesses were arguing that they were being used as an easy target by various local authorities. The then Conservative Government created a means of conducting consultation with businesses. When that did not seem to work, it moved to the aggregation of non-domestic rates. There are differences.

Bob Doris: Thank you for providing the historical context and some of the technicalities that could be used for the administration of a nationally set tax to provide local services. The Scotland Act 1998 specifically mentions non-domestic rates. It does not add a caveat; it simply mentions them. If the interpretation is that non-domestic rates are set nationally, as I think we would all accept, but they fund local services, I put it to you that, if a local income tax is set nationally but delivers for local services, that would, by the same token, also be legal. That would seem to be quite clear, especially given the example that is specifically mentioned in the 1998 act.

I would like to ask you a further question. I am sure that you will agree with these figures. If a business has a rateable value equal to or under £29,000 a year, it must pay 45.8p in the pound in non-domestic rates, irrespective of which local authority the business is in. Would you accept that?

Professor Kerley: I am not familiar with the detail on that point.

Bob Doris: I can assure you that that is correct. If the rateable value is above £29,000, the business would have to pay 46.2p in the pound, irrespective of which local authority the business is in. Those rates are nationally set, and they provide for local services.

I will mention one other thing that I would like you to reflect on and on which I would like to hear your comments. As you know, a small business bonus scheme was put in place. The proposal went through the Parliament, and there were no objections to it. That small business bonus scheme says that, if a business has a rateable value of “£8,000 or less”, it will get 80 per cent relief; if its rateable value is

“More than £8,000 but not exceeding £10,000”,

it will get 40 per cent relief; and if its rateable value is

“More than £10,000 but not exceeding £15,000”,

it will get 20 per cent relief. That is from a Scottish statutory instrument of this Parliament. No one at the time said, “Whoa, haud yer horses, Government!” Nobody said that that was ultra vires or outwith the terms of the 1998 act. If it is legal for the Parliament to amend the provisions of one nationally set tax that is used for local services, surely local income tax follows precisely the same logic.

Professor Page: That is a big leap in logic, is it not?

Bob Doris: At least we are dealing with logic rather than fantasy at the moment.

The Convener: Bob, let the witness answer the question. You cannot object about the answer that you get.

Bob Doris: Certainly not—I listen with interest.

Professor Page: I personally think that that is quite a big leap in logic. The example that you gave was an amendment of the terms of a local tax, albeit one that, as you rightly point out, is set nationally. I am sympathetic to the point, as I think we all are, but the other, crucial point is that none of us sitting round this table can authoritatively determine the question. Ultimately, it falls to be settled by the courts. As Professor Himsworth says, we are simply speculating about the

arguments that might hold sway and prove conclusive.

Bob Doris: Is anyone aware of—

The Convener: Give the witnesses a chance to answer if they want to, Bob.

Professor Kerley: There is a difference between complete change and variation. I have no doubt that, given that there is a single-person discount of 25 per cent on the council tax, the Parliament could determine that that discount should be increased to 30 per cent or reduced to 20 per cent, which seems more analogous with the rates-relief system. One should bear in mind that the highest proportion of non-domestic rateable value out there in Scotland is attributable to very large organisations, not necessarily businesses. I do not think that your palace neighbour over there pays non-domestic rates; I am not sure, but it did not use to. I am not sure whether there are rateable charges on the Parliament building.

The Convener: There are indeed.

Professor Kerley: Many organisations do not report a turnover in that sense. I am with Alan Page—the leap of logic is too far for me.

Professor Himsworth: I am afraid that I agree with that. I appreciate that one has to give some meaning to the reference to non-domestic rates, but it is quite a leap from an adjustment to the manner in which that is levied to the devising of a new local tax. Other considerations would apply.

Bob Doris: I appreciate that. The reason for asking was that if one tax is legal under the Scotland Act 1998, another would be too. That is my personal position. We might have heard some people say that the proposal to amend one nationally set tax for local services is illegal, but we have not heard anyone say that it is illegal to amend business rates in Scotland.

The Convener: I think Professor Himsworth made the position clear. The word “illegal” has not been used; it is about testing the competence of the Scottish Parliament. Some of that language has been attributed to him, but it does not appear in any of the submissions that have been presented to us this morning or in other evidence.

Professor Himsworth: That is correct. It is a question of whether the law as made would be law at all. I do not object altogether to the use of the epithet “illegal”. However, the problem is still that you cannot move at great speed from the position of one legislative change a year ago, or whenever, to another, and simply reason by analogy. Certainly, you cannot reason from the argument that such a proposed change attracted no complaint. It is often the case with legislation that no complaint may be found for years and years

and it might be only after a long period that someone thinks to make the complaint, perhaps in respect of another related proposal.

Johann Lamont: I preface my remarks by saying that a number of people had serious reservations about the small business bonus scheme, not least because it lacks evidence, outcomes or conditions. However, that is clearly a political matter rather than a technical one.

For information, would you expect the Scottish Government to take legal advice before putting out the consultation document so that the arguments would be balanced? I presume that the Government is obliged to undertake a risk assessment of any proposed legislation that it pursues. Would the presumption against the taxation agency, as opposed to against the taxpayer, have to be factored into any legal advice that was provided to ministers?

Professor Himsworth: I assume that at the point of devising a bill, legal advice is bound to be taken in that a minister would have to sign off a declaration, statement or certificate to say that in his or her view, the bill was competent and within the powers of the Scottish Parliament. I assume that it would be almost inevitable that the Government would take legal advice before signing off such a certificate.

12:00

Johann Lamont: Whatever the legal process inside the Executive—or Government—would the obligation on the civil service be to ensure that it articulates the accompanying risk that you have identified? There would be no requirement on ministers to take the advice, but officials would need to lodge it somewhere in the system.

Professor Page: The question of legality will almost certainly be gone into in considerable detail.

Johann Lamont: The committee may, in the future, want to request sight of the evidence on that.

I am interested in the two separate arguments in Professor Himsworth's submission, one of which seriously questions the competency, under the current devolution settlement, of the Government's proposal. I think that you are saying that, if a country—no matter how its status is defined—is signed up to being part of the European Union, it would face legal challenge if it tried to define a local tax in the way that is proposed. I think that you are saying that such a challenge could be made regardless of the devolution settlement.

Professor Himsworth: Yes, but with one important proviso: the two issues are set out separately because one does not necessarily lead

to a judgment that a tax is unlawful whereas the other does. The issue of legislative competence arises uniquely, in terms of our purposes, in the Scotland Act 1998 settlement, which is why we are focusing on the act to interpret the powers of the Scottish Parliament in this context. If the UK Parliament were to legislate in this way for England, for instance, it would not face the same question of competency that the devolved Scottish Parliament would face. Of course, that is because the UK Parliament would be legislating directly for the state.

The sway of the European charter applies throughout the United Kingdom, but it is not European Union law. I made the point earlier that non-compliance with the charter does not lead to something that is likely to be actionable in the courts of Scotland.

Johann Lamont: Yes, but when we are trying to balance the powers at every level of government, is it not reasonable to say that the view across the European Union is that part of valuing local government is valuing its capacity to raise moneys? The issue is more one of good practice. In essence, we are talking not about legality but the language that we use in talking about the balance of powers across government.

Professor Himsworth: I agree with that. Also, we are talking not only about the European Union but the 47 countries, virtually all of which have signed up to the charter. Again, virtually all have undertaken to respect the provision.

Johann Lamont: I understand that the Scotland Act 1998 allows for a 3p in the pound variation in income tax.

Professor Kerley: On the basic rate.

Johann Lamont: Yes.

Would the courts take the view that what is proposed in terms of a nationally set tax of 3p in the pound, which would be set across the whole country with no influence at the local level—local government has no capacity to shift it one way or another—is, in effect, the same thing? If it is the same thing, why does the Scotland Act 1998 distinguish between local taxes and the nationally set 3p in the pound variation in income tax?

Professor Himsworth: With respect, it is not the same thing. The consultation paper does not go into the legal basis of the proposed tax—or, it does not do so in so many words. My understanding is that what is being invoked is the power to impose local taxes instead of using the power to vary the rate on the basic tax. The proposal would produce a different result. For its validity, one would look to schedule 5 to the 1998 act.

Johann Lamont: In the reasonable world where “local” means local—where common sense says that any such proposal should have a local element—the reasonableness test would be of whether the court sees a difference between 3p in the pound being set on someone’s income at the Scottish level and a local income tax that is set at 3p in the pound on income. Is it not reasonable to draw the conclusion that the tax is not a local tax but equivalent to a proposal that would come under other powers in the act?

Professor Himsworth: That is the argument that has been made; it is Mr McLetchie’s point. Must separate meaning be given to the localness of the tax—I presume principally through its being locally determined, which would be what would give it its localness—or would it acquire sufficient local tax characteristics simply because it was devoted to local purposes down the line? I am afraid that there is room for both possibilities. In part of my paper, I share your starting position that local tax means a locally determined tax but, equally, one can see room for the argument that the alternative view is true.

Johann Lamont: You made the point that, if it was possible to establish that there were other local charges, those could be the local bit and, therefore, the tax would not be against the charter. If those charges were not ones that it would be reasonable to expect anyone in a local authority area to incur, would it mean that that test could not be applied? For example, if they were only charges for support for a child with disability or for an elderly person and they were variable, would that be sufficient to pass your test, or would it have to be a charge such as one for collecting the bins?

Professor Himsworth: That is a good question and, to be honest, the answer is that I do not know. Because the European Charter of Local Self-Government is not justiciable in the courts of any part of the United Kingdom and not justiciable directly in other courts, we do not have such fine-tuning of the meaning of that part of it. My hunch would be that a charge that could be regarded as having a level of impact that could be described as *de minimis*—that is, a minute impact on a minute proportion of the population—would not satisfy the terms of the charter but that something towards the other end of the scale might begin to, perhaps along with other charges.

The Convener: It could do. There is a warning in, I think, Professor Kerley’s paper that, given that local authorities would be constrained from raising taxes but would have the power to levy fees and charges for other services that they provide, such charges and fees could increase. You suggest that, if that was all that we were left with, we could have the local income tax plus.

Professor Kerley: Absolutely. I will spare you a long history lesson, but local authorities have habitually been poor at considering charges for services, although across the piece they charge for in the region of 600 different activities. They have the right to do that and exercise it, but have tended to treat it as an afterthought: they consider the rate of inflation and, if it is 3 per cent, they increase prices by 3 per cent.

I anticipate that, if a major element of fundraising discretion were removed, local authorities would enthusiastically or reluctantly use their charge-varying powers to the maximum, test out the elasticity of demand and ask whether, if they have previously charged a flat rate for a service, they can push the charge up or vary it. They will consider introducing peak charging, shoulder charging and charges for activities for which they have not previously charged. Much of the charging regime in local authorities is historically based and has not been the subject of intensive or serious review. The rental charge for local authority housing and local authority properties and licences also benefit commercial operations. If I had a limited area of discretion, I would maximise my discretion in that area.

The Convener: Did you say 600 activities?

Professor Kerley: In total, there are about 600 activities.

Patricia Ferguson: If the charter is not justiciable in Scottish law or UK law, what would happen if we went against our obligations in that connection? Are there any penalties?

Professor Kerley: There are no direct penalties. The Council of Europe, through the Congress of Local and Regional Authorities of Europe, carries out a process of monitoring and supervision in the background, with a more or less frequent programme of inspections of the member states. Alternatively, the congress can investigate complaints from a country on an issue. The congress then expresses whether the charter requirements are being met, and that works its way up through the political processes of the Council of Europe, which can lead to a political rebuke for the state on its lack of compliance with the charter. A similar rebuke can result from a breach of other treaties that the Council of Europe polices. However, the charter does not have the directly enforceable characteristic that, for instance, the European convention on human rights has.

Patricia Ferguson: A breach would be more of an embarrassment and a moral issue rather than anything else.

Professor Himsworth: Yes—that sort of thing.

Patricia Ferguson: We have all tried to debate with you, with greater or lesser effect, the legality of the proposals. You rightly say that the devolution settlement has never really been tested in law in Scotland to find out what would happen with case law. What would the courts consider if they were to adjudicate on a bill that contained a proposal for a local income tax? For example, would they take into account any pronouncements by the Presiding Officer or the guarantees that I presume the Government would give on the legality of the proposals? If the Parliament were to debate the issue, which is by its nature controversial, the outcome of the parliamentary deliberation would likely be close and could even come down to one or two votes. Would the courts take that into account, too, or would they simply look at the text of the Scotland Act and adjudicate using that?

Professor Himsworth: They would look almost entirely at the text of the bill, if the proposal was at that stage. That would happen in the Judicial Committee of the Privy Council or, if the process is delayed for a year or two, in the Supreme Court of the United Kingdom. If the legislation was tested after it had been completed and was on the statute book, the principal focus would be on its text. I am sure that people who were involved in a case would remind the court that the bill was signed off by the Presiding Officer, if it had been, and that it attracted the certificate from the minister. That would no doubt be mentioned as part of the case.

It is less likely that the court would consider the balance of the Parliament's vote, although it might take account of the seriousness with which a body of the status of the Scottish Parliament took the issue and of the fact that the issues were taken on board. The courts have gone to some trouble to consider human rights issues—the issues that have hit the courts in Scotland. Rightly or wrongly, in judging whether legislation meets the human rights standards, the courts have considered whether the Parliament balanced appropriately the human rights issues and the policy concerns in the legislation.

I think I am right in saying—Alan Page will correct me if I am wrong—that there has been a judicial response to the certificates that have been given by ministers in relation to the Human Rights Act 1998. However, that judicial response simply said that it is another factor to be taken into account; there is certainly no question of being bound by what a minister thought at the time about the validity of a bill, whether in the Scottish Parliament or in the UK Parliament.

12:15

Professor Page: That is an interesting point. The Westminster Parliament has been more

successful than the Scottish Parliament in compelling the Government to disclose the reasoning behind its view that legislation is compatible with the Human Rights Act 1998. As far as I am aware, the Scottish Parliament has just accepted the certificate without any attempt being made to get at the reasons behind the Government's view although, as we all know, those reasons are crucial.

Patricia Ferguson: Any legislation that is passed by the Scottish Parliament still has to receive royal assent. Could consideration be given at that stage on the Government disclosing its reasoning?

Professor Page: There is a mechanism in the Scotland Act 1998 for pre-assent scrutiny by the Judicial Committee of the Privy Council. I imagine that such a case would go down that road.

Professor Himsworth: That has to be done on the reference of a law officer. It is not expected that the Scottish Government's Lord Advocate would do that; nevertheless, it is conceivable in such a case, in which there is the will to have the questions tested, for example before a local income tax is formally launched. It might even fall to the Lord Advocate herself to make the reference to ensure that a judicial view is taken.

The Convener: We appreciate the time that you have given us. We have a couple of brief questions to ask before we will close this evidence session.

Kenneth Gibson: My question for Professor Kerley follows what was said earlier. You pointed out Age Concern's comment that 100,000 pensioners could be worse off under a local income tax. Does that mean that the other 900,000 pensioners would be better off?

Professor Kerley: I do not know. As I said when I made that reference, I was surprised by that figure. I am also surprised that the data appear to be so hard to find. I have not yet had the chance to ask Age Concern how it arrived at that figure. I presume that, if 100,000 pensioners are worse off, the balance of 900,000 pensioners will be better off.

Kenneth Gibson: I think that we need more information on that.

Professor Kerley: I agree.

Kenneth Gibson: My second question is for the whole panel. Everyone accepts that the Government would be competent to impose an additional taxation of 3 per cent—the so-called tartan tax—if it so wished and if there was political support for that. It could, of course, disburse the moneys that it gained from that to local authorities throughout Scotland. Why, therefore, is it so difficult for it to do that and then remove the council tax element?

Professor Page: Do you mean to scrap the council tax and replace it with a local income tax?

Kenneth Gibson: Yes. That is basically what we have been talking about. The tax would be local to Scotland—not national, which, as Professor Page said, would mean UK-wide. Should it not be possible to introduce the tax in that way? I am thinking about the different ways in which the issue can be approached.

Professor Page: I need to check, but I think that the 3p could be levied only on the basic rate.

Professor Kerley: It would be 3p, not 3 per cent.

Kenneth Gibson: Sorry. Did I say 3 per cent? I meant to say 3p in the pound.

Professor Kerley: I assume that a 3p supplement on the basic rate—the Scottish variable rate—would not yield the gross moneys to replace the current gross moneys that are generated by the council tax. Therefore, if local authority expenditure were to remain the same, it would be necessary for the relevant ministers and then the Parliament to agree a further transfer of moneys—an increase in aggregate external finance—over and above the amount that is allocated to councils at the moment. That money would, necessarily, come from other budget heads that are within the control of the Scottish Government.

Kenneth Gibson: That would be the case even if Scotland did not get the £400 million back.

Professor Kerley: Even allowing for that, my calculations show that there would still be a gap.

Professor Himsworth: Whether there will be a shortfall is another matter but, on competence, there is nothing under the Scotland Act that would prevent a move to a greater dependence of local authorities on central grant, which is what it would turn out to be. The way in which the Scottish Government would then get the additional moneys—whether or not they were sufficient—would not be material to that. It would not resolve the problems that I have raised in relation to the European Charter of Local Self-Government because it would leave local authorities with no obvious local source of revenue.

The Convener: I do not know whether you were correct in saying that 900,000 pensioners would automatically be better off under the local income tax, given that many pensioners do not pay council tax in the first place, and that the amount that some people pay may stand still. We look forward to getting that information, whether it is by contacting Age Concern or through the consultation.

Professor Kerley: I responded to the question on that by saying that if that is your figure and it is correct, the balance will be better off.

David McLetchie: I have a couple of questions about the role of the Lord Advocate. The Lord Advocate is a member of the Scottish Executive. As I understand it from the Scotland Act, when a bill is introduced a member of the Executive has to certify its competence. The Lord Advocate is also a gatekeeper at the end of the process and, after the bill is passed, has the power to refer an issue of competence to the Judicial Committee of the Privy Council. If the Lord Advocate has a gatekeeper role at the end of the process, should he or she take no collective responsibility for the initial certification, and play no part in determination of that competency? Should the Lord Advocate be involved in the certification of competency at the start of the process, when the bill is introduced?

The Convener: Before you answer that, I remind members that BlackBerrys should not be in use in the committee.

Professor Page: My understanding is that the latter would be the case and that the certificate would not be given without the say-so of the Lord Advocate.

David McLetchie: Your understanding is that when a bill is introduced, the Lord Advocate is consulted, and he or she effectively takes responsibility and has to sign it off.

Professor Page: Yes.

David McLetchie: Notwithstanding that, the act gives the holder of the office of Lord Advocate collective responsibility at the end of the process.

Professor Page: Indeed.

David McLetchie: Is that the view of the other panel members?

Professor Kerley: I defer to my colleagues.

Professor Himsworth: That is probably correct. There might be a point about what is meant by “collective responsibility” in that context. There is presumably room within that process for the Lord Advocate’s role to be the legal adviser to the Executive; therefore, were questions to be asked inviting political responsibility for what is being done, I imagine that it would not be the Lord Advocate who would answer them. I take the general point that he or she is a member of the Executive. I do not know whether you are making a point about a conflict of interest, but what happens is within the terms of the legislation.

David McLetchie: This is an issue of practice, though. The issue is whether, as part of the processes of Government, the Lord Advocate effectively signs off the competency of a bill, which

means saying to a colleague—for example a cabinet secretary—that a bill is competent and can be introduced.

Professor Page: That is my understanding of the practice.

David McLetchie: Maybe we should ask the Lord Advocate.

The Convener: Thank you, gentlemen, for your attendance this morning and for your patience and your answers. I hope that in the future we may be able to discuss this interesting issue again.

12:24

Meeting continued in private until 12:48.

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