The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

# LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

Wednesday 17 March 2010

Session 3

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

# Wednesday 17 March 2010

## CONTENTS



## LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE
**8th Meeting 2010, Session 3**

**CONVENER**

*Duncan McNeil (Greenock and Inverclyde) (Lab)

**DEPUTY CONVENER**

*Alasdair Allan (Western Isles) (SNP)

**COMMITTEE MEMBERS**

*Bob Doris (Glasgow) (SNP)
*Patricia Ferguson (Glasgow Maryhill) (Lab)
*David McLetchie (Edinburgh Pentlands) (Con)
*Mary Mulligan (Linlithgow) (Lab)
*Jim Tolson (Dunfermline West) (LD)
*John Wilson (Central Scotland) (SNP)

**COMMITTEE SUBSTITUTES**

Brian Adam (Aberdeen North) (SNP)
Margaret Curran (Glasgow Baillieston) (Lab)
Alison McInnes (North East Scotland) (LD)
Margaret Mitchell (Central Scotland) (Con)

*attended

**THE FOLLOWING GAVE EVIDENCE:**

Councillor Michael Cook (Convention of Scottish Local Authorities)
Joe Di Paola (Convention of Scottish Local Authorities)

**CLERK TO THE COMMITTEE**

Susan Duffy

**LOCATION**

Committee Room 2

# Scottish Parliament

## Local Government and Communities Committee

*Wednesday 17 March 2010*

[The Convener *opened the meeting at 10:01*]

## Decision on Taking Business in Private

**The Convener (Duncan McNeil):** Good morning and welcome to the eighth meeting in 2010 of the Local Government and Communities Committee. I ask committee members and members of the public to turn off all mobile phones and BlackBerrys.

Our first item is a decision whether to take in private item 4, which is consideration of the committee's work programme. Are members agreed?

**Members** *indicated agreement.*

## Equal Pay

10:01

**The Convener:** Item 2 is an oral evidence-taking session on equal pay with Convention of Scottish Local Authorities representatives to follow up last year's inquiry on equal pay in local government and see what progress has been made. I welcome once more to the committee Councillor Michael Cook, spokesperson for strategic human resources management, and Joe Di Paola, head of the employers organisation. Do the witnesses wish to make any brief opening remarks before I move to committee members' questions?

**Councillor Michael Cook (Convention of Scottish Local Authorities):** As on the previous occasion, we are happy to move directly to questions.

**Alasdair Allan (Western Isles) (SNP):** According to our evidence, although the committee wrote to all 32 councils on the issue of equal pay, it received responses from only 21. Can you say which councils did not reply and perhaps tell us why not?

**Councillor Cook:** I do not have full details about the councils that did not respond. We have simply provided a global response on behalf of the councils that intimated a response, because it was felt that that was the best way of dealing with the matter.

As you will appreciate, though, there are sensitivities surrounding certain aspects of this issue. For example, councils might not want to show their hand with regard to budget envelopes that they might have set aside or other circumstances relating to litigants or potential litigants. In that respect, they might have been somewhat reticent about giving fully detailed responses on some of the committee's questions.

**Alasdair Allan:** I appreciate the need to maintain confidentiality. However, the numbers involved are quite large. In its submission, COSLA says that, instead of providing estimated figures with a large margin of uncertainty,

"Several councils have deemed it appropriate to give a narrative response which provides an explanation of the present situation and difficulties currently being worked through by"

them. Is it helpful to be so general? Does such an approach provide adequate information?

**Joe Di Paola (Convention of Scottish Local Authorities):** It is difficult to get the kind of drilled-down information that you would think would be the most helpful. After all, every single authority is in the process of dealing on a local basis either

with their local trade unions—and quite appropriately so—or with agents representing individual employees. Many of the discussions in that continuum are at different points along a legal road and, as Councillor Cook has pointed out, councils are reluctant to tip their hand about what are properly confidential exchanges between the council as the employer and the trade union or the lawyer representing the individual or groups of individuals. We are not saying that the information is not available; what we are saying is that we have been told by councils that, given the number of cases and the fact that the legal positions involved are not only different for every council but, indeed, different from case to case, progress is being made but they cannot give us that information. It is not an attempt not to provide proper information.

**Alasdair Allan:** COSLA also says:

"A small number of councils acknowledge that there are 'meritorious' or 'strong' claims and that settlement of these is a priority."

What does that mean? How many is a "small number"?

**Councillor Cook:** We do not have details of the number of cases that we are talking about. As you know, there are—

**Alasdair Allan:** I am talking about the number of councils.

**Councillor Cook:** It is a small number. Just a handful of councils have adverted to things in that way.

When we were here on 22 April 2009, there were a number of questions about how councils would deal globally with meritorious claims. As Joe Di Paola might have touched on, 30 single status agreements have been completed and we have explained on previous occasions that we have always seen such agreements as the mechanism for putting a seal on the matter and achieving non-discriminatory terms of pay and conditions in councils. It is then a question of working though the equal pay claims. It has been recognised that some claims are stronger than others and each council is going through sifting and risk assessment processes and carrying out a detailed analysis of each claim that sits against it in order to make a judgment about how best to respond and decide whether an offer should be made or whether the claim should be taken to the wire and contested all the way to an employment tribunal. As I explained previously, where a council recognises that certain claims are cogent, there is a dynamic, even in terms of how we deal with the public purse, with regard to responding to those claims and paying them off sooner rather than later in the recognition that if a council continues to contest something that has merit, it is likely to pay more if it takes it down to the wire.

**The Convener:** Does the fact that a dozen councils have not responded at all mean that they have made progress or no progress? How can you speak on their behalf if they have not responded?

**Councillor Cook:** We have got to come clean: we cannot tender any information on behalf of councils that have not responded to us on the committee's questions. We sought to gather in responses from councils. Ultimately, however, they need to resolve and take forward the issue individually, and I think that the fact that they have chosen not to provide information on this occasion is a reflection of that. The majority of councils have responded, and we have laid that information out before you as completely as we think we can.

**The Convener:** Can you tell the committee which councils have not responded so that we can ask them the questions directly?

**Councillor Cook:** I have not created a list of the councils that have not responded.

**Joe Di Paola:** I wonder whether I can help, convener.

**The Convener:** Yes, please. Someone needs to help me.

**Joe Di Paola:** We have not finished the process. We asked every council to reply to the questions in your letter. To date, we have received 22 responses, so 10 councils have not responded. We can give you an undertaking that we will continue to ask those councils for a response and to tell us why they have not provided a response to date.

However, it is only right to tell the committee that we cannot force our member councils to give us that information. We can request, encourage and cajole, but our relationship with individual local authorities is such that we cannot enforce anything. As I say, though, we will undertake to continue the process and complete the exercise that we undertook on the committee's behalf.

**The Convener:** Do you need to update any other figures before we ask any further questions? Of the councils that provided information, nine indicated that they had made progress. Is the figure still nine or has it increased?

**Councillor Cook:** The truth of the matter is that all councils are making progress on the single status arrangements and their equal pay claims. A process of consideration of the claims that stand against each council is going on in each of these councils. I think that we can safely say that much.

**The Convener:** As Alasdair Allan pointed out, your submission says that a small number of councils are saying that there may be strong

claims. Did you receive that information in response to your letter to the councils suggesting that claims that are particularly meritorious be considered for early settlement? What response did you get to your letter on that?

**Joe Di Paola:** In commenting on the process that they were engaged in, some councils said that it depended on how the claims were being made and on what basis. You will obviously understand that there are different legal bases for claims. One group of claims is made on the basis that a job evaluation exercise has been completed in the authority in question and has demonstrated that the work done is of equal value. By definition—it has been proved in law—those are stronger claims than claims made on other bases, so authorities have said to us that they are looking, in the first instance, at claims that are based on the outturn of the job evaluation scheme, and that they are being pressed on those by both trade unions and lawyers. That is entirely reasonable and we understood that. Those are the kind of meritorious claims that the convener was talking about previously, where there is at least an agreed basis on which jobs were valued and claims were made. They are probably at the top of the queue.

However, we have not had any evidence from any individual councils and, through them, from their local trade unions, that litigation is being pursued at a local level. Unison is pursuing cases at a Scottish level; it has a litigation strategy and it is following that. There do not seem to be any pressure points in individual authorities, but we have asked them all that question.

**The Convener:** What would you have expected locally?

**Joe Di Paola:** I would have expected locally what is happening locally, which is that discussions are taking place with agents and with trade unions about how they settle some of these claims. However, I have to say that there is a real nervousness—I think not only on the council side—about being the first or second to settle claims, on the basis that they turn up in another tribunal in another place and are cited as precedent. That is an issue and it is a difficulty for councils. I get the impression that there is also a bit of wariness about litigation on the trade union side, because the trade unions are trying to reach agreements locally without having to litigate—you would have to ask them about that, though. The situation has not moved on either side.

**The Convener:** But it has moved quite considerably for the no-win, no-fee claims, in respect of which we are approaching 70 per cent settlement.

**Joe Di Paola:** You have to be careful how you look at that. The no-win, no-fee claims are a very small proportion of the number of cases that are in the system.

**The Convener:** They seem to have achieved priority and a success rate of 70 per cent.

**Joe Di Paola:** They would say that, wouldn't they?

**The Convener:** You said it in your paper. It states:

"UNISON lodged further Equal Pay claims. Settlement offer has been made for 67% of 'no win no fee' claims."

I am sure that other members might pursue that issue.

**Mary Mulligan (Linlithgow) (Lab):** Good morning. Will you outline what action COSLA has taken to progress the issue since you were here almost 12 months ago?

10:15

**Joe Di Paola:** We have always taken a twin-track approach to equal pay claims. In the main, cases in the past five years have flowed from the introduction of single status agreements in the authorities. We have been keen to make sure that the route forward has been through authorities reaching local agreement on a single status package. Since we were here in September, at least six authorities have completed the single status process. That said, what has flowed from that process over the past 10 years before the introduction of the single status system and now through it, is that a number of people have said, "I now have a claim." We have been encouraging councils to reach agreement as far as possible through the single status process to try to mitigate the number of cases that come into the system. We say to them, "Do the single status thing as best you can with as much agreement as you can get from your recognised trade unions and any other staff interests and try to minimise the number of cases."

Notwithstanding our advice and support to our member councils on that—and the provision of legal and human resource advice over the course of the process has been pretty intense—it is inevitable that a number of cases will come out in which people are not happy with what has happened with their jobs or they think that they have been treated badly historically, which they have been. There is no doubt that women have been badly treated on pay and have gone to law to seek redress.

We are still trying to push the twin-track approach to authorities and say to them, "Get your single status in, do your appeals properly and try to cut down the number of cases." You should see the number of cases that are in the system now—it is a huge number. A lot of historical cases

predate the introduction of single status in authorities. Everybody hopes that single status should stop claims at the other side of the agreement.

**Mary Mulligan:** If I understood what you just said, by dealing with single status you will stop an increase in the number of claims, but what has COSLA been able to do to assist local authorities in dealing with the outstanding claims?

**Joe Di Paola:** Put simply, there is very little that we can do because the claims are not against us; they are against the individual authorities as employers, which have to deal with the claims. We do not have a whole lot of money to give to local authorities and cannot say, "That pays off your equal pay claims." They have to deal with those claims as part of their ordinary allocation of funds—although the amounts of money involved are extraordinary—that come through the system as per the normal distribution. We do not have any money to give them. All that we can say is, "Try to cut it off at source by getting proper agreements in place," and then they have to undertake local negotiation.

**Mary Mulligan:** I understand what you are saying—the claims are against the individual local authorities. However, you also just said in response to the convener that individual local authorities are scared, and maybe the unions are too, about being the first to put their heads above the parapet. I cannot see how we can make any progress, which is why I am asking whether COSLA has a role in bringing together those local authorities so as not to leave somebody exposed and in helping them to act in a joint way.

**Councillor Cook:** It is appropriate that COSLA is recognised for what it is. We are a representative organisation for the 32 local authorities; we can certainly give advice, guidance and support to local authorities but, ultimately, they are absolutely in the best position to judge the claims that they face, consider those claims in detail, carry out the appropriate analysis and make judgments on how to respond to those claims either through settlement or through some other approach.

I do not think that we are in a position to gainsay any of those approaches. Local authorities would very much see it as being their domain to deal with such issues, particularly because the position on single status arrangements is now entirely fragmented—there are different arrangements in each local authority area. They may follow broad parameters, but they are separate. Indeed, the equal pay claims, which in some circumstances are built on those job evaluation processes, are also particular to the local authority against which they were made. There will be huge circumstantial variation, depending on where the claims originate. That is because of the historical circumstances that have led us to the present point in time.

There is probably a limit to what we can do in that regard. I have confidence in individual local authorities to make judgments about such matters. As a member of a particular authority, I know what our approach is to dealing with claims. I am satisfied with that approach and believe that we are making progress. I believe that that is also the position in other local authorities, but I would be wary of telling members of other councils how to proceed.

**Mary Mulligan:** I understand your position, but I am not sure that I can have much confidence that progress is being made when your submission says that three local authorities indicated to you that they had not made progress and that one stated that the number of cases was still increasing. Your making a general statement that the position is improving for everyone flies in the face of what is in your submission. Given that you do not seem to know which local authorities have not responded, I am not sure that you know what their position is. It is difficult for us to accept that progress is being made when the number of people who are waiting for their claims to be settled is increasing.

**Councillor Cook:** We can certainly go back and track those authorities that have not responded, but I do not think that that would be terribly valuable. We are trying to give you a global impression of progress being made.

As we have said, single status has always been the mechanism for resolving discriminatory terms and conditions. There has been movement forward on that. That was highlighted as the proper course in previous representations to the committee. However, there are many claims, which need to be worked through. No one pretends—we have certainly not done so on previous occasions—that it will not take considerable time and industry simply to work through those claims, but I am confident that, as is the case with my authority, authorities are beginning to get to grips with them and will begin to make judgments on them.

There are certainly tensions. Local authorities have wider statutory duties in relation to how they approach claims and how they use public money to settle them. They need to factor such considerations into their deliberations, but I am confident that they are beginning to do that and that, ultimately, we will see progress on the issue. It will not be the immediate progress that people would wish for, but that reflects the nature of the problem, which is hugely complex.

**Jim Tolson (Dunfermline West) (LD):** As the convener said at the start, the purpose of this session is for us to get an update on progress on equal pay. As you will be aware, in seeking updates, the convener has been in correspondence with the Cabinet Secretary for Finance and Sustainable Growth. In that correspondence, the cabinet secretary said that he had deliberated further on whether any interventions might be necessary to help to make progress and that the matter had been discussed with the COSLA team. Can you update us on any interventions that have taken place since Mr Swinney was in contact with you? What fruitful outcomes have there been as a result of Mr Swinney's interventions?

**Councillor Cook:** I may be under a misapprehension, but my reading of Mr Swinney's evidence to the committee was that although there was a willingness to speak to local authorities and COSLA about the wider context of pay strategy, the Government viewed equal pay as being the responsibility of local authorities to resolve. That is the position that seemed to be encapsulated in his evidence to the committee, and we would agree with that. We think that equal pay is an issue for local authorities to take forward and resolve.

**Jim Tolson:** I understand your point about local authorities and, of course, as you rightly point out, they have ultimate responsibility as employers. However, your response to my first question indicates that there has been no real progress following Mr Swinney's interventions. Is that the case?

**Councillor Cook:** One thing that we could advert to is capitalisation, which featured as a question last April. Clearly, at that time there were moves south of the border to allow local authorities to use capitalisation as a way of dealing with significant claims. There has been movement on that in Scotland and there is agreement that, within the financial year 2010-11, authorities will be able to undertake £64.4 million-worth of capitalisation with a view to meeting equal pay claims.

That is obviously helpful to authorities in dealing with the weight of claims. However, we are profoundly conscious of the changing position in relation to public spending, which may impact on the availability of capitalisation as a proposition in future. There is therefore something for this year, but it is not as much as local authorities requested. I understand that they requested something approaching double that figure, but I am afraid that I do not have more detail than that.

**Jim Tolson:** I appreciate that.

Mr Swinney mentioned the capitalisation scheme. It is a separate point and I appreciate your answer on that, but there does not seem to have been any other progress, despite the pressure that Mr Swinney has told the convener of the committee he has put on COSLA to try to make progress. What interventions has he been able to make? What progress has been made?

**Councillor Cook:** That sounds more like a question for Mr Swinney. My attitude to the problem is that I am sure that, if we approached Mr Swinney on the matter, he would be willing to discuss it, but there is recognition on his part and on ours, in the evidence previously given, that we regard it as primarily the responsibility of local authorities to take the matter forward. That is certainly COSLA's view and I think that it is the view in local authorities. Other funding pressures unquestionably flow from that and there is a context for that. Capitalisation is a means by which the Scottish Government can reasonably respond to provide a mechanism for us to deal with some of these issues and it has responded in part. I think that we can move forward on that basis.

**John Wilson (Central Scotland) (SNP):** We are once again on the issue of equal pay and single status. Joe Di Paola mentioned previously, in relation to equal pay claims—I make clear the distinction between single status claims and equal pay claims that predate 2005—that a large number of the sisted tribunals relate to equal pay claims that predate the single status issue. Can you clarify how many of the 36,000 cases that are listed predate single status and how many arise out of the single status agreements that local authorities are currently working through? How many local authorities have settled, or are about to settle, on the single status claims or the single status agreements? As I understand it, some local authorities are still working through the single status agreements.

It would be useful for me and the committee to know the answers to those questions, because we are now not only five years away from the single status agreements being introduced in 2005, but are almost 11 years away from the time when equal pay should have been introduced. It is about trying to get COSLA to make a clear distinction between historic claims that predate 2005 and new claims that arise from single status. There is an issue about getting clarification on the two issues that are currently outstanding. Equal pay claims that are now 11 years out of date are a scandal for local authorities. Those claims should have been settled long before now. As I have said previously at the committee and elsewhere, the lowest-paid workers—they are predominantly female—are being penalised because local authorities have failed to act to settle equal pay claims that have been made in the past.

10:30

**Joe Di Paola:** I will respond to some of the points that Mr Wilson has made. Early in the 10-year process, in December 2004 and into 2005, compromise legal agreements with the women concerned were reached in all local authorities. Those agreements dealt in the first instance with claims that had been lodged at the front end of the process, although I understand that no claims have been extant for 11 years. The agreements were reached mainly with women—it is clear that women were most affected by inequalities. They were reached through a variety of methods, involving trade unions and authorities and a series of payments were made. Compromise agreements were not reached on all claims, because some people quite properly decided that they did not want to participate in the process, although the vast majority of claims were settled at that time, through discussions and on the advice of trade unions.

Later in the process, some individuals sued their trade unions on the basis that, in their view and from a legal perspective, the advice that they had been given and that had informed the compromise agreements had not been good. However, compromise agreements were reached on most claims from the first four or five years. Authorities then began to work through the single status issues. The introduction of job-evaluated pay systems resulted in a vastly reduced number of claims, relatively speaking. Unfortunately, if a compromise agreement covered a specific period of time and the authority concerned failed to reach a single status agreement by the end of the three years to which the compromise agreement related, women were able to make second-wave claims.

One would expect very few women to have first-wave claims from the period prior to the introduction of single-status agreements. There are some people in the system who did not compromise their initial claims, for whatever reason. Some women have taken their trade unions or representatives to law. Now there are second-wave claims, where a compromise agreement has expired and the women concerned have another claim. There is no monolith of claims. In some cases, authorities have reached agreement on a pay and grading system, but people are saying that they have a claim based on that. There is a continuum.

Few cases have been settled because the system has demanded that a series of legal questions be cleared out of the way before the substantive case is heard. I can reel off the cases that have been heard in England—Redcar and Cleveland Borough Council v Bainbridge and others, and so on. The only cases that have been heard in the Scottish system are the two Highland cases relating to the use of comparators, which clarified a legal question. Any case would be taken by the pursuer—either a lawyer or the trade unions—but no one has taken a case or cases to tribunal. Unless a pursuer does that for the cases that are in the system, they will not be heard and there will be no reduction in the figures.

Yesterday, I heard that there was a finding in favour of North Lanarkshire Council in a single status case, in which I was a witness, that has gone to an employment tribunal. That case has now gone to the Employment Appeal Tribunal and is being settled there. I do not know yet whether it will go to the Court of Session; that is up to Unison. A case can go to the Employment Appeal Tribunal and then, conceivably, to the Court of Session. No substantive equal pay case that has arisen from single status and equal pay in Scottish local government has yet been set down and heard. Until that happens, we will not get a reduction or flow-through of cases or cases being settled that create a precedent so that authorities can safely say, “Right. We’ve now got legal direction. We should settle that raft of cases.”

I am sorry that my answer was so long, but there were many points to deal with.

**John Wilson:** I am grateful for Mr Di Paola’s clarification that we are in a mess with equal pay and single status. That is exactly what I think the current situation is: we are in a mess with the settlements and how things have been dealt with.

Councillor Cook referred to local authorities not being prepared to go for a settlement in case they are challenged. He said that they would be used as examples in further tribunal settlement cases and in relation to claims that are made against those settlements by local authorities. There is a difficulty that I and others face. Low-paid workers in local authorities who have been looking for a settlement for a number of years face great uncertainty. I accept that tribunal cases are few and far between in Scotland, but they have not been few and far between south of the border, and my understanding of employment law is that those cases apply in the Scottish tribunal system: tribunal cases that have been cited apply equally, and have applied. The Redcar and Cleveland v Bainbridge case and claims against trade unions can be cited in tribunals or cases in Scotland.

The issue is how we settle things. Councillor Cook referred to the fact that local authorities must protect public money and ensure that it is not wasted. Equally, there is an onus on them to try to reach early settlements, because the longer disagreements or cases extend, the more the final settlement and local authority costs will be. Every day, local authorities are paying money to lawyers and legal departments to deal with cases, but money is being spent on both sides: it is being

spent on defending councils' positions and on defending councils against making reasonable settlements when such settlements should have been made a long time ago. The question is how soon we can expect settlements to be reached. That begs a question for the 32 local authorities.

There seems to be co-ordination among the local authorities that do not want to pre-empt general settlements being reached in case they are the ones that are used. How can we move matters forward and get local authorities to act in unison—I am not referring to the union—to resolve matters so that we are not back here in five years still talking about single status and equal pay claims on which workers have been denied settlements? The longer things drag on, the more it will cost local authorities, and the more it will potentially cost in capitalisation to settle claims. For every hour that claims continue, more money is added to possible settlements for workers who have submitted claims.

**Councillor Cook:** There was quite a lot in that.

Actually, it was Joe Di Paola who pointed out the risks of precedent having an impact on other cases. However, we need to recognise that the legal process does not simply involve one party. Obviously, the context here is that a pursuer could expedite a claim and push matters forward, but unions and legal representatives have plainly taken the view that things should not move as quickly as they perhaps could. In many respects, local authorities are just responding to that.

However, we are aware of the impact or influence of cases such as the Middlesbrough Borough Council v Surtees and others and Redcar and Cleveland v Bainbridge cases, which we accept have implications in Scotland as well as south of the border. Indeed, local authorities north of the border have responded to those cases—many local authorities will have recognised that the Bainbridge decision must be factored into their future settlements of claims. In my authority—like Shetland Islands Council, as Graham Johnston adverted to in his evidence to the committee—we believe that we have anticipated the Bainbridge-style claims through the way in which we have proceeded with single status. Local authorities have sought to respond to those cases.

It is also true that, following our previous evidence to the committee on 22 April last year, COSLA spoke to the unions in an effort to see whether we could jointly agree an approach to issuing a circular providing advice on the Bainbridge case. The unions were unpersuaded of the efficacy of such an approach, so we issued advice individually, as employers.

**The Convener:** For the sake of clarity, can Mr Di Paola confirm whether the complexity of the equal pay issue applies across the board in all its manifestations and cases? Does that complexity also apply to work that has been rated as equivalent or as of equal value? Are not such cases less complex?

**Joe Di Paola:** A better case can be made, I suppose, in respect of work that has been evaluated, where it is easier to make comparisons.

**The Convener:** I want to press further on evaluation of claims. Both in the written submission and in the explanation from Councillor Cook, we have been told that councils are revisiting some claims. Why was that process not carried out before the claims went into the tribunals system?

**Joe Di Paola:** It is difficult for me to answer that but, basically, councils did not put those claims into the tribunals system. Organisations or lawyers representing the claimants decided that they would take the claims forward through litigation. I do not, and cannot, know what happened in individual local authorities that pushed those representatives to litigation. I do not know whether they tried to reach a local agreement or settlement and then decided to litigate when no settlement was reached. However, trade union colleagues certainly have policy that they have identified to us as involving litigation strategies.

**The Convener:** In normal practice, if a council received a tribunal claim from someone, would the claim be evaluated to see whether it could be defended? Would that not be normal good practice?

**Joe Di Paola:** Absolutely.

**The Convener:** Why did that not happen when local authorities were presented with these claims? Why is that happening only now?

**Councillor Cook:** It did happen. In a way, an employer can respond to a claim only once it is made. Once the claim is made, the employer is in a position to evaluate its merit and make a judgment on whether to offer a settlement or to contest the claim. In those circumstances, the issue crystallises.

**The Convener:** For work that has been rated as equivalent or of equal value, the claims have already been evaluated. That is why people have told us that there are "strong" or "meritorious" claims in the system. Despite the fact that the claims are still in the tribunals system, there is a knowledge that those claims will need to be conceded. Only the value of those claims is at issue—

**Councillor Cook:** That is not necessarily the case, as a number of issues are involved. In some ways, the claims for work that has been rated as equivalent are a product of the single status

exercise, which gave people a context in which they could make comparisons. People then made those claims, to which councils have responded over the course of time. Councils have had to make judgments on the merit of those claims and on how they should be dealt with in the wider context, where matters relating to following the public pound and a range of issues come into play. They are making judgments about that all the time and analysing the strength of those claims.

10:45

It goes back to something that Mr Wilson said. The fact is that councils are not daft about this matter: they recognise that if a claim is convincing, powerful and has genuine merit, it is financially advantageous to settle it sooner rather than later. They are more likely to save on costs in the long term by taking that approach rather than by continuing to defend what some would characterise as the indefensible. That is not the context here; there are much more finely tuned judgments going on in relation to how individual councils should deal with the claims that they face.

**The Convener:** The committee recognised in its report that there were complex claims and legal battles still going on. It would not have been good use of public funds to insist that they be settled without going through that process, but we differentiated between those complex claims and the strong cases. We are expressing disappointment that there seems to be little or no momentum—"impetus", as the cabinet secretary described it—to settle those claims. It is not only about the low-paid workers, as John Wilson said; in the cabinet secretary's words, we also need to settle the claims

"to give certainty to the execution of local government finance in Scotland".—[*Official Report*, 1 October 2009; c 20151.]

That is our remit, too. The uncertainty in local government finance should not be made worse by unsettled equal pay claims. There is an imperative that goes beyond dealing with equal pay for low-paid workers.

**Joe Di Paola:** I understand exactly what you say, convener. The last thing that authorities want is more uncertainty in their finances. They understand that the equal pay claims are huge liabilities. Given that councils' finances are difficult and challenging and are getting more challenging, the huge sums that are in the pipeline for settling the claims do not make things any easier; they make them worse. However, at the minute, authorities are not able simply to say that they can settle the claims. They are getting advice from their own legal people—

**The Convener:** I do not think that the committee has asked for them to do that. We are focusing on the claims in which there are clearly strong cases. I am certainly not convinced that we have made the progress that we should have made. The Scottish joint council has discussed the Bainbridge case, but has it discussed the focus in the committee's report on the strong cases? You said that there was an element of fear about breaking through that. I would have thought that the committee's recommendation to allow the cabinet secretary to facilitate such a meeting could have broken through that barrier.

**Councillor Cook:** As we discussed earlier, the pursuers need to give the matter some impetus. There is not a level of push there. We also need to be careful. There is inevitably a spectrum of merit in the cases. At one end, there are cases that will be strong but the spectrum goes right through to those that are, to be quite honest, without merit. It is extremely difficult for us, even where we sit, to instruct or push local authorities. They are unequivocally in the best position to judge which claims they should respond to now and whether they should push those claims, recognising that they are defenders rather than the pursuers.

That all comes back to judgments that authorities need to make. They can make those judgments effectively only with some impetus from pursuers to take claims forward.

It needs to be said—perhaps it is implicit—that many claims are protective: their purpose is to ensure that a claimant does not lose out on a potential claim. In no way does that prevent continuing informal and formal discussion between a local authority and a claimant's representatives. The subtext of what we have said all the way through is that, ultimately, we expect the 35,000 claims that are in the tribunal system to move forward by dialogue rather than by litigation.

**The Convener:** That is the reason for my questions. Has the Scottish joint council, which involves the trade unions, discussed the strong cases? I understand the strong case element. Is the suggestion that the situation will continue until a local authority loses a court case that plunges local government into a financial crisis? Why are we not taking matters into our own hands?

**Councillor Cook:** The joint council is not in a position to understand the detail that is available to councils. Councils have their hands on a level of detail and have an understanding of the cases that they face that we do not have. To be candid, our trying to anticipate or be directive would be a foolhardy exercise.

The issue touches on the questions that have been asked about a national matrix. That idea might help, but we are not in a position now to give

local authorities any useful instruction about settling claims on that basis. As I said, the claims against each council are exceptional and unique to those councils, which will need to judge how best to respond. As a consequence of single-status arrangements and the historical context in which claims have developed, the control that we can exercise nationally has changed. It is down to claimants and local authorities to take matters forward.

**The Convener:** The only positive—I had to search for it, right enough—in your submission is annex II, which sketches a matrix by describing progress that has been made and its basis. It says:

"Offers [have been] made in respect of ... Work of Equal Value."

It explains that two thirds of claims were settled in one area and that another area has settled with no-win, no-fee lawyers. With a bit of will, that could provide the basis for discussion and the development of a matrix. If it is okay for nine or a dozen authorities to proceed on that basis, others could follow that, but I do not know whether that is the case. I do not necessarily take your pessimistic view.

**Councillor Cook:** If you refer to annex II to our letter of 12 March, that is a synopsis of responses that we received from local authorities to the questions that the committee asked. However, that shows a range of responses. That summary of responses makes the point that no one-size-fits-all approach can be taken. Some approaches pull in opposite directions.

**The Convener:** That makes the case for involving the Scottish Government to bang heads together. Today's session proves that.

**Councillor Cook:** I say with respect that it is not the Scottish Government's business but local authorities' responsibility to resolve the situation. If I were to identify a single item that could usefully be developed, it would be to allow class actions to be processed through the tribunal system. That could be reflected on nationally. Such a change would have a positive impact by allowing significant groups of cases, rather than individual items, to be pursued.

**Joe Di Paola:** I wonder whether I can help with that. It would be problematic to get an agreement in the joint council.

**The Convener:** Have you tried?

**Joe Di Paola:** There have been discussions in the joint council before.

**The Convener:** Since our report was published?

**Joe Di Paola:** Yes, but the issue is that even if a collective agreement is reached at the Scottish joint council that you will do X, Y and Z, any individual claimant can still say that that agreement does not meet their aims and objectives and does not deal with their issues properly. That is the basis on which the GMB was sued in the Cleveland case. The collective agreement that had been reached between the local authority and the trade union did not properly meet the aspirations of the individual women. That is the difficulty in trying to reach a collective agreement when the difference between the employer and the employee is a matter for an individual legal claim. That is the root problem with having a collective agreement.

**The Convener:** I am sure that we will come back to that.

**David McLetchie (Edinburgh Pentlands) (Con):** Good morning, gentlemen. I want to clarify a couple of points on single status. I think that you informed us that 30 of the 32 councils had now reached single status agreements with their employees. Can you advise us which two councils have still to reach such agreements?

**Joe Di Paola:** As I understand it, Clackmannanshire Council has not reached an agreement yet, but it has set the implementation date as 29 March—by the end of the month, it will have reached an agreement. The only other outstanding council is the City of Edinburgh Council.

**David McLetchie:** Is there any news on when Edinburgh expects to report, or should I take that up with the chief executive, who I saw from the papers the other day is about to retire?

**Joe Di Paola:** The City of Edinburgh Council has been in discussions since 5 January. The trade unions are taking slightly different positions. The GMB is concluding a ballot, but the other unions are still engaged in the statutory consultation process. As I understand it, an agreement has not been reached in Edinburgh. It looks as though it is in the statutory process.

**David McLetchie:** Right. Hopefully, Clackmannanshire will tick the box by the end of the month, which will leave only Edinburgh. With a bit of luck, we will finally get 32 councils with single status agreements. Do the councils expect that the single status agreements will be equality proofed, to use the jargon, and that they will finally put a cap on equal pay claims going forward? I appreciate that they might generate claims in respect of past conduct, because, in effect, they amount to an admission of previous inequality. Are we satisfied that the agreements will put a ceiling on claims going forward?

**Councillor Cook:** Yes. That conforms with the evidence that we gave previously. We expect the agreements to put a ceiling on claims going forward. The agreements of individual councils have been equality impact assessed.

**David McLetchie:** Fine. Is that position accepted by the trade unions and other representatives of the staff who have been involved in the agreements?

**Joe Di Paola:** It has certainly been our advice—which individual councils have taken up—that as and when each single status agreement is reached, an equality impact assessment has to be carried out by an expert and the report that comes out of the assessment has to be agreed by the workforce and employer representatives before the single status pay and grading arrangements can be signed off. That process cannot be done just once and then left. Once you are on the circuit, if you like, of equality impact assessing, you have to keep doing it regularly to ensure that your pay and grading systems and other systems are equality proofed and remain so.

**David McLetchie:** That is understandable. The process that you have described has been followed by all member councils, so we should achieve a happy conclusion once Edinburgh finally sorts things out with representatives there. Is that right?

**Joe Di Paola:** That is the hope.

**David McLetchie:** That is fine.

We have been provided with information from your survey of councils in response to the committee's questions, and we have heard about the fragmentation of the situation. Is it the case that COSLA has no more information on the current global position on outstanding claims and so forth than that which has been presented today?

11:00

**Councillor Cook:** Yes, that is broadly the position. Before I came to the meeting, I looked at Audit Scotland's general overview of local government from the end of March last year, which provides what we might call additional information on the moneys that Audit Scotland perceives local authorities have expended on equal pay claims and the moneys that they hold to deal with claims. However, it is open to question whether that reflects the entire picture. That goes back to the point that local authorities will exercise reticence in identifying budget envelopes and contingencies in relation to meeting potential claims.

**David McLetchie:** The recent Audit Scotland overview report to which you refer estimated that the value of claims that are still to be met is £162 million. However, do I take it from your remarks that that is far from being the total picture on prospective liabilities?

**Councillor Cook:** It is not possible for me to make that judgment. I am simply saying that Audit Scotland has identified a sum of money that it believes councils have set aside to deal with equal pay claims. However, it is natural to conclude that local authorities will exercise care in identifying those sums, so whether that is an exact picture is open to question.

**David McLetchie:** In effect, Audit Scotland is reporting what the councils have told it about their reserves, set-asides or estimates, and it has not carried out an audit of the value of the claims or the potential liabilities. Audit Scotland has simply aggregated the reserve figures and said that the total is £162 million. Is that correct?

**Councillor Cook:** Obviously, I will not be drawn into criticism of Audit Scotland, but it is true that it will have relied primarily on information that was provided by local authorities.

**David McLetchie:** Okay.

You have described the nature of COSLA and its role in the matter. You will recall that, when we discussed the issue previously, we had several exchanges with you—and subsequently in an evidence session with the cabinet secretary—about how the concordat fitted into the process and what was or was not a new funding pressure in relation to equal pay claims. Eventually, you—and, in fairness, the cabinet secretary—seemed to accept that the implications of the Bainbridge decision, which post-dated the historic concordat, were a new funding pressure.

COSLA and the Government have regular negotiations and discussions on the local authority grant settlement, which the Parliament has just approved. We know that there is a regular pattern of private meetings, the content of which we are never informed about, although we know that they take place. I find it slightly difficult to understand how the parties to the discussions and negotiations—the Scottish Government and COSLA—can conduct them sensibly when both parties are in the dark as to what is actually going on. How can you have a negotiation about the prospective liabilities and funding pressures on local government if 11 councils are not telling you what is going on? If they are not telling you, I presume that they are not telling the Scottish Government either—or perhaps they are. Do you know?

**Councillor Cook:** I am not party to those discussions, so I am afraid that I cannot tell you about the detail of what takes place in those meetings.

**David McLetchie:** Right, but do you accept the principle that if people do not have the information, they cannot have a discussion? Is that not a reasonable proposition?

**Councillor Cook:** As a general proposition, that might be true.

What I can say, as I said when we discussed the matter previously, is that a discussion takes place between the Scottish Government and local government, through the agency of COSLA, on the general funding position, and particular funding pressures are identified. The Scottish Government and local government are obviously engaged in discussion about the future public spending context and the pressures that it might bring to bear. It is true that, in that context, equal pay claims are receding as a fiscal threat. There are now threats of much greater significance, but that is not to say that equal pay claims would not feature in that discussion, which may go into greater detail on what we think the full extent of equal pay claims might be.

**David McLetchie:** Equal pay claims would have to feature in that discussion, because one of their characteristics is that local authorities must pay them. There are many areas in which spend by local authorities is desirable but discretionary—a service can be expanded or contracted, more or fewer teachers can be employed and so on. A local authority can do numerous things on a discretionary basis, but it has no discretion if a tribunal says that it must pay 3,000 employees £5,000 each. Given that that is mandatory spend, is it not reasonable that the parties to the discussion should have a handle on what sort of mandatory liabilities and obligations they might be responsible for?

**Councillor Cook:** Plainly, if a judgment says that a local authority is required to pay £X in relation to particular claims, that is unavoidable. It is a mandatory requirement, as you correctly identify. However, as we have said, in this context compromise is likely to be one of the prime ways in which matters are resolved, even in relation to claims that are already extant in the system. When it comes to the assessment of cost, individual local authorities will look at worst-case scenarios and compromise agreements that they think they can achieve, and will seek to manage the public pound as best they can, while acknowledging that people have a legal claim and, in some ways, a moral claim on equal pay issues.

**David McLetchie:** Thank you for that, but on the progress that is being made, you described councils' nervousness about reaching settlements and setting precedents. I think that Mr Di Paola referred to the absence of court cases, at least in Scotland, with definitive decisions. Are we not in a situation in which precedents need to be set? Do we not need a set of rules and decisions so that we can settle some of the claims? The problem is that because of the fragmentation of the process, paralysis sets in and councils, as employers, are reluctant to take a step for fear of unsettling or compromising the position of someone else. The fragmentation and the lack of precedents seem to me to be the problem. If more of an effort were made to pull the issue together and establish precedents, we would be further along the road to a solution. Is that not a fair comment?

**Councillor Cook:** We are not the claimants.

**David McLetchie:** I know that, but another thing that I find slightly odd is the fact that you mentioned that the pursuers need to give things a push. In previous evidence, we heard an awful lot about the so-called iniquities of no-win, no-fee lawyers, who got a bit of a pasting from the cabinet secretary in the parliamentary debate on equal pay in local government—although he was subsequently forced to retract those words in correspondence.

If I were a no-win, no-fee lawyer, which I never was, I would want to settle cases. No-win, no-fee lawyers do not sit doing nothing in cases. Lawyers who follow that business model want to settle cases because that is how they get their fees. I do not see any reluctance on the part of those people who are representing claimants to push for a solution. It is common sense that they want to achieve a solution. Who are the people who do not want to do that?

**Councillor Cook:** I do not disagree with you. It has already been mentioned that there is a greater battery of settlements among claims that were taken on by no-win, no-fee lawyers, although they form a relatively small subset of the overall number of claims.

**David McLetchie:** I might be wrong, but I think we heard that thousands of actions were being pursued by Stefan Cross and that such claims form a high proportion of the total number of claims.

**Councillor Cook:** That is not the case. It is a relatively small group of claims. Reference was made earlier to the fact that 67 per cent of a certain category of claims have been resolved. That category is claims that are pursued by no-win, no-fee lawyers. In some ways, that is a response to your point, in that it perhaps reflects an incentive on the part of those lawyers to progress those claims more efficaciously and get a settlement. If they get a settlement, whether it is within the realms of an employment tribunal or outside it, they will get a cut.

**David McLetchie:** Yes. Under their contract, they will get a fee, to which their diligence entitles them. Perhaps we should get more people to use

no-win, no-fee lawyers, because we would then settle the whole business and we would not need to have these inquiries. If those are the people who are progressing cases and winning and settling claims on behalf of their clients, who are the people who are pursuing claims that are not being settled and which are stuck in the system? Is it the trade unions?

**Councillor Cook:** We need to be careful. Plainly, those who advise claimants will give them such advice as they consider appropriate in relation to settling a claim at a particular level on the basis of a compromise or pursuing it.

**David McLetchie:** No doubt they will, but it is not those no-win, no-fee lawyers who are being sued for having made inadequate settlements on behalf of their members. It is the trade unions, is it not? It is the GMB. Did we not hear that in evidence?

**Councillor Cook:** I do not think that that is a question for us.

**Patricia Ferguson (Glasgow Maryhill) (Lab):** Before I ask the question that I had intended to ask, can I follow up on Mr McLetchie's questions? If cases are being settled by no-win, no-fee lawyers, does that not help to build a body of precedent that can be used by others?

**Councillor Cook:** The problem is that the cases have not gone to tribunal but have been settled by compromise agreements, so no legal precedent has been set by them. What that reflects on the local authority side of the fence, as it were, is that local authorities have made a judgment in the light of discussions with no-win, no-fee lawyers and have considered it appropriate to make an offer, or to work out a formula for an offer, that has been accepted on the other side.

**Patricia Ferguson:** Just to be clear—because you are beginning to open up another area that I had not intended to go into—could people in those circumstances still come back and register another claim, as others who have had some kind of settlement through other means have done, or is that the matter dealt with?

**Councillor Cook:** That would be unlikely in the present context. A compromise agreement that is reached by a local authority would be expected to compromise all potential claims. It would certainly be intended to compromise the basic equal pay claim, any residual claim that dealt with the gap between single status implementation and the date at which the original offer ended, and potentially Bainbridge elements of claims as well. It would be intended to deal with all of those. Certainly, any shrewd lawyer would be more than concerned to ensure that claims were settled in full and that there was final settlement of any potential claims that could be foreseen.

**Patricia Ferguson:** Thank you for that.

In a letter to the convener in November, the Cabinet Secretary for Finance and Sustainable Growth wrote:

"As well as writing to COSLA after the debate"—

that is the debate that we had in the Parliament—

"I have since discussed the position directly with COSLA's President and the Presidential Team. We agreed that the Government and COSLA would continue to consider whether there are any interventions that the Government could make. COSLA have agreed to revert to us when they identify any such initiatives."

Has COSLA identified any such initiatives since November?

**Joe Di Paola:** The short answer is no. A discussion took place, the issues were laid out clearly, and the agreed view was that local government had to deal with the matter. In that sense, there were no interventions that the Government could usefully make. What intervention could there be? Could the Government give us a whole lot of money to settle the matter? Okay, it could do that, but any intervention comes back to the fact that individual local authorities require to deal with their individual employees. The interventions that can be made under the law are limited—in fact, they are virtually zero, because of the contractual relationship and the way in which it must be settled. We can advise, support, cajole and encourage strongly, but for either the Government or COSLA to intervene, in the sense of getting into the process and saying what must happen, is not possible.

11:15

**Patricia Ferguson:** I understood Councillor Cook to indicate that the cabinet secretary could help if he was able to assist with securing an opportunity to undertake class actions. Has COSLA put that to the cabinet secretary?

**Councillor Cook:** No, I do not think that that has been raised. I was saying that, as a matter of objective fact—and this is a bit simplistic—such an approach would allow cases to be processed more quickly than processing cases individually, as happens at present. However, that would not be a matter for the cabinet secretary; it would be for Westminster to take a view.

**Patricia Ferguson:** Has COSLA approached Westminster to take a view on that whole area?

**Councillor Cook:** No. I cannot comment directly in relation to this issue, but no less than the retiring president of the Equality and Human Rights Commission intimated things that would help the situation south of the border. One of those was a moratorium on claims, to allow local authorities to process single status, deal with

equal pay claims, make settlements and so on. Periods of even three years were hazarded.

As committee members will be aware, Westminster has been considering a single Equality Bill. My understanding is that, in the wider context, Westminster has ruled out a moratorium, not being well disposed to that approach. The view prevails that it is for local authorities to deal with the matter in relation to their contracted employees.

**Patricia Ferguson:** Is work going on within COSLA to identify possible interventions, perhaps bringing together the two sides or trying to get one set of legal advice rather than many sets? Could the cabinet secretary intervene once the offer has been made? Has the cabinet secretary been told that there are no interventions that he can make?

**Joe Di Paola:** Following the discussions between the cabinet secretary and the COSLA presidential team and colleagues, there was an agreement, as I understand it, that the cabinet secretary could make no useful interventions at that time.

**Patricia Ferguson:** He indicated to the committee that

"COSLA have agreed to revert to us when they identify any such initiatives."

**Joe Di Paola:** We are saying to you—quite openly and properly, I think—that it is a matter that local government requires to resolve. The issues that remain on the table about equal pay and equal pay cases remain matters between local authorities and their employees, and they are the only ones who can resolve them.

You asked whether we in COSLA are looking into things. Absolutely—of course we are. The matter is considered just about every day, as issues come to us from authorities regarding their position on single status and equal pay. It is not possible to divorce one from the other, because one flows directly from the other—equal pay issues have been triggered by the introduction of single status agreements, as you know. It is all tied in.

We regularly talk to councils individually and collectively about their position, how many cases they have, what is happening in their localities, whether moves are being made by local trade unions and so on. We do that all the time as we explore whether there can be a breakthrough anywhere. We want to know what cases are coming to tribunal.

I should mention that cases are not coming to tribunal. I know for a fact that lots of work is going on at individual local authorities, with discussions with representatives on how cases will be managed. There have been discussions in the tribunal system, and case management conferences are taking place on a regular basis, but I have not seen a single case or situation move forward. We are doing all that we can, but our interventions are limited, and we can do nothing to mandate a member council.

**Patricia Ferguson:** Can COSLA hazard a guess as to when the situation will finally be resolved?

**Councillor Cook:** If we did, it would be demonstrated to be wrong. It would be unwise for us to hazard a guess, because it would be only a guess.

**Patricia Ferguson:** So it will continue.

**Councillor Cook:** I made that observation at the end of a previous evidence session—I know that the convener was rather depressed by it, but the issues need to be worked through. That will not be a quick process—it will take time and cost money—but local authorities are considering how they can best manage it. They are best placed to make judgments about that, and they will continue to do so.

**The Convener:** The Advisory, Conciliation and Arbitration Service has been mentioned a number of times. Is there a role for ACAS in bringing people together, given the failure of COSLA and the trade unions?

**Councillor Cook:** It would be remiss of me if I did not pick you up on that, convener: there has not been a failure on the part of COSLA. We are saying straightforwardly that the matter involves individual claimants within authorities making claims against those authorities. Those authorities are in the best position to make judgments about how they deal with those claims; we in COSLA cannot give any directive context to that. The mandate exists within authorities; I have a mandate as a member of an authority to deal with equal pay claims.

**The Convener:** We have got the message, from previous evidence and since the committee published its report, that there is not much of a role for COSLA in the process—that has been stated. COSLA may have an advisory role, but I accept that there is not much that you can do, whether or not that leads to failure.

Given your experience, could arbitration help? There has been a failure, in that neither the joint council nor the trade unions and the councils on their own can resolve the situation. We are all frightened to set off the booby trap.

**Joe Di Paola:** Or the starting gun. With regard to a role for ACAS, the same difficulty would exist as currently exists with the role of the joint council. Both bodies are set up to deal with collective bargaining, and issues that stem from the failure of

the collective bargaining machinery. The bane of the issue is that it cannot be resolved on a collective basis. People have tried to resolve the issue in that way, but that has failed. ACAS usually becomes involved where there is a failure—as you know, convener—in the collective bargaining process. We cannot deal with this issue on that basis, as we have to satisfy every single individual that her claim—or his claim, as some males have now joined in the process—has been met in a proper manner. ACAS is not set up to do that.

**The Convener:** We will need to ask ACAS.

**Bob Doris (Glasgow) (SNP):** I sense the frustration that is growing among committee members; that is a reflection not necessarily on the witnesses, but on the complexity of the situation.

Are the COSLA members helpless bystanders or active participants? At the current stage, perhaps you are helpless participants. That is not a slight against you as individuals, but there is growing frustration because we want to help where we can, to get to the bottom of the matter.

I will pick up some other points that have been raised, to try to get some clarity. You told us that pursuers were not pushing the cases. However, David McLetchie established that the no-win, no-fee people were keen to push the cases, which leaves us to consider only the position of the unions in that regard. Is there any union that is not keen to push an equal pay or single status claim for any of its members?

**Councillor Cook:** I will leave the question on the unions to Joe Di Paola.

There are a couple of points to deal with. We are not "helpless bystanders".

**Bob Doris:** I am talking about perception.

**The Convener:** Bob Doris moved on from that—he went on to say "helpless participants".

**Councillor Cook:** The important point is that I am a councillor in a local authority, where I have a mandate. Part of that mandate is to respond to workforce issues in the authority. Together with others, I make judgments about those issues; that is the nature of my responsibility. It so happens that I am also COSLA's HR spokesperson. COSLA can provide advice and guidance, but it is for me, as a councillor, to make decisions in my local authority. That is the nature of the decisions that are made in the 32 local authorities. As I intimated earlier, I am satisfied with our direction of travel.

There is a distinction to be made in the settlement of claims. Earlier, I referred to protective claims. It is routine for people to lodge a potential legal claim, even if they are involved in discussions about it, so that they do not lose the legal opportunity to pursue it at some point in the future. That does not mean that there will not continue to be discussion about the possible settlement of such claims. We have referred to the fact that, for whatever reason, the subset of no-win, no-fee represented claims appears on a percentage basis to have made greater progress than some others. There are a number of dynamics at work; for me to speculate on what has brought about compromises in those cases might be to go too far. However, it is certainly true that no-win, no-fee lawyers need to have a settlement or some conclusion to the legal process in order to attach a fee to a result for the client. Such claims have not been resolved through the tribunal process; on the contrary, they have been dealt with by compromise agreements.

Joe Di Paola may want to respond to the question about the unions.

**Joe Di Paola:** Would Mr Doris mind repeating his question?

**Bob Doris:** This morning we have heard in evidence that pursuers are not pursuing cases proactively. There seem to be two main camps of pursuers—no-win, no-fee pursuers and union pursuers. If we are making progress with no-win, no-fee pursuers, why are the union pursuers reluctant to push matters forward? I would like you to answer that question before I put my next one. I am trying to identify the problem—does it relate to cash or to the courts? Where is the logjam? I like to think that, if I were a GMB representative of members with a claim, I would pursue their rights proactively. Why is that not happening?

**Joe Di Paola:** My difficulty is that I am no longer privy to the discussions that take place inside trade unions. I am not dodging the issue. I know how trade union colleagues will think. Wider policy considerations on the question of equal pay and the positions at which unions have arrived on the issue will be set against the question whether it is right at this time to move to law. As Michael Cook said, the unions have lodged thousands of claims on the basis that they are protecting their members' position. However, in my experience, they will always try to reach an agreement before going to law. That is the nature of the beast.

The difficulty is that all of the trade unions have been bitten in relation to equal pay. They reached agreements that officials and some lay people thought were appropriate and reasonable but, quite properly, the people concerned took the view that they were not. The unions have a marked reluctance to engage in their normal business, which is collective bargaining. That leads them to go to law on a scale that I have never encountered

during my 30 years' experience in the unions. The situation is unprecedented.

You will have to ask trade union colleagues what point they have reached with the cases that they have lodged. I hazard a guess that their preference is still to reach agreement with local authorities when they can and to go to law as a last resort. That is the only reason that I can suggest—you need to ask them the question directly.

11:30

**Bob Doris:** I will get to the cash in a second, but for now let us stick to the idea of the matter going to court. I use GMB as an example simply because that was the union that I mentioned earlier. There is no reason why the GMB could not push the case of an individual GMB member in a local authority. I would say that it would be advantageous to the GMB and to local authorities not to have the matter settled by a tribunal. If the GMB and the local authority were confident of their positions, would not a tribunal—someone independent—be necessary to set a precedent? Is not the problem the fact that everyone is shying away from finding out what the truth is? Let them take the matter to a tribunal and have a precedent set. After all, precedents exist to tell us what is right and what is wrong, so that we do not need to have two parties with vested interests in opposition to each other doing a backroom deal.

**Joe Di Paola:** Or not.

**Bob Doris:** Or not, as the case may be.

**The Convener:** The council could make an offer of a payment directly to that employee.

**Joe Di Paola:** Yes, it could.

**Councillor Cook:** It could.

**The Convener:** It would not need to use the union. It could just say, "There's the payment. Withdraw your tribunal case." That is what has been done in the case of the imposition—as some would call it—of the equal pay structures. The City of Edinburgh Council is frightened about its bin men disappearing.

**Joe Di Paola:** That is correct.

**The Convener:** Why is that not being done?

**Councillor Cook:** It is being done. We have a small number of claims against us, and we have made offers in relation to some of those claims. A formula for settlement of such claims is currently under discussion, and I am sure that that is happening in other local authorities.

**Bob Doris:** Those claims will not create precedents because they have not been through the legal process.

**The Convener:** But that will eliminate the uncertainty surrounding the financial position of the local authority.

**Bob Doris:** Yes, absolutely.

**Councillor Cook:** Put simply, that is one of our primary objectives. There is a concern about precedent, but we are less concerned about precedent than we are about getting settlement and financial certainty—that is our primary objective.

**Bob Doris:** I return to my point that the reason that things are not being settled is that people are waiting to see what precedent is set before they decide how they want to settle. We need to put a public focus on this. If a union has a member who it perceives has a strong and justified case against the local authority, let us let the tribunal decide. However, there could be a pause of another five or 10 years before that happens. Where are we with this?

**Councillor Cook:** I do not know. It is ultimately a question of the claimant making decisions with those who represent him legally about the merits of his claim and whether he wants to pursue that claim. That is really the alpha and omega of it. It always falls to the individual claimant to determine how they pursue their claim. If they decide to pursue it expeditiously, we will respond to that. If they choose not to, the local authority will still consider the implications of that potential claim but it may be less willing to consider settlement in relation to a claim that has not been fully tested.

**Joe Di Paola:** You say that we are helpless participants, but we are not totally helpless. Discussions are taking place in every local authority with the claimants' representatives—I use that term broadly. Those discussions, which are taking place daily, are about the level of the claim, the possibility of the claim being settled immediately and how settling the claim will affect the broader group, which might be the bin operatives or somebody else. They are about risk assessment—the number of people in the group, whether the claim should be settled at 50, 60 or 70 per cent, and the total cost.

Those discussions are taking place all the time, with the trade unions as well as with agents representing individuals, and they are taking place in every local authority. Local authorities ask us what the current legal position is, whether anything has changed, and whether what they are thinking of offering is all right. The issue that you raise, properly, is a big policy decision for the unions representing big numbers of their members in big numbers of our authorities. I do not know whether the unions will say, "We will push a claim now in that respect"; you would need to ask them that directly, because that matter is entirely for them. In

some ways, it would be improper for us to ask the unions what they will do with a claim. We have asked in the past, but they say, "That's a matter for us to determine."

**Bob Doris:** At what level should a union settle for an individual member—should it be 50, 60 or 70 per cent? That links into my point about tribunals; I think that the unions should go for 100 per cent and allow the tribunal to decide the correct level, but that is just my view.

On cash, Mr Tolson got some interesting information about capitalisation moving forward: 50 per cent of capitalisation requests have been granted. Of course, that means that 50 per cent of them have not been granted, but if we look at the situation from a glass-half-full perspective, that is borrowed money that was not there before, so some progress has been made.

**Councillor Cook:** We need to pay for that money.

**Bob Doris:** Precisely: it is borrowed money. I was careful to use the word "borrowed". It is a one-off payment rather than a recurring cost, so I have been clear about that.

The second idea, which I had mentioned previously, is staged payments; I see that that appears in the evidence. A small number of local authorities—two, I think—have said that they are moving forward with staged payments and another 10 have not specifically ruled out doing that, but have said that they have not done so yet. Some local authorities have said that they are worried about the concept of staged payments, because it could be "detrimental to negotiations". Staged payments are another tool that local authorities have in their box when it comes to spreading the cost. As you rightly say, they still have to pay back borrowed money from the public purse. Making staged payments does not mean paying any less money; it just means spreading out the payment method.

**Councillor Cook:** The risk is that a local authority will possibly pay more money. If a local authority agrees a settlement by which it makes staged payments on a claim, it may end up paying more as a consequence.

**Bob Doris:** I accept that; the point is well made.

Why would staged payments be "detrimental to negotiations"? If you cannot answer that for yourself, why might some local authorities feel that staged payments would be "detrimental to negotiations"? We have focused on the legal issues and we are now talking about cash. Mr Tolson mentioned capitalisation, and staged payments are another tool that could be in a local authority's box. Why are some local authorities scared to use it?

**Councillor Cook:** It is difficult to speculate on the precise context, because the circumstances in each local authority are unique and the claims have an individuality about them. As you identified from the information that we supplied, two councils have used staged payments; I think that a further three were considering the active use of staged payments and 10 said that they were not using staged payments—there was nothing to indicate whether they had considered their use.

One or two councils have adverted to the fact that the use of staged payments might, in their view, prejudice negotiations. Any number of contexts might lie behind that view. For example, the council may wish to make full and final offers in settlement of claims and may feel that introducing the prospect of staged payments to that discussion would militate against such offers and increase the extent of any expectation on the part of the claimant. Staged payments would therefore have an adverse impact on that council's resources and may not represent the council exercising its best stewardship of the public pound. That is simply a scenario. It is difficult for us to say that that is the precise situation, but I am trying to give an example of the possible thought processes around the issue.

There is a range of opinion on staged payments. Other councils may consider the matter and think that, in the wider context of affordability, staged payments are appropriate for them. Individual authorities have to make that judgment, given their mandate in relation to their workforce and taking into account the claims that they face. Some authorities will take the view that staged payments suit the wider purposes that they have to fulfil.

**Bob Doris:** This is not a question but a request. I understand that, in cases that you might be close to settling, you might have tactical reasons for wanting to back off from staged payments. However, if you become aware of any structural reasons for that approach not being taken, can you let the committee know about them? I am well aware that, as far as cash is concerned, councils have very few tools in their tool box. The financial belt is incredibly tight and, as you have pointed out, it will only get tighter, so we are keen to ensure that you have as many levers as possible.

**Councillor Cook:** That is helpful.

**Alasdair Allan:** We have focused on the legal aspects and the past, but what about the future? What have local authorities learned from this mess? Are we getting towards equality of pay in local government?

**Councillor Cook:** That is such a broad question.

**Joe Di Paola:** People have mentioned unintended consequences; that is what the equal

pay liabilities are. Everyone in the room knows that the Equal Pay Act 1970 predated single status by 15 or 20 years. I have said to the committee before—and I make no apologies for repeating—that single status was not about gender equality of pay but about removing the old differences between blue and white collar workers in local authorities to ensure that the manual workers, as they were called, got the same benefits and conditions as their white collar colleagues. Of course, when it came time to examine pay and grading structures, in particular performance-related bonuses, which were paid almost exclusively to male staff members in Scottish local authorities, the whole mess of the inequality in gender-based pay surfaced very quickly.

You ask what we have learned. We have learned that we should have dealt with the equal pay consequences well in advance of the consequences of single status, and we are in this mess because we mixed up our approach to two issues that we were very appropriately dealing with. As I say, we are now paying for the fact that we did not deal with pay inequality before we went near changing the terms and conditions of white and blue collar workers.

**Councillor Cook:** I understand—and, in many respects, share—the frustration about what has happened. All of this, however, should be set in a historical context. You need to wind back to the strike in 1888 by the unorganised Bryant and May female match workers; even then, people were talking about equal pay for equal work. Indeed, at that time, the Trades Union Congress was making such pronouncements. In 1955, a Conservative Government—no less—was making decisions about equal pay for civil servants through the national Whitley council. In the 1970s, everyone thought that with the passing of the Equal Pay Act 1970 and the Sex Discrimination Act 1975 some of these matters would have come together and that we would have resolved discrimination in pay between men and women. The fact is that that did not happen.

However, the public sector, at least, is beginning to address those issues effectively. I realise that there is huge frustration about all this; it has cost a lot of money; and it has taken what seems to have been a long time. However, if we put it in its historical context, it has taken a relatively short time. If we look at the wider spectrum, it is interesting that Office of National Statistics data from 2007 suggest that at that time the equal pay gap between men and women was 13 per cent in the public sector and 22 per cent in the private sector. There has not been much activity to resolve the issues in that sector.

**Alasdair Allan:** I am sure that, if the dispute were placed in the glacial timeframe that you have described, it would seem to have taken quite a short time. Does COSLA keep a record of different local authorities' progress on equal pay? The written submission from Action 4 Equality Scotland picks out some less-than-glowing examples, albeit that some are historical. With regard to Glasgow City Council, it states that

"the non-core pay element is discriminatory and unlawful".

With regard to North Lanarkshire Council, it states that its

"experience-related increments cannot be justified as they discriminate on the grounds of age."

Does COSLA keep a record of how local authorities are progressing towards the aim, which I am sure you all share, of achieving pay equality?

11:45

**Councillor Cook:** Yes. We have details of the progress that all local authorities have made on single status and equal pay issues. Action 4 Equality is obviously at liberty to express those views, but it does not have an unprejudiced interest in the issue.

**Alasdair Allan:** Do you have anything to add, Mr Di Paola?

**Joe Di Paola:** No. I am content with what Councillor Cook said in that regard.

**John Wilson:** I thank Councillor Cook for his brief history of inequality in society in the United Kingdom, particularly his account of the match workers' strikes in 1888. I am glad that Mr Di Paola has accepted the point that I have raised in the committee on a couple of occasions, which is that we ended up with a crisis in 2005 because we mixed two issues together—the equal pay issue was not resolved before we moved on to single status. I have argued that point for some time, and I am glad that Mr Di Paola has accepted that that was the position in which we found ourselves because we tried to resolve single status and equal pay at the same time.

Councillor Cook has indicated, both previously and today, that it is up to each local authority to resolve the equal pay issue for itself. However, does he not agree that the capitalisation scheme that was requested from the Cabinet Secretary for Finance and Sustainable Growth is an intervention from the Scottish Government? What is it if it is not a Scottish Government intervention to try to resolve the issues of equal pay and single status in local government?

**Councillor Cook:** I will deal with that first, then I am sure Joe Di Paola will be happy to answer the other point. It is interesting that you put your question in that way. The fact is that at present we get all our funding from central Government. The

context in which we deal with any specific funding pressure is that the Scottish Government agrees to an approach that allows us to capitalise some of the costs. I do not think that there is anything strange about that. It does not depart from the basic proposition that I have offered to the committee on a number of occasions, to which you rightly alluded, which is that, fundamentally, each local authority must resolve the equal pay issue with its claimants and its workforce and that that is the only proper basis on which we can proceed. However, with regard to the funding context, all the money that we get at the present time comes from central Government, and capitalisation is simply one dimension of that.

**John Wilson:** Is it not the case that the capitalisation scheme was requested and introduced to deal specifically with single status and equal pay claims?

**Councillor Cook:** We have talked about money for that particular item, but there have been wider discussions about capitalisation being used for other things as well.

**John Wilson:** Just to clarify that, the capitalisation scheme figures that we have in front of us relate directly to equal pay and single status claims. However, other capitalisation schemes are being negotiated and discussed on a daily basis among local authorities.

I have another question about COSLA's role in the Scottish joint council and negotiations on pay and conditions. Today, we have once again heard that it is up to local authorities to negotiate at a local level the pay and conditions that relate to equal pay and single status. However, does COSLA not have a role, through the Scottish joint council, to negotiate pay and conditions nationally? If so, is there not a contradiction between what is happening at a local level and COSLA's objective of negotiating pay and conditions at a national level, through the Scottish joint council?

**Joe Di Paola:** I do not see an inherent contradiction in the role that COSLA plays in the Scottish joint council, vis-à-vis its member councils. The member councils, which are represented on the employer side in their entirety, give the authority to discuss and agree pay and grading matters at a national level. That is set out in the red book and in the single status agreement, a section of which deals with national matters and says that COSLA will provide the employers' secretariat to deal with those pay and grading issues—I acted as the employers' secretary in the previous set of negotiations. That is part of a collective bargaining arrangement.

The difficulty with single status and equal pay is that the collective bargaining element breaks down because individuals are able to say, "Notwithstanding the collective agreements that have been reached on my behalf, I have an individual arrangement with my employer that has not been dealt with properly." The nature of the collective bargain on equal pay that was reached in a number of English local authority areas was challenged successfully.

There is no inherent problem in COSLA acting as the voice of the 32 councils in relation to pay and bargaining. That is accepted by everyone, including colleagues on the other side. The difficulty is that, in law, we cannot make the bargain stick in relation to equal pay. That is the inherent difference in terms of the councils' approach.

**The Convener:** So, if we have one man standing, that prevents us from addressing 44,500 people at a tribunal. It is not credible to put that to this committee. Where there is a will, there is a way.

**Mary Mulligan:** Or, of course, one woman standing.

**The Convener:** I forgot that my colleagues from the Labour group were here.

**Mary Mulligan:** The cabinet secretary announced £64.5 million for the capitalisation scheme that has been referred to already this morning. How much was bid for?

**Councillor Cook:** Getting on for double that. As Mr Doris suggested, I think that the funding is about 50 per cent of what was asked for.

**Mary Mulligan:** The table in the papers before us identifies 10 local authorities. Were they the only ones that bid? If so, why did only 10 bid? What about the other 22?

**Councillor Cook:** The bottom line is that taking on that borrowing will cost money and will represent a pressure on revenue. My local authority took the view that it did not require capitalisation. The difficulty for local authorities is that they have to weigh up the cost of that borrowing against other capital spend. They have loan repayments, prudential borrowing, public-private partnership contract payments and all other sorts of things to take into account. That is the context in which they have to decide whether capitalisation is appropriate for them.

A series of bids have been made, and have been met, in part.

**The Convener:** Thank you both for your time and the evidence that you have given us.

# Subordinate Legislation

## Building (Scotland) Amendment Regulations 2010 (SSI 2010/32)

## Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2010 (SSI 2010/38)

## Local Government (Allowances and Expenses) (Scotland) Amendment Regulations 2010 (SSI 2010/45)

## Town and Country Planning (Prescribed Date) (Scotland) Amendment Regulations 2010 (SSI 2010/61)

11:54

**The Convener:** Agenda item 3 is consideration of eight negative instruments. Members have received copies of the instruments. No concerns have been raised and no motions to annul have been lodged.

I advise members that, in relation to SSI 2010/45, the Scottish Government has laid amending regulations in the light of comments that were made by the Subordinate Legislation Committee.

Do members agree that they do not wish to make any recommendations in relation to the instruments?

**Members** *indicated agreement.*

## Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2010 (SSI 2010/62)

**The Convener:** We come to SSI 2010/62.

**Mary Mulligan:** I have a question about the order, which seems to seek to ensure that money from the general fund is not transferred into the housing revenue account. Is there a similar order that prevents money from the housing revenue account being used to subsidise the general fund?

**The Convener:** We do not know, but we can write and ask.

**Mary Mulligan:** I ask because that certain issues have been raised with me recently by tenants and tenants organisations. First, people feel that sometimes they pay twice for things such as ground maintenance—once through their rent and again through their council tax. There seems to be some duplication, but it is difficult to find out from councils whether that is the case.

Secondly, where councils use prudential borrowing to build new properties, the housing revenue account has been paying for that, rather than the general fund, and there is a feeling that that might not be the most equitable way of proceeding. I wondered whether there might be an order that would stop that practice.

**The Convener:** We will write to seek clarification of that issue and will circulate the response to members of the committee. Are you satisfied with that?

**Mary Mulligan:** Yes.

**The Convener:** Do members agree that they do not wish to make any recommendations in relation to the order?

**Members** *indicated agreement.*

## Firefighters' Pension Scheme (Scotland) Order 2007 Amendment Order 2010 (SSI 2010/65)

**The Convener:** We come to SSI 2010/65.

**Mary Mulligan:** I have a concern about the amendment order, and also about SSI 2010/66.

The Executive note on SSI 2010/65 says:

"The instrument is not expected to have any financial effects on the Scottish Government".

However, earlier on it talks about a

"new actuarially-based employer's contribution calculated as a percentage of pensionable pay"

to which

"a 'top-up' payment will be made by the Scottish Government".

That seems to contradict what is said about the financial effects at the end of the note.

**The Convener:** We will write to seek clarification of that issue and will circulate the response to members of the committee.

Do members agree that they do not wish to make any recommendations in relation to the order?

**Members** *indicated agreement.*

## Firefighters' Pension Scheme Amendment (Scotland) Order 2010 (SSI 2010/66)

**The Convener:** Mary Mulligan mentioned that she had a concern about SSI 2010/66 as well.

**Mary Mulligan:** It is the same point that I raised in relation to SSI 2010/65.

**The Convener:** In that case, we will write to seek clarification of that issue as well, and will circulate the response to members of the committee.

Do members agree that they do not wish to make any recommendations in relation to the order?

**Members** *indicated agreement.*

## Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment (No 2) Order 2010 (SSI 2010/78)

**The Convener:** Do members agree that they do not wish to make any recommendations in relation to the order?

**Members** *indicated agreement.*

**The Convener:** As previously agreed, we now move into private session to deal with agenda item 4.

11:58

*Meeting continued in private until 12:08.*

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

Members who wish to suggest corrections for the archive edition should mark them clearly in the report or send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP.

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

*Single copies: £5.00*
*Meetings of the Parliament annual subscriptions: £350.00*

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

*Single copies: £3.75*
*Annual subscriptions: £150.00*

Printed and published in Edinburgh by RR Donnelley and available from:

**Scottish Parliament**

**All documents are available on the Scottish Parliament website at:**

**www.scottish.parliament.uk**

For more information on the Parliament, or if you have an inquiry about information in languages other than English or in alternative formats (for example, Braille, large print or audio), please contact:

**Public Information Service**
The Scottish Parliament
Edinburgh EH99 1SP

**Telephone: 0131 348 5000**
**Fòn: 0131 348 5395** (Gàidhlig)
**Textphone users** may contact us on **0800 092 7100**.
We also welcome calls using the Text Relay service.
**Fax: 0131 348 5601**
**E-mail:** sp.info@scottish.parliament.uk

We welcome written correspondence in any language.

**Blackwell's Scottish Parliament Documentation Helpline** may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

**Telephone orders and inquiries**
**0131 622 8283 or**
**0131 622 8258**

**Fax orders**
**0131 557 8149**

**E-mail orders, subscriptions and standing orders**
**business.edinburgh@blackwell.co.uk**

**Blackwell's Bookshop**

**53 South Bridge**
**Edinburgh EH1 1YS**
**0131 622 8222**

**Blackwell's Bookshops:**
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

**Accredited Agents**
(see Yellow Pages)

and through other good booksellers