The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

EDUCATION AND CULTURE COMMITTEE

Tuesday 9 June 2015

Session 4

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EDUCATION AND CULTURE COMMITTEE
15th Meeting 2015, Session 4

CONVENER

*Stewart Maxwell (West Scotland) (SNP)

DEPUTY CONVENER

*Siobhan McMahon (Central Scotland) (Lab)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Chic Brodie (South Scotland) (SNP)
*Mark Griffin (Central Scotland) (Lab)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Mary Scanlon (Highlands and Islands) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Keir Bloomer (Reform Scotland)
Professor Sally Brown (Royal Society of Edinburgh)
Sally Cavers (Children in Scotland)
Professor Sue Ellis (Joseph Rowntree Foundation)
Noel Fojut (Scottish Government)
Iain Glennie (Scottish Secondary Teachers Association)
Irene Henery (Equality and Human Rights Commission Scotland)
Fiona Hyslop (Cabinet Secretary for Culture, Europe and External Affairs)
Jim Martin (Scottish Public Service Ombudsman)
Iain Smith (Inclusion Scotland)

CLERK TO THE COMMITTEE

Terry Shevlin

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Education and Culture Committee

Tuesday 9 June 2015

[The Convener opened the meeting at 09:45]

Decision on Taking Business in Private

The Convener (Stewart Maxwell): Good morning and welcome to the 15th meeting in 2015 of the Education and Culture Committee. I remind all those present that electronic devices should be switched off at all times.

Agenda item 1 is to decide whether to take in private item 6, which is our response to the Scottish Parliamentary Corporate Body on Scotland's Commissioner for Children and Young People. Do members agree?

Members *indicated agreement.*

Subordinate Legislation

Historic Environment Scotland Act 2014 (Ancillary Provision) Order 2015 [Draft]

09:45

The Convener: Agenda item 2 is an evidence-taking session on the draft Historic Environment Scotland Act 2014 (Ancillary Provision) Order 2015. I welcome to the committee Fiona Hyslop, the Cabinet Secretary for Culture, Europe and External Affairs, and her supporting officials. Good morning to you all. After we have taken evidence on the order, we will debate the motion in the name of the cabinet secretary under agenda item 3. Officials are, of course, not permitted to contribute to the formal debate.

I invite the cabinet secretary to make some opening remarks.

The Cabinet Secretary for Culture, Europe and External Affairs (Fiona Hyslop): Good morning, convener. The order is part of a group of instruments that we have laid to complete the actions to implement the Historic Environment Scotland Act 2014, which the committee considered last year. All the other instruments follow the negative procedure, but they are related to the affirmative order that is before the committee.

We have consulted extensively on the details of procedure that are dealt with in the instruments, and I will be publishing the Government response to that consultation very shortly. As there was widespread agreement with our views on the best way forward in general and on matters of detail, we have been able to follow a consensual route in preparing the order and the other instruments. Historic Environment Scotland will assume the existing functions of Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland from 1 October, and it will take on its new, broader remit on the same date.

I can summarise the purpose of the order very quickly. It changes several pieces of primary legislation in which the Scottish ministers currently have a role so that Historic Environment Scotland is named, thereby enabling it to perform from 1 October the relevant functions, which involve its being consulted or playing other roles to support other bodies that are charged with decision-making functions. The order also sets out transitional arrangements for situations in which administrative processes have not been completed at the date of change, and those arrangements are intended to avoid any double handling or delay for those who are awaiting decisions.

The order also adds Historic Environment Scotland to enactments that list bodies that are required to adhere to statutory public procurement and regulatory standards. The specific enactments that the order changes to ensure HES's role are: the Roads (Scotland) Act 1984; the Building (Scotland) Act 2003; the Land Reform (Scotland) Act 2003; the Housing (Scotland) Act 2006; and the Environmental Assessment (Scotland) Act 2005.

Few of the enactments that are dealt with in the order generate substantial volumes of consultation or other work. The bulk of the regulatory and consultation work for Historic Environment Scotland will arise from the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and from a range of planning and environmental impact assessment regulations. As the principal acts for those areas already cover the new dispositions, the revised procedures can be implemented by changes to regulations, which follow the negative procedure. I also note that the order adds Historic Environment Scotland to the Procurement Reform (Scotland) Act 2014 and the Regulatory Reform (Scotland) 2014 to require it to operate according to the standards that are expected of public bodies in those areas.

The order helps to deliver the Government's commitment to position Historic Environment Scotland as the national lead body in our collective efforts to understand, protect and value Scotland's historic environment, and it contributes to setting the high standards that we expect HES to uphold. I would welcome the committee's support for the provisions.

The Convener: Thank you very much, cabinet secretary. Do members have any questions?

Chic Brodie (South Scotland) (SNP): Good morning. I have no problems with the order, but what management changes are likely to take place when consolidating the present organisations as HES?

Fiona Hyslop: That is a big question, and the committee discussed it at length during its consideration of the Historic Environment Scotland Act 2014. Considerable management changes have already been in effect for a significant amount of time; indeed, with regard to procedure, we are currently recruiting the new chief executive, and the new board has been established and has been meeting. The transition process and the management changes are being effected, as was discussed with the committee when it scrutinised the primary legislation.

Chic Brodie: I was not on the committee at the time.

Fiona Hyslop: I am sorry, Chic. We would be happy to forward you that information if it would help with the background.

The Convener: I believe that the order is affected by two consultations, one that was undertaken in summer 2013 and another, on changes to regulatory arrangements, that took place in the winter of 2014-15. Can you assure us that those consultations directly covered the changes that are now being made?

Fiona Hyslop: Yes, indeed.

Noel Fojut (Scottish Government): The large-scale changes set out in the HES Act 2014 were covered in the first consultation, which related to the framework.

For the second consultation, which dealt with the detail of the draft regulations, transitional provisions and so forth, we had a group of nine regulations as they were then drafted. We put those out to consultation as full draft regulations and received comments on them, and we have analysed those comments and taken them on board. Some minor changes were made to the drafting, but generally the response was very positively in favour of the arrangements as set out in general and in detail in the draft order. There were a few queries about minor technical matters, which we have addressed.

I should also say that the report on that will be published in the next week.

The Convener: That is very helpful.

As there are no further questions, we move to agenda item 3, which is the formal debate on the instrument. I invite the cabinet secretary to move motion S4M-13406.

Motion moved,

That the Education and Culture Committee recommends that the Historic Environment Scotland Act 2014 (Ancillary Provision) Order 2015 [draft] be approved.—[*Fiona Hyslop*.]

Motion agreed to.

The Convener: Thank you, cabinet secretary. I suspend the meeting briefly.

09:52

Meeting suspended.

09:53

On resuming—

Education (Scotland) Bill: Stage 1

The Convener: Agenda item 4 is an evidence-taking session on the Education (Scotland) Bill. First of all, I must thank everyone who has submitted written evidence on the bill. We have received almost 100 submissions, which will help to inform our detailed scrutiny of the bill over the coming weeks.

Today we will take evidence from two panels of witnesses, the first of which will cover the bill's provisions on attainment, inequalities of outcome and the proposal for a chief education officer. I welcome Keir Bloomer, who is representing Reform Scotland; Professor Sally Brown from the Royal Society of Edinburgh; Professor Sue Ellis from the Joseph Rowntree Foundation; and Iain Glennie of the Scottish Secondary Teachers Association.

We move straight to questions from committee members.

Chic Brodie: Good morning. As you would expect, a vast range of opinion has been expressed in the written submissions. To what extent do you think that legislation in general rather than custom and practice can contribute to closing the attainment gap?

Keir Bloomer (Reform Scotland): That is a very important question, and the answer is that the legislation can contribute only to a negligible extent. The proposed legislation has only one guaranteed effect, which is that every two years there will be a frenetic outburst of activity to prepare reports. We will get lots of bureaucratic action and lots of reports, most of which will be in competition with each other in trying to demonstrate huge quantities of activity. However, that is not the purpose of this proposal, which is a statement of aspiration. Looking at the evidence, I think that the only argument in favour of putting such an aspiration into law is that it will help to raise awareness, but that addresses a problem that we do not have.

In our submission, we have pointed out that Scotland has been aware of this problem for the best part of half a century, and that successive Governments have, in good faith, put in place all kinds of initiatives to tackle it. However, although the teaching profession has been solidly behind such measures, success so far has been negligible. The problem is not that people are insufficiently aware of the issue, but that we do not have an agreed consensus on how to tackle it, and legislation has little to contribute in that regard.

Professor Sue Ellis (Joseph Rowntree Foundation): The bill is useful, because it puts the attainment gap issue on the agenda and sends a clear signal to people involved in education that the issue must be tackled.

When we were preparing for last year's Joseph Rowntree Foundation systematic review, I looked through all the policy advice to schools to see the extent to which it framed issues such as getting it right for every child and "How good is our school?" in terms of poverty. Interestingly, although gender, looked-after children and educational support for children with special needs were mentioned, poverty was not mentioned at all. The bill is therefore useful as it will put poverty clearly on the agenda. It asks local authorities to collect data, but the difference will be made not by their doing so, but by schools, headteachers and teachers taking that data and using it to make a difference to the children whom they teach.

Chic Brodie: I am sorry to interrupt, but would strengthening the duty make an appreciable difference to the legislation's potential impact?

Professor Ellis: No. What will make an impact and a difference is the extent to which national advice, local authority advice and school advice line up and marry together, so that schools and headteachers are getting clear advice and signposts about what matters and clear information about what works.

Iain Glennie (Scottish Secondary Teachers Association): We support the bill, because it will bring up attainment. Unfortunately, however, schools are facing unforeseen funding issues, and a lot of our members and schools are complaining about the lack of resources in schools as a result of local authority cuts. It is getting to the point where we will no longer be able to buy the resources that we could buy five years ago.

Resources do not make education; education is made by teachers with the support of resources. However, having one without the other makes it very difficult to close the attainment gap, and the bill's resourcing impacts must be looked at carefully.

Professor Sally Brown (Royal Society of Edinburgh): I largely agree with what has been said. The bill is a necessary initial statement; it is saying, "This is on your agenda, and this is on our agenda." Other things go along with that, such as the First Minister's interest in the London challenge and in New York schools; those are all okay as signals, but they are, of course, nowhere near enough.

As Keir Bloomer has pointed out, we in Scotland—indeed, people throughout the world—have for a very long time now been putting an awful lot of emphasis on the idea of closing the

attainment gap, but we have not had the success that one might have expected given the amount of effort that has been put into it. Consider, for example, the work of the Joseph Rowntree Foundation, particularly through the University of Strathclyde in the Scottish context. We know a fair bit about the strategies that can be used to develop the reduction in the attainment gap that we are seeking, but we do not fully understand the issue by any means.

One thing that comes over is the need for schools to engage much more with parents and families. There has been a plethora of what people see as "good ideas" that might work, particularly in Scotland, but we have little proper evidence about what does and does not work. The Strathclyde work is a good starting point, but we are pretty low on that kind of work across the board. We all like to think of ways in which we personally think that something could be done, but we are not so good at evaluating how effective something has been.

10:00

Chic Brodie: I would like to ask one more question, if I may. Collecting data is important as long as it does not transmogrify into our starting to set targets again instead of trying to achieve outcomes. The issue is on the agenda, and we have had an indication of strategy. Could any more effective legislative measures be introduced not just to put the matter on the agenda but so that we can start to see effective outcomes?

Keir Bloomer: My problem is with your use of the word "legislative". I suspect that my answer to your question is no, because I do not think that legislation itself will contribute very much. A lot can be done to address the problem. As Professor Brown has said, the evidence that Sue Ellis has provided contains a great many good ideas, and I would like to think that our evidence from Reform Scotland also contains some good ideas.

One issue that I think needs to be taken much more seriously than it ever has been in the past is about how we create appropriate mechanisms for bringing about change. Scotland has never been short of good educational ideas, but it has always been short of the means of putting them into effect. We have seen that with, for example, curriculum for excellence. It is an admirable programme in many ways, but there is an astonishing amount wrong with the way it is being implemented. Of course, that is not the subject of this morning's discussion. I can say more if the committee wants me to, but I will leave it at that for now.

The question of how we bring about change is crucial. I assume that nobody in the room wishes us to close the attainment gap by reducing levels of attainment at the top, but that is what has happened in Scotland on some occasions. In the motion that was debated in Parliament about a week ago, I noticed that the Cabinet Secretary for Education and Lifelong Learning referred to us as a country in a "mid-table" position in relation to international comparisons, with the implication that that was not good enough. If we are to address the issue of overall attainment and how we raise everyone's standards and simultaneously close the gap by raising standards even faster for those who are most seriously underperforming at the moment, we need an acceleration of an order of magnitude in the rate of change in Scottish education. If we consider our position in international tables, it is clear that although we might have been improving over the past 20 years, that improvement has happened at a pace slow enough for others to overtake us comparatively comfortably. In other words, we are a long way from having mechanisms in place to allow us to address a problem of this complexity, given the timescale and pace of change that are required.

Professor Ellis: On the question of what we need to do to close the gap, I think that the images that we have are really important. We know that, in Scotland, the gap starts before children go to school, but it widens as children move through their schooling, and that indicates that our school system is not serving all children equally well. We need to look at what it is about the system that causes problems and to ensure that the system serves all children equally well. That does not necessarily mean that we have to lower anyone else's attainment. It is not like a pair of scales; we do not have to take something out of one thing to put it into another.

The second thing that the Joseph Rowntree Foundation would emphasise is that the issue applies to all schools in Scotland. Roughly two thirds of children who are in poverty in Scotland do not go to schools in areas of poverty. That means that we have different contexts for change. There are schools with a small percentage—say, 5 or 6 per cent—of children in poverty, schools with an average percentage of 20 per cent and schools with much more. Those are three very different contexts and they face different issues and different affordances and have different levers for change.

We need local solutions for each of those things and also national narratives of change that cover what works for each of those contexts, because the people who will make the difference—teachers and headteachers—need examples that are not generic but which cover contexts like theirs. In a middle-class school with a small percentage of kids in poverty, the danger is that those kids become isolated. The issue that that school has to

face is different from the issue that a school with a high percentage of kids in poverty has to face.

Returning to your question, I do not think that that is something that you can legislate for, but we need national knowledge building about it, and it needs to be on the national agenda.

Professor Brown: It seems to me that we need to make use of what other people have already found. For example, the complex strategy for achieving this important strategic aim—and I note that a strategic aim is, of course, not the same as a strategy—needs to take account of others' experience. The closest example to us, in a sense, is the London challenge, which has a lot to tell us about the time that it takes to develop this work—for example, we are not going to do it by next Monday afternoon—and the different elements that come up when the overall evaluations of these ambitious goals are addressed. We cover that in our report.

At the same time, we need to take account of the University of Strathclyde work that I have already mentioned and which you will hear about today. The paper talks about the situation in which we get the worst outcomes when we are trying to achieve something of this kind. For example, it talks about the difficulties of

"Short term external support for tuition"

or

"'hit and run' interventions or developments"

and

"Interventions that rely on anecdotal evidence".

It has been mentioned that this session is not about curriculum for excellence or curriculum reform, but we need to learn from those things. One thing that has been striking about the Government's strategy for curriculum reform has been its fragmentation. Enormous numbers of groups and committees have been set up to do different things in different places and they have had virtually no collaborative engagement and no mutual accountability. Accountability is important, and we really need to go for it.

The other day, somebody accused me of being back on an old research and development model. I am not on an old model. I really want to be on a new model, but that does not mean that we do not need development, research and collaboration.

It is interesting that Education Scotland's quite recent school improvement partnership programme report was a collaborative exercise involving Education Scotland and schools as well as some collaboration with the University of Glasgow. However, it did not tell us anything about the impact on the whole system; the only data that it reported was on teachers' preferences and views, and what the teachers like about that kind of collaborative exercise. That is not a new finding; when I was a teacher 50 years ago in the 1960s, we had collaborative exercises, and we liked them and felt that they were really valuable.

What the report did not tell us was whether we have looked at any basic measure that will allow us in future to say whether such an intervention has had any effect. You cannot just measure something at the end; you have to measure it at the baseline as well. That seems to be something that we have neglected in curriculum for excellence, and if we are not careful we might neglect it in this new strategic goal, too.

Mark Griffin (Central Scotland) (Lab): Most of us can see the things that impact on educational attainment in our communities. We can see that more affluent families are paying for extra tuition or for transport and are using the placing-request system to move their kids out of schools that are seen as not doing so well and into higher-performing schools. Those are only the families who have not paid extra money to buy houses in the catchment areas of schools that are perceived as better. There are more affluent parents who are better educated and are therefore able to help out with their children's homework.

Do any of the measures in the bill address those drivers of inequality, and should the Government be consulting on what can be done to redress that imbalance, while not doing anything that would reduce the attainment of people at the top? For example, should the Government be looking at homework clubs or at adult learning classes to improve the ability of parents to teach their children, be consulting on such specific measures and policy interventions and be considering including them in the bill?

Professor Brown: It seems to me that the most important thing to do—as you have done—is to identify the family characteristics that may lead to lower attainment for those who are disadvantaged. They are to do with parental education, occupation and all the things that you have mentioned.

Sue Ellis can probably tell you more about this than I can, but the Joseph Rowntree Foundation, whose work covers not just Scotland, has found that the most promising area is engagement of schools with families—there are a number of different ways in which schools can engage with families. We have always done a lot of telling families what they ought to do, and quite often they have done absolutely nothing about it, but the Joseph Rowntree Foundation has some research that suggests what might actually work; that is what we should focus on. We should take what we know about examples that work from Scotland and other places.

We should look at examples that are promising and that might work, even if we do not have hard evidence. We should also consider whether there are things that we are adhering to strongly that do not work. We were talking about a requirement on local authorities to report that they are paying attention, but the big question that we need to focus on now is how we can make a difference. Scotland is certainly not leading at the moment. If we put enough effort into the system, it could, and that is what we need to do.

Mark Griffin: We have been speaking about what works and what we think could work. If we have consulted and have identified what works, is there an argument for including specific policy initiatives in the bill?

10:15

Professor Brown: There is an argument for doing so, provided that the initiatives start small and pilots are carried out. One of the big dissatisfactions with curriculum for excellence was that there was no pilot. We learn an enormous amount from pilots: what looks as though it might be successful and worth going on with, and what does not work. We get an understanding of why things work or do not work. If we drop everybody into such things straight away, we are much less well informed.

Keir Bloomer: There is a difficulty about using legislation as the vehicle. The Government has at its disposal plenty of means for sponsoring initiatives of whatever kind in closing the attainment gap. It does not need to legislate to do that. The difficulty with legislation is that it creates a prescribed list of approved ways of going about things, which are difficult to change and which may, in the light of experience, be demonstrated not to be best.

I return to the question of how to bring about change in a large and complex system such as education. I do not think that change is primarily brought about by top-down action. One question that has to be asked is this: do schools see themselves as customers of the main national agencies—in this case Education Scotland and, to a lesser extent, the Scottish Qualifications Authority? Do they believe that those are places where they can get help in solving the problems that they experience? I suspect that the answer to that question is no. Schools tend to view those agencies as bringing about ways of imposing upon them policies that have been devised further up the system. That seems to be the wrong way round.

We have always had three levels of education governance: national level, local authority level and school level. I am not sure that we are clear any more about what the functions of those three levels are. On one hand, there has been a growing tendency towards micromanagement by national agencies. In the period since the previous local government reorganisation in the 1990s, which most people were very unhappy with at the time—it is astonishing that it has lasted as long as it has—the ability of the middle tier to function in the way that was originally intended has been seriously impaired, partly as a result of the much smaller average size of authorities and partly as a result of funding constraints.

There is, as yet, insufficient recognition of the importance of initiatives at school level. Schools in Scotland are more empowered than they are in many parts of the world, but are less empowered than they need to be. There is a need for a significant adjustment in our model of governance, so that it encourages at the different levels innovation that is appropriate to the different levels.

Am I suggesting that you take some of the excellent suggestions that you have received and legislate them into universal existence? I am most certainly not. That would be a very retrograde way of addressing the problem.

Professor Ellis: Keir Bloomer is right: legislation is too clunky for this approach, although you have a national level of advice. Strategic advice should be given to schools and local authorities about what will provide the biggest pay-off and about how to get there. At the moment, that strategic advice is not always absolutely clear to schools. There are 101 initiatives coming out, but how a school or local authority chooses from among those initiatives is not always clear.

The bookbug initiative is excellent, but it needs above it a strategic layer emphasising that reading engagement matters, outlining why it matters and describing the contexts in which such initiatives will give a really big pay-off for schools.

The level of strategic advice coming out of national bodies is absolutely crucial. If national bodies take the scattergun approach of issuing masses of things to try, that can distract local authorities and schools from determining what will give the biggest pay-off for them in their circumstances. That is why data are important. It is important to tailor how national bodies use data and it is important to tailor the advice that comes out of those bodies. The data do not always filter down to headteachers and teachers quickly enough in a form that they can use to improve teaching and learning in their classrooms.

Iain Glennie: Our concern is about having the time to teach, which is important for our members. If we want to close the attainment gap, teachers must be allowed to be teachers; they like to teach,

need to teach and want to teach, so we need to get them doing what they are good at. There has been a recent initiative to reduce the extra bureaucracy that does not allow us to teach. A recent survey indicated that the average Scottish teacher is working 47.5 hours a week.

The problem is that if we want to support children, a lot of things need to be done today and not tomorrow or next week; as a result, we need to allow teachers time to teach and—I argue—time to support. However, time is the greatest thing that we cannot buy. Development of curriculum for excellence and development of the national 5, the national 6 and the new higher get in the way of some aspects of teaching.

When all is said and done, a lot more gets said than ever gets done. We need to allow teachers to do what they do best, which is to teach and support. That will genuinely close the attainment gap. Adding legislation that will give us more bureaucracy will not do that.

Liam McArthur (Orkney Islands) (LD): I will pick up on a little of what Keir Bloomer said earlier. This is a legislature and we are legislators, and what we do is legislate. There is always a temptation to think that wielding the legislative stick will resolve any and all issues. I have listened to what the witnesses have said, and it strikes me that we know that the issue of closing the attainment gap has been around for decades. We have any number of solutions from the work of the Joseph Rowntree Foundation, Reform Scotland and others that would address aspects of it. I am slightly concerned that we might get distracted by putting in place, through legislation, something that makes us feel good and that we are moving in the right direction, but which takes us away from doing what we should be doing, as is evident from the Joseph Rowntree Foundation report and other work. Those things are, as the London challenge has demonstrated, pretty resource intensive and need resources to be channelled to where need is greatest. In that regard, Professor Ellis pointed to the numbers of children in poverty who are not in areas that come under the SIMD 20—the Scottish index of multiple deprivation 20 measure.

With the bill, is not there a risk that we are making ourselves feel good because we are putting something into statute but are not in fact getting on and doing the things that all the evidence shows us we should be doing in terms of targeting resources, forming engagements with families and providing support for teachers to do what they need to do? Is that a legitimate concern?

Professor Ellis: It is important that the bill is not seen as the be-all and end-all but is a prompt for other things to happen. For example, research on homework shows that parents who are in poverty give their children just as much support with their homework as do parents who are not in poverty. The problem is that the support of parents who are in poverty is not as high quality as that of the other parents because their education was not as good and they are not part of the sort of networks that can help them to get support. I bet, for example, that there is not a single person on the committee who has had a child doing highers who has not at some point phoned a friend to get an answer to a homework query for their child.

To address the problem of support, we need to provide homework clubs and to ensure that the right kids are coming to the clubs. Again, the recruitment methods for that are different. If we want kids in poverty to come to the clubs, we need peer-to-peer recruiting rather than teachers or parents telling kids to come. Schools need lots of implementation knowledge: national bodies could broadcast the research on what works, and implementation knowledge so that a school that wants a homework club will know exactly what it must do to make that work.

Liam McArthur: In a sense, that goes back to what Keir Bloomer said about the relationships among the SQA, Education Scotland, schools and local authorities' education departments. The risk is that, with a legislative requirement, resources will be taken up in pulling together the reports that will be required under the legislation and will not necessarily be tasked with putting in place the sorts of relationships and activities that you are talking about.

Professor Ellis: That is why light-touch legislation that asks local authorities to collect hard-core outcome data about what is and is not working—rather than data about what people like to do, which Sally Brown talked about—is really useful.

Professor Brown: It seems to me that there could be a policy of having more evaluation. I am not sure whether that counts as something that would go into legislation. It was just mentioned that if efforts and money were to be put into Education Scotland, maybe it would not be possible to do other things: that is true. We should have an evaluation of Education Scotland. Reform Scotland's commission on school reform certainly flagged that up. How long ago was that?

Keir Bloomer: That was two years ago.

Professor Brown: Reform Scotland said that Education Scotland should be accountable in the sense of its having been evaluated by 2015. The other day, I asked a senior person at Education Scotland whether there had been any move on that. There has not. It seems to me that, in policy—I am not sure that I understand the distinction between policy and legislation all the

time—there could be something that definitely looked to evaluate whether money was being put in the right place.

George Adam (Paisley) (SNP): I want to try to get a basic understanding of our problem with attainment. I note that the Royal Society of Edinburgh said in its submission:

"Over a period of at least fifty years, many of the most important initiatives taken in Scottish school education have been intended to improve outcomes for the disadvantaged ... In these circumstances, the rate of progress is all the more disappointing and demonstrates the intractability of the problem."

When the word "intractability" is used, are we talking about the issue being unmanageable and there being no way in which we can deal with it? That is my concern. Have we given up on it? I agree with everything else in the statement, but that bit makes me think that we are almost saying that the task is impossible.

Professor Brown: We did not use the word "intractability" as a synonym for "impossibility"; rather, we indicated that the evidence that we have from history is that improving outcomes is very difficult to do. It will not be done by next Monday afternoon.

On the evaluation of the London challenge, it is interesting that only secondary education was focused on for a period of five years. That is quite a long period in a Government's lifetime, of course. That brought it home to me that we have to really develop, test and then perhaps redevelop ideas, which takes a while, but is worth it in the end. That approach has been shown to be worth it and has been extended to other areas.

There have been successes. Sometimes people identify successes in particular schools or particular classrooms, which is rather different from system-wide success, but that nevertheless suggests that change is not impossible. However, we are in the very early stages of knowing things that are likely to be fruitful ways forward, and we need to emphasise that.

George Adam: The attainment gap is narrowing, but slowly. There is clear evidence about the strong correlation between poverty and attainment. What are the key triggers? I know that we have discussed the situation, but I would like to hear more detail. How can we deal with it? What is the best way forward?

10:30

Professor Brown: The relationship with the family and parents is important. Our work indicates some approaches that might work well. Other approaches, such as mentoring, which can take a number of different forms, are probably quite promising, but we do not have any sound evidence on them.

The official statistics on the families that the children who attain less are likely to come from show that the parents' education, and particularly the father's education, is important. I was in Norway over the weekend, talking about the issue, and a Norwegian woman challenged me, saying that that cannot be true and that the mother's education must be important. I tried to persuade her otherwise, but I will not stand on a platform and do that here.

Such matters would be difficult to change. It would be a lot more straightforward to change the relationship between schools and parents. I suspect that I got this figure from Keir Bloomer, but around 20 per cent of young people, including those from impoverished homes, do not achieve what we want them to achieve. We explain that by saying that they come from chaotic families. However, only about 1 per cent of families are chaotic—I am talking about families where there is drug dependency and so on—so what is happening to the other 19 per cent? We must look into that, rather than focusing on the impossibility of doing anything.

Iain Glennie: There are children with a great deal of poverty in their background. One of the worst attaining groups that my members deal with in schools involves those who are looked after and accommodated. Those children have had an incredibly hard life and it is not fair to say that they are in a chaotic situation now. The people who look after and accommodate them, whether in a care home or through fostering, strive to give them consistency and the support that perhaps they have never had before. It may take until the upper part of primary or the lower part of secondary before they get any form of stability, and they will have missed so much by then. They are at the bottom end of the attainment gap. They may be the ones who are furthest away from the norm, and perhaps the legislation will help them.

Legislation on the right to additional support for children with capacity who are over 12 could work well. We would greatly support that. Those children may be somewhere where the parent—we use the word "parent", but the term is broad and means whoever takes on the parenting responsibility—may not be able to drive them forward how they would want to be driven forward. Therefore, there is strength in the legislation giving power to the child, and we would greatly support that.

Keir Bloomer: Let me offer half a dozen quick thoughts.

The Convener: Half a dozen sounds like a lot—I am concerned about the time.

Keir Bloomer: I will be quite quick. The first point is on the early years. Sue Ellis has made the point about children being far behind before they get into the education system. We need to do something more systematic about the period from birth—or perhaps from before birth—through to the ages of two or three, when the child may begin to have contact with the education system.

Secondly, Sally Brown is right about the 19 per cent. Sue Ellis made the point that the problem is not that the children from that 19 per cent are not loved or helped by their parents, but that their parents are less able to help them than other parents are, so we must help those parents more.

Thirdly, relationships in schools are absolutely critical. Having positive relationships between children and teachers, which has been something of a success story under curriculum for excellence, needs to be taken a lot further.

Fourthly, we do not target the resources that we have as effectively as we might at poverty and disadvantage. I suspect that in Scotland less resource is now targeted specifically at disadvantage compared with south of the border. We must bear in mind Sue Ellis's point that disadvantaged children are not the same as children in disadvantaged schools. There are plenty of poor children who attend other kinds of schools and who need to be helped.

Fifthly, quality staff need to be retained in the schools where they are most needed.

My final point is that processes of change need to be improved. I have already hammered that point home, and Sue Ellis very usefully fortified it for me when she talked about the nature of the advice that national agencies give out. There is too much of it and it is insufficiently strategic; it is muddled, unreadable and barbarously written. We need to do something about that.

Professor Ellis: You need early intervention, but, as children move through their schooling, early intervention will not be a complete inoculation against future failure. You need early intervention before children come to school as well as intervention during primary and secondary school.

The research shows that families are really important for younger children. As children get older, it is more about peer-to-peer networks and wider networks outside school. Schools need to become consistently good at negotiating and liaising with families in a way that is about dialogue, not broadcast. They also need to become consistently good at putting secondary schoolchildren into employment and industry networks and giving them a vision of the range of places where they could end up and the social contacts that they need to get their first experiences of work. The research on children's work experiences shows that children who live in poverty tend to get work experience that is not as exciting as a middle-class child would get, given all the contacts that middle-class families have.

Ultimately, when it comes to the curriculum—the core of how children spend their day—we know that children in poverty benefit most from a broad, knowledge-rich and intellectually exciting curriculum. We should not concentrate on some sort of Gradgrind, skills-based, atomistic approach or some sort of generic process approach that says that the knowledge that children need does not matter. We should give children the knowledge that they need.

The research on literacy, such as the evaluation of the No Child Left Behind Act of 2001 in America, which covered 1.5 million kids, shows that kids in poverty can get quite good at decoding but they are not good at reading, because they do not bring to the text the broad general knowledge that a middle-class child brings to it in order to be able to understand it well. If you want to really equalise opportunities in the school curriculum for kids in poverty, you need to provide an intellectually interesting and exciting, knowledge-rich curriculum that gives them the knowledge that will set them up for the rest of their lives.

The Convener: Thank you. Siobhan McMahon has a supplementary.

Siobhan McMahon (Central Scotland) (Lab): A lot of the evidence has suggested that we need evidence-based approaches, which I agree with, but we have also heard that there is not enough of an evidence base out there and that we are not doing enough in that field. How long would it take to get an effective evidence base?

We heard from Professor Brown and the Joseph Rowntree Foundation about mentoring. Where will the volunteers come from? Who do we think will do the mentoring? It is all well and good proposing it, but where should we look for our mentors?

Professor Ellis: The data on mentoring shows that, as a whole, mentoring is not a particularly powerful way forward, although for some groups it is very powerful indeed. For example, for several years the University of Strathclyde has run a really successful mentoring programme for kids living in poverty in Springburn. Those kids should be going to university to do law, medicine, dentistry and all those things, but none of their relatives has ever been to university. That mentoring programme works really well because it is tightly targeted.

However, there is quite a lot of evidence to show that mentoring looked-after children, for example, is a difficult thing to do. Those children are already vulnerable, and if mentoring is done in such a way that the programme breaks down, that

is another source of failure and can do harm rather than good. It is not just the headline about the intervention that matters; it is how we implement it. Evidence can indicate what might be worth trying, but Scottish schools and local authorities need to collect data and consider whether something is working in their particular context.

There are two different problems with evidence-based approaches. The American approach states that fidelity is everything: "This is the programme; you have to do it to the letter." However, with that approach, teaching quickly becomes mechanistic and does not intellectually engage the kids, and the curriculum becomes very crowded and not joined-up, which we do not want. We want the diamond that Sally Brown talked about, with proven, promising and unproven interventions. Schools go first for the proven intervention, and if there is no proven intervention they go for the promising one. If there is no promising intervention they go for an unproven one, and as they implement they attend constantly not to what they are providing—the input—but to the impact on the target group that they want to achieve. That use of data can make the education system more sustainable, much cheaper, and much quicker and slicker when it responds to issues on the ground, and that is what a good education system will do.

Gordon MacDonald (Edinburgh Pentlands) (SNP): The bill places a new duty on local authorities to provide school education in a way that gives due regard to the desirability of reducing inequalities in educational outcome. We already have national priorities, including the requirement to raise standards of education and attainment for all in schools. The Equality Act 2010 contains the public sector equality duty, which states that those carrying out a public function should consider how they can

"positively contribute to a fairer and more equal society through advancing equality".

Given that we have those national priorities and the 2010 act, do we need further legislation that refers specifically to reducing inequality? All political parties have been struggling for decades with how to close the attainment gap. Will further legislation help us to achieve that?

Iain Glennie: It is a question of policy. Legislation is legislation—it is words on the page, but it does not effect a change. It is not about writing the words; it is about ensuring that those words make a difference. If the legislation effects a change in policy in practice in education authorities, yes, it may make a difference. Given the legislation that is already in place, further legislation will not make a proportionate difference. It may, however, create a proportionate increase in bureaucracy, which might mean that people are less able to support the legislation that is already in place.

Keir Bloomer: Part 1 of the bill is pious thinking masquerading as law making. That does nobody any good.

Mary Scanlon (Highlands and Islands) (Con): Don't you hold back, Keir. Tell it like it is.

Professor Brown: It is ridiculous for me to keep citing the Joseph Rowntree Foundation, because I represent the Royal Society of Edinburgh, but one striking thing was its suggestion that what does not work is having very broad goals without guidance about what to do. What tends to work is when we really focus down on what affects attainment. We do not know all the answers to that yet, but that is what we need to assess.

I am sorry to sound like the usual parrot, but we go on needing research and evaluation and the Government has not been generous in commissioning research. Perhaps the committee is not interested in this today, but the result has been that our educational research community has suffered, and people have moved. We must be careful that we do not find ourselves wanting to fund research without having anybody to do it.

Gordon MacDonald: We have the bill in front of us, but is it better to pass the legislation or to change the national priorities?

10:45

Professor Brown: Not passing the legislation would send a message that might not be the message that you want to send. It might amount to saying, "Come on, let's forget this. We've been at this for years, so we'll just drop it." Dropping legislation is a difficult thing; I would not want to say more than that.

Professor Ellis: I return to my original point, which was that the bill puts the matter on the agenda for local authorities. It means that local authorities have to look at attainment every two years and have to collect data. The important message that needs to go out to local authorities is that it is not just about collecting data for the legislation but about collecting data to improve teaching and learning in their schools, using mechanisms such as school inspections and local authority quality improvement officers. A whole load of levers are available.

Mary Scanlon: My question is on the reporting requirements. The Convention of Scottish Local Authorities has said in response to the bill that

"It undermines local democracy and will provide little in the way of useful information that could aid public scrutiny of education."

The Scottish Government thinks that it would not be helpful to have league tables, but I think that all the witnesses have said in their submissions that there is insufficient baseline and on-going data. It seems to me that Audit Scotland is probably the best source of data for comparing schools. In a recent report, it said that there is no consistent testing between primary 1 and secondary 3, that 75 per cent of primary 7 pupils meet competency standards in literacy and numeracy but that two years later only 42 per cent of pupils meet those standards. If you want to find any kind of data or comparison, it seems that we can find it not in the education sector but from Audit Scotland. I add that I am also a member of the Public Audit Committee.

How do we get some sort of national benchmarking? How do we identify the pupils—whatever school they are in—who are falling behind the rest of the class and give them the support that they need to keep up? How do we compare school against school and local authority against local authority without having the politically unacceptable tests and league tables? That is what I am struggling with.

Professor Ellis: You do not want tests and league tables, because they tend to encourage people to vote with their feet, as happens in England, which results in polarised school systems that are very hard indeed to shift. It is probably not helpful for teachers either—certainly not for primary teachers—to have tests that put children on a general level if it is not quite clear why those children are on that level; it requires a further level of analysis.

You want teachers to be able to get, quite quickly and easily, data about the issues that make a difference to children's progress. In literacy, for example, that might be decoding data—observations, running records and book levels; comprehension data such as a standardised test; and engagement data that shows how much children read, how much they want to read and how they see themselves as readers, which would be survey-type data. However, you probably do not want all that data to hit all the schools all the time. You want class teachers to be able to call on that data when it will be most useful to them. Having a national bank of surveys and tests that allows schools to form their own local policies about which years to test, what information they will find out and when, and how they are going to use that information to move the situation forward is probably one of the most useful things that you can do.

The important thing to remember about data is that data does not tell anyone what to do. Data generates a conversation at the classroom teacher level about the issues and the possible ways forward, and it gives class teachers a grounding so that they can try an intervention and see whether it is working.

Having a data system that puts class teachers and headteachers in control of which data they get and when they get it is preferable to having some sort of criterion-referenced national test that is done for particular year groups every year.

The issue with criterion-referenced tests is that, very often, teachers will teach to the criteria, when those criteria are just proxy measures for a whole load of other things. I would go for standardised comprehension tests every day of the week. With a standardised comprehension test, you get an overall view as well as a specific view of a class. We should let teachers use those tests as and when they need to in order to find out about their class.

Mary Scanlon: In considering a standardised test, are you looking for a national test that will be used in all schools? I am aware that, at present, many local authorities—27 out of 32, I think—buy private sector tests from England. There is no peer appraisal and no comparison, and there is very little that teachers can do from that perspective. Are you looking for Education Scotland or whoever to consider a national survey or a test with national benchmarking, not to compare school with school and local authority with local authority but to identify the children who are falling behind? Do we need a national type of test?

Professor Ellis: We need a national bank of tests and surveys that schools can call on. You are right: we do not want to see that much money walking south of the border to buy things that we could provide much more cheaply and cost effectively, and much more responsively, in Scotland.

The tests that local authorities are buying from England are very often geared towards the political concerns that exist south of the border. For example, in one of the tests there is a non-word reading score. Children have to read words like "banic" that do not actually make sense in order to test whether they have been taught phonics; at one point, Mr Gove was very keen on phonics. The problem is that the kids who do really well on those tests tend to be the kids living in poverty who have been taught a lot of phonics but who do not expect reading to make sense. The kids who are failing the tests are the middle-class kids who expect reading to make sense. They read a word such as "banic" and think, "That can't be right—it's not a real word; it must say 'banana'," and they change it.

The tests are setting up a mindset that is not helpful in producing the sorts of readers that we want. It would be much cheaper for Scotland to

produce a bank of surveys and standardised tests—standardised for the Scottish population—rather than using national criterion-referenced tests.

Mary Scanlon: The Government is allocating £100 million to address the attainment gap—

Professor Brown: A rather small amount of money.

Mary Scanlon: How will national tests or surveys—whatever we want to call them; I am referring to something that will be used consistently in all schools—be used to measure whether the money is being well spent and whether we have addressed the issue of attainment outcomes for children from poorer backgrounds with low attainment? How can we know from those tests that the money will be spent and will be effective?

Professor Ellis: If you have a standardised test, you will measure the gap between rich and poor kids on something like comprehension. However, to improve comprehension among children living in poverty, you need to have good decoding but also good reading engagement. The average book that is written for a seven-year-old or eight-year-old child has more rare words and multisyllable words than the conversational speech of a university professor; the only thing that beats it is the expert testimony of a witness in court. If you want to improve a child's vocabulary and their knowledge, you need to get them reading widely and reading novels. That will impact on their comprehension scores, which are the hard measure. With standardised scores, even if one school is testing in primary 2 and another is choosing to test in primary 3, there will be standardised results, and each school will know whether they are closing their poverty gap. As I said, schools work in different contexts, so the levers that will work in them will be different.

Keir Bloomer: Scottish education is surprisingly data poor compared with education in England and a lot of other places. The difficulty is the one that has been described. How do we increase the flow of data without bringing in undesirable unintended consequences such as teaching to the test, narrowing the curriculum and so forth?

If you want to improve the bill—I can see that, having been introduced, it is not simply going to be wished away, although personally, as you will have understood, I would have preferred it had it not appeared in the first place—you should address section 4, on reporting, and transform it into a section that empowers ministers to expand the collection of data. There is authority to do that at present, so in a sense you do not require the bill, but it could be a useful vehicle for greatly improving the range and quality of data that we have.

Mary Scanlon touched on the fact that standardised tests are done in 27 of the 32 local authorities and not in all 32 of them. It would be helpful to introduce something that enables national comparability. Incidentally, it is also unhelpful that we have withdrawn from two of the three international surveys that we used to be involved in, and I hope that that will be rectified someday soon.

It would be helpful if the bill was changed to place the emphasis on data rather than on bureaucratic reporting, which I am fairly sure will knock through to bureaucratic effort in schools. When a local authority is asked to prepare a report on what it is doing about poverty, the first thing that it will do is get schools to fill in forms to tell it what is happening at the school level, so there is a danger of huge amounts of worthless bureaucratic activity. If the bill can be transformed into something that helps to boost the data set that we possess nationally, that would be helpful.

The Convener: I am slightly puzzled because, on the one hand, you are saying that we should collect lots more data. I presume that, in effect, that data collection would be done by schools.

Keir Bloomer: Yes.

The Convener: But you also suggested that it is a terrible bureaucratic burden for schools to be involved in reporting on the activity that they are doing in attempting to reduce the attainment gap. I am struggling to understand why one set of bureaucracy is good and another is bad.

Keir Bloomer: One set is purposeful and the other is purposeless. That is essentially the difference.

The Convener: You think that reporting on what schools are doing to tackle inequality, poverty and the attainment gap is not valuable information.

Keir Bloomer: We have other ways of getting it. We have the national inspection system, which gathers a lot of this kind of material in any case. The gathering of data is objective; the seeking of reports is not. What we will get is competition among authorities to produce reports that make them look as good as possible. Not only will we have huge quantities of bureaucracy, by which I mean useless data collection, we will have massive amounts of mendacity, which is not hugely helpful to the system either.

The Convener: I ask Mary Scanlon to make this her final question.

Mary Scanlon: I will be very brief. I heard Sue Ellis talking about teacher training, and I think that the response to a freedom of information request

from the convener showed that teacher training in Scotland includes about 20 hours of literacy training—maybe I am wrong—while in England it includes more. I wonder whether, rather than always looking at schools for the solutions, we should be looking at teacher training to help to close the gap.

Professor Ellis: One of the really interesting things about the FOI information is the range. One university gave only 20 hours, which was four lectures and two workshops in the third year and the same in the fourth year on how to teach a child to read, write, talk and listen from the age of three right up to the age of 13. That is not enough. Another university gave 90 hours and one university did not know how many hours it gave. There is an issue there with teacher education.

11:00

There is a broader issue to do with the relationship between universities and local authorities. A lot of really interesting work is going on in local authorities. They are trying to gather and use data and evidence, but no conversation is really happening between university researchers and local authorities, nor is there a conversation between universities and schools.

However, there are some really good examples. I am working with Renfrewshire Council to help raise the literacy rates for children in poverty there. There are good examples of universities working well with schools, but you are right, in that there are things that we need to look into when it comes to initial teacher education, continuing professional development and, as Sally Brown said, research, to improve the partnership between universities and schools. I am not convinced that the current partnership arrangements are sufficiently rooted in the sorts of things that research shows matter. Even though universities are changing the arrangements, I am not sure that the model that has been adopted is the best one.

Liam McArthur: I will follow up on the questions from Gordon MacDonald and Mary Scanlon. There is obviously a need to establish the strategic priority of closing the attainment gap and to gather more data on which to base policy development—but without going down the route of having bureaucracy that serves no useful purpose.

One of the national priorities is:

"To raise standards of educational attainment for all in schools".

There is a way of fashioning that to capture the issue of the attainment gap more clearly. Through the work of Education Scotland, both in testing and in support for teachers and schools in making improvements, having that priority allows schools to reflect their own different environments and to do work with standardised testing. That allows us to achieve the objective without putting a reporting commitment into legislation. I am still struggling to see what benefit that commitment delivers.

Iain Glennie: Two things have happened of late. To start with, you need a benchmark. Then, you need to find out how far from the benchmark you get at the end. One of the biggest things that have affected Scottish secondary teachers is a moving away from some of the real attainment data. We used to use a clunky mechanism called STACs—standard tables and charts—which was very much based on attainment in examinations. Lots of children fell through the hole because of not completing something. A child could do two thirds of a course and be rated as a fail. To me, if someone is not getting dressed in the morning, does not get breakfast and struggles to get to school, the fact that they have got through two thirds of the course is not a failure—it is an achievement. STACs did not allow for that.

Now, we have moved to the senior phase benchmarking tool—the insight system—which focuses much more on achievement, rather than attainment. We have closed the sieve a wee bit, in that we catch those kids now. Instead of penalising someone for what they did not get, we reward them for the thing that they did get. That carries them on through. However, we still do not have the bottom-end benchmark for where someone started from, so that we can know where they have got to.

The people doing the London challenge project said at the start, "This will run for five years. We will take data in year 1 and we will compare it with the year 2 data. By year 5, things will have changed—we will not be comparing apples with apples; we will be comparing apples with apple-like fruit—but at least we will know that the thing that we started with is measurable and repeatable." Our problem is that the foundation is extremely sandy. For the reasons that have been outlined, we do not have a benchmark.

If we do not know whether we are starting at zero or 100, the fact that we have got to 1,400 at the end—whatever those numbers mean—is meaningless. We need something that is not a one-year, two-year or next-Monday issue. It needs to be five years at a minimum, or the data from year 1 is as meaningless as the data from year 5. Whatever we do—whether it is through legislation, policy or practice—we need a benchmark and an end point. Only then can we measure the difference between them.

The problem is that, if the benchmark is primary 3 and the next big thing is at the end of fourth year, using the insight tool, we are not talking about a five-year investment. A five-year

investment will not cover that period from start to finish, because it will be 10 years plus.

When the programme for international student assessment scores for this year come in, we will not be at all sure whether CFE has in fact worked as a concept. That will be a big problem.

Professor Ellis: The other aspect of the London challenge that is quite useful to think about is that it was a very data-driven but also a very tailored intervention. It was not the case that it came in saying, "These are the programmes that work; everybody is to do them." It paired schools in similar sorts of catchments that were high achieving and low achieving in different areas. It got school management teams to visit each other. The low-achieving schools had independent outside academic advisers from the Institute of Education in London who brought to bear their networks and their analysis skills. The schools were given highly tailored advice about what they did. Although it was not explored in the evaluation, the partnership between the Institute of Education and the schools was fabulous. The leadership that the schools were provided with and the emphasis on leadership were very important.

There was also an econometric report that showed that some of the big gains came when the kids who had undergone the national literacy strategy and shown big improvement in their literacy in the primary sector then hit the secondary sector. That seemed to whop on the attainment of the schools.

It was a networking approach, but it was very much data driven, and it involved experts from outside the local authority.

Liam McArthur: You have not referred to the legislative driver that made that happen. It is not clear to me that a legislative driver was necessary. There was a commitment that was backed with funding and the recognition that an approach tailored to each of the different schools was what was going to deliver the results.

Professor Brown: Of course, the push and commitment to get it going came from London, not from Westminster. It was then extended to Manchester and somewhere else.

Keir Bloomer: The black country.

Professor Ellis: It was not as successful in those two places, because it had a different context of implementation.

Keir Bloomer: It also had much less time—three years against eight.

Professor Brown: Yes. I do not know about the black country initiative, but I think that one of the reasons why the Manchester one did not succeed more was that those involved there thought that they could make up time and take advantage of London having taken longer. Maybe there is something in that, but how much?

It seems to me that, in talking about testing—which is a very big issue that is on the Royal Society of Edinburgh's agenda for thinking about—we have to be careful that we do not put all our emphasis on the senior phase. We need to do a lot more work on the basic education phase. We would certainly want to emphasise that in the future.

Of course, I cannot say anything about what tests we should use now but, even if standardised tests from elsewhere are used, they can always be adjusted to be valid for whatever it is that we are aiming to assess. However, we have to be very clear what it is that we are aiming to assess. We have talked for most of this morning about literacy, which is terribly important, but it is not the only thing that is important; there are many other things as well.

Colin Beattie (Midlothian North and Musselburgh) (SNP): Section 20 of the bill will introduce proposed new section 78 into the Education (Scotland) Act 1980, which will require education authorities to appoint a chief education officer. The bill does not give the CEO any particular statutory function, but proposed new section 78(1) of the 1980 act states that the officer's role will be

"to advise the authority on the carrying out of the authority's functions under"

the legislation. Proposed new sections 78(3)(a) and 78(3)(b) of the 1980 act state that the Scottish ministers will set by regulations what qualifications the officer will require but that the officer's experience is to be determined by the education authority. I am interested in the panel's views on what the officer's qualifications and experience should be.

The Convener: Mr Glennie, do you want to kick us off again?

Iain Glennie: Some people will think that the director of education—as they once were—will ipso facto be the chief education officer, but they are two different roles in many ways. The director of education is like the chief executive officer of a small company: someone does not need to be a teacher to be a good director of education. In fact, some people have proved that to be the case—I mention no names.

The Convener: Please be careful, now.

Iain Glennie: I am being very careful.

However, as a chief education officer, your principal business—your meat and your murder—is education, so I think that it is important that one

of the officer's qualifications is that they are registered with the General Teaching Council for Scotland.

The question of the required experience moves us outwith the remit of the Parliament, but the CEO would certainly have to be someone who had spent some time in schools. They would not necessarily have to have been a headteacher, but they would need to have spent some time in schools so that they know what the people who they are directly in charge of—who deliver education at the chalk face—do for a living. If the CEO does not know that, they cannot call themselves a chief education officer. You cannot be a chief if you do not know what your Indians do.

Professor Ellis: My understanding is that the legislative requirement for a chief education officer will bring education into line with the similar legislative requirement for social work and that it is just a tidying up of the situation as it is.

The Convener: Do you have a view on the issue, Professor Brown?

Professor Brown: I do, but I am not sure that it is an answer to Mr Beattie's question.

It seems to us very important that Governments control policy, which is what they have the opportunity to do. However, it is then a question of the extent to which they start micromanaging at all levels below policy. We tend to think that that area must be left to the professionals who are in place. We would therefore expect that an insistence on having a particular post at local government level would be a response to a problem, but we have not been persuaded in the case of the proposed chief education officer that there is a problem.

The committee will have noted that we said in our written submission that there is now variation across local authorities on the role of educationists in education services, but we are aware of only one case where somebody responsible for education does not have an education background. We are simply not persuaded that the bill's proposal for chief education officers is a valuable one.

Keir Bloomer: The key issue is how appropriate it is for national Government to prescribe through legislation the management structures of local government. I am not persuaded that that is the right thing to do. Incidentally, the bill would not bring the post of chief education officer into the same position as the post of chief social worker officer, because the bill as introduced prescribes no duties or powers for the proposed chief education officer and that is quite different from the set-up for the chief social worker officer. I am therefore not persuaded of the need for section 20 and have nothing to say about what experience or qualifications should be sought for a chief education officer.

Colin Beattie: The role of chief education officer would be limited to providing advice, but do you think that the role should have a stronger purpose? For example, the role could be to be a centre of knowledge about education and so on that people could tap into.

Professor Brown: As far as I am concerned, the role that would be played would be dependent on how the local authority organises its business, what its beliefs are or what its ideology is. It seems to me that in all cases there is an education input, but that sometimes happens along with social work or with the library service, or both.

I suppose that I would go along with what my colleague Keir Bloomer has just said, which is that it is the business of the local authority to decide how it does its education business. The authority has to be accountable for that, of course—I am not suggesting that authorities are not accountable. I am afraid that I do not really have an answer to your question, Mr Beattie.

11:15

Professor Ellis: The position is something that ADES has asked for, and its members are the people on the ground. It is technically possible, and not desirable, for education decisions to be made by people who have no experience of education; they may come from leisure or social work, or a range of different backgrounds. ADES is obviously very concerned about that.

We need to listen to the professionals on the ground and consider the extent to which they are saying, "This is something that's needed". We need to read their submissions carefully and take what they say on board.

Colin Beattie: Given that there has been a huge amount of change in local authorities in terms of their organisation and who is responsible for what, is there a case for the person in that role to cover more than one local authority and provide expertise across a wider area?

Professor Ellis: That is Education Scotland. What we want is that, when local authorities are making decisions about how to allocate their funding and which projects they are going for, and about how they analyse the data that they have and consider the education implications, someone who understands education on the ground and who understands schools, as Iain Glennie said, is there to inform the conversation.

It would not be good if a local authority did not consult anyone in education on such matters, but it is perfectly possible at present, given the current context, that such a situation could arise. It would

obviously not lead to good decisions for Scotland and for Scottish kids if there was not someone in the local authority with knowledge about education who could help.

It is the conversations that come out of the data that matter, and in those conversations it is important to ensure that there is a good voice for education rather than voices just from social work, leisure and all the other areas. At present it is possible that people in those positions could form the entire committee that looks at the education data.

Colin Beattie: Coming back to my point about organisational changes, there are clearly mixed views as to who would be most appropriate for the role of chief education officer. One council has suggested that the person would not need an education background, which seems a little odd to me. Other people are carrying out heads of service roles and so on without any educational qualifications or experience.

Is the legislation filling a gap and ensuring that we have a certain degree of expertise available in a local authority, at least for advice and reference purposes?

Keir Bloomer: As I said earlier, I have considerable concerns about the capacity of local authorities to deliver what has traditionally been the role of the middle tier of governance in education. There is no question but that that has been exacerbated by the financial circumstances that we have experienced in recent years. Very few authorities can now afford to have what we would traditionally have regarded as a director of education, and there are much larger agglomerations of services under the control of a single director.

It seems to me that those difficulties require to be addressed in a much more fundamental way than is proposed. I would have thought that the Parliament would, sooner or later, have to look at the position and organisation of local government in the post-devolution circumstances. The current set-up pre-dates the legislation for the Scottish Parliament by three years and its implementation by five years. Looking at local government in a fundamental way seems to me to be far more appropriate than what is really a tokenistic action.

As far as I understand it, what you are saying confirms that view. The job has no powers and requires no established qualifications, and there is no established role, and yet it is held to be a good thing. I find that a little difficult to understand.

Colin Beattie: The point is that the qualifications will be laid down by the Scottish ministers in regulations.

Keir Bloomer: Yes, but I would have thought that, if there was a clearly established problem to be resolved, there would be a good deal more clarity at this stage about how it is to be resolved than appears to be the case.

The Convener: I thank you all very much for attending the meeting this morning. We are most grateful for your time. I suspend the meeting briefly for a change of witnesses.

11:20

Meeting suspended.

11:23

On resuming—

The Convener: Our second panel will cover issues relating to additional support for learning rights and section 70 complaints. I welcome to the committee Sally Cavers from Children in Scotland; Irene Henery from the Equality and Human Rights Commission; Jim Martin, the Scottish Public Services Ombudsman; and Iain Smith from Inclusion Scotland.

As with the first panel, we move straight to questions from members.

Liam McArthur: Good morning. In the written evidence that we have received, a number of people, including the Faculty of Advocates, have raised concerns that the definition of capacity is not consistent with the current law or the Equality Act 2010, thereby giving rise to the potential for confusion.

The faculty goes on to propose that the bill be amended so that

"a child of any age who understands the issues may access legal remedies, with a rebuttable presumption that a child aged twelve understands (ie it is assumed the child is capable unless shown not to be) and the possibility of showing that a child under twelve has capacity."

I wonder whether the witnesses would offer their views on the potential for confusion and, if there is that potential, what the potential remedy ought to be in relation to capacity.

Irene Henery (Equality and Human Rights Commission Scotland): No reason is given in the bill to move away from the Age of Legal Capacity (Scotland) Act 1991, which deals with the issue of the capacity of children and applies to disability discrimination claims that are heard before the additional support needs tribunal. The proposal is to apply a different test. We are unaware of any reason to deviate from the principles of the 1991 act.

The Equality Act 2010 introduced a change, which came into effect in 2011 and simply transferred the place where disability

discrimination claims could be heard from the sheriff court, which is where other discrimination claims remain. Since 2011, those claims have been heard in the additional support needs tribunal.

The 1991 act deals with the principles relating to whether a child is considered to have capacity. Like the Faculty of Advocates, we feel that those principles should apply equally here. There is no reason to move away from that. The 1991 act provides that a child who is 12 or over is presumed to have capacity; they are taken to have capacity unless there is evidence that challenges that. Children under 12 may have capacity if they have sufficient understanding.

Liam McArthur: I am sorry to interrupt, but I take it from what you say that you would also have concerns about the specific inclusion of references to disability. In your view, that is covered by the existing legislation and there is no case for moving away from that or referencing it specifically in the bill.

Irene Henery: Our position is that the 1991 act covers what is needed here.

On the definition in the Education (Additional Support for Learning) (Scotland) Act 2004, which is about the establishing of children's views, and the proposal that that would be the test that would apply to whether a child has a right to make a reference to a tribunal, there is a further difficulty. As it stands, the definition runs the risk of not complying with the United Nations Convention on the Rights of Persons with Disabilities. That is because, rather than focusing on the issue of understanding, which is the first part of the test, it adds a second part. That is problematic, because proposed new section 3(2) of the 2004 act that the schedule to the bill would insert says that

"a child or young person lacks capacity"—

if they do not have—

"sufficient maturity or understanding by reason of—

(a) mental illness,

(b) developmental disorder,

(c) learning disability"

and so on. The test should be about the child's understanding and not whether their lack of capacity arises from a mental illness or disability.

Liam McArthur: Is Inclusion Scotland's position the same?

Iain Smith (Inclusion Scotland): Although we welcome the proposal to extend the rights to children in relation to additional support needs, we are concerned that the proposal in the schedule is not compatible with the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. Article 7(3) of the UNCRPD says:

"States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right."

We are concerned that, rather than being given the same rights as children who do not have disabilities, children who have additional support needs will have to jump through an additional hoop to prove that they have capacity before they are able to access their rights.

11:30

The legislation seems to be framed the wrong way round; if children have additional support needs they will have to prove that they have capacity, rather than, as Irene Henery said, there being a presumption that they have capacity if they are over the age of 12 or, indeed, if they are under the age of 12, if it can be shown that they have the maturity to make the decision. That is a major concern, and we do not think that the legislation is compatible with the UN conventions.

No doubt we will talk a bit more about the best-interests test but, in addition to children having to prove that they have capacity, the local authority may then just say, "You've got the capacity, but you still can't make the decisions, because we don't think it's in your best interests." In other words, they are given the right to participate, but then that right is refused once it is used.

The bill must be amended. A key factor is that there was no consultation on the issue or on the definition of capacity when the question about extending the rights on additional support needs was consulted on last year. The legislation goes way beyond what is reasonable without proper consultation on its consequences.

If I were to make a suggestion on how the capacity issue might be resolved, I would stop paragraph 2 in the schedule to the bill at the proposed insertion of new section 3(1) into the 2004 act and not include proposed sections 3(2) or 3A. A right to make regulations or statutory guidance, which could be further consulted on, on the process for assessing capacity where there is a doubt about whether a child has capacity, could be included.

Sally Cavers (Children in Scotland): First, I agree that we do not want to introduce the extension of children's rights and then put in place unnecessary barriers to children being able to access those rights.

We did not say much on the capacity issue in our written evidence. However, we absolutely

support what the Equality and Human Rights Commission has said on the guidance that would be required for local authorities about the assessment on capacity. We would want any likelihood of disputes arising as a result of the introduction of the legislation to be minimised. Therefore, the guidance would have to be detailed. It would need to ensure that local authorities were able to demonstrate impartiality in their consideration of capacity.

Liam McArthur: Iain Smith mentioned the lack of consultation on the definition of capacity. The previous panel had similar concerns on a couple of other matters. Was there any indication from the discussions in the lead-up to the bill about why that consultation did not take place? Why was there a sudden need to define capacity in the legislation, or did it come out of left field for everyone?

Iain Smith: We were not involved in any discussions about capacity. We made a submission last year to the original consultation. However, as I said, that consultation said nothing other than that children with capacity would have those rights; it did not indicate that the legislation would seek to redefine capacity. I think that the assumption would have been that the existing capacity definitions, which Irene Henery mentioned, would apply to the legislation rather than a new definition being brought in, which is effectively what the legislation is doing. The change to the definition is quite significant. It is clearly discriminatory, because people who do not have ASN do not have to prove their capacity, but those with ASN will have to prove their capacity.

The Convener: Iain Smith mentioned the best-interests test, which is connected to the capacity issue that we have just been discussing. The bill introduces a test of best interests, which will be applied to children and young people. Concerns have been expressed about that, including in the submissions from Inclusion Scotland and others.

However, others have been more supportive of the introduction of the best-interests test. Indeed, on 28 April Scottish Government officials provided an explanation of why the best-interests test should be included. Will you expand on the EHRC's view that the best-interests test is not compliant with the UN conventions, which is what you submitted to the committee?

Irene Henery: We welcome the aim of the bill, which is to extend the rights of children. That is obviously consistent with human rights, and in line with the United Nations Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. We are concerned, however, about the way in which the bill is framed, and in particular that the preliminary assessment of capacity for children and young people, and the preliminary best-interests test, could, when combined, undermine the purpose of the bill. It is proposed that both assessments will be carried out by the education authority, which is in effect the authority that would be challenged by any reference, as it is the body with the duty to meet additional support needs. That is our concern.

The bill introduces two preliminary hurdles. If a child wants to exercise the proposed right, they must notify the education authority of their intention to exercise that right, and the education authority will assess their capacity at that early point—that is the proposal. If the view is reached that the child does not have capacity, that child does not have the right to make a reference. Equally, imposing the best-interests test at that early stage when the child intends to exercise that right means that if the education authority takes the view that such action is not in the child's best interests, the child cannot exercise that right. The measure does not give the child the right to make a reference; it lets someone else decide whether they can exercise that right. That someone else is the education authority, and it would be the party that was challenged by any reference.

The Convener: Is your complaint about both parts of the proposed measure? Is it the fundamental part about the assessment itself, or the fact that it involves the education authority, or both?

Irene Henery: Both are a concern. A best-interests test at the stage where there is an intention to exercise that right does not exist for disability discrimination claims, for example, which are also heard by the ASN tribunal. We must consider what capacity is, as it is distinct from best interests. Capacity means having sufficient maturity and understanding, and understanding enough to take decisions and understand risks. The Scottish Parliament information centre briefing that accompanied the bill provides a useful example. It is not directly analogous because it is in the context of consent to medical treatment, but the issues and principles are the same. To cite the text by Wilkinson and Norrie, it is about stressing that once a decision has been taken that a child has the capacity to understand, it means that the child has the capacity to take decisions that may not necessarily be in their best interests as viewed by someone else. That is logical because the test of their capacity is based on their understanding, including their understanding of the risks.

There is particular concern about this proposal because it would introduce a best-interests test for 16 and 17-year-olds, which would be a retrograde step. Young people at the moment have the right to make references, and there is no best-interests test. That would be a retrograde step, but as I said it does not apply to other claims. The concern is

that the measure does not actually give children that right but it lets someone else, in particular the education authorities, decide.

The Convener: You have just given a medical example, and the Scottish Government officials gave us an example of a child who was assessed and needed a speech and language therapist. The child did not want to engage with that person any more, and that was deemed to be acceptable and agreeable. If they had had the right, that child could then have removed support completely, rather than just objecting to the individual, even though a speech and language therapist had been identified as necessary, helpful and in their best interests. I presume that your view on that example would be the same as for the medical example that you gave.

Irene Henery: If the child has capacity, they should have the right to make a reference to the tribunal. If that was on the basis that they were unhappy and that they had been assessed as requiring speech therapy, it would be for the tribunal to decide, given the child's dissatisfaction with the assessed need, and taking into account the evidence, whether a therapist was an additional support need that was in the child's best interests. The issue is about not the individual but the assessed need. That should not involve a preliminary decision about whether the child has the right to have their case heard.

Iain Smith: That is a key point; I think that there is a misunderstanding by Scottish Government officials. I have read the evidence in the *Official Report* and I agree that the issue is not whether the child should have the right to make the reference for an assessment—if they have capacity, they should be able to do that.

The point about best interests relates to the question of what the assessment comes up with. There is confusion about the point at which the best-interests test kicks in. In the bill as it is drafted, the test kicks in on the basis not of the assessment but of whether the child has the right to make a reference, which is the wrong time for it to kick in.

It is important to recognise that that is not compatible with article 12 of the UNCRPD, which is on equal recognition before the law. The UN Committee on the Rights of Persons with Disabilities has made a general comment on the denial of legal capacity and the role of substitute decision makers. One of its points is that substitute decision makers make decisions based on what is believed to be in the objective best interests of the person concerned as opposed to being based on the person's own will and preferences.

The UN committee's view is that substitute decision making is inappropriate and supported decision making is the correct thing to do. The additional support that is being proposed for the service is aimed at giving children who wish to access their rights under the Education (Additional Support for Learning) (Scotland) Act 2004 the support that they need to do so.

By introducing the best-interests test, the bill gives children a right by saying that they have capacity, but it then takes that right away by enabling the authority to say, "We as an education authority don't think this is in your best interests."

I have one other point to make, which is quite interesting. Given that the education authority has a statutory duty under the Children and Young People (Scotland) Act 2014 to act in what it considers to be the best interests of children, the authority may find it quite difficult to say that a child who is challenging the authority's decision is doing so in their own best interests, because the authority will already have determined what the child's best interests are.

A rather strange circular piece of legislation is being introduced, and I really do not understand why the best-interests test is being brought in. The provision is certainly not compatible with the conventions and with the children's rights that the bill is meant to bring in.

The Convener: I will ask what is very much a layman's question. Surely most of us understand that those who are involved in such cases are trying to act in the child's best interests. In other words, they are suggesting, for example, that a speech and language therapist is necessary, even if the child does not want such a therapist. Most of us would think that children sometimes take a view that is not necessarily in their own long-term best interests.

Iain Smith: My point is that the provision is not about the assessment of the child's need but about the child's right to make a reference on that. If the child wishes to make a reference to say that they do not require such a service, and if the assessment determines that they still require that service, the assessment is the point at which the best-interests test should kick in.

The problem is that the test should not kick in at the point when the reference is made. The bill is putting in the best-interests test—or the second best-interests test, essentially—at that point. First, a child must prove their capacity but, if someone has capacity, nowhere else in the law of Scotland does someone else have the chance to say, "Well, we will have to decide whether it's in your best interests to exercise that capacity." Once it has been determined that someone has capacity, they are entitled to act in what they consider to be their

own best interests. The law of the land then allows decisions to be taken after looking at other factors.

The problem with the bill is that it introduces a block and a barrier to the use of a right that it is meant to be introducing. Once an assessment has been made of a child's needs, that determines what is in the co-ordinated support plan and what support is to be given.

If the child does not agree with that, they can challenge it at the tribunal. As Irene Henery said, the tribunal will decide what the support should be, and it will take account of the child's best interests. That is the appropriate stage for the child's best interests to be taken into account at.

The Convener: That is clear—thank you for that. Does Sally Cavers have anything to add?

11:45

Sally Cavers: Where there is any dispute or disagreement and a local authority has a role in making an assessment or a judgment, we have seen with the additional support for learning framework that that can be problematic. However, we are satisfied with the provision in the bill for children to be able to appeal to the ASNTS or to request independent adjudication when there is an agreement on capacity and the best-interests test. We are satisfied that that would be adequate in those cases.

Colin Beattie: Part of what I was going to ask about has been covered, but let me have another chew at it. I was considering conflicts of interest. We have touched on the fact that capacity and best interests will be assessed by the local authority or the ASNT. How much of an issue is that? Does the local authority's undertaking both assessments cause that much of a problem?

Irene Henery: It is not appropriate for the education authority to assess capacity. We have talked about our position, which is that it is not necessary or desirable to have that process. The age of legal capacity principles should apply. There should not be an additional hurdle for children in additional support needs references.

There is concern about the potential for a perceived conflict of interest, because the education authority will inevitably be the subject of the reference. It has the duties in relation to additional support needs, and it is not appropriate that it should have a say in whether a child or young person can exercise their right.

Colin Beattie: One panellist said that they are satisfied that the right of appeal to the ASNT is sufficient in respect of the local authority's having a conflict of interest. Does the rest of the panel agree?

Irene Henery: It is not appropriate to have the capacity assessment done by the education authority. We have discussed the fact that it is not appropriate to have the best-interests test at the proposed stage. Putting that test in the education authority's hands raises concern about potential conflict, and neither issue is sufficiently addressed by having a right of appeal.

Colin Beattie: Does the rest of the panel agree?

Iain Smith: It is a general principle that a party to a decision should not make decisions about who can challenge its decision. In that context, it seems illogical that an education authority that is being challenged about additional support needs should have a right to determine whether the person who is making that challenge has a right to make it. That does not seem to be natural justice.

Colin Beattie: How should that be apportioned? Who should make the decision?

Iain Smith: I share Irene Henery's views. Unless there is a clear case that a child does not have capacity, they should be presumed to have capacity in terms of existing legislation. There is a legal framework for determining the capacity of children, and that should apply to the Education (Additional Support for Learning) (Scotland) Act 2004 as it does to any other piece of legislation. I do not see a need to include an additional test in the bill to access the rights that it is meant to give.

Mary Scanlon: I will look at further potential conflict between parents and children and at the role of parents. Extending rights to children highlights that parents' and children's rights can sometimes be in conflict. The bill provides that a parent can exercise a right even when a child does not want them to do so, and various councils have raised the issue of tension between the child and the parent. I find this bit quite complex.

When a parent disagrees with a decision that a child has taken, they will have the right to go to the ASNTS to review the education authority's decision. Similarly, when a child is unhappy with the provision of support, they will have the right to make an application for independent adjudication or appeal. The Equality and Human Rights Commission, the Faculty of Advocates and the Additional Support Needs Tribunals for Scotland have all referred to the complex drafting of those provisions in the bill. I am certainly finding it quite difficult to wade my way through that.

Do you find the provisions easy to follow? If not, is that because this is a necessarily complex area of law, or is there scope for simplifying the drafting? If the Faculty of Advocates thinks that it is complex, it will be enormously complex for laypeople such as us and others.

By the way, I read the ombudsman's submission. I am not sure whether Jim Martin has something to say on that. I am just trying to bring him in, because he looks quite lonely sitting there.

The Convener: I am sure that we will get to ombudsman questions in a moment.

Mary Scanlon: I will let whoever wants to answer come in, but I imagine that Iain Smith, Irene Henery and Sally Brown at least want to say something. Is the drafting easy to follow and what should be done?

Iain Smith: Legislation is always written in a way that is more complex than I think is necessary. That is the way of lawyers. However, as you rightly said, if the Faculty of Advocates thinks that it is too complex, we are in trouble. As I said earlier, part of the problem is that the schedule, which brings in the detail of the proposal to extend the rights of children with capacity under the additional support for learning legislation, was not subject to prior consultation. That is where the problems arise.

I suspect that a lot of this will be proven to be not fit for purpose. I am not a legal expert and I get very confused about some of the drafting as well, but I think that this is not fit for purpose. I hope that the committee will consider asking the minister to look not at withdrawing the bill—we do not want that to happen—but at minimising what is in the bill to allow proper consultation on the detail to be carried out before it is finalised. If the bill goes through in its present form, I suspect that we will create more problems than we are solving.

Mary Scanlon: You say in your submission that you are concerned that the proposals in the bill undermine the principle of children with additional support needs having the same rights as other children. It is quite a serious allegation that the bill undermines that fundamental principle.

Iain Smith: The fundamental principle from the UNCRPD is that children with disabilities should have the same rights as any other child has. The concern is that bringing in things such as the capacity test and the best-interests test will mean that those children do not have the same rights.

Irene Henery: One way to simplify things would be to use the framework of the Age of Legal Capacity (Scotland) Act 1991, so that processes were not required for children to notify their intention to exercise their rights. An assessment of capacity by education authorities would not be needed and a best-interests test would not be needed. The bill would be simplified by taking all that away.

As I have said, there is difficulty with the definition complying with the UNCRPD. The opportunity could also be taken to look at that in relation to the provisions for establishing the wishes of children.

Mary Scanlon: I am not sure that either of you addressed the point about the bill providing that a parent can exercise a right even when a child does not want them to do so. Is that reasonable and fair? Should that remain in the bill? That is about the conflict between child and parent.

The Convener: This is about the conflict of interests between a parent's rights and a child's rights.

Iain Smith: There will be situations where we find differences of opinion between the child, the parents and the education authority. The bill does not provide a mechanism for resolving that in a way that does not require going through formal procedures.

One of our concerns—it is not shared by many other organisations, although it is shared by the Faculty of Advocates—is that children will not be able to exercise the right to mediation services. We would have thought that mediation services might be the most appropriate way of dealing with situations where there is a conflict between parents, children and the education authority about the right way forward.

I am not entirely clear about—in fact, I totally fail to understand—the reasoning behind that. My understanding of mediation is that an independent facilitator tries to remove the issues that arise from the differences of power between the parties and to reach a common agreement on the way forward. The children would have support, if they required it, from the support services that the bill proposes, so I would have thought that mediation was a way forward.

The family mediation services that charities such as Children 1st operate already provide considerable support to families when there is internal conflict, and that might be a way of addressing the issues that you mention without requiring the complex legislative framework that the bill proposes.

Sally Cavers: On Mary Scanlon's first question, the provisions are not necessarily easy to follow, but that is not unusual.

The bill is right to cover conflict within families. We are talking about children between the ages of 12 and 15, which is a period in children's lives when there are often conflicts, disagreements and differing opinions within families.

We expect the four elements of the proposed support service for children to do the job that is required and raise children's awareness of how to access their rights and the implications of their rights, so there is advocacy provision in the proposed children's service. It is suggested that

the named person will pass on details of the children's service to all children who wish to exercise some of those rights, and we believe that that is an important and strong role for the named person. Every child will have an allocated named person who is able to fulfil that role.

Irene Henery: We did not comment specifically on mediation, but I agree that there needs to be a good reason—which I do not think has been established—to exclude children from that right. I also agree that mediation can often avoid the need for a matter to be heard by the tribunal. I would have thought that, with appropriate support, children would be able to participate effectively if they had capacity.

On conflict between parents and children, in disability discrimination claims before the additional support needs tribunal, either a parent or a child can make a claim, and it is then for the tribunal that hears the claim to listen to the evidence and make an assessment, taking the evidence into account and resolving any conflict of views as part of that.

We have not mentioned looked-after children so far, but there is particular concern about them. Govan Law Centre recently did research on the 12,500 looked-after children with additional support needs. According to its research, almost half of them have not been assessed for a co-ordinated support plan and, of those who have such a plan, none has ever appealed to the additional support needs tribunal. It is a concern that very few cases that are heard by the tribunal relate to references on looked-after children.

Chic Brodie: We have mentioned conflict of interest. Who decides the capacity of the parent or indeed the education authority?

Iain Smith: That is a good question.

The Convener: Does anybody want to even attempt to answer it?

Chic Brodie: Maybe Mr Martin can help us.

Jim Martin (Scottish Public Service Ombudsman): Given that I spend my life looking at the competence of local authorities, I am probably the wrong person to ask.

Chic Brodie: My question is a serious one. I know that there is the tribunal and that there is a balance, but it is reasonable to ask in some cases—not in every case—about the capacity of the parent or the capacity of the education authority.

Irene Henery: The basic principle in law is that adults are presumed to have capacity. If someone has a mental—

Chic Brodie: But why do we not make the same assumption for children?

Iain Smith: Precisely.

Irene Henery: Under the Age of Legal Capacity (Scotland) Act 1991, that is the position in relation to children who are 12 or over. The presumption is that they have capacity.

12:00

Mark Griffin: The complexity of the provisions has been touched on. Just for clarification, do you think that the provisions are complex because that area of law is complex, which means that the bill as drafted is necessarily complex, or is there scope to simplify things?

Irene Henery: I think that there is scope for simplification by removing the provisions relating to assessment of capacity by the education authority, which is what we suggest will be necessary to comply with the conventions. The Age of Legal Capacity (Scotland) Act 1991 deals with those principles. Given that that approach works elsewhere, there is no reason to deviate from it, so all the provisions relating to that area could be taken away. Equally, the best interests test should not be there either, so that, too, could be removed.

Sally Cavers: We do not want to put up any unnecessary barriers to children being able to exercise those rights. Children in Scotland has absolutely welcomed the proposal to extend children's rights, and we want children to have a positive experience of education without there being barriers in place. This morning's discussion has illustrated some of those barriers, so my only comment would be that, if simplification removes some barriers, that would be a good thing.

Siobhan McMahon: I have some questions about the complaints part of the legislation. Maybe that is where Mr Martin comes in.

Jim Martin: I will wake up now.

Siobhan McMahon: It should not be hard to follow my question, but let me know if it is. In the evidence that we have received, there seems to be some disagreement about whether the respective roles of Scottish ministers and the additional support needs tribunal in dealing with complaints are clear. Do you consider that further clarification should be provided in that respect?

Jim Martin: Yes—and I do not think that it should be difficult to do or that it needs to be complex. I should make it absolutely clear that it is not appropriate for ministers to reconsider decisions that have been made by a tribunal. The system has to be transparent and the current vagueness in section 70 of the Education (Scotland) Act 1980, under which ministers can act if they are satisfied that there might be failings

in duties relating to education provision, would have been addressed by a tribunal decision.

Siobhan McMahon: Do other witnesses wish to comment on that? Paragraph 8 of Mr Martin's submission highlights how the Scottish Public Service Ombudsman is restricted by law. How do you see what you already do, what tribunals do and what it is proposed that Scottish ministers could do being made compatible?

Jim Martin: It is perfectly clear that there is a route to tribunals, mediation or adjudication for people. However, confusion might arise because ministers and the ombudsman have similar powers on complaints. Section 70 does not relate primarily to complaints; it relates to situations in which ministers can act if they believe that someone might not be carrying out a duty, and that might come to their attention through either a complaint or other means. It could, for example, come from this committee, individual members, the media or any source that ministers choose. What I am talking about is therefore not purely a complaints procedure but, nevertheless, it is currently possible for someone to bring a complaint to my office that I could look at and which it would be equally competent for the minister to look at.

Siobhan McMahon: Do other panel members have a view on whether the bill could go further in making the complaints landscape a bit simpler for people? How do parents and children engage with it and how do they become involved?

Jim Martin: I have been watching with interest the way in which the committee has been grappling with overlaps and confusions over the past few weeks. With his 2008 report, Douglas Sinclair put Scotland ahead of the rest of the United Kingdom in arguing for simplifying the landscape, removing complaints bodies and trying to make it as easy as possible for people to make and run with complaints. As a result, we removed the Scottish Prisons Complaints Commission and Waterwatch Scotland, and I have taken on the responsibilities that ministers previously had for dealing with prison health complaints. The direction of travel in Scotland is to reduce complexity and to make it as easy as possible for people using the system to complain and to have their complaint resolved as quickly and as well as possible. That theme should underpin everything that we do in this area and in all the other areas of public service.

I do not think that we should come at this in the normal way by having proposed legislation and then discussing as a group how best to administer it; instead, I think that it is best to consider the proposals from the user up. What would be the simplest and easiest way for the user to get a fair hearing? If we present people with a complex landscape, they will go to the wrong place, go round in circles, get tired, drop out and not pursue their rights. In my view, the job of this and other committees is to make it as simple as possible for users to find the right route to the right people who can give them the right solution.

Iain Smith: As far as education complaints are concerned, it is important that everyone has the right to an impartial tribunal, hearing or complaints system. It has to be clear what that system is and to whom the complaint should be made. There also needs to be an element of speed. If a complaint is about a child's education, we cannot afford to delay for months and months of endless formal processes before reaching a conclusion. Any system that is brought in must be clear, simple, impartial and speedy.

Siobhan McMahon: On the point about timescales and things being speedy, a near-unanimous view in the evidence that we have received is that the proposed deadlines are at least reasonable. I note that, with regard to streamlining the complaints process and having reduced timescales, Children in Scotland argues:

"The welfare and wellbeing of the child caught in the middle of the dispute should always be the primary consideration."

Should there be any redress if the timescales for resolving complaints are not met?

Sally Cavers: Going back to your first question, I should point out that, in the Enquire service, we try to simplify information on the additional support for learning framework for parents of children and young people and for practitioners. Indeed, many of the questions that we get are about the dispute resolution mechanisms and their complexity. We also produce information on behalf of the Scottish Government in what I hope is an accessible way, and we see that as absolutely critical to the ability of families to access the correct information about how to use the mechanisms.

I cannot remember your second question.

Siobhan McMahon: It was about timescales and the issue of redress. Would that be lost if the process were to be streamlined?

Sally Cavers: With regard to the proposed timescales, the period for an investigation, if one is required, is at present approximately six months. I think that that length of time is necessary, given the volume of evidence that sometimes accompanies a case. However, as Jim Martin has said, the impact on everybody involved in a dispute and in making a complaint is significant. We are satisfied with the proposed timescale, but we would welcome any opportunity to reduce it in practice.

Jim Martin: It is important that the timescales are treated not as the amount of time that it takes to deal with something but as outriders. The factors that need to be taken into account—this is, after all, my business—include the issue's complexity; the volume of complaints that are going to be dealt with; the availability of evidence and how long it takes to gather it; the availability of expertise; and the resource for tackling the issues. If ministers and civil servants have considered all those things and have factored them into their thinking as a practical set of numbers, that is fine. On the face of it, the numbers look reasonable to me, but were I on this committee and I had a member of the Government in front of me, I would ask them how they had arrived at those numbers and whether they had factored in volume, resource, experts and expert advice or whether they were like-to-have numbers.

Iain Smith is right to say that, when you deal with such complaints, it is important that there is a speedy resolution and that you are able to fast-track matters. That means having everything to hand and not starting from scratch in every case. I know that the number of cases will be small, which means that it will take a long time for resources and experience to accumulate, what with staff turnover and so on, but if I were you, I would be asking the ministers who come to justify those numbers those kinds of questions.

Liam McArthur: I was interested by your earlier comments about the appeal to ministers. In the previous evidence-taking session, as you might have heard, the appetite of ministers to get involved in things that they should not get involved in came under some scrutiny.

To be fair to the Government, its policy memorandum talks about plans to repeal section 70 and introduce alternative provisions that would have allowed complaints to be made to the ombudsman rather than to ministers, but they received limited support.

I find it intriguing that we have a sort of dual-running mechanism for complaints, with people picking and choosing which referee they have. Do you think that additional pressure can be applied to ministers, who might have half an eye to how something might play with the wider public, rather than basing their view on objective criteria? They might be tempted to do that. Do you think that we are setting up problems that might need to be resolved in due course? Do you think that we should really be heading back in the direction of the streamlined landscape that you mentioned, and that we should be trying to deal with that through the bill?

Jim Martin: I should perhaps start with a disclaimer. I have never sought more powers or a broader jurisdiction for my office; I have always believed that that is a matter for Parliament and for Government to decide on. I see my role as commenting.

If I were a child or a parent with a complaint, I would be confused about where I should go. That cannot be right. Either we have to have clearer signposting about where to go for what or we have to have a simplified system.

As I said at the beginning, section 70 is not purely a complaints provision. It gives the minister power to intervene if they become aware—by whatever means, one of which might be a complaint—that there might be a breach of their duty. That is an important thing to have and an important thing to keep. I see that as an "own initiative" power for the minister in lots of ways, and I see the complaints as being the "own initiative" power of the user—the child, parent or whoever.

If we are going to keep things the way that they are, we need better signposting. The Enquire service is excellent for that. My advice for the committee is that, when you come to decide what the best process is, you should think from the parent and child up, rather than from the administration down.

The Convener: Are we clear what the underlying key principles are? If we are going to streamline the system—we have discussed the possibility of reduced timescales, because we do not want months and months of a child's education to be disrupted—what are the key principles that need to be addressed, irrespective of what system we come up with?

Jim Martin: You mean in terms of how a complaint is handled.

The Convener: Yes.

Jim Martin: If someone comes to us, and we think that there is a support issue that the local authority has not acted on, the first thing that we do is try to find out why it has not done so. Something that presents one way on paper might actually be far more complex, and that has to be determined.

At that stage, we will probably direct people, as appropriate, either to the tribunal route or to the local authorities. In March this year, we issued a notice to Highland Council that its signposting was not great in this area, and we ask that all councils in Scotland think about their signposting.

When the issue comes to my office, we take a view about whether I should use my discretion to fast-track it. We rarely do that in relation to education issues. More often, we do that in a health case—for example, if someone is facing a terminal illness.

If I were you, I would ask what ministers are going to do about that fast-track element. Putting in place a complaints procedure that looks good on paper is one thing, but dealing with people is quite another. You have to take a human approach to these things.

12:15

The Convener: Okay—thank you. Do you have any view on how we could best inform anybody who wants to complain, whether they are parents or children, of their rights in the area? You mentioned a case of poor signposting by local authorities. How can all parties be properly informed of their rights and where they should go?

Jim Martin: That should happen at the point of contact, whether that is the school or the place where looked-after children are being looked after. It should happen at that initial point of contact.

People tend to get themselves into a process, and my experience—not just in this area but in other areas—is that public bodies decide which part of the process someone can enter, when and for what. It is rare that an individual controls that. It is important that people are educated about what rights they have and what routes they have if they believe that their rights are not being met. For most young people that should be happening at school, and for looked-after children that should be happening where they are being looked after.

The Convener: You mentioned briefly the discussion that we had with Scotland's Commissioner for Children and Young People about overlap. You have submitted some views in writing, but I wonder whether you can expand on whether you see problems with the possibility of overlap between the commissioner's new investigatory powers and the powers of your own office.

Jim Martin: The short answer is yes, but that is true of a number of organisations. We find ways to manage those down so that the incidence of something falling between the cracks is kept to a minimum.

I think that it will take a bit of time for the processes that I have heard described to be put in place and to bed in. The volume of complaints will need to be watched closely. I read somewhere about the number of investigations being between one and four and that the likely number of approaches to the office will be in the region of 800 to 900. That situation will have to be managed very carefully.

I will do anything I can to help young people to access routes to get things resolved where they think they need them to be resolved. If the Government and the Parliament have decided that one of those routes should be through the children's commissioner, my office is committed to helping the SCCYP to make it work. However, there seem to be a number of complexities that will need to be ironed out.

The Convener: Given what you have just said, how confident are you that the system can be worked out? As you say, there are always overlaps and sometimes difficulties. How confident are you that those complexities can be dealt with harmoniously and, more important, that it will be clear to the users of the system who will deal with their complaints?

Jim Martin: We are all public servants with a duty to make this work. We have spent maybe the past 18 months, off and on, talking with the commissioner about what an investigation looks like, what a complaint looks like, what a front-of-house office looks like, what a process looks like and what we do when we have to disappoint people—which we do at least 50 per cent of the time.

We have also talked about the difference between the part of the office that is about making decisions on things that children bring to the commissioner and the part that is about being an advocate for children, and how to keep those two parts separate.

I am confident that we can all work together to make the system work, but it will have to be resourced and there will have to be a lot of good will and patience, because it will not be up and running on day 1—it will take a bit of time. You might also want to think about reviewing it at some point.

The Convener: Thank you very much for that. I know that that was not entirely on topic, but I thought that I would ask about it, seeing as you are here.

Jim Martin: It was not unexpected.

The Convener: I am glad that you said that.

I will check one final thing with Sally Cavers. In your answers, you referred a couple of times to the support service for children. Are you content with the Scottish Government's proposals for that service and, in relation to the extension of rights that would be available to children under the bill, are you content that any plans or proposals to raise awareness about the support service are adequate?

Sally Cavers: Yes, they are adequate. As many people said in response to the bill, there is no point in extending rights to children under the bill unless they know about it and have support to access and exercise those rights.

We talked about the complexity of the dispute-resolution framework within additional support for learning. Children in Scotland considers it absolutely essential to have a children's service such as the one that has been described, which has four elements: information and advice; advocacy; legal representation; and the ability to gather children's views. Those four elements are comprehensive enough to allow children to know about the new rights.

As others have commented, the bill is also an opportunity to continue to raise awareness of the additional support for learning framework, which gives further rights to children and young people. The bill is an opportunity to extend the information that is provided to children in general.

On the children's service, we must consult the target audience of 12 to 15-year-olds on how they would like to access its different elements and on their views on delivery. We consider it essential that that should happen before anything else happens on the planning or the detail of the service.

The Convener: Thank you very much for that.

I thank all the witnesses for their time. We appreciate you taking the time to come and speak to the committee. We find it invaluable in our work of examining the bill.

I suspend the meeting briefly to allow the witnesses to leave.

12:21

Meeting suspended.

12:23

On resuming—

BBC (Memorandum of Understanding)

The Convener: Item 5 on our agenda is consideration of the draft memorandum of understanding on the BBC and its future engagement with the Scottish Parliament. The clerks have circulated a paper, and we received a letter yesterday from the Cabinet Secretary for Culture, Europe and External Affairs. I presume that everybody has had an opportunity to read the papers and the letter from Fiona Hyslop, so I invite comments from committee members.

The purpose of the item is to allow the committee to consider the draft memorandum of understanding and agree any comments that it wants to pass to the Devolution (Further Powers) Committee, which will thereafter report to the Parliament to inform a subsequent chamber debate. It is the lead committee on the item.

What are members' views on the draft memorandum of understanding?

Mary Scanlon: My comment concerns the fact that the draft memorandum

"is concerned … with … how the BBC engages and consults with the Scottish Parliament and Scottish Government … and not with the subject matter of any of the BBC's programming or activities".

The Convener: That is correct.

Mary Scanlon: I am looking at the matter from the point of view of editorial and operational independence. There is a commitment from the BBC to send its annual report and accounts to the Scottish Government and a commitment from the Government to lay them before the Parliament. I do not have any problem with the accounts being laid before the Parliament but, if the annual report is not quite to the Scottish Government's and the Parliament's liking, is it possible that it might stray into "programming or activities"—that is, editorial or operational independence?

If we are being sent an annual report, what is it reporting on and what are we scrutinising? If we were not happy with how much had been spent on religious broadcasting, educational broadcasting or political broadcasting or how it had been done, is it likely—I hope that it is not—that the Parliament could say that it did not like the way that the BBC was doing this, that or the other? I am just not sure about the report.

The Convener: The memorandum of understanding says that the report will cover areas such as

"finance, administration and work of the BBC".

Mary Scanlon: I am okay with finance and administration, but I am not sure about it covering the work of the BBC.

The Convener: The Smith agreement says that the arrangement should be the same for the Scottish Parliament and Government as it is for the United Kingdom Parliament. It is just about the BBC laying its report. There is a clear view about the separation of the BBC's role and the protection of its independence, particularly its editorial independence.

Mary Scanlon: I appreciate that and I bow to your superior knowledge, as you are a member of the Devolution (Further Powers) Committee.

Paragraph 2 of the draft memorandum, which is headed "Annual report and accounts", says that the annual report has to comply

"with any directions given (after consulting the BBC) by the Secretary of State or the Foreign Secretary as to the information to be given in the report about the finance, administration and work of the BBC".

I presume that BBC Scotland will consult the Parliament and the Government to decide what will be included in the report. Is there potential for that to stray into the BBC's work and operations? That is all that I am asking.

The Convener: I can only give you my understanding—

Mary Scanlon: It is nice to hear evidence from the convener.

The Convener: My understanding is that what you suggest is not the case. That passage relates only to the input of the report and not the BBC's editorial independence and decision-making processes. It might be a fine defining line, but the arrangement is not supposed to be about the organisation's editorial independence.

Mary Scanlon: I was asking just to make that clear. Thank you for the clarity. It is an important issue at this time because of the charter coming under review and because of the further devolution.

The Convener: Indeed, but that is for the charter, which deals with that area. It is not for either Government.

Mary Scanlon: I appreciate that but, because of the further devolution, it is important to clarify such issues.

Liam McArthur: The clerk's paper and the letter from the cabinet secretary were helpful. The draft MOU seems a fairly reasonable reflection of what emanated from the Smith commission, but the lead committee will take its own view on that.

I was not quite clear why Fiona Hyslop says in her letter:

"Whilst the present draft presents some detail on how consultation on the terms of reference for the Charter will be agreed, it does not currently provide for a role in determining the content of the Charter".

The process of consultation seems to be reasonably clear. Some such processes do not necessarily work out in practice as they were intended to, but I did not see the problem that Fiona Hyslop identified in her letter. Obviously, the lead committee will have gone into the matter in rather more depth.

The Convener: Not yet. It will do so.

Liam McArthur: It will be going into it in more depth and will be able to cross-reference it with the work that it has already done on the Smith agreement. However, as it stands, the MOU looked to me to be a reasonable reflection of what emanated from the commission.

The Convener: I have some sympathy with the letter from the cabinet secretary. I am at an advantage, being on both committees. The Devolution (Further Powers) Committee's work has been based on the principle of trying to ensure that everything in the Smith agreement that is followed up through memorandums of understanding or legislation meets what was in the agreement, if I can put it that way. In its report, that committee was unanimous about trying to ensure that. We all have different views about whether to go beyond the Smith agreement, but the idea is to give the Parliament the opportunity to examine what is proposed and whether it implements the original Smith recommendations.

For me, that is the core point of the cabinet secretary's letter, which says that

"the current draft MoU does not yet fully deliver the role which the Smith Commission outlined"

and refers to a particular point about the governance of the BBC being the same as it is for the UK Parliament—the MOU says that the Scottish Parliament should play the same role. There is a question mark about that if nothing else.

It might be nothing more than a question of clarity but, when we write to the Devolution (Further Powers) Committee, we should at least point out the correspondence that we have had from the cabinet secretary, although she has copied in that committee's convener.

In principle, we should also ensure that this committee takes the view—a unanimous one, I hope—that whatever is agreed should, in the phrase that the Devolution (Further Powers) Committee used,

"deliver the spirit and substance of the Smith Commission recommendations."

Do we agree to write to that committee on that basis?

Members *indicated agreement.*

The Convener: We agreed under item 1 that we would move into private for item 6 so we now move into private.

12:31

Meeting continued in private until 12:48.

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