

## **Review of the Balance of Competences between the UK and the EU: Social and Employment**

### **COSLA Response**

The **Convention of Scottish Local Authorities** (COSLA) is the representative voice of all Scottish municipalities both nationally and internationally. COSLA has long been advocating that European Union (EU) legislation needs to fully respect the local competences and the autonomy of Local Authorities in organising and providing local services.

We therefore welcome the opportunity to contribute to this call for evidence. We very much welcome that the UK Government undertakes this thorough review on the distribution of powers between the EU, national and local governments in strong support of the principle of subsidiarity.

COSLA has recently agreed a **Vision for Strengthening Local Democracy**<sup>1</sup> that aims to empower local democracy, to foster integration instead of centralisation, to focus on outcomes and to put local democracy at the heart of improvement and accountability. This vision also notes the lack of constitutional protection for local government in Scotland which further complicates matters where the EU dimension is added. Our response precisely tries to address some of the concerns and proposals outlined in the Vision where applicable to European Union legislation in social and employment affairs.

### **PART I: The argument for social and employment competence**

#### **Q1: To what extent is EU action in this area necessary for the operation of the single market?**

COSLA believes that EU involvement should take place not only when it has clear EU Treaty competence by principle of conferral but also *only when* its action can provide real added value; we therefore strongly defend the **subsidiarity principle** whereby “the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level” as well as the principle of proportionality (Article 5 TEU).

COSLA clearly respects the role of the European Commission as the guardian of the EU Treaties and the Internal Market. However, we disagree with the view that potential economic benefits can be put forward as an argument to override the basic principles of allocation of competences such as the principles of conferral, subsidiarity and proportionality upon which EU Treaty Law is based.

COSLA is also keen that the European Commission fully respects **Protocol (No 26) on Services of General Interest (SGIs)** of the Lisbon Treaty which sets out that the Commission should fully respect “essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users” in any forthcoming proposal or initiative that regards local public service provision.

**In the field of employment, health and safety at work and equal treatment EU legislation needs to take fully into account the need for certain local public services (e.g. residential**

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<sup>1</sup> <http://www.cosla.gov.uk/sites/default/files/private/l130426item09appendix.pdf>

and social care; first response services) to be organised with some discretion locally, including the possibility of setting specific working time arrangements, to ensure that public services are provided efficiently and sustainably at the local level.

Q2: To what extent are social and employment goals a desirable function of the EU in their own right?

COSLA has been keen to emphasise that the EU has limited competences in social and employment affairs, and therefore must remain within the powers laid down in the EU Treaties, fully respecting the subsidiarity principle. It is equally important that EU legislation is enabling and not inhibiting Local Authorities in effectively exercising their competences and delivering public services.

COSLA, through its umbrella body the CEMR, is part of the **EU Social Dialogue for Regional and Local Government as Employers** which fosters an exchange between local government employer organisations and trade unions on sector-specific issues. Over the past years, this sectoral format of the European Social Dialogue has provided a platform for discussions on social, financial and sustainability issues in the local government sector and fostered a good exchange of best practice between the participating organisations. Partners also reached various agreements, for instance on equality of women and men in local life or third party violence at the workplace as well as joint positions on, for instance, occupational safety and health and youth employment.

In this respect, COSLA considers the European Social Dialogue in its various formats as one route to inform the European Commission's policy work in social and employment affairs. It provides social partners with a platform for exchange on common challenges that are linked but not necessarily determined by the European Commission's agenda.

We would also like to highlight at this point that the call for evidence paper perhaps does not shed enough light on the role that the European Social Dialogue can play in controversial dossiers such as the regulation of working time; it is duly noted that the Council of Ministers has in the past given legal effect to collective agreements but not further elaborated on.

Q3: What domestic legislation would the UK need in the absence of EU legislation?

While there are views expressed that EU legislation may in some cases be seen as stimulus for domestic legislation, for instance where UK equal treatment legislation transposed obligations from EU Directives, it is open to question whether EU rules are necessary beyond guidelines to approximate legislation. In social and employment affairs, there are many local, regional and national policies and frameworks that have already gone beyond the rules set out by the European Union. However, these have been developed in order to tackle societal challenges rather than to fill the gaps left by EU legislation (e.g. see Box 2).

#### **Box 2: Health Working Lives**

Scottish Councils are taking part in the **Healthy Working Lives Scheme**, which adopts an outcomes focused approach to support employers and employees to achieve better and healthier working lives in their organisation. It therefore works as a benchmark for achieving health and wellbeing practices in the workplace spanning a range of topics including health promotion, occupational health and safety, employability, mental health and well-being, community involvement, and health and the environment. More than a third (12) Scottish Local Authorities have reached the Gold level, the highest level which requires a three-year health, safety and wellbeing strategy and three-year rolling action plan, benchmarking, awareness of health inequalities as well as stress risk assessment, lifestyle checks, equality and diversity, mentoring and the fulfilment of more criteria each year of maintaining the award. The remaining Councils are currently working towards achieving Gold and Silver levels. Five Scottish Councils have also been awarded the Healthy Working Lives Mental Health and Well-being Commendation Award. COSLA fully supports the Healthy Working Lives Award Programme as does the Scottish Local Authorities' Employers Organisation.

## **PART II: Impact on the national interest**

### *Q4: What evidence is there that EU action in social policy advantages the UK?*

Scottish Councils have a strong interest in employing and developing a healthy and productive workforce and in advancing the strategic national as well as European agenda around improving health and safety at work, tackling unemployment and stimulating economic growth.

In our view, the European Commission should continue to make use of recommendations and guidelines on sustainable working conditions and safety and health at work, and perhaps in other areas where public authorities are implementing existing EU legislation in social and employment affairs, whilst being aware of the EU's limited scope in public health and other relevant policy areas that fall under local and national competences.

#### *Health and safety at work*

Occupational safety and health is an important issue for Local Authorities as employers and they are key partners in enforcing health and safety legislation in Scotland. In keeping with the 1974 Health and Safety at Work etc. Act, they are responsible for environmental health including licencing, environmental protection, food safety and inspections, investigations and enforcement of health and safety regulations and therefore co-regulators of occupational safety and health (covering business premises employing 45% of the Scottish working population). Scottish Councils are committed to prevent risks to health, to ensure that the workplace is safe and to provide health supervision as needed.

As regards a possible review of the EU's health and safety framework, COSLA is keen to emphasise that simplification is recommendable (e.g. for SMEs) but that it must not come at the cost of additional administrative or financial burdens for regulators, the business community and employers or to the detriment of the enforcement of safety and health for the wider public.

Addressing issues related to occupational diseases, new emerging risks, demographic change, administrative simplification presents, the European Commission considers developing a new EU strategy for occupational safety and health. COSLA would welcome a new strategy but we are keen to stress that it needs to take into account existing national policies, create more links with tackling health inequalities, promoting social inclusion and employability, and recruitment and retention to better coordinate EU policies in health and environment matters and to avoid duplication of work.

#### *Equal Treatment*

In Scotland, the promotion of equal opportunities for men and women is enshrined in an array of legislation, where individual rights derive from both European legislation (Art.157 TFEU (equal pay) and secondary legislation) and the UK Equality Act 2010 (formerly contained in the Equal Pay Act 1970). Equality is also addressed in the Local Government in Scotland Act (2003). Scottish Councils are actively promoting equal treatment, in addition to the public sector duties (Equality Act 2010), first and foremost through their delivering specific duties in their Single Outcome Agreements (SOAs), performance planning and management arrangements.

Scottish Local Authorities are required to pay due regard to gender equality laid down by European and domestic legislation as well as to abide by specific duties for Scottish public authorities. In this respect, they are implementing a national equality framework that goes beyond the provisions of EU legislation: Councils have developed Gender Equality Schemes including plans to gather information and assess policy impacts on women and men, set equality targets and take action to meet these targets, report annually and review the scheme after three years in

consultation with employees, services users, trade unions and other stakeholders. Scottish public authorities are amongst other things required to report on the **gender pay gap** and publish an **equal pay statement** containing information on their equal pay policy and occupational segregation.

A potential EU Gender Pay Gap strategy, as foreseen in the European Commission's Work Programme for 2014, needs to take into account the existing strategies at the local, regional and national level in order to develop a feasible EU strategy, at best in consultation with local authorities and other public bodies.

#### Q5: What evidence is there that EU action in social policy disadvantages the UK?

Scottish Local Authorities are among the **major employers** in Scotland currently employing a significant workforce of over 250 000 staff in a variety of occupational groups. In this sense, they are directly affected by the EU Treaties (esp. Article 19 TFEU) and the European Court of Justice (ECJ) rulings on working time and equal treatment as well as EU legislation in these two areas and occupational safety and health.

Scottish Councils have statutory functions, defined through a vast set of national legislation, with **core responsibilities and service provision in key areas in social and employment policy** including children and families, community care, older people, youth and adult social services, housing, education and equal opportunities etc. In exercising their responsibilities and being accountable locally, Local Authorities are best placed to determine their local communities' needs and challenges in order to provide appropriate public services. It is therefore essential that they enjoy a sufficient degree of autonomy in designing and organising public services tailored towards the needs of their local communities and employing a local workforce for this purpose.

In recent rounds of negotiations on the Working Time Directive (WTD), COSLA has brought forward an assessment of the potential local impact of changes to working time regulations and supported an evidence-based argument for the discretion that Local Authorities need to organise local public services effectively and sustainably for the benefit of their local communities (see Box 1). Considering the concerns that have been brought forward by Local Authorities, it can be said that certain changes to the existing EU legislation on working time would be to the disadvantage of local resources and service provision.

#### **Box 1: Impact of working time rules on Scottish Local Authorities**

In the previous round of negotiations on the Working Time Directive (WTD), COSLA carried out a wide ranging survey on the basis of the questionnaire that was submitted by the European Commission to the European Social Partners in 2010. An exceptionally high rate of feedback from Councils' human resource departments and at the time related police and fire and rescue services, COSLA was able to collect facts-based evidence.

##### **Key findings:**

- Council experts recognise that WTD review could have a significant impact upon the provision of a number of local public services given the nature of services and the geographical specificities in Scotland;
- COSLA's survey found that between 100 and 1000 employers per local area would be affected by the changes in current working time rules, leading to 10 000 employees across Scottish Council areas to be potentially affected;
- At the time of the survey, a clear majority of Scottish Councils applied the opt out clauses across a variety of staff groups: road operatives, home carers, social workers, police staff, janitorial staff, road workers, drivers (winter gritting) and craft workers were mostly cited;

Our experts believe that in absence of a **distinction between 'active' and 'inactive' on call time**, the calculated working hours of employees on 'call-out' or 'standby' arrangements would be significantly increased; these arrangements apply across a wide range of local government services in Scotland.

A classification of inactive on call time as working time causes difficulties, in particular in residential care services. While easier to comply with in part-time working arrangements, some care services (e.g. Children's Residential Care) with full-time employment face limitations to comply due to reduced staff resources and longer shifts. Many residential care establishments have the practice of 'sleeping over on call' which results in certain full time employees quickly accumulating 48 hours in a working week, necessitating the opt out form to be completed.

A majority of Councils feel that inactive on call time classified as working time would raise costs and would render many long-standing on call arrangements unworkable. It would result in issues for the viability of cost effective service delivery and would therefore have an impact on vulnerable service users. Another concern is the legal definition of 'reasonable' in the provision for 'reasonable time period' for compensatory rest.

In view of the potential removal of the **opt out clause** and the call-out time status, Local Authorities raised specific concerns in particular in relation to Fire and Rescue Services in relation to retained service personnel. Staff frequently hold other positions in addition to their Fire and Rescue Service commitments so that they are highly likely to exceed the 48 hour week where hours accumulate across their posts including on-call commitments.

While remaining an issue for the provision of local emergency services, the responsibility for fire and rescue as well as policing services has since been transferred from Scottish Councils to regional bodies. At the same time, this situation remains a concern where it applies to other local public services that have working arrangements similar to retained firefighters. A change in working conditions to the end of removing the opt-out clause, in combination with no distinction of on call/call-out time, would significantly affect small and remote Local Authorities who operate with retained personnel systems.

In general, there has been a widespread concern among practitioners about the **additional cost** that changes to the current working arrangements would force on Local Authorities. Depending on the specific situation of each Council's working time arrangements, the responses from Local Authorities range from moderately optimistic – where costs for recruiting extra staff could be offset by avoiding to continue to pay premiums to full time staff working overtime) to more pessimistic anticipating large amounts of extra funds to be allocated to future staff resources.

**Q6: Are there any other impacts of EU action in social policy that should be noted?**

The European Commission has increasingly sought to introduce social requirements and ex-ante conditionalities in various other policy areas, examples being public procurement and most recently the Economic and Monetary Union, as well as in its Europe 2020 strategy and the related economic monitoring procedures (e.g. through Country-specific Recommendations). Equally there is a persistent trend to come up with indicators that once formulated create a momentum to be used in EU legislation, often in matters not directly related to the indicators' original purpose (procurement being one clear case). We see some EU policies such as Employment that have moved towards a welfare function that was not anticipated in the EU treaties (such as the compulsory 20% spend of ESF on social inclusion). Clearly these developments, often via indirect or implicit ways, go beyond the powers conferred in the EU Treaties.

**Q7: What evidence is there about the impact of EU action on the UK economy? How far can this be separated from any domestic legislation you would need in the absence of EU action?**

It is clear that EU legislation on working time, health and safety, and equal treatment (and where applicable its transposition into domestic legislation) has a significant impact on the EU economy. However, it is difficult to separate the impact of EU legislation from any domestic legislation that would have been implemented in the place of EU legislation.

### PART III: Future options and challenges

#### Q8: How might the UK benefit from the EU taking more action in social policy?

COSLA considers it important that the European Commission will work towards improving existing social and employment legislation through non-binding instruments such as good practice guidelines and addresses the remaining challenges to safety and health at the workplace such as occupational diseases, social inclusion and tackling poverty, demographic change and ageing workforces etc.

Some benefit may also derive from activities in the framework of the Open Method of Coordination where these are for the exchange between national, regional or local authorities and stakeholders on common challenges in social affairs (e.g. as already practices in the Joint Action on health inequalities). It provides a platform for exchange on successful national policies where it does not pursue the aim of harmonisation, setting of standards or regulation but duly acknowledges differences in domestic legislation, service provision etc. in different national policy context.

At the same time, EU initiatives and policy coordination intended to foster this exchange between the national, regional and local levels must not impose monitoring or reporting requirements which would add significantly to the administrative burden and costs of Local Authorities in Scotland.

#### Q9: How might the UK benefit from the EU taking less action in social policy, or from more action being taken at the national rather than EU level?

COSLA has often disagreed with the European Commission about using the argument in terms of freedom of movement for workers in bringing forward legislation in employment and social affairs. In practice, this is often used to legislate in minutiae details, as it is the case with the Working Time Directive, instead of focusing on cross-border aspects, for instance the rights of posted workers (to which there is a justification up to a certain point).

#### Q10: How could action be undertaken differently? For example, are there ways of improving how EU legislation is made e.g. through greater adherence to the principles of subsidiarity and proportionality or the ways social partners are engaged?

COSLA advocates that the EU should fully incorporate into its policy development and implementation process a multi-level governance approach as this would better reflect the partnership approach involving national, regional and local authorities and communities that is in place in Scotland. In this way, local and national good practices and successful policies in the relevant social dossiers will inform EU activities and may generate an added value across Europe.

COSLA has repeatedly been calling on the European Commission to establish a **robust mechanisms of pre-legislative consultation for local stakeholders** in matters that affect them directly and to take more into account the impact on the local level in its policy assessments.

#### Q11: How else could the UK implement its current obligations in this area?

The UK Government Policy Statement on Part 2 of the Localism Act 2011<sup>2</sup> has been a game changer in terms of ensuring that UK positions on EU law was properly informed on local impacts. It contains for the first ever formalised and structured procedure for COSLA to engage with the UK Government on EU issues.

Firstly, it contains the first ever clear and unambiguous recognition by the UK Government that “*Local government is one of the democratically elected tiers of government in the UK. Local*

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<sup>2</sup> UK Government (2012) Policy Statement Part 2 of the Localism Act 2011:

<https://www.gov.uk/government/publications/policy-statement-for-part-2-of-the-localism-act-2011>

*authorities have a broad span of responsibilities, covering a large range of issues which affect people locally. Many of these responsibilities are affected by EU laws and regulations.”*

Secondly, as regards to EU legislation the Policy Statement recognises that *“the UK Government specifically names local government as a key sector for involvement” and that the “UK Government would involve local government – or a suitable representative body as appropriate – at the following stages:*

- *In time to influence EU negotiations – the relevant UK Government Department would look to identify local implications, where known (for example, technical administrative, resource and financial implications), in the relevant Explanatory Memorandum which it prepares on the EU legislative proposal and be accessible to the local government sector to discuss any local implications.”*
- It recognises that Local Government involvement needs to cover the upstream policy formulation but equally downstream implementation:  
*“Ahead of transposition into domestic law – the relevant UK Government Department should also take into consideration the New Burdens doctrine, which is part of a suite of measures to ensure council tax payers in England do not face excessive increases, and the Better Regulation Executive guiding principles that burdens are minimised and UK businesses are not put at a disadvantage relative to their European competitors. The purpose of this involvement would be to inform local government of any new legal obligations arising from new EU laws and the UK implementing measures and to give local government the opportunity to inform the legislative process”.*

Finally the statement makes provision for COSLA to receive the information on EU dossiers as soon as it becomes available.

Clearly this is an improvement that, if implemented would ensure that UK pre-legislative scoping, impact assessment and negotiating positions are sufficiently informed on specific impacts upon local government – just as it is the case in some Scandinavian Member States or the Netherlands.

It would now be necessary to flesh out these principles in detailed practices so that all Ministries and local authorities across the UK (or their representatives such as COSLA) are able to work together throughout the EU policy development and negotiating process.

*Q12: What future challenge/opportunities might the UK face in this area and what impact might these have on the national interest?*

COSLA and Scottish Local Authorities have long been aware of the challenges from **demographic change** in key areas of interest, namely, health and social care, housing, pensions and workforce and the pressures that an ageing population is likely to exert on local public service provision.

Scottish Local Authorities also face the challenge of changing demographics within their own workforce, which is predominantly female (71%; Q1 2013) and middle-aged (42% aged 35-49, 35% aged over 50 in 2011) (Scottish Government Public Sector Employment tables). As these figures show, many local government employees are due to retire in the short and medium-term which will place serious costs on Scottish Councils in terms of pension payments, skills loss, possible shortages of skilled workers and more.

It is clear that an ageing workforce will also bring a higher rate of disabilities, long-lasting and chronic health problems, reduced working capacities and early retirement. It is therefore important for Scottish Councils to promote healthier and longer working lives, while planning for large numbers of local government staff to retire over the next few years. At the same time they will have to ensure a sustainable service provision for an ageing population, in times of reducing public finances, and ensure to recruit young, skilled professionals.

At the EU level, there is an awareness of the common challenges that demographic change will pose to national, regional and local government in Europe. COSLA would welcome European

cooperation on common challenges posed by changing demographics, for instance through EU initiatives and the European Social Dialogue, and we see the benefit in sharing best practices for the exchange of good solutions and information in various related policy areas.

**COSLA Brussels Office**