EDUCATION COMMITTEE

Wednesday 7 January 2004
(*Morning*)

Session 2

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EDUCATION COMMITTEE
1st Meeting 2004, Session 2

CONVENER

*Robert Brown (Glasgow) (LD)

DEPUTY CONVENER

*Lord James Douglas-Hamilton (Lothians) (Con)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)
*Rhona Brankin (Midlothian) (Lab)
*Ms Rosemary Byrne (South of Scotland) (SSP)
*Fiona Hyslop (Lothians) (SNP)
*Mr Adam Ingram (South of Scotland) (SNP)
*Mr Kenneth Macintosh (Eastwood) (Lab)
*Dr Elaine Murray (Dumfries) (Lab)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Mr Richard Baker (North East Scotland) (Lab)
Rosie Kane (Glasgow) (SSP)
Bill Aitken (Glasgow) (Con)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Rachel Edgar (Scottish Executive Education Department)
Shirley Ferguson (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Martin Verity

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 4

Scottish Parliament

Education Committee

Wednesday 7 January 2004

(*Morning*)

[THE CONVENER *opened the meeting at 09:50*]

Item in Private

The Convener (Robert Brown): Good morning and welcome to our first meeting of 2004. A happy new year to everyone. I hope that everyone had a happy break. As we are in public session, I ask everyone to ensure that their mobile phones and pagers are turned off.

The first item on the agenda is item 1—which is perhaps not surprising—which is to consider whether to take item 4 in private. Item 4 relates to the appointment of a budget adviser. Because of the commercial issues involved, it is normal to discuss such items in private. Is it agreed that we should take the item in private?

Members *indicated agreement*.

Subordinate Legislation

Pupils' Educational Records (Scotland) Regulations 2003 (SSI 2003/581)

09:50

The Convener: For item 2, which is consideration of the Pupils' Educational Records (Scotland) Regulations 2003, we will take evidence from Rachel Edgar and Shirley Ferguson, who are respectively the head of branch of the Scottish Executive schools division and an official from the solicitors division. I welcome them both.

It is fair to say that we are slightly surprised to have this wad of papers on pupils' educational records. Will you tell us about the background to the regulations and about what they propose to do? Will you also comment on the Subordinate Legislation Committee's observations and on the policy issues that are raised?

Rachel Edgar (Scottish Executive Education Department): Certainly. The regulations will give parents an independent right of access to their child's educational record. Parents of pupils at local authority schools previously had that right under the School Pupil Records (Scotland) Regulations 1990. However, the right was effectively removed as a consequence of the extension of the Data Protection Act 1998 to manual as well as electronic records. The regulations before us today will restore that right to parents of children at local authority schools and will introduce a new right for parents of children at independent and grant-aided schools.

The Scottish Executive issued guidance to local authorities in March 2002 to assist them in handling requests for access to records during the interim period until the regulations were brought in. Draft regulations were issued for consultation between November 2002 and February 2003. The consultation was sent to a wide range or organisations, including the information commissioner, and was also available on the Scottish Executive website. Many of the responses received were from those who will use the regulations. The draft regulations were amended in the light of the responses. We sought to address other issues that were raised in the consultation by means of a question-and-answer note, which accompanies the regulations.

As the convener mentioned, the Subordinate Legislation Committee has raised a number of issues about the drafting of the regulations. Ms Ferguson will be able to address those technical details, if the committee wishes.

The Convener: That would be helpful, as we want to know whether the issues raised are simply technical matters or whether they could cause problems such that somebody could challenge the regulations. We would appreciate a view on that. Clearly, there is an issue about the charging power, to which the Subordinate Legislation Committee has drawn our attention. Perhaps the other matters are less significant. Could we have your observations on those?

Shirley Ferguson (Scottish Executive Legal and Parliamentary Services): I refer the committee to the terms of the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002, which provided the power to make the regulations. Section 2(1) of the act states:

"The Scottish Ministers may, by regulations, provide as to the keeping, transferring and disclosure of educational records about pupils."

Section 4(2) then goes on to specify provisions that the regulations may include. The Executive's view is that section 4(1) gives the Scottish ministers a very broad power and that the Parliament's intention was to leave it to the Scottish ministers to devise the whole scheme for keeping, transferring and disclosure of educational records. In our view, the regulations do that.

The Convener: With respect, will you deal with the particular point about the charging power? It is said that the case law requires that such a power must be specifically provided for.

Shirley Ferguson: Indeed. It is accepted that the authorities to which the Subordinate Legislation Committee have referred make it clear that, for example, a local authority would have to have a specific power to enable it to levy a charge. The Executive accepts that, which is why the regulations deal with the matter. The Executive takes the view that the extremely broad power that it is given by section 4(1) of the 2002 act enables a range of matters relating to the keeping, transferring and disclosure of educational records to be dealt with. In section 4(2), there is a specific power to authorise persons supplying copies to charge up to a limit that does not exceed the cost of supply. Our argument would be that, with that broad power, it was envisaged that there might be provision in relation to charging. There is no suggestion that the Scottish ministers will levy a charge. It is accepted that there would have to be a specific power in the regulations before the responsible bodies were able to levy a charge, which is what the regulations allow for.

The Convener: I am sorry to press you on that point in the middle of your explanation, but presumably if there is no power in the law to levy a charge, that power cannot be conveyed by statutory instrument.

Shirley Ferguson: Our view relates to what the Parliament intended. It is important to remember that the powers of the Scottish ministers are different from those of a body that is set up by statute, which has to be given specific functions. The Scottish ministers can, within the limits of their devolved competence, exercise any powers or functions that they have. When examining a statute, you have to consider what the ministers are not entitled to do rather than what they may do.

The Convener: I thought that you accepted that they were not entitled to levy a charge without specific statutory sanction.

Shirley Ferguson: That is right, but they are not seeking to do that. The ministers are merely empowering those who are supplying copies to charge a fee that is subject to the maximum amount that Parliament had considered and allowed in section 4(2), which is up to the cost of supply. Parliament, envisaging that charges might be made, set a ceiling on the charge and our view is that the Scottish ministers have the power to do anything up to that maximum ceiling.

The provisions that are made in regulation 9 refer to the cost of supply but also set a lower threshold. Our argument is that the act sets the maximum limit. In drawing up the regulations, it was decided to impose additional caps further down so that the fees would not exceed the fees that would be levied under the Data Protection Act 1998 for a subject access request. Similarly, where a copy is supplied in an alternative form—in translation, for example—there should not be a greater charge than there would be if it were not supplied in an alternative form.

The Convener: Are you relying on the Data Protection Act 1998 to give you powers to allow local authorities to charge for copying?

Shirley Ferguson: No, but we are conscious that data protection is a reserved area and that our regulations had to sit underneath that act and not conflict with it in any way. As you might be aware, the 1998 act allows disclosure only where there is a legal provision that specifically allows disclosure.

The Convener: Would you like to comment to the committee on anything in the consultation response?

10:00

Shirley Ferguson: The draft regulations were sent out to a wide range of consultees, principally because we were aware that they had to work under the Data Protection Act 1998 and that, for example, other holders of information would have to be aware of their obligations under the Disability Discrimination Act 1995, the European convention

on human rights and various other pieces of legislation that form the much wider legislative obligations and duties of which people have to be aware. It was therefore important to ensure that practitioners and, for example, the Scottish information commissioner were content with the regulations. Once we had ingathered the consultation responses, we took some time to consider them and then adjusted the draft regulations in the light of the responses.

Mr Kenneth Macintosh (Eastwood) (Lab): I would like to clarify a point on charging. You say that the 2002 act allows education authorities to charge up to the cost of copying documents, but the regulations seem to forbid that: regulation 5(1) states that the documents must be "available … free of charge". Does that mean that the documents are available for inspection free of charge and the copying charges come after that?

Shirley Ferguson: Yes, that is right. That is consistent with other regulations on the provision of information about school to parents and others. Other regulations about the provision of information were made under the Education (Scotland) Act 1980 and they provide that, if someone is going to inspect documents, the inspection should be free of charge.

Mr Macintosh: I do not understand how that varies from what the 2002 act intended. If the act intended that there should be no charging except for copies, there is no variation—or is there?

Shirley Ferguson: The only thing that the 2002 act says is that the regulations may include certain things. Section 4(2)(c) specifies that the regulations may authorise persons who supply copies to charge up to the maximum, which is the cost of supply.

Mr Macintosh: You spell out in regulation 9 the details of how that charge will be regulated, but the Subordinate Legislation Committee suggests that the Executive should not say that education authorities should supply information free of charge because it does not have the authority to do so. Do you accept that point?

Shirley Ferguson: No. The provision on providing information free of charge was included in the regulations because there was provision for charging in the 2002 act and the Executive wanted to make it explicit that someone cannot be charged for going to the school or elsewhere just to look at the records. The provision was included in the regulations to make explicit what was implicit in any event; if it had not been included, there would still be no authority for an education authority to levy a charge, but its presence underlines that fact and makes it clear to all users of the regulations, including parents, that there is to be no charge. That is consistent with other sets of regulations that have been made on education.

Mr Macintosh: The Subordinate Legislation Committee obviously takes a different view. It says that the 2002 act did not allow for charging—it allowed only for a fee for copying—and that to say that an education authority cannot charge is therefore to go beyond the act's powers. However, you do not accept that point.

Shirley Ferguson: No. The Executive takes the view that, because of the terms of section 4(1) of the 2002 act, there are no restrictions in the act on what the Scottish ministers can put in the regulations.

The Convener: However, there is no power to charge in section 4(1). Is that accepted?

Shirley Ferguson: Yes, it is.

The Convener: I have difficulty in understanding how, if it is the general law that specific powers to charge are necessary, you can say that because a power to charge is not included in section 4(1) the Executive has the power to charge. I do not follow that.

Shirley Ferguson: I am saying that, underneath that broad power, there are examples, which include a provision about charging.

The Convener: Those examples relate to particular situations, not to a general power to charge.

Shirley Ferguson: Yes, but the regulations do not go any further than that. We are not imposing a charge in any other circumstances.

Fiona Hyslop (Lothians) (SNP): From what you are saying, it seems that section 4(1) of the 2002 act does not specifically say that ministers have the power to charge, but that they have power to make regulations on other content. We do not have a policy concern—everyone is agreed that there should not be a charge for inspection of records—but the issue is how we ensure that the regulations are drafted in such a way as to make them robust law. My understanding is that the regulations say that there should be no charge for inspection of records, but that that matter is not covered by the original legislation.

The Subordinate Legislation Committee's suggestion about the charging issue would be a stronger method of ensuring that what we would approve would be robust law. The matter comes down to an interpretation of whether the 2002 act gives the authority or whether we need to refer to other measures, such as the Education (Scotland) Act 1980. The concern is not about policy; it is a technical one. I would be concerned if we relied on section 4(1) of the 2002 act, when we could rely on other measures to cover the charging issue. Would the Executive object if we gave initial approval to the regulations with the proviso that the Executive should bring back amended

regulations that take on board some of the Subordinate Legislation Committee's suggestions to make the regulations a bit stronger in law?

Shirley Ferguson: That is obviously a matter for the committee, if it feels that there is a difficulty. However, as I have said, the regulations are consistent with previous regulations that refer to documents being supplied free of charge, using a similar broad regulation-making power. It might be helpful if I gave the committee a bit more detail of that. For example, the Education (School and Placing Information) (Scotland) Regulations 1982 were made under section 28B of the 1980 act, which contains a general regulation-making power. Section 28B states that

"The Secretary of State"—

which now means the Scottish ministers—

"may by regulations prescribe or make provision for the determining of … procedure in accordance with which education authorities are to perform the duties imposed on them",

which are the duties to provide information as to placing in schools and other matters. Therefore, the regulations may cover how education authorities are to go about publishing or otherwise making available the information to parents and the kind of information that is to be so published. That is the extent of the regulation-making power.

The Convener: To be clear, that is a different example; you are not using it as the basis of the regulations that we are discussing.

Shirley Ferguson: I am just saying that there are other examples and that the regulations that we are discussing are consistent with the previous approach. The 1982 regulations refer to information being provided as the education authorities

"think fit and … free of charge."

Regulation 9(3) of the 1982 regulations states:

"Every education authority shall make available at each school free of charge school information in relation to that school".

My point is that we have taken a consistent approach. The School Pupil Records (Scotland) Regulations 1990, which the present regulations are intended in part to replace, also refer to the inspection of documents at schools being free of charge.

The Convener: The report on the consultation refers to a possible conflict between parents—depending on how they are defined—and children about revelation of records and mentions the balance between parental and children's rights. For the sake of argument, let us assume that children have no right to object to the revelation of records to a parent. I am not sure that that is appropriate. Will you provide some insight into the intention behind those particular regulations?

Shirley Ferguson: Yes. The intention was to recognise that the parent has an obligation to provide school education for their child and that therefore the parent should be in possession of the relevant information that enables them to do so. As members will see, regulation 6 contains safeguards that seek to cover the kind of situations that some of the consultees highlighted. For example, "sensitive personal data", such as health information, are excluded. Another, more general provision in regulation 6(d) refers to the revelation of information causing

"significant distress or harm to the pupil or any other person".

Although we felt that we had built in safeguards, we also felt that the right of parents to have access to records was fundamental.

Lord James Douglas-Hamilton (Lothians) (Con): Regulation 5(2) says that a copy of the records must be provided to the parent "within 15 school days" on payment of any fee. Does that 15-day period begin on the day that the request is made or on the day that the fee is paid? Is the time limit disapplied if no fee is paid?

Shirley Ferguson: We should bear in mind that charging a fee is not compulsory; the responsible body is merely given the power to charge a fee in the circumstances outlined in regulation 9. However, it is intended that that will be a precondition of the release of any copies and that the 15-day period will run from the payment of the fee.

Lord James Douglas-Hamilton: I see. So if there is no payment, the time limit will not apply.

Shirley Ferguson: That is right.

The Convener: I am sorry that we gave you such a hard time about the regulations, but we had to resolve some of the issues that the Subordinate Legislation Committee raised in its report.

We now need to decide what to do with the regulations. I suggest to members that we are dealing with a relatively technical issue that will not lead to any challenges. Nevertheless, the Subordinate Legislation Committee is right to draw our attention to certain drafting matters and I feel that its points have some substance. That said, I am not sufficiently knowledgeable about the background to be entirely clear on that point. It is not up to the committee to approve the regulations as such; instead, in our report to Parliament, we should perhaps indicate to the Executive our concerns about the drafting of the regulations in relation to the issue of charging. Although the matter might be somewhat insignificant as far as these regulations are concerned, it raises a

broader issue about the rights of citizens not to be charged for various things. Perhaps we should also ask the Executive to consider such matters in a slightly different way in future regulations.

Mr Macintosh: I agree. As the policy intention is quite clear, we should not urge the Parliament not to agree to the instrument.

I was interested in Shirley Ferguson's comment that other regulations—including the regulations that the current ones replace—state that no fee should be charged. There are obviously plenty of examples around, although perhaps those regulations have always been wrong in that respect—I do not know. In any case, now that the Subordinate Legislation Committee has drawn the matter to our attention, we should at least draw it to the attention of Parliament and ministers and, if possible, seek some further comments from the Executive.

The Convener: Are committee members happy with that?

Fiona Hyslop: Yes, that is a reasonable approach. I find it interesting that paragraph 4 of the Subordinate Legislation Committee's report points out that the Executive has undertaken to correct at the earliest opportunity an error in relation to a different matter in the regulations. When the Executive reflects on our comments and concerns, it might want to come back and amend the regulations. I presume that case law will also report that the Parliament was concerned about the basis of the charging mechanism.

The Convener: Is the committee content with what has been proposed?

Members *indicated agreement*.

The Convener: We should not lose sight of the fact that the regulations are important and that we are keen to have them implemented. I am grateful to the Executive officials for giving us their time.

Education (Additional Support for Learning) (Scotland) Bill: Stage 1

10:15

The Convener: We come to the most substantial item on the agenda, which is continued consideration of the Education (Additional Support for Learning) (Scotland) Bill at stage 1. We have a number of documents for consideration, but in particular we have a summary of the evidence that we have heard. The purpose of our consideration of the summary is not to amend it but to comment on it and to give the clerks and staff of the Scottish Parliament information centre an indication of our views for the draft stage 1 report that we must present to Parliament, which we will discuss at subsequent committee meetings.

I propose to go through the summary section by section, but I am also interested in having some general comments. There is quite a bit of linkage between the co-ordinated support plans and the right to go to a tribunal. A number of general themes arose from the evidence, on which we might want to reflect. Does anybody have any initial, general comments on how we should approach the matter?

Fiona Hyslop: I have a technical question about our process. We have been presented today with a report from the Equal Opportunities Committee. Obviously, that cannot inform our initial discussion, but it will inform our discussion of the draft stage 1 report. Can we agree that we are not—

The Convener: Yes, it is a process and not an event, as somebody said in a different context.

Fiona Hyslop: Exactly. Therefore, we cannot take account of the Equal Opportunities Committee's report in today's discussion.

The Convener: Yes, it would be unfair to do that, because we have not had the chance to read the report, which is lengthy. It is fair to say that some issues that are likely to be in the Equal Opportunities Committee's report have been reflected in evidence that we have heard. Therefore, I hope that we will be able to take on board initially at least some of the issues that are in the Equal Opportunities Committee's report. We can check whether we have got it right as we develop the draft report.

Are there any general observations on our approach? We have had much evidence about the need for a single, inclusive system as opposed to targeting children with co-ordinated support plans. That involves a philosophical issue and a practical issue. We heard a lot of stuff about documentation and how all that would fit together. Some further

statements on that are to come back from the minister. I wonder whether we have had anything further from the minister. I believe that he said at the most recent meeting at which he gave evidence that he would give us further thoughts on how the documentation would fit together.

Martin Verity (Clerk): No, we have not had that back.

The Convener: He also said that he would inform us about the continuing discussions with the Convention of Scottish Local Authorities on costings, numbers and so forth.

Martin Verity: We have no information other than what the minister said when he appeared before the committee in December.

The Convener: Perhaps we can ask the clerks to pursue the minister on those matters because I believe that the indication was that we would have the minister's comments at least in time to inform our decisions on the final report.

Fiona Hyslop: Can I kick off with a general comment? We recognise that it is broadly accepted that we need additional support for a wide range of children. However, there is obviously a conflict between ensuring that there are proper recording and administration systems and ensuring that proper support is provided. Is the core approach to ensure that all children have support? I asked the minister whether he thought that more children would have more support because of the bill and he said yes. However, that seems to conflict with the bill's content, which seems to focus only on CSPs, which are for only a small number of children.

The bill seems to be about recording and the administration of the system and not necessarily about how support for children will be provided. As the minister acknowledged, the bulk of support will not be provided to children with CSPs, because the majority of children will not have CSPs, although they might require additional support.

Members will remember that the financial memorandum and the documentation in relation to the costs of the bill that we received from the bill team focused only on CSPs. Clearly, the bill team believes that the bill's main focus is the system for administering CSPs rather than the wider support for the majority of children, which is at the bill's core because of the big duty on local authorities to provide support.

We are wrestling with how to ensure that there is a single system, which all the evidence suggests is what is ideally required. However, just as COSLA and other interested parties must do, we must strike a balance between ensuring that we do not spread a limited cake too thinly and dealing with the resources. That is probably at the core of our concerns and is the contention in much of the evidence that we have heard.

The Convener: That is a helpful comment. Section 3 includes the general power in relation to additional support needs, which in a sense is the defining part of the bill. The individual rights provided by the bill home in on the CSP aspect. The bill has been introduced against the background of the Standards in Scotland's Schools etc Act 2000, the increasing resource and administrative changes. We have heard a lot of evidence about the various pots of money that the Executive has made and continues to make available to support facilities in this area. Arguably, that is not a consequence of the bill, although to some extent it is, given the change of definitions. That is the slight problem with which we have to wrestle.

Ms Wendy Alexander (Paisley North) (Lab): This follows on from what Fiona Hyslop said. The point is fleshed out in paragraphs 31 to 33 of the summary of evidence. Paragraph 33 states:

"The Minister made assurances that those currently with a RON but who would not qualify for a CSP under the new system will not lose any services. He also outlined that the extent to which the services for those children change over time will relate to how those children's needs change not to resource issues. "

The last bit of that is written slightly badly.

The concern is about the mechanisms or about the robustness of the general power for parents to take a view on whether the assessment that is made school by school for the broader group of children is appropriate. Getting clarity around that for all concerned would be a helpful contribution for us to make at stage 1. Perhaps by moving towards a position on the situation as we understand it—Ken Macintosh and others have pursued the point so strenuously in the committee's investigations—we could see whether there is a meeting of minds on what the post-bill situation will be and on the right of parents to take a view on that. That is not to detract from what the CSP is trying to do. We should get clarity around the area as it is the one that will cause difficulty at subsequent stages.

The Convener: Are you suggesting that the report should try to clarify what existing rights there are and to what extent they are being changed, increased or reduced?

Ms Alexander: I looked at the committee's planned timetable and saw that we have a number of evidence-taking sessions to come.

The Convener: We do not have another evidence-taking session coming up; decision time is coming up.

Ms Alexander: In that case, we should try to get clarity from ministers about what we are trying to do.

Ms Rosemary Byrne (South of Scotland) (SSP): There is a lot of concern about the creation of a two-tier system, which is what worries me. My fear is that we will get the situation that we had with the record of needs: resources will chase the CSP. I do not know how we get round that, but we must consider that carefully. There is also a real concern about resources being in place. If we are going to co-ordinate interagency working properly, which is the crux of the CSP in bringing together the agencies that work with young people, the lack of resources will diminish the additional support for children who do not have a CSP—we have taken evidence from a number of agencies so we know that there is a lack of resources.

The Convener: Are you talking about admin resources and teaching time?

Ms Byrne: I am talking about all of it—admin resources and teaching time. Outside agencies have told us that they are not ready and are not resourced to be working with schools in the way that the CSP envisages, although there is good practice, as we keep saying.

In places where there is not an integrated system of speech and language therapy in the school—in a community school, for example—there can be difficulties in tapping into the various agencies. The big concern is that additional support needs will get lost somewhere in the mire. In effect, resources will chase the CSP and we will get into a situation similar to that of the record of needs and we will not have improved the system any. We need to consider carefully how we handle the two-tier system and how we ensure that access to resources is provided for all young people.

I am not sure that the bill provides the right route. In some senses, it creates in the CSP another deficit model. As I have said before, we should have concentrated more on the good practice that has been going on in schools and local authorities and on the development of individualised educational programmes, or IEPs. I am not concerned about whether personal learning plans—PLPs—or IEPs are the instrument that is used, but I am not sure that we need to have a two-tier system. We should perhaps instead be considering how we can plan for each individual young person so that their needs are met through the planning process and through working with agencies. We must also ensure that the agencies are resourced. That is a big concern, on which we need to be assured.

There are other areas of the bill that the committee needs to examine. We must do something about the provision for under-threes. We need also to examine carefully the situation of young people at independent nurseries. We spoke about that last—

The Convener: We will come to the detail when we consider the bill page by page. This discussion is more on the bill's general principles.

An issue with which we will need to wrestle is the application of standards across Scotland, with provision by different local authorities and schools.

Dr Elaine Murray (Dumfries) (Lab): There is a fear that the bill might not fulfil its intention. I do not think that its intention is to create a two-tier system; it is to get rid of the current two-tier system. The fear of the bill failing to achieve that is partly linked to resources, but we also need a more robust assurance that, if an authority is not fulfilling its duty towards children with additional support needs—not just those with CSPs—something can be done about that. It is not yet clear what a parent is to do if they feel that that duty is not being fulfilled. Does there need to be a stronger ministerial power of intervention?

The Convener: There is a point there about system rights, in other words rights that are given to people through the system—through inspections from Her Majesty's Inspectorate of Education and so on—as opposed to people's individual rights. That tension exists throughout the bill.

Rhona Brankin (Midlothian) (Lab): Like the majority of witnesses, I welcome the bill, which extends rights to a much greater number of young people, which I very much welcome. The evidence that the committee has received suggests that it is difficult to be exact about resources. Many resources are currently being spent on the majority of the pupils concerned. The differences will affect those youngsters who are now to come under the category of additional support needs. I take the view that there must be an understanding that it has been difficult to quantify that. The Executive must accept that a range of resource needs to be available for the bill to be implemented. I was reassured when Peter Peacock told us about the amount of money to be allocated, based on the figures that the Executive had.

There is an issue around ensuring that other agencies are required to comply with the eventual act. Currently, good interagency work might go on—for example representatives from the health service might attend the meetings of an interagency committee or a youth strategy group—but sometimes it is not so easy to deliver the service. We understand the intention to create a legal duty, but we are concerned and seek reassurance about how that might be delivered in practice.

10:30

The Convener: Are you talking about the legal duty to co-ordinate support?

Rhona Brankin: No, I mean the fundamental duty on local authorities to ensure that other agencies comply with the law. We need to be reassured that the bill is robust enough to ensure that interagency work, which is notoriously difficult, is effective in practice.

Lord James Douglas-Hamilton: The paper says that the majority of witnesses supported the general principles of the bill, but it would be helpful if we added "with the exception of some of the parents." It would be fair to say that the majority of professionals supported the bill, but some parents were seriously concerned. We should also carefully consider transitions.

Mr Macintosh: The paper is helpful as it covers everything and I am not sure that I want to add anything at this stage. I have some sympathy with the matters that Rosemary Byrne raised, although my conclusion differs from hers; I think that the bill still represents an improvement on the current situation.

I do not know whether we want to go through the paper point by point.

The Convener: I think that we should do that. As I said, I want to start with an overview of the general issues and then go through the paper section by section. We will stick with the general points for the moment.

I was struck by Dr Gwynedd Lloyd's comment about the relationship between the number of CSPs and the effectiveness of the support. In other words, as others have said, if the approach is too wide, there is a risk that there will be a loss of focus and that children might lose the support that they currently receive. Alternatively, a more focused approach might enable us to concentrate support on those children without losing track of the need to mainstream and develop more general facilities for support.

The school that some of us visited in East Kilbride, which had the duplex arrangement, where special school provision is available in a mainstream primary school, represented a good example of that approach. Resources such as therapists are generally available in the school, but the facilities are used in a focused way, so that resources are concentrated on children with pronounced additional support needs. The system works in quite an interesting way in what is, in effect, a mainstream environment.

Fiona Hyslop: We have seen a lot of best practice and, where it exists, the administrative system and recording are less of an issue. Our report must reflect that.

Because we are dealing with the law, we must also support those parents who are facing worst-case scenarios. The bill must ensure that the rights of those people and their children are upheld. We cannot underestimate the concerns about children who might lose their records of needs. A core point is the idea that only half the children who currently have a record of needs will be entitled to a CSP, which would cause problems when we came to implement the bill. Whether those concerns reflect perceived or real concerns about children's rights, we cannot ignore them and our report must reflect them.

The Convener: Do members have a view on the fact that the identification of the need for co-ordinated support seems to be the key that allows people into the system of appeals and tribunals and brings them special attention? It seems that the bill contains a kind of sideways definition: children who have particularly severe problems are defined as having complex needs, but on to that definition is tagged the aspect about co-ordination, which seems to be the key point. There is no access to the appeals system unless a child has problems that require the involvement of other agencies. Although the Executive said that, during the consultation, the need for co-ordinated support kept cropping up as the point at which the system fell down, I do not think that we heard much from other agencies to suggest that that was the key point.

Ms Byrne: The most important aspect of assessment is that every young person's needs should be assessed. I do not know whether the bill will take us there. The needs of every single young person in school should be assessed as professionally and appropriately as possible. Whether a child has multiple needs, a specific learning difficulty or a communication disorder, they should have the right to access appropriate assessment. I am not sure whether the bill takes us along that road.

The Convener: Sorry, Rosemary, but do you mean every child or do you mean every child with—

Ms Byrne: Every individual child's needs should be assessed if they require it. That should be a statutory requirement across the board. You cannot plan for individual children unless you know what their needs are. For many young people, a PLP will be fine and they will not need a huge amount of in-depth assessment, but everyone would accept that every child needs to be planned for. We are in danger of leaving out of the loop those young people who have a specific learning difficulty or a communication disorder, or who have one form of difficulty rather than multiple forms.

We are driving along with CSPs, but we should either broaden it all out—which would create a huge amount of extra paperwork, the chasing of bureaucracy and all the rest of it—or we should place a duty on other agencies to be involved in assessments, tribunals and so on. That should be a statutory duty, because at the moment the education authority has the statutory duty and the other agencies do not. We need to ensure that there is a statutory duty and that any child who needs speech and language therapy, which has been raised, gets it. The situation should be simplified.

Dr Murray: I return to the convener's point about why the multi-agency element is the central issue around the creation of the co-ordinated support plan. In a sense, I understand where the Executive is coming from, because there is an issue about other agencies being involved appropriately. I got that out of the meeting that we had with Drummond High School. There are difficulties. The school was worried about the fact that the main duty will still be placed on teachers and education authorities; however, the bill clearly will place a duty on other agencies to respond to education authorities if requested to do so.

I can understand where the Executive is coming from in seeking to do that. It is trying to give the education authority a key role and also to force other agencies to be involved, come round the table and take their responsibilities seriously. Like Rhona Brankin, I agree with that approach. As Fiona Hyslop said, the issue is the comfort blanket for people whose children do not have CSPs. So much of that will depend on the guidance. People need that reassurance.

Mr Macintosh: Everyone has identified the fact that the change from records of needs to CSPs will be an issue for parents. The minister said at the committee last week that the bill is a compromise. Ideally, we would all like a single system, which would be sounder and fairer. However, we have a compromise between a system that treats everybody the same and the need to allocate scarce resources to some children whose needs are of a far greater magnitude than those of the average child in school. It is a compromise, and the minister said as much. If one is going to compromise, one tries to do so in the fairest way possible. As Rosemary Byrne said, we should get away from the deficit model and focus on needs rather than impairment. We should not use the impairment as the definition, which encourages people to focus on the impairment, rather than the outcome.

Although the system is a compromise, it is the only one that I can see—after wrestling with the issue for the past six months—has got remotely close to being able to make the difficult decision about how to allocate resources adequately to those who need them without discriminating unfairly against all other children.

The Convener: One of the problems is that the cohort that is covered by the system has changed slightly. There is an issue around whether some children with dyslexia or autistic spectrum disorder will be covered by the new CSP arrangements when they would have been under the record of needs system. On the other hand, some children with emotional and social difficulties will be covered who would not have been before. There is a movement of the cohort, which gives us some problems.

Mr Macintosh: The definition is very difficult. If it is based on the complexity of the need or of the support needed, it is not black and white. It will not be easy for professionals to make the decision. There was also some talk about medicalisation and trying to get away from a medical model of defining educational needs and support. However, some of the conditions that we are talking about are medical conditions. Autism and dyslexia are medical diagnoses, whereas emotional, social and behavioural difficulties are diagnosed differently.

The Convener: It is apples and oranges.

Mr Macintosh: Exactly. Trying to fit them into the same system will always be difficult.

It is clear that we have to tighten up the definition as much as possible, provide examples and make it clear where the Executive thinks the line should be drawn. The code of practice or piloting should be used to say which children will get a CSP and which will not. That would be helpful to the committee, although the work will have to happen after we have agreed the bill. Parents and professionals will also need that clarity, otherwise we will end up with parents and professionals still arguing, because parents are unclear about whether their children are missing out and professionals are still having to make difficult decisions about allocating resources in a way that does not satisfy them either.

The Convener: We are all struck by the disparate evidence on what some of the different sections of the bill mean. There was not always a consensus on the issues.

Fiona Hyslop: There is a core issue, which Kenny Macintosh and Rosemary Byrne raised, around whether the system should be driven by a deficit model. Really it should be driven by the rights of the child. There is new government and management speak about things being supplier driven or consumer driven. The problem is that the core definitions in the bill are supplier driven because they are about who is supplying the services. The CSP is defined by whether the child needs a multi-agency supply of services.

The battle between the ideal of a single system and the compromise that Kenny Macintosh talked about is about the right to ensure that the support is provided. Elaine Murray explained it quite well. The issue is about ensuring that the legislation covers all rights. It comes back to the assessments and tribunals. If those parents with children who do not have CSPs had the same or similar rights to access tribunals and assessments as they would now, a great deal of the fear engendered by the bill and by the fact that it rations the attention given to those that have just been given CSPs would be alleviated.

There is a spectrum of possibilities between the single system, which is in danger of spreading the resource too thinly, and one that is very targeted. That compromise is the context in which the bill sits, which I think neither our witnesses nor the committee is comfortable with. The issue is not how but to what extent we can move and broaden the bill. If we consider the practicalities, the issue comes back to the fact that rights should be determined on the assessment of the tribunals.

10:45

The Convener: We have to keep the right perspective on the issue. Much emphasis has been placed on tribunals and so forth but, in any system, relatively few people will end up going to tribunal and being dealt with in that way. As many people have said, the key thing is to try to avoid the need for that in the first place. We need to make mainstream provision available and we need the system to work well on the ground. There is an extent to which we should try at the outset to put the tribunal issue to one side. Given that the CSP is the doorway to the tribunals, we will keep coming back to it.

If there are fears about numbers and so forth, there may be scope to increase the jurisdiction of the tribunal over time. It will be possible to see whether the tribunal copes; if it does, it could be extended a bit. That would give some sort of guarantee to people whose children have records of needs at the moment. It allows us to break the fear thing.

Ms Alexander: I want to ask for the advice of the committee. On what Fiona Hyslop said, there is a tension. I have a lot of sympathy with Elaine Murray's suggestion that we should ensure that there is a route for parents to say that they do not think that the support of their child by exception on an individual basis is inadequate, although the child does not qualify for a CSP. That would take us a step towards strengthening the child and client-centred perspective in a supplier-driven system.

On the other hand, the very small numbers of people who are likely to pursue that route means that, if we are to have an inclusive approach, one might be tempted to push for greater clarity in the definitions of autism, dyslexia and emotional and social behavioural support, which the convener pointed out earlier.

We are dealing with a range of expectations that are out there—the width of that range of expectations is not helpful. If all practitioners were a little clearer about who is included and who is not, that might help to smooth our passage and reduce the waste of resources in tribunals. Autism, dyslexia and emotional impediments are in themselves a continuum of need. There are real dangers in trying to create rules that are too hard and fast.

We might want to clarify the issue with ministers by posing it to them in those terms. We could say that we are to have totally uncapped expectations by providing no clarity on the issue. However, on the other hand, we understand why judgments on individual children's needs must be made case by case. That is one of the other areas of tension between the supplier-driven model, which we are trying to make inclusive, and the decision not to go the whole way in trying to have an entirely by-exception intervention model for the parent who is organised and active enough to scream.

Ms Byrne: My concern is that we are creating a confrontational situation from the beginning simply because of the number of young people who will not carry through their records of needs unless we make the recommendation that we discussed about the records' being carried forward for an interim period or whatever.

I want to return to what I said about the two-tier system. It is a great pity that we did not consider having a single system in which every young person is given access to what they require. I do not know whether it is too late to change the two-tier system that is to be created under the bill. We either do that or we do as Fiona Hyslop and Elaine Murray suggested and consider making the legal recourse for children who have additional support needs the same as the legal resource for children who have CSPs. That could be the way to assure parents that they have some means of being able to get the right resources and planning for their children.

I feel that we are creating a huge amount of difference and a huge amount of unnecessary work. If planning was properly carried out and consultation with the different agencies was built in, the right resources would be available where they are required, without a CSP. If planning and consultation were done properly and the resources were there, it would make no difference whether a child had multi-agency input or single-agency input, or whether they had one disability or more than one. The provisions in the bill will create

confrontation because they will create a two-tier system. It would be worth while to discuss how to avoid a two-tier system; if we consider a single form of planning and a single way to get access to the appropriate resources, we might come up with the right route. There are two ways to proceed: either we can look again at that aspect, or we can consider access to legal recourse; however, the latter will be confrontational and costly and will put everything on the wrong footing to start off with.

The Convener: It is reasonably clear that we cannot move in one fell swoop from where we are now to the ideal system that has been talked about. In the short term, the money is not there and neither are the staff resources or training.

Ms Byrne: If we are to provide for additional support needs anyway, what is the difference? I do not understand the difficulty. Resources must be there in one way or another.

The Convener: We have had a lot of discussion with the minister and others about ways in which we can draw together the paperwork and the bureaucracy so that the foundations of an ideal system are built—that is one of the objectives of the process. The time scale is an issue and there are questions about how soon resources can be put in place and about the stages that are involved in the move towards such a system. I recollect that the minister committed himself to that aspiration.

Lord James Douglas-Hamilton: To follow on from Wendy Alexander's theme, if we move to the new system, we will have to address the question of how to phase it in, particularly for those who have records of needs. Some people will worry greatly, although many thousands will not. The question that arises is whether those people should be seen through the system. I put that question to the minister and was surprised that he did not give an emphatic refusal.

The premise from which I start is that the more gradual the process is, the less distress, worry and anxiety will be caused to parents, and the less friction there will be. The officials do not want to take that approach, because it does not make for administrative convenience, but there will be a key decision to make about whether parents' concerns should weigh more heavily than convenience to officials. We will have to make a decision on that.

Mr Adam Ingram (South of Scotland) (SNP): Rosemary Byrne said that the bill will create a two-tier system, but we have a two-tier system at present. We are all conscious that we are treading in a minefield. We have had so many representations on the current system from parents and others and we have heard their fears of change. What should we do? Given the two-tier system that we have and the way in which it is set out, we must try to improve it.

The second area in which we need to make a major effort is in restoring parents' trust in the system. To my mind, that trust has totally broken down. We must focus on advocacy for parents in the system, and the question of independent mediation will have to be nailed down.

We might improve the provisions on another major issue by providing ready access to tribunals not only to those who have CSPs. I suggest that the committee should focus on trying to improve the legislation on those two subjects.

Dr Murray: The stage 1 report's purpose is to state whether we agree to the bill's general principles. In a sense, Rosemary Byrne advocates our not agreeing to the general principles because she would prefer alternative legislation. Our initial decision must be on whether we agree to the general principles; if we do, we need to decide what recommendations for improvement to make to the Executive.

The Convener: The question is what the general principles are. It is arguable that section 2 encompasses some of the general principles.

Fiona Hyslop: Exactly what we have to do in the stage 1 report has been described. The feedback and evidence that we received were generally supportive of the general principles, but we did not define them, although general principles appear in the bill's long title. The core question is whether we should have a single system or a two-tier system. We recognise that the general duty is in section 2, but as the CSP is essential to the bill, it should be given equal weighting. Legal backing for that is an issue.

The stage 1 report should reflect the fact that the bill team told us that it had considered whether a two-tier system should be used. We should check the evidence on that, but I think that the bill team recognised that that was a genuine general debate, as did the Association of Directors of Education in Scotland and/or the Association of Directors of Social Work. We cannot ignore the fact that a single system is the ideal that people want. Does the bill close down that option, or is the compromise that Ken Macintosh talked about available? Would Adam Ingram's amendments and suggestions move the bill more towards the implementation of such a system, if personal learning plans and individualised educational programmes can be got up and running?

Perhaps we could achieve consensus not only in the committee, but in the Executive and among the practitioners who undertake the implementation. The question is whether we take a hard line now, say that this is not good enough, throw out the bill and do not try to make progress. A stage 1 report could do that.

The Convener: A lot turns on the procedures and the documents.

Fiona Hyslop: We should reflect the debate.

The Convener: Absolutely.

Rhona Brankin: If Rosemary Byrne opposes the bill's principles, I disagree fundamentally with her. The bill will create a more inclusive system. I also disagree with Fiona Hyslop's suggestion that the system will be supplier driven. The definition relates to complexity and the enduring nature of children's needs, but it also concerns the barriers to children reaching their potential. Philosophically, I support the bill and the principles that lie behind it.

Rosemary Byrne said that we need to move to a single system but, from what I remember, none of the parents to whom we spoke would agree that their youngsters should lose the additional support, planning and recording that a two-tier system provides.

Ms Byrne: I do not advocate that.

Rhona Brankin: You are talking about a single system. Every child's needs must be met; however, I am the parent of a youngster with special educational needs and I would be unhappy if my youngster did not have additional resources and additional provision. In a sense, we are asking for a system that is different because it has to meet individual children's needs.

The bill gives pupils new rights. Rosemary Byrne says that pupils need the right to be assessed. I agree that assessment is an integral part of the teaching and learning process, but the bill gives new rights in relation to assessments of pupils. Nothing would be gained by our saying that we disagree with the principles, because virtually all the evidence was that people support the principles of the bill. There are no grounds for saying that the evidence did not support that.

The Convener: I do not particularly want to go round and round on this—people have had a chance to express their views.

Ms Byrne: I think that I need to respond to what Rhona Brankin said.

Rhona Brankin: I was responding to Rosemary Byrne.

The Convener: This is going round a little. I do not want to go on too much about this.

Ms Byrne: Rhona Brankin has misinterpreted me.

Rhona Brankin: Am I going to get a chance to come back on this as well?

Ms Byrne: It is only fair that I should come back on this and explain what I meant.

The Convener: I will let you do so without this going on too long.

Rhona Brankin: Can I respond to Rosemary Byrne?

The Convener: Hold on just a minute. Let us see what we get out of this.

Rhona Brankin: We either go round on this or we do not.

Ms Byrne: I am happy to do that.

Rhona Brankin: Absolutely. We could go on all morning.

The Convener: My initial impression was that Rosemary Byrne stated a view and Rhona Brankin stated a view. Others have stated their views—we are getting a range of views.

11:00

Ms Byrne: My opposition is to a two-tier system. There are many parts of the bill that I welcome, but I am opposed to the creation of a two-tier system at this juncture. I feel that this is the time to be far more imaginative about moving forward. We should not take away rights from any young person; we should give every young person the same rights.

The Convener: With respect, Rosemary, that is just repeating what you said already.

Ms Byrne: Yes, but I feel that there has been a misinterpretation of where I am coming from and that it is fair for me to respond to it. I am not advocating that anyone should lose their rights; that is not what I said. I am thinking about a much more imaginative approach. It is a pity that we do not have the remit to recommend a reduction in class sizes alongside the bill. If there was a dramatic reduction in class sizes across the board, some additional support needs could be met very easily. I think that we are taking the wrong approach.

The Convener: We should be careful about going beyond the remit of the bill, which is what we are beginning to do. I wanted us to have a general discussion about the principles of the bill, which would be helpful. Members have before them the report from Contact a Family Scotland on the civic participation event that was held in the Scottish Parliament committee rooms on 1 December. It may help to focus the committee on where we are if I say that, on page 2, the summary states:

"Parents generally thought that the proposals contained much that was good and which offered the prospect of significant improvements on the current system.

'Wonderful opportunity to improve our children's lives' …

At the same time parents had concerns about some of the proposals and what might result from them in the years ahead. Many parents had struggled to secure Records of Needs for their children."

In a nutshell, that is the central area that we are dealing with. Members may have views at either end of the spectrum, but that quotation homes in on what a number of parents seem to think about the bill and it reflects quite a lot of the evidence that we have heard.

Let us move from that to the detailed summary of evidence, as we go through the principles of the bill. We will go through the summary page by page, starting with page 1, which is introductory. Do members have any comments on page 1?

Fiona Hyslop: There are several pieces of evidence that we are getting reports on now and it is important that we include them in our report. I attended and observed the parents' session that was held upstairs, which was extremely useful. We have only just got that report and it is not included in the summary of evidence. I am keen that the evidence from schools and the sessions with parents in Glasgow and Edinburgh be included in our stage 1 report.

The Convener: Those reports will be included in the record of evidence that goes with our report. They will also be taken on board by the Scottish Parliament information centre in the draft report that comes to us to ensure that we reflect the issues. That will definitely be done.

Do members have any comments on page 1 of the summary of evidence? We are not dealing with alterations to the document; this is just a summary that SPICe has produced. Members may have their own slants on it, but we will just treat it as a helpful document. I am looking for observations about things that members might want to have in our stage 1 report, which SPICe can reflect in the draft report that we will discuss at future meetings.

Do members have any comments on page 2?

Members: No.

The Convener: Let us move on to page 3. I have two observations to make. I have some concerns about the complexity of the definitions in the bill. We might go into this in a little more detail at stage 2. The bill seems to contain quite complex definitions, and even the minister said that the Executive was considering whether they could be simplified in some way. The reason why that is important is that it leads to confusion among the people who have to deal with the system if they cannot relate to the definitions, which they regard as being important.

Fiona Hyslop: We may also want to reflect on the fact that the problems with the definitions have led to on-going correspondence, and on the comments of the Finance Committee on whether 2 per cent or 20 per cent of children would get a CSP. If that confusion exists at this early stage, and if we are talking about the same people who will be implementing the bill, it is essential that we draw attention to those problems.

The Convener: I am still of the view that section 1(1) is tautologous and does not reflect exactly what the Executive wanted. That is the section that refers to children who are

"unable without the provision of additional support to benefit from school education".

That rather suggests that, if a child benefits at all, he or she will not have additional support needs. There is a slight problem with that.

Fiona Hyslop: The wording of section 1(2) could be interpreted as meaning every single child. That may be fine if you want there to be a single system, but

"education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential"

could mean anything and everything.

The Convener: In the context of section 2, on co-ordinated support plans—

Fiona Hyslop: I am talking about section 1(2).

The Convener: I beg your pardon.

Fiona Hyslop: Section 1(2) is so broad that, although some people might welcome it, depending on their perspective, I am not sure that it fulfils the Executive's intention. My general point is about clarity.

The Convener: That section brings on board the gifted children and the children with English as a second language.

Fiona Hyslop: However, it could also mean absolutely everybody.

The Convener: Yes. I absolutely take your point.

I am now looking at paragraph 18 of the summary of evidence. There was a certain emphasis on the specific issues of dyslexia and autistic spectrum disorder. Those are the areas where, as far as I could judge, there are specific problems with records under the current system, particularly where people have fought the good fight, if you like.

Ms Alexander: We touched on three areas: dyslexia, autism and emotional, social and behavioural needs. If we define the need for a co-ordinated support plan as being the need to involve other agencies, the most superficial understanding of that definition would mean that severe emotional, social and behavioural needs would be likely to be included, because another agency would have to be involved. That might also be true for autistic spectrum disorder, but perhaps not for dyslexia, so some parents are, quite

properly, relying on the existence of the general power and on its being strengthened.

I do not think that there is any harm in that, but the purpose of stage 1 is to draw such matters out and to show that a decision about a co-ordinated support plan is not a judgment about the degree of need. That is how we must convince parents that it is not a two-tier system. The matter is not about the degree of need in the classroom. It is about the extent to which the need to involve an external agency drives the co-ordinated support plan. In that sense, the co-ordinated support plan is fundamentally different from the record of needs.

Rhona Brankin: This is also about the degree of need in the classroom. In a sense, it is about both definitions, but it is difficult to support both. A child with autistic spectrum disorder might be very mildly affected while another child would require a CSP.

Ms Alexander: Indeed.

Rhona Brankin: That is why we cannot simply say that a child who is dyslexic needs one thing and a child with autistic spectrum disorder needs something else. Provision must be based on the needs of the child, which is why the problem is difficult. Organisations such as the National Autistic Society must find it difficult, because they represent parents of children who have a huge variety of needs. In a sense, the evidence that we have heard probably reflects the views of the parents whose youngsters are most severely affected and who are in need of most support.

Mr Macintosh: We should not pretend to parents of children who have dyslexia and autism that the bill will do more than it will. If parents currently have difficulty in having their children diagnosed or assessed, that difficulty will continue. The bill will undoubtedly improve matters because it will give people more rights. I hope that the code of practice will also spread best practice. I have no doubt that the bill will improve things generally and—I hope—for specific individuals, but it will also make parents' rights clearer and it should make decisions about who gets what resources fairer.

I welcome the broad definition of additional support needs, because it tries to move away from a deficit model. There is a fear about replacing a term that has become slightly pejorative with another that in 20 years will become like that term, but we should assume that the move is positive. The widening of the definition to include many other groups of children is a plus that will help all children.

I think that Wendy Alexander said earlier that dyslexia and autism have spectrums of disorder, so it is impossible for the bill to say that children with dyslexia will or will not be included, because some children who have severe and complex needs also have dyslexia, whereas many others do not. Originally, the record of needs was not supposed to include dyslexia. If a child has dyslexia only, he or she should not have had a record of needs—such a record was not intended for such children—but over time the record of needs has been used by parents of children with dyslexia to battle for resources. The point is to try to get away from that. There will always be confrontation in the system, but we are trying to put in place a mechanism that will make it easier to handle such confrontation and that will make things fairer to all sides. We are coming to the next section and the CSP definition, which is very tricky, but the broad definition that we are discussing is very welcome.

The Convener: It might be useful if the code of practice drew attention to such issues and gave examples.

Ms Alexander: There should be general Executive clarity about the bill's intention. The worst thing that we could do would be to reinforce perceptions. If we think that the bill is right, we should say so explicitly and we should say what we believe it means.

The Convener: With dyslexia, for example, part of the difficulty has been the developing understanding of the concept, and people's difficulties in understanding and recognising dyslexia at the school level. If the issue can be covered in the code of practice and people be put in place who understand and know about such things, that should reduce the scope for dispute—CSPs or no CSPs—and allow us to move forward. Therefore, the code of practice is important.

Ms Byrne: Appropriate assessment is the key to ensuring that resources are available for young people with communication disorders, autistic spectrum disorder or dyslexia. The NAS and the Scottish Dyslexia Association highlighted concerns about assessment in their evidence. We must take such concerns on board and consider them carefully. If there is no appropriate assessment to identify needs, the proper resources that the child needs will not be made available. One concern is that multiprofessional assessments—

The Convener: You are making an important point that we do not want to lose, but we will deal with assessments when we consider the section on assessment.

Ms Byrne: We need to look out: appropriate assessment is the key to ensuring that the proper resources are made available.

Fiona Hyslop: Language difficulties are mentioned. Interesting written evidence was submitted by the Scottish English as an Additional Language Co-ordinators Council, which was very

concerned. The issue cuts to the point that the bill tries to get away from a deficit model and attempts to be far more inclusive. We have not drawn attention to covering gifted children and what covering those children means. I refer to section 1(2) of the bill. If any parent thinks that their child has any additional needs that might prevent the child from meeting their fullest potential, they could fully exploit that. We must think about what that means. The Scottish EAL Co-ordinators Council was critical because it thought that there would be a backward step. I understand the Executive's thinking that there should not be such a backward step because the idea is that addressing any additional need should be welcomed. However, we should take on board that council's criticism and consider that bilingualism can be an additional help for educational abilities.

The Convener: That came out when the lady presented evidence.

Fiona Hyslop: Yes. We should cover that matter. I agree with what the Executive is trying to do, but am concerned that that has not been communicated.

The Convener: It might be dealt with in some other way, but Fiona Hyslop is right. The issue is important and should be referred to in the report, although it is off to one side of the bill in some ways.

11:15

Rhona Brankin: In a sense, the lady's understanding of the bill was that it should be based on a deficit-of-understanding model rather than on a needs model. I fundamentally disagree with that.

The Convener: I think that her understanding was wrong but, nevertheless, she made some good points about the way in which the issue is approached. If I understood her rightly, she was trying to say that many schools do not have a proper understanding of the proper way of dealing with children who are in that situation. I think that she was right on that.

Fiona Hyslop: I suggest that the written evidence that we received from that group more clearly articulated some of those arguments.

The Convener: For today's purposes, we shall say that we need to say something about that. We will have further discussion about what that should be.

If there is nothing else on those sections, we will move on to the section on "Education authorities' duties, CSPs, and integrated working", which is on page 4 of the summary.

Fiona Hyslop: Paragraph 22 is critical.

The Convener: Paragraph 22 summarises the paragraphs further down, so we do not actually need to get into the detail of that paragraph.

On page 5, there are some interesting observations in paragraphs 23 and 24. Paragraph 23 states:

"Children in Scotland suggested that the decision to open a CSP should not be based on where the support is provided from but that the support needs *co-ordinated*."

That is a slightly different slant.

Mr Macintosh: That was one of the more positive comments. What often happens with all these bills is that people go through them and criticise what is being offered. Very rarely do we get positive suggestions for alternatives, but a positive suggestion has been made here.

Fiona Hyslop: I like the suggestion. The issue comes back to the question whether the CSP should be driven by whichever department or agency happens to be providing the service. That raises the question whether a child would qualify for a CSP who had a particularly complex set of needs that required a lot of co-ordination within one authority. In written evidence, one organisation—I cannot remember which—gave a practical example by listing five or six different departments within an education authority that would need to be involved for a child with particular needs. I presume that such a child would be excluded from a CSP under the current definition, but the suggested definition would allow for that. In some cases, the co-ordination required between social work and education in one authority could be quite complex. The suggested definition would move us away from the idea that the health authority must be involved before someone would qualify for a CSP.

Dr Murray: It is an interesting idea but, on the other hand, it would introduce many problems about the definition and would probably make the definitional problems considerably worse.

The Convener: Yes, that could be right.

One thing that occurred to me was whether all eligible children would have a CSP. If we assume that a child is in principle entitled to a CSP, in practical terms would the child need it if the documentation was otherwise right? I am not sure about that.

Fiona Hyslop: What do you mean?

The Convener: Do all children who are in principle eligible to have a CSP need to have one? There is the bureaucracy aspect.

Mr Macintosh: I think not. In the evidence that we heard, there were some examples of obviously good practice in schools that did not have a record of needs. Some schools had a record of needs

and some did not—interestingly, nearly all had IEPs. There was obviously no need to intervene in those situations, where people should just do what works.

The Convener: In a sense, that goes back to the original point about getting the thing right to start with. On the other hand, I suppose that what people's needs are will have to be written down somewhere. That comes back to the documentation issue and about which document the needs should be recorded in. The minister spoke about the desire to use a light-touch approach, which is something that we want. How easy that is to bring about is another question.

Ms Alexander: In paragraph 24, two very distinct issues are trying to get out. The first issue, which was highlighted by Dundee City Council and which we have just touched on, is whether CSPs should be made compulsory only in circumstances of multi-agency involvement. I do not know the answer to that. The second issue is the definition of the CSP, which was highlighted by the Scottish Dyslexia Trust. We need to break those two issues apart because—we might not do this today—we need to take a position on whether CSPs are needed in circumstances where things are working, which is the issue that Dundee City Council raised. Do we need the CSP there for the sake of recording and uniformity? As I said, we need to stick that issue to the wall, but it is a different issue from the issue about definitions that was raised by the Scottish Dyslexia Trust.

Rhona Brankin: I think that it was made clear that things would become impossible if the definition were to include all children who receive non-educational agency support, as that would then bring in looked-after children and people like that. That would be hugely wide and is not the intention. Again, that is where the code of practice and such things become more important.

The Convener: There was a related issue, which was about how to reduce bureaucracy and to avoid having forms for looked-after children and various other people, as well as CSPs, at school.

Mr Macintosh: That appears elsewhere in the paper.

The Convener: Yes, a point is made about that later on.

Mr Macintosh: Paragraphs 23 and 24 provide a neat summary; indeed, the very first sentence of paragraph 23 is crucial and, in some ways, we do not want to hide it away. It says:

"Concerns were expressed by a number of witnesses about the eligibility criteria".

We need to make more of that; we do not want to lose it in the report. Eligibility for a CSP will be the dividing line. Although we are trying not to favour in any way those who have a CSP, there will be a dividing line. The decision on whether someone is above or below the line is very important. Therefore, it is crucial to get the eligibility criteria right and to offer as much clarity as possible.

The Convener: If we separate out the appeal procedures, there will be less of a dividing line.

Mr Macintosh: That might be the case if we go on to suggest that having a CSP should not be the criterion for being able to go to the tribunal, but we have not decided that. Even if the CSP is not a criterion for access to the tribunal, it is still an important document.

We do not want to replicate what happened before. Let us assume the worst. Because the CSP is a written document that will have a certain status—a status that IEPs might not have—it could be used, as I think Lorraine Dilworth pointed out, as a bludgeon. The fact that it is a written document means that parents will use it as a means of asserting their rights and we do not want to encourage the misuse of CSPs for purposes for which they were not intended. That said, the more definition and clarity that we can provide about who will qualify for a CSP, the easier it will be for parents to accept the professionals' decision on whether someone gets a CSP. Given that parents and professionals will definitely come into conflict, no matter how well intentioned the bill is, we need to be fair to parents about whether their children will come above or below the eligibility line.

The Convener: We must not lose track of the hierarchy issue. In a sense, the most effective measure is for the teacher to talk to the child and the parents and to sort things out, with the result that the facilities are put in place without any need to go up the hierarchy. We do not want conflict if matters can be resolved. The bill's whole emphasis is on implementing mechanisms, such as the code of practice and mediation, which will encourage the avoidance of dispute. It should be possible to reduce such situations to a minimum.

Mr Macintosh: Do you not think that we will avoid dispute if the criteria are clear? The point is made, but I think that we should make more of it and give examples.

Dr Murray: When we eventually had the discussions with the Executive about what the wording of various sections meant, I felt fairly confident that I understood what they meant. In my view, the eligibility criteria were clear, once we had received an explanation of the complexities of the ands and ors and the way in which the parts of the bill relating to the education authorities' duties had been phrased. Although COSLA seemed to be very confused, it was noticeable that parents understood what the bill meant. One of the parents from Record of Needs Alert said that one of her

children would get a CSP and one of them would not; she obviously understood the criteria.

The Convener: RONA deals with 1,000 or so cases, so it is quite up to date with such issues.

Dr Murray: The people from RONA obviously take a great deal of interest in the bill.

In tribunals and so on, I imagine that arguments will arise in cases in which a parent feels that another agency ought to be involved so that their child can get a CSP but there has not been professional agreement that that other agency should be involved. Although I was initially concerned about the definition, I became a lot more confident that it was clear.

The Convener: Can we move on, or do members have anything else to say on that?

Fiona Hyslop: I agree with Elaine Murray in that I think that the definition has become clearer as it has evolved. The fundamental issue here is that the CSP is not the passport to support services; that view, which I think the Executive shares, needs to be stated somewhere. If legal backing for that view could be provided, that is all well and good but, even at stage 1, that is the crux of the matter. Ken Macintosh is always arguing on this point, and every time I hear him he causes me to retreat more. However, if the CSP ends up being a passport for services, the bill will have failed. We should be explicit about that.

Mr Macintosh: I would agree with that.

The Convener: In other words, it will be the documents in schools that will lead to the targeting of resources.

Mr Macintosh: The CSP is there purely to help co-ordination in very complex cases. It is not, to use Fiona's word, a "passport" to resources. All children, particularly those with additional support needs, should have rights to resources. Decisions should be made fairly and not on the basis of the CSP.

The Convener: That goes back to the definition and the co-ordination that the minister was on about.

Mr Macintosh: The CSP should be purely about co-ordination.

Fiona Hyslop: At stage 2, we will discuss institutional and individual rights to back things up. We have to be explicit and say that, if the bill does not do certain things, it will have failed in its purpose.

The Convener: The difficulty is that the CSP will contain a whole range of other points to do with resources and things. Those points may well come up in IEPs and various other documents. What appears in the CSP will be over and above what appears in other documents.

Fiona Hyslop: We got a powerful sense of that from the parents.

Mr Macintosh: Are you talking about things such as therapies?

The Convener: Yes.

Ms Byrne: When IEPs work well and when there is good practice, all the agencies are co-ordinated. That happens already as part of the process. IEPs are regularly reviewed as well, so another issue that we will have to consider is the right of pupils with additional support needs to have regular reviews.

The Convener: The problem may lie in having a three-tier system rather than a two-tier system.

Rhona Brankin: I was going to talk about that. People talk about a two-tier system but, in practice, it is broader than that. The bill will greatly strengthen the rights of a great number of children and should improve the provision. It is based on good practice. I do not know whether the teacher that Rosemary Byrne brought was from the school that she taught in—

Ms Byrne: No, from Kilwinning Academy.

Rhona Brankin: The bill was clearly based on the practice in schools such as that. Broader support exists in some schools but not all schools. The intention is to provide that greater level of support for a greater number of youngsters. So, in a sense, the system is three tier.

The Convener: Let us move on to page 6. The interrelation between the education authority and other bodies is not unimportant. There is a quote at the top of the page:

"There is no stated power of the education authority to compel other agencies to comply".

I thought that there was such a power in the bill.

Dr Murray: Yes, there is.

The Convener: Indeed, although admittedly with certain exceptions.

Dr Murray: A problem that arises when we report directly from evidence that we have taken is that, sometimes, the evidence is not accurate. The quote that you read out is an example of that.

The Convener: I was searching for the section because there certainly is a duty—although there is a line that says "unless" this, that or the other.

The question also arises over whether the tribunal should have powers. Even if the tribunal does not have direct powers—which it does not—the education authority itself can instruct other people to do this, that or the other, following the tribunal decision. That is not tidy, but it does complete the loop, does it not? I just make that observation in passing.

Lord James Douglas-Hamilton touched earlier on the loss of the record of needs. That loss is a matter of concern for us all. I think that there was general agreement in the committee that some degree of reassurance is needed. The minister has written to local authorities, but that may not be enough. There may have to be something in the bill to highlight the change in the way that things are done. We need to have a mechanism of some sort to ensure that people who have fears—valid or not—can be put at ease.

Fiona Hyslop: At the parents' evidence session in committee room 1, it was very concerning to hear about an authority saying, "No, we are not going to start any new records of needs now." That has happened despite the minister having written to the authority and it is happening as of now. Even if the bill is passed as it stands, it will take some time to come into effect. We need something else.

The Convener: That particular point should perhaps be referred to in the evidence. It might be anecdotal, but if it has any substance at all, the problem should be squashed now.

Mr Ingram: That was the point that I was going to make. Parents have made representations to me about local authorities taking that line. From the parents' evidence session that Fiona Hyslop attended, it was quite clear that that was happening across the country. We definitely have to follow up this matter.

11:30

The Convener: We should take that on board.

Lord James Douglas-Hamilton: If there is a phasing in of the new system, when will the code of practice become available? That is a key point because the code of practice will give a lot of important information to parents.

The Convener: We had some information from the minister or his officials on that matter at some point, I think. It will take a couple of years to bring in the new system, but I think that the Executive expected the code of practice to be available towards the latter part of this year.

Fiona Hyslop: We should check on that and should also ask the minister whether it would come to the committee for affirmative approval.

Lord James Douglas-Hamilton: It will be reassuring to parents if it is in place before the new system comes in.

The Convener: It will have to be; the new system cannot operate without it. In some respects, the more important issue was that the committee and relevant interested groups such as parents and so on would have the opportunity to be involved in the consultation on the code of practice, which has a lot of important implications. We had that assurance from the minister.

Ms Byrne: Could we ask for some assurances and clarification from the minister on the code of practice? Who will be involved in drafting it? What sort of consultation process will there be? Who will be involved in that consultation? What will the time scale be?

The Convener: If you check the record, I think that you will see that we have been given most of that information. Perhaps the Scottish Parliament information centre could draw out some of that information. It might be worth noting in our report the assurances that we have been given. That will enable us to revisit the matter again if the situation is inadequate.

Mr Macintosh: On the loss of the record of needs, paragraph 33 summarises what the minister said at the last meeting. Although his words were welcome, I am not convinced that the situation is satisfactory yet. The issue is a tricky one and could end up undermining the purpose of the legislation.

The Convener: There are ways of dealing with that matter. Perhaps we can return to the issue once we have thought about what advice we want to give in relation to other areas. If we accept that there should be a widening of the tribunal jurisdiction, for example, that would take some of the heat away from the matter. We all agree that something has to be done about the matter at a later point, but we have yet to determine what that should be.

Mr Macintosh: I am worried about the on-going confusion about this matter. We received a letter from Argyll and Bute that was good in many ways but demonstrated that there is a lack of clarity.

The Convener: Did it deal with the numbers issue?

Mr Macintosh: It made good points on the two issues that it focused on, but it started by making a false assumption about the numbers. I had thought that we had clarified that matter.

The Convener: I do not know that the matter has been entirely clarified. The minister said that he would have conversations with COSLA and would get back to us. I think that the implication was that that would be within the context of a time scale. We have asked the clerk to chase that up.

Fiona Hyslop: Once we have got that clarification, we should produce a section containing our comments on the Finance Committee's report. The correspondence is on-going and we need to come back to the issue later as we cannot say much about it just now.

Dr Murray: One of the problems is that, although the Executive managed to clarify what the definition was, there is still a bit of uncertainty as to how the desktop calculation that produced the figure of 50 per cent was done. It seems to have been done in consultation with a number of councils that then said something different to COSLA. The confusion is not over the definition but over how that translated into the figure of 50 per cent.

The Convener: Remember that there is scope for leeway. The minister said that a figure of 70 per cent would not cause a major problem because resources were in place. However, the resources to support the system might be an issue.

Dr Murray: We need to chase up the continuing dialogue between the minister and COSLA. If COSLA has substantially misled the committee or local authorities because of the misinterpretation, the matter need to be clarified. That would cause a lot of concern within local authorities.

Fiona Hyslop: There is a more fundamental question. I am concerned that the financial memorandum talks only about those with CSPs. We can argue about how many people are concerned but, if we agree that CSPs are not by themselves a passport for resource, the financial memorandum should not be so tightly focused on them unless, as I think we understood from the minister—although I stand to be corrected—the bill concerns the administrative system and the costs in the financial memorandum are just about the administration of a new recording system, as opposed to the provision of support.

If the additional support provision under section 2 is to be realisable, and if we agree with the minister that there is to be an improved service for all children with additional needs, then we must acknowledge that that needs to be resourced from somewhere. We cannot ignore the Auditor General's report on mainstreaming. The resources must come in somewhere. Preferably, they should be detailed in the financial memorandum. That should certainly be covered in our stage 1 report.

The Convener: We should also bear in mind the minister's comments about the resources that are already going in.

Fiona Hyslop: That should be in the financial memorandum.

Rhona Brankin: I was going to make a point about that. We need to look at it within the wider context.

The Convener: I am sure that that is right.

Fiona Hyslop: We need to have a debate about whether we think the resources ought to be covered by the financial memorandum, given that their allocation is a consequence of the bill. If we think that the bill is just about administration—

The Convener: It is very tricky. There is the background of the move towards inclusion through the Standards in Scotland's Schools etc Act 2000, with administrative moves already having been made in that context. According to one view, the bill does not change that process. According to another view, it slightly amends the way in which things are being done. I therefore take your point. However, I do not personally think that that is head-on to the issues that the committee must deal with. Members might take a different view, however.

Ms Alexander: I accept that that is fundamental to the wider issues; it is at the boundary of the scope of the financial memorandum. The purpose of a stage 1 report is to be as factually accurate as possible. I therefore wonder whether it would be possible for the clerks to write to the minister, seeking clarification on the issue. I think that we could get quite a helpful response back. That means that we would neither ignore the issue completely nor misrepresent it in our stage 1 report.

Fiona Hyslop: I asked the minister whether he would provide that clarification. We are expecting additional information some time in January.

Ms Alexander: We could clarify the matter with the bill team. It is not as if they are unaware of the issue. We could ask whether they could put their position on the record, which might resolve some of the anxieties that we properly have about the matter. The bill's provisions should not simply represent a passport to resources. At the same time, I think that the difficult issue of the scope of the financial memorandum is also raised. Perhaps it would be reasonable to write a two-paragraph letter to the minister, saying that we are struggling with how to capture the issue appropriately in our stage 1 report. We could say that we wish to give the Executive the chance to put its position on the record.

The Convener: Another aspect is the varying provision between different local authorities, which it is very difficult to get a handle on. If some element of standardisation comes through the code of practice, for example, what are the resource implications of that? I do not think that anyone could honestly say, as the information is not there. However, we should keep our eye on that and on the question of budgets as we go along.

Mr Macintosh: Page 17 of the financial memorandum is relevant here.

Fiona Hyslop: The point is that there is more to the financial memorandum than just the number of CSPs.

The Convener: Let us move on to IEPs, PLPs and the question of having two or three tiers and so on. This is at the bottom of page 7 and the top of page 8 of the summary. My only observation is that we need to be aware of the significant resource implications involved. That came out during the evidence from Rosemary Byrne's colleague from Kilwinning Academy in particular. The evidence on that has been understated to a degree.

Fiona Hyslop: I was quite disappointed with the union's response. Having spoken directly to teachers, I am aware that they recognise that they might face an additional burden if they are to fulfil the requirements properly.

The Convener: The evidence contains a number of references to individual examples of how much teacher time is involved. The lady from Kilwinning said something about that, as did one or two other witnesses. I suggest that those could be included in the report as illustrative examples of the extent of the need that has to be resourced.

Ms Byrne: It would be worth looking in more detail at the best way forward. Given that IEPs have already been developed, we might wish to recommend those as the vehicle for additional support needs—as they are at present in cases of good practice.

The Convener: We will return to that issue. As I said, the minister has to get back to us about the documentation, which is one of the issues that we are chasing up. We should have that discussion when we have the minister's response.

Rhona Brankin: Do you mean the single-system documentation?

The Convener: Yes. Unless we are clear about that, it will be difficult to get a handle on the other issues.

Mr Macintosh: The committee has expressed its general opinion on that matter: we want a more co-ordinated system.

Another point—I cannot remember whether it was made in oral evidence or in one of the sessions that we had in schools—is that IEPs are, as the minister said, supposed to be a light-touch working tool, but if a document is subject to dispute and may go to the tribunal system, the person who draws it up will pay a great deal more attention to it. The CSP is the document that will open the gates to the tribunal, so it is a more formal document and more attention will be paid to it.

The Convener: I cannot remember who, but somebody said that there will have to be two systems of recording.

Mr Macintosh: If we introduce a dispute resolution process at local authority level, that will also place more scrutiny on IEPs, which will mean that it will become a different kind of document. I am not exactly sure what will happen, but there is a difference between scribbled notes that will probably not be held against the writer, and documents in which every word must be measured.

The Convener: Like a defensive medicine.

Mr Macintosh: Exactly. Rather than being a working document, it will become the person's defence.

Ms Byrne: To clarify, under current practice, when IEPs are developed, the young person and the parents have an input. Everyone who is involved with the child has an input into, for example, setting targets and reviewing.

The Convener: But those people do not go to court, which is part of the issue.

Ms Byrne: They do not go to court, but nevertheless, they are under scrutiny.

Mr Macintosh: That is reassuring.

Fiona Hyslop: That is a fair point, but there is a danger of IEPs, as effective as they are, becoming over-bureaucratic. However, we must recognise that we may want to extend the tribunal system.

The Convener: We move to the issues about the term "reasonable cost". Reasonableness is a criterion in many pieces of legislation, but I am unsure about the phrasing that is used in the bill, which is

"not practicable at a reasonable cost."

We need some guidance on that matter.

Mr Macintosh: I thought that we had received such guidance. We should be as consistent as possible and use the terms that we used in the Standards in Scotland's Schools etc Act 2000. We had a similar discussion during the passage of that act. We must make it absolutely clear that the provision is not a get-out clause for local authorities.

The Convener: The minister said that it was not a get-out clause.

Mr Macintosh: Yes. I thought that we agreed that the same wording in the 2000 act will be used, but perhaps we did not. We need to double-check that.

The Convener: We will look into that.

Rhona Brankin: I think that the Disability Rights Commission Scotland gave a suggestion about the use of the term "reasonable". We had an interesting discussion about that. We need to consider other definitions.

The Convener: Consistency is a good line to take on the issue.

Page 9 deals with the issue of assessment, which is trickier.

Mr Macintosh: There are two sections on assessment: one on page 9 and one on pages 11 and 12. In many ways, my concerns are about rights, not about the ending of compulsory assessment.

The Convener: Rosemary Byrne touched on the important issue of the substance of assessments, on which we have received a lot of evidence. We may also need to take account of the later stuff.

Mr Macintosh: The term "assessment" is confusing because different people use it to mean different things. Some people use the term to mean a one-off diagnosis or examination, but it is also used to mean an overall approach. Evidence from physiotherapists and social workers highlighted the issue of a medical model versus a social model and the idea that psychological assessment should not be based on a medical approach.

11:45

The Convener: As you said earlier, we are dealing with a mixture of issues. Some are medical issues, but others are not.

Mr Macintosh: That is exactly the point. Dyslexia is a very good example in that respect. Parents who have children with dyslexia are aghast that it takes so long to get a diagnosis—to get their children assessed for dyslexia, as it were. Indeed, their big battle is to get an early and accurate diagnosis. However, although that is a form of assessment, it does not quite cover the totality of it.

The Convener: It also involves identification to some degree.

Mr Macintosh: That is right.

The Convener: Rosemary, I cut you off earlier when we began to discuss this matter.

Ms Byrne: A number of organisations are concerned about the removal of the multidisciplinary assessment, which is the only way of identifying some young people's specific difficulties. Quite often, more than one agency can be involved in identifying children who have, for example, autistic spectrum disorder. Moreover, with children who have dyslexia, we must ensure that their eyesight is okay and so on before we carry out further tests on them. Again, on the subject of good practice, some schools have established their own systems in that respect and have trained staff who can carry out those tasks. There are ways of progressing the matter.

Although everyone welcomes proposals to allow parents to request assessment, some organisations are also concerned that people might not always know the right type of assessment for a particular child. As a result, we need to broaden things out to ensure that the child's problem is identified. For example, many agencies will be involved in dealing with a child with mental health problems who displays bad behaviour and in identifying the nature of his or her difficulties. Although we welcome proposals to broaden out access to assessment, we need to be very careful and ensure that such an approach is appropriate and that the parents who ask for assessment are assisted and directed to the right agencies.

The Convener: It is not quite true to say that multidisciplinary assessments are being removed. Compulsory assessments are being removed, but that is not quite the same thing. However, the procedures must be right to ensure that multidisciplinary assessments are carried out when necessary.

Ms Byrne: The NAS is certainly concerned that multidisciplinary assessments will disappear somewhere along the line.

Dr Murray: I think that the convener has pretty much covered what I was about to say. The point is that multidisciplinary assessments will not be compulsory for every single child. However, the comments in this paper might reflect some of the current fears and misunderstandings about the legislation. There is certainly no intention to remove such assessments from the children who require them.

Rhona Brankin: I agree with Elaine Murray, although I acknowledge Rosemary Byrne's points. As someone who has worked with youngsters for whom a medical examination has thrown up surprising results, I think that we should probably refer to the need for the code of practice to provide advice in this area.

Mr Ingram: In its evidence, Sense Scotland indicated that it was concerned about the assessment process. I understand that the current procedure is very much based on the assessment of impairments and that the new process will be focused on meeting support needs and achieving learning outcomes. However, I feel that problems arise with the issue of assessment itself. Rosemary Byrne talked about the one-off assessments that provide a snapshot of the individual, but assessment has to be on-going.

The Convener: Somebody said that in evidence.

Mr Ingram: By its nature, assessment will fall on teachers in the classroom, but they will not necessarily be in a good position to carry out such assessment. Do they have the requisite training, experience and skills? We need to focus on such

assessment in terms of the support that is given to teaching staff so that they are able to do the job properly.

The Convener: Is it right to say that the process begins with the teacher? I think that I picked up somewhere that educational psychologists have a lead role in the area. They will have a breadth of experience—which the ordinary classroom teacher will not have—of the conditions that we are talking about. We need to get the procedures right. We mostly agree that we can do away with compulsory assessment, but then we arrive at a point at which we have to put in place suitably focused expertise to provide proper assessments.

Mr Ingram: My understanding is that there is a role for educational psychologists in the current system, but that they would have no role in the new system.

The Convener: Do they have a role in law in the current system?

Mr Macintosh: Stuart Aitken from Sense Scotland said that the educational psychologist currently has a role under existing legislation, with a duty to ensure that the process is undertaken, whereas he or she does not have a role—

The Convener: There is an issue about whether the psychologist should have a role in practice. Where the resource is available it should be drawn upon and used better, and not downgraded in any shape or form. Is not that the issue?

Rhona Brankin: One of the main issues with assessment is that people often have to wait a long time, as the system is overly bureaucratic and complex. We need to be reassured that where the school co-ordinates assessment it can draw on relevant expertise to build a picture of a young person's needs.

Fiona Hyslop: There may be an issue with the duty on other authorities to comply. Members will know from their own case loads that one of the biggest issues is that of education authorities trying to get health authorities to comply with what the psychologists, psychiatrists or whoever say. If education authorities have the lead role in the provision of services and assessment, the power to compel should be strengthened so that they can draw on other authorities. Those authorities will have a duty to comply. This might be a technical detail for stage 2, but we need to ask whether the assessments are robust. It comes back to the general point about co-ordination and integration. Is the general duty on local authorities to request other agencies to comply sufficient to cover all aspects of the bill, or do we need to build that into each individual aspect?

The Convener: That is a good point.

Ms Byrne: We are trying to improve the system. We do not want a parent to have to wait from primary 1 right through to secondary 1 before they find out that their child is dyspraxic. That is a good example to use, because dyspraxia can be interpreted in so many different ways, as can autistic spectrum disorder. In trying to fine tune the bill we should ask whether that will mean that that parent will have access to appropriate assessment when necessary. Such assessment is often required at an early stage, when parents say, "There is something wrong with my child", and everybody else says, "No, your child is badly behaved", or, "Your child has whatever difficulty", when the child really has something else. We need to keep asking whether we are tightening up that situation and making it easier for parents to get the kind of assessment that they want, so that they are satisfied and that everything else follows on from that assessment.

The Convener: That is central, is it not? If we get that right, it will take much of the sting out of a lot of the rest of the system.

Mr Macintosh: I agree totally with Rosemary Byrne, in the sense that many parents are concerned about the inability of the system to pick up on their child's needs, and in particular to identify their child's needs. The bill will give parents a new right to have their child assessed. If it is interpreted wrongly, that right will not be the right to have their child assessed in the holistic way that Rosemary Byrne referred to at the beginning of our meeting, when she talked about the right of all children to be assessed by a teacher continually, and for planning to be in place. Instead, the provision will be interpreted in the medical sense of having a child diagnosed and examined.

It is a different concept of assessment, and although the two approaches are not necessarily mutually exclusive, we should not overemphasise the parents' right to have their child's needs identified. Assessment is about much more than that right—it is about assessment of the child's situation and the on-going planning that is necessary to improve the child's education. It is important that we somehow reflect that—I do not know how—and that we do not distort the picture.

On parents' rights, I agree with the point that Fiona Hyslop made. A concern was voiced—I cannot remember when, although I think that it was in a school meeting, rather than at a committee meeting—about the local authorities' opt-out, which is that parents have a right to assessment for their child unless the authority considers the request to be unreasonable. I find that worrying, because the local authority will decide whether the request is unreasonable. I was led to believe by the person who voiced the

concern that that provision was inserted at the request of local authorities, the Convention of Scottish Local Authorities or the Association of Directors of Social Work. The paper mentions that we talked about it with Dundee City Council.

The Convener: I cannot remember whether this is the relevant sub-section, but section 4(2) says:

"the authority must … comply with the request unless they consider the request to be unreasonable",

We could make that provision objective by amending it to read "unless the request appears unreasonable", which would give the potential for outside consideration of the matter.

Mr Macintosh: For the sake of local authorities and parents, greater clarity on what is unreasonable is necessary. We do not want to encourage continual, vexatious or repeated requests or an unwillingness to accept the professional opinion of many others, but we have to give parents rights at the same time. It is difficult to get diagnoses—they can take years—and we should not put barriers in parents' way. The provision is a difficult one to get right, and I am concerned that we are tipping the balance slightly against parents.

The Convener: That is another issue to consider in detail at stage 2.

Lord James Douglas-Hamilton: The possibility of non-compliance from other agencies should be considered. I notice that section 19(3)(b) says that an appropriate agency could refuse a request if it considers that the request

"unduly prejudices the discharge of any of its functions."

One is either required to look after children or one is not, and

"unduly prejudices the discharge of any of its functions"

sounds like convenience.

The Convener: It is a low barrier.

Lord James Douglas-Hamilton: Yes. We need to address that area.

The Convener: If we have finished dealing with assessment—it is a central matter, and it is important that we get some of what we have said into the stage 1 report—we will move on to the next section of the paper, on pupils outwith the public education system. A point was made about parents not so much opting out of services but feeling that they had been driven out of them because of particular disputes that they had had.

Fiona Hyslop: To be fair, I think that the minister picked up the point that we made. We must recognise that most children are not in state nurseries; the majority of parents want nine-to-five places, but there are very few such places in state nurseries, and there is an issue about children who are with childminders or other nurseries. There is confusion as to whether, where the education authority pays for the two hours of education in independent or private nurseries, such provision would qualify. That must be clarified, and there is a willingness to face that. It seems that the only reason that the provision has changed from two hours to three is the general perception that health authorities are responsible.

The Convener: We will come to that later; we have a section on that.

Dr Murray: I did not quite understand paragraph 55 of the paper, but perhaps that was only because of the way that it read; it did not quite seem to make sense, particularly the first part. To be honest, I would have thought that, if the local authority is working in partnership with the voluntary sector or private sector and is purchasing and paying for half a day of nursery education—that would happen in rural areas, for example—it would have a duty to assess, because it is purchasing that nursery provision.

The Convener: That was Fiona Hyslop's point.

12:00

Dr Murray: I do not know whether that was the concern. There are some circumstances under which a local authority would not pay for a private sector place. If a pupil's parents were at work all day, for example, they could say that they have to go to the private sector because although the local authority has places in its public sector nursery, the public sector does not provide in those circumstances. That is a slightly different point to the one that the deputy minister made.

Fiona Hyslop: I did not think about that. I do not know whether this is the case now, but a couple of years ago, some local authorities would not contribute to the cost of private nursery places. The issue is not to do with accessing private services. The matter should be child-centred. We should reduce the age of eligibility to two years, in which case we would encompass all children who qualify for nursery provision in the local authority area. The local authority has a duty to identify all children who have additional support needs.

The Craighalbert centre sent me correspondence in which it suggested helpful amendments to that part of the bill. That is for stage 2, but we need to flag up the issue now.

The Convener: It is worth flagging up. There were a couple of other points on the matter. Euan Robson mentioned that some parents who are in dispute with the local authority keep their children at home as a result. One cannot say that they have opted out of the state system in the same way. The other point is that, even if a child goes to

an independent school, that does not mean that they opt out of linked co-ordinated services. I wonder whether we have got that area totally right.

Ms Byrne: We need to look at that area. I agree that there is concern. A lot of the witnesses mentioned that point, too. The rights of the child should be paramount.

Fiona Hyslop: Is the issue about the rights of the child or the rights of the parents? The proposed approach seems to imply that the right of the parents to buy private education is more important than the right of the child to have their additional support needs met. We have to get the underlying approach right. If we go with the rights of the child, the approach would be strengthened and might address those other matters.

The Convener: We have not heard any evidence on the independent schools element. Perhaps it is not a concern, but that seems a bit odd.

Via that useful link, we can now move on to the rights of the child. The general point is about the phraseology of the rights that are in the bill. Govan Law Centre said that the rights should apply from the age of capacity. That is consistent with the approach taken in other legislation, is it not?

Dr Murray: Yes, it is consistent with the Children (Scotland) Act 1995.

The Convener: I think that there is a deficiency in the phraseology in the bill. I was not entirely clear about the reason for restricting it in that way, not least given the involvement of children and rights in that regard.

Ms Alexander: I am completely sympathetic to the point made in paragraph 60. However, in relation to paragraph 59 and in keeping with what Elaine Murray said, we want to excise inaccurate evidence. That statement is inaccurate, therefore it should go.

Dr Murray: The statement also refers to parents' rights rather than to those of children.

The Convener: What does it say?

Ms Alexander: It says that parents will not lose rights, but that they will not get any more rights. That is just not true, so although it is useful to draw that evidence to our attention, it should not appear in our report.

Fiona Hyslop: The point is significant because currently, when children apply for additional support to meet their needs and the local authority says that it cannot do so—based on the initial assessment by officials—they can appeal. However, under the bill, they would not have that right to appeal unless they had a CSP. The current system of appeal is to a local education authority's education committee. The child's legal right to appeal would be lost. The information about which rights will be lost comes from the table supplied by the Craighalbert centre, and that is how it has been interpreted.

Mr Macintosh: The only rights that would be lost would be those for two and three-year-olds, which will be addressed later. No other rights have been lost.

Fiona Hyslop: No. The concern is about the right to appeal the decision on an application for support.

The Convener: You are saying that there is a right of appeal at the moment that applies specifically to children.

Ms Alexander: Can we get the clerk to give us some clarity on the issue?

Fiona Hyslop: There is no right of appeal to the courts. The right of appeal is kept within the education authority.

The Convener: What appeals are you talking about? Are you talking specifically about exclusions?

Fiona Hyslop: No. I am talking about cases in which a local authority decides that it will not give support. I have a constituency case at the moment about an application for behavioural support for a child with autism.

The Convener: That is part of the record of needs.

Fiona Hyslop: Yes, but if the application is rejected, there is a right to appeal to the education committee. Whether or not you feel that that is similar to the proposed right, people perceive that they have the right of appeal at the moment.

The Convener: I am not sure that I totally accept that. When—

Ms Alexander: There is no point in arguing about it. It is either factually accurate or it is not. One of the great values of these sessions is that the clerks can be asked to look at issues and come back to us.

The Convener: They can sort it out. Is there general support for the proposition? It affects a number of sections. Should the dividing line be that children with legal capacity have the right to apply for one thing or another?

Members *indicated agreement*.

Rhona Brankin: That would fit into other legislation on children and young people.

The Convener: There has been a change in that respect. I understand that the Education (Scotland) Act 1980 and the Education (Scotland) Act 1981 do not include rights for children in

placement requests, although such rights may have been introduced by a later appeal. The United Nations Convention on the Rights of the Child and the Children (Scotland) Act 1995 broadly allow for the definition that children have rights from the age of understanding, which is the age of capacity.

Fiona Hyslop: Wendy Alexander raised a point of clarification on paragraph 59. I suggest that that paragraph is in the wrong place. We are talking about whether fundamental rights are being taken away in respect of support services as opposed to whether the bill includes a definition that allows children to have general rights.

The Convener: We will not amend the paragraph numbers in the paper. We are at a preliminary stage. Let us not get too tied up in that at the moment.

Mr Macintosh: I am not sure whether this point should be included under support or under advocacy, which comes later in the paper. The one thing that struck me about the views of young people that were made known to the committee is the need for young people to be given support when they contribute to their own assessment, IEP or CSP.

We are building in the fact that children will have rights in terms of their CSP that they did not have before in respect of their record of needs. Although we do not mention the IEP in this context, I hope that the same principle will be followed. A lot of the evidence from young people suggested that, if the right is to be more meaningful, they will need support. That is quite a difficult thing to address in the bill. Perhaps it can be included in a code of practice. We might want to refer to that in our report.

The Convener: There is also the issue of advocacy.

Mr Macintosh: It might be better to put that suggestion in the section on advocacy. The point is that we are giving children a further right for their opinion in a given situation to be ascertained. For that process to be meaningful, the child requires not only to be asked but to be given support.

The Convener: I accept that entirely.

We move on to children under three. The single point is whether the bill should extend to children under two. Rightly or wrongly, I got the impression that there was some support for the bill to apply to children under two.

Rhona Brankin: The decision hinges on whether the change proposed in the bill would represent a reduction in good practice. At the moment the record of needs is applied from the age of two. Given that children enter nursery at the age of three, the thinking is that that is the time that things will be picked up on. However, I agree that concern was expressed, especially about youngsters with autistic spectrum disorder and so on. An early diagnosis can be important for those children. We need some reassurance that there will be no diminution in the ability of education authorities to make early diagnoses.

The Convener: We had evidence about two groups of people. We heard about people whose conditions or problems could be identified fairly early on, in which case early intervention was the theme. We also heard about other people whose conditions developed and became evident later, in which case their condition could not have been identified at an early stage. The issue is that if a condition is identified, people should be making planning arrangements as the child moves towards going to school.

Fiona Hyslop: Yes, but how can that be done in practice? It is anticipated that the health authority would be the lead authority in identifying any problems with children from zero to three, and after that the education authority will be the lead authority. The point again comes back to whether it matters which authority has responsibility as long as the child's condition is identified. If we reduce the age to two, the provisions on two to three-year-olds may well put the emphasis on health authorities in particular. That might be a way round the problem.

The Convener: That is a valid suggestion. The central point is the need for early intervention procedures to be in place—we can argue about the precise technicalities of the procedures.

Ms Byrne: A lot of parents appreciate the input that they get from the education authority as well as from the health authority when their child is two, prior to nursery, and they are frightened that they will lose that. A lot of preparatory work is done and there are a lot of programmes that can be worked through for specific areas of difficulty.

The Convener: We received some evidence about the difficulties of all the transitions: the transition into school, between stages of school and out of school at the other end.

We have dealt with parents' rights under assessment.

We may deal with placing requests later, but I should declare my usual interests—I am a member of the Law Society of Scotland and have a consultancy with Ross Harper solicitors. We have not achieved a full resolution to the issue of legal aid in relation to placing requests and the discrepancy between different sorts of placements.

Mr Macintosh: We will come to that matter later.

The Convener: There are a number of headings under the main dispute resolution heading. It may be sensible to deal with them separately.

The first heading is mediation.

Mr Macintosh: It is actually "Meditation".

The Convener: Yes.

Martin Verity: I apologise for that deliberate mistake.

The Convener: The issue is the ability of local authorities to provide in-house services. The minister was keen that that should be the case, but there was a perception the other way in quite a lot of the evidence that we received. Do members have any views on that point?

Lord James Douglas-Hamilton: In principle, independence is important. If parents have a dispute with a local authority official, no other local authority official will support the parents for fear of falling out with the local authority. It is therefore important to have independent mediation.

Ms Byrne: I agree.

The Convener: I am not sure that I would go as far as that.

Mr Macintosh: I do not think that we can rule out local authorities providing mediation services; that would be unfair. I can think of many examples of independent service providers that are truly independent. Although we often make statements about the perception of independence, to me the reality of independence is more important than the perception. I have no doubt that local authorities can provide independent mediation services.

Lord James Douglas-Hamilton: There has to be a firewall, rather like there is with Her Majesty's Inspectorate of Education. Although the inspectorate advises the Executive, it is independent of the Executive. There must be firewalls.

The Convener: It is clearly the minister's intention that there should be firewalls. It is a bit like the money advice agencies that the Social Justice Committee dealt with in the previous session; to some extent, those were in-house services. The difference in this case is that, in practical terms, the dispute is always with the local authority. Perhaps the code of practice could deal with the issue; it might not rule out in-house provision of mediation services, but it might press against that being the normal approach.

Mr Macintosh: We should stress that the mediation services should be independent, but it would be unfair to local authorities to rule them out. We would be taking a stance against local authorities, which I would not advocate.

Lord James Douglas-Hamilton: I do not think that we would go that far, provided that there were firewalls, but the principle of independence is very important.

The Convener: Okay. We know where we are going on that issue.

Rhona Brankin: It is important that we include the evidence from the Scottish committee of the Council on Tribunals about services being uniform and about minimum standards being set down.

12:15

The Convener: Perception is important, though. Mediation does not work unless there is a perception of independence; we must not lose track of that.

There are probably several issues to discuss under the heading of tribunals. A number of people asked why the tribunals were to be called additional support needs tribunals as opposed to CSP tribunals. That is a valid point.

That is the area that bothers me the most. I can see the possible problem of a flood of cases, some of which might be about relatively trivial matters, coming to tribunals if the jurisdiction is too wide. As I mentioned, I am veering towards the idea of giving powers in the bill to widen the tribunals' jurisdiction as we become more experienced. The tribunals could cover certain areas to start with, which could be widened later. In principle, people should have the right to vindication for the different situations that they are in.

The issue is one of practicality and whether that can be brought about in the first instance, or whether things are too unpredictable and the tribunals will be swamped, which will take away the focus from the people with the greatest need.

Fiona Hyslop: That was our concern, but we did not get that from the witnesses' evidence. The Scottish committee of the Council of Tribunals said that the provision of tribunal membership would suit the demands and needs of what was required, and that it could expand to meet any future needs.

I am concerned that the focus will shift, but I am not sure that that is what emerged from the evidence.

The Convener: The Council of Tribunals said that if the resources are in place, it can do anything that is thrown at it.

Fiona Hyslop: If we believe that tribunals are important and can engender confidence in the system, perhaps that should be highlighted at stage 2.

Rhona Brankin: I have grave concerns about this. We do not want a system that is based on tribunals. We want the system to be based on meeting the needs of youngsters without having to seek recourse to a tribunal. The emphasis is therefore, quite rightly, on mediation and dispute resolution. We have to be careful not to move away from that. There are concerns about parents whose children have records of needs at the moment. However, we do not change legislation because we are concerned about an interregnum.

Ms Alexander: I share some of Rhona Brankin's concerns. The problem is crystallised for me when I think about the purpose of the tribunal. We heard a lot of evidence that when things reach the tribunal stage, the situation is highly conflictive. There was quite persuasive evidence about the need for proportionality in representation. Inevitably, in a process which, at the tribunal stage, is conflictive and will have a quasi-judicial element or feel to it, the reference will be to the CSP. That will be the starting point for the deliberations.

If we consider all the other additional support needs that we are trying to meet and the sort of flexible, needs-based, and non-deficit model that we are trying to build in to how additional support needs are addressed in their widest sense, there will be no CSP. We are trying to encourage more creativity, resources and a degree of variety in how additional support needs are met. Therefore, I wonder how a tribunal would go about its business in circumstances in which the CSP did not exist or when the CSP was not yet well established.

I have some sympathy with the view that the balance should shift to a tribunal process over time, when the character of those tribunals would be quite different. At this stage of the process, there would be a risk of restricting the extent to which local authorities could rise to the challenge of meeting the full additional support needs of other children in a variety of ways.

The Convener: There is certainly no disagreement that we must sort out such matters early on without having to involve tribunals or anything like that, as far as we can.

We must also consider the issue of the DDA anomaly. The minister said that that would be dealt with by Westminster legislation or a Sewel motion in reverse. I would have thought that we could cover that with a relatively straightforward amendment that would give our tribunal power to deal with the specific matters that would have gone to a DDA tribunal, which is a joint tribunal in England. We do not want separate tribunals dealing with the same core issues. I would have thought that it would be possible to sort that out by widening the tribunal's jurisdiction on that issue. I will ask the minister whether that is doable.

Fiona Hyslop: If there was follow-up written evidence to that effect, we might be able to put it in the report.

The Convener: We need a solution to the problem; whether that is the right one is another issue.

Mr Macintosh: The aids and adaptations point needs to be put in our report. I do not know what we will say, because we have yet to agree it, but it does not matter how the problem is resolved, as long as it is resolved. On the tribunals, I am concerned that there could be a multiplicity of ways of resolving disputes. Each way could lead to a different outcome and individuals could be favoured depending on which route they took.

The Convener: That would be confusing for the parents.

Mr Macintosh: Yes. It would be confusing and it makes me slightly uneasy. I welcome the general approach whereby tribunals offer lay justice, as it were, rather than legal justice. I am not saying that that is always better, but in this case it would be a better way of resolving disputes.

I am concerned that not everyone will have access to the tribunals. The two disputes that I am aware of concern placing requests and the level of services that will be provided under the record of needs. Placing requests are fairly straightforward now. Everyone has a right to make a placing request, which is right. If someone is in the business of opening a CSP, they can go to the tribunal—an extra level of people will go to the tribunal. The difficulty is that the dispute is often with the people who do not qualify for a CSP; they are often the ones who cannot access mediation or find a resolution. In some ways, we might be shutting the door to the tribunal route to those people. I am slightly concerned that the very people who will need the tribunal are the ones who will not be able to access it. I am not sure whether there is a way round that. I do not have a solution.

Rhona Brankin: I do not know whether that was the evidence that we got. I thought that one of the bill's intentions was to include those youngsters whose needs were greatest, most complex and involved outside agencies. In a sense, that covers those who are most likely to seek the tribunal's decision on the provision of therapy or whatever.

Mr Macintosh: I am not sure.

Fiona Hyslop: You will have received written evidence from one of my constituents, who sought the only successful judicial review in this area. Her child had autism and she does not think that they would necessarily get a CSP. It all comes back to the issue of what route people take. I agree with Rhona Brankin that we want disputes to be resolved without having to base everything around

the tribunal. Ken Macintosh is right that there are differences and concerns around who can access the tribunal.

The Convener: The definition of CSPs is not necessarily that helpful in deciding who goes to the tribunal.

Fiona Hyslop: No, and if we agree that CSPs are not the passport to support services and there is a dispute about support services, why is the CSP the only way people can get to the tribunal?

The Convener: Yes. That is absolutely central.

Ms Byrne: My concerns are about access to tribunals and the jurisdiction of the tribunal. As far as I understand it, the tribunal will have jurisdiction only over the local authorities, not over health boards. We have to address that concern.

We have to talk about legal aid and the inequality that might be created. None of us would want to have a system that was adversarial to the point that people were bringing in lawyers, but, on the other hand, people with the means to do so might well do so, which would mean that others would be left out.

The Convener: I would like to get a flavour of members' views on that issue.

Ms Alexander: Looking through the mediation section, I wonder whether there might be a possibility of guaranteeing access to mediation to anybody who felt that they had an additional support need that was not being recognised or met. Perhaps therein lies an intermediate solution that gives a flavour of the direction in which we want to move without bringing to bear all the bureaucratic and legal apparatus.

Rhona Brankin: Is that not what dispute resolution is intended to do?

The Convener: That relates to a different area.

Ms Alexander: There is a degree of ambiguity in relation to access to mediation services for people who have children who do not qualify for a CSP. That could be cleared up in the code of practice.

The Convener: That is an important point and we should not lose it. A number of people have said that the mediation and the tribunals are the wrong way around, but I think that that view is based on a mistaken interpretation of the bill due to the order in which those elements are dealt with in the bill.

Mr Macintosh: Everybody has access to mediation. However, there are two levels of dispute resolution: those with a CSP go to the tribunal and those who do not are dealt with in a new system that we do not know the details of. We accept the need for dispute resolution, but I do not know whether we accept that that is a fair way of doing it.

On legal aid, I still have worries that we might create two classes of people: those who can afford legal representation and who therefore have an advantage and those who cannot and who will be at a disadvantage. However, I think that the advantages of having a non-legalised system outweigh that. The minister's assurance that guidance on that matter will be included in the code of practice further reassures me.

Lord James Douglas-Hamilton: I agree with what Kenneth Macintosh has said. As the convener said, there is a case for tribunals having wider jurisdiction. Few cases have gone to court in any case, so there would have to be only a small body of precedents for people to understand that it would not be worth pursuing their case in the light of previous decisions.

I hope that only a small minority of people will appeal, but I think that the right of appeal should be available to those on the borderline and those whose circumstances have changed.

The Convener: I would like to see if there is consensus on two points.

Kenneth Macintosh made a proposition on legal aid, with which I agree. We do not want to have a legalised tribunal and, in normal cases, there should be no legal aid at the tribunals. To that end, the code of practice should discourage the use of lawyers and so on. Is that view accepted by the committee?

Lord James Douglas-Hamilton: Some of the cases that might go to a tribunal would formerly have got legal aid before a sheriff court.

The Convener: Are you talking about the placement requests?

Lord James Douglas-Hamilton: Yes.

The Convener: That is a special issue that we need to deal with. Forgetting about that for a moment, however, is the committee agreed on the broad proposition that I outlined?

Fiona Hyslop: In principle, I agree that we do not want to have a legalised system. However, how can it be fair for a parent not to have legal representation if the local authority has such representation? The situation would be fair only if both sides agreed not to have legal representation or to seek legal advice. It would be difficult to police that, though.

The Convener: The code of practice could deal with that. It could say that local authorities were not expected to have legal representation. It could give an extremely strong direction in that regard.

Rhona Brankin: The evidence from the Scottish committee of the Council of Tribunals was very powerful. I was not clear beforehand about the right to access to legal advice before and after the tribunal. That evidence was persuasive, as was the suggestion that, because lawyers are not necessarily experts in the field, they might not be the best people to have at a tribunal. We asked whether any research had been done into differential outcomes, dependent on whether people had had access to legal representation. Did we get anything in writing about that?

Martin Verity: We asked about that.

The Convener: We may be able to chase that up as background information.

Rhona Brankin: My instinct is to agree with you, convener. However, it would be useful to find out whether any evidence on that exists.

12:30

The Convener: There are parallels. Lawyers rarely appear at children's hearings. Industrial tribunals commonly have lawyers present but often have trade union representatives and people of that sort present as well, and they do equally well. That leads on to the advocacy issue, to some extent. If the advocacy issue is firmed up a bit, we will be dealing with the question of representation and support rather than the question of legal representation and support. That is an essential point.

Fiona Hyslop: I agree with Rhona Brankin about the need for us to get that evidence.

The Convener: Yes. James Douglas-Hamilton is right. We need to deal with the placing request oddity, although I am not quite sure what we will do on that. There is a difficulty if the more serious cases do not get legal aid and the less serious cases do.

The other question is whether the tribunal should have the power to make orders against health boards and others. As I have said before, there is a linkage in that education authorities can require them to act. The tribunal can order the education authority to act as a linkage, but it is a bit indirect.

Fiona Hyslop: There is a logic. If someone gets a CSP only if an outside agency is involved, but they can have a tribunal only if they have a CSP, it makes no sense to say that the outcome of the tribunal is that they need better support.

The Convener: The logic, also, is that there is representation of the outside agency at the tribunal, which is a complicating feature. Agencies can hardly be expected to have orders made against them if they have no right to state their case or to make their view known.

Rhona Brankin: But there is a clear duty on the local authority to impose that duty on the other agencies.

The Convener: Yes. That is the point that I was trying to make. I am not totally certain that it is needed, in the direct sense, but I take your point.

Ms Byrne: I feel that it needs to be strengthened.

Mr Macintosh: A very good example was given by the Scottish committee of the Council of Tribunals concerning the children's panel, although I do not know what we can learn from it. Social workers and teachers do not appear before some children's panels, although they appear before the majority. In the majority of cases, the panels work well, but in a few cases they do not work well because the other agencies are not co-ordinating in earnest, for various reasons such as resources, lack of staff, or whatever.

The bill, as an education bill, puts a clear lead duty on the education authority. That is fine. There is a duty underneath that. It would probably require a problem to grow to a level at which ministerial intervention would be required, but there is a general power there to follow it up.

Ms Byrne: But the whole idea is to co-ordinate outside agencies. There is absolutely no point in people going to a tribunal and having no teeth at that stage because the health board or whatever other agency can turn round and say, "We don't have to comply."

The Convener: Let us leave that one sticking to the wall, for the time being. There is still an element of debate to be had on this one, I think, before we reach a conclusion.

Can we move on to advocacy? The simple question is whether there should be stronger provision—perhaps not necessarily in the bill—for advocacy support. I suspect that there is general support for that. Would that be fair?

Mr Macintosh: Yes, on two levels. The first of those is support at tribunals; the second is support for young people generally making their views known. Such provision should be in the bill or the code of practice. It would probably be better in the code of practice, because it is difficult to work out exactly what to say in a bill.

Fiona Hyslop: If we think that that is important, would it incur a cost that was a result of the bill?

The Convener: I think so. The minister touched on that. He was open-minded about, and fairly favourable towards, strengthening advocacy. If I read him right, he acknowledged the issue. Fiona Hyslop is right that the measure would have a financial implication.

Two issues have been raised in connection with transitions from secondary school to work, college or university. Should planning for transitions be extended to start when a young person is aged 14? Should the authorities that receive young people in those transitions have more direct input or power? That might be difficult to deal with in an education bill, but we must consider at least how the linkages can be improved. What are members' views on planning from the age of 14?

Ms Byrne: Most witnesses had the same views on that.

The Convener: Have members reached consensus on the subject?

Rhona Brankin: I do not know about the matter. The bill says that the period must be at least a year, so there is nothing to stop planning from the age of 14. That might be a matter for the code of practice, because although planning for youngsters whose needs are more complex must start earlier, it does not need to start at 14 for all pupils.

The Convener: That point is valid. Perhaps the code of practice could describe different cases.

Ms Byrne: When final needs assessments are undertaken properly, they always start when a young person is aged 14, from when the procedure is followed. That is good practice that is already happening. If a young person's needs were not too dramatic, a short meeting could be held. For example, those involved might start by considering whether a child will stay in school after they are 16 or move on. If they are to move on, much work must be done to alert agencies to the child's needs and to start making links. The reference should be to the age of 14.

Rhona Brankin: The decisions that youngsters make at the end of secondary 2 are important and have a major knock-on effect on the rest of their time in education.

The Convener: That relates to good practice. We would not legislate on that.

Rhona Brankin: That is right. Engagement on IEPs should take place at the end of S2 as well.

The Convener: The people who would know about that are in Skill Scotland and Careers Scotland, which both gave evidence that supported the age of 14.

Rhona Brankin: Planning for some youngsters takes more than a year and the bill does not stop that. The minimum time is a year.

Fiona Hyslop: I read the report from children and young people. Careers Scotland and Skill Scotland have an input, but we should include in our views and judgments what young people say. They wanted to start looking ahead early, and certainly wanted to do that two years before leaving school. Their evidence is probably the strongest.

One interesting aspect, which had not occurred to me and which we had not discussed, is the fact that some children do not feel ready to leave school and the question whether they should have an extra year. Changes to the system have been made. Initially, I pursued such an issue at the other end of the scale, because some parents wanted their children to have an extra year at nursery and the question was whether that would be paid for. The Executive has changed the rules on that. We might want to consider that, if this is the appropriate place for such a matter, because just as parents should have the right to defer entry to school for their children, that consideration might apply at the other end of the scale, particularly if that request has come from young people.

Rhona Brankin: Is such deferral not currently possible?

Fiona Hyslop: I took what I said from the evidence.

Rhona Brankin: One of my daughters stayed on for an extra year.

Fiona Hyslop: We can check the current legal position, but that came across in the report.

The Convener: It was not so much the legal position as some schools' practice that was being complained about, as encouragement was not always given. Particular situations may have arisen; one does not know the background.

Fiona Hyslop: Part of our consultation process involved obtaining young people's views directly, so it is important to reflect their views.

The Convener: The remaining central issues are the linkage and the fact that people can sometimes be thrust into colleges or other situations before resources are ready for them, which is not appropriate.

Rhona Brankin: Certainly, in my experience, it is sometimes necessary—

The Convener: I am sorry, but I forgot that Elaine Murray wanted to add something.

Dr Murray: I thought that I had been forgotten. I keep coming in late to the discussion because I am too far down the table.

Organisations are not talking about the same thing when they talk about transition planning. Some organisations say that the planning should begin earlier—for example, at age 14, or 18 months before a child is likely to leave school. However, the 12-month minimum period is for information to be gathered and handed on.

Therefore, the positions are not incompatible. It is possible to begin the transition planning as early as possible, but the bill places a duty on education authorities to begin collating all the information on a child 12 months before the child is to leave school.

The Convener: Perhaps for the transition planning to be done properly, the code of practice should place a heavy emphasis on it, so that it is well entrenched in the system, begins at a proper level and involves other agencies, for example Careers Scotland.

Fiona Hyslop: Is it appropriate for further education colleges to be involved in transition planning? Young people have expressed their concerns about expectations not being met and promises not being kept. I am a bit concerned that the bill is regarded as dealing only with school education and so should not stray into other areas of education, but unless we undertake silo thinking, we will have to make recommendations about other education sectors. I believe that there is consensus that there is a duty—

The Convener: We might have to be general in how we flag up transition planning. Somebody said that in other bills, for example on mental health, orders are put on all sorts of people who are outwith the central scope of the bill. We do not know enough about transition problems at the FE level. We know that there is a problem, but we have not taken evidence on it. We should not be too precise in what we put in the report about transition planning. We should just flag up the fact that procedures should be tightened, good procedures should be put in place and so on. Perhaps we should also say that the further and higher education sectors should consider transition planning.

Mr Macintosh: The bigger problem is not so much the weaknesses of existing services as the lack of services altogether—the falling off of services. Parents and families feel that they fall off a cliff at the end of compulsory education and that nothing is in place to catch them or support them.

The Convener: That is right.

Okay, we move on from transitions to implementation issues. Clearly, there is much to be said about training, but I do not know whether we need to discuss that today. It was clear from the evidence that the training issue affected a series of other issues, but SPICe probably has a handle on that. Do we need to say any more about training?

Ms Byrne: We just need to ensure that we keep highlighting the issue.

The Convener: Yes, the issue must be highlighted. I do not dispute that, but I do not believe that the issue merits a detailed discussion until we see what SPICe draws out of the evidence. There is also much evidence about resources and adequately qualified staff, which we must reflect in our report.

I believe that we dealt with the code of practice earlier.

Rhona Brankin: I am sorry, but I was thinking about something else just now. What about the issues of training and staff availability? We have talked about the need for teacher training. Did we not also talk about the implications for staff time in schools of managing what is a complex system?

The Convener: Yes. We touched on that when we discussed IEPs.

Rhona Brankin: The staff time issue is an important one to capture.

The Convener: That is right.

I am not sure that transitional arrangements are a big issue. Only one council thought that they might be.

Mr Macintosh: Should we not say something about the code of practice? We referred to it before, but should we not say how important the committee regards it as being?

The Convener: Yes. That would cover everything that we have said about the code. The big issue about the code of practice is that the committee and others should be consulted on it and it should fulfil its purpose. A lot of stuff is going into the code of practice.

Rhona Brankin: What is the status of the code of practice? Originally it was to be guidance, but it has been strengthened.

The Convener: Do you mean what is its legal effect in terms of its being binding on councils, for example?

Rhona Brankin: Yes. I cannot remember the evidence that we took on that.

The Convener: Neither can I.

Rhona Brankin: Was it not strengthened way back, from being guidance to being a code of practice?

Mr Macintosh: That is right.

Rhona Brankin: We must express strongly how important we feel that the code of practice is.

The Convener: I believe that the code of practice will be binding, will it not? Is that not the point of having a code of practice as opposed to guidance?

Rhona Brankin: I cannot remember the evidence. We need to check that out.

The Convener: Yes.

Mr Macintosh: One query that was raised was whether a code of practice would be written for parents or professionals. Parents will master the code of practice. The experience with all the obscure and obtuse circulars from the Education Department is that when parents have to get to grips with such documents, they do. However, there is a specific concern that this document should be for, and available to, parents as much as professionals.

12:45

The Convener: That is an important point. A linked aspect is the fact that either the code of practice should apply to other agencies, such as the health people, or there should be separate provisions for them. One or two people raised that in their evidence.

I do not know whether members want to say much on the points about transitional arrangements that are made in the summary of evidence paper.

Fiona Hyslop: It depends on what we come up with.

The Convener: It does.

We have dealt with a good deal of the financial issues. Do members have more to say?

Mr Macintosh: The financial issue that Fiona Hyslop touched on earlier is a concern. It is not so much the cost of CSPs that is of concern as the general cost of additional support needs. The question is whether we are actively creating demand. The interim letter from Mr Goole at Argyll and Bute Council says:

"It is important to recognise in realistic terms that measures designed to enhance the potential for a consumer group to make demands on council services will actually increase the level of demand."

In other words, we are increasing the rights of parents and young people and so we are increasing demand, not just for CSPs but across the board.

The Convener: It is difficult to measure that. The issue comes back to monitoring and budgetary issues. I do not think that anyone can put precise figures on the extent to which that will apply.

Fiona Hyslop: That does not mean that the issue should be ignored in the financial memorandum.

The Convener: No.

Let us move on to other issues. We have dealt with the point about the Disability Discrimination Act 2001. There were one or two adverse observations on consultation. Frankly, I thought that the bill had a good consultation.

Dr Murray: I thought that those comments were unfair. The Executive went out and did several different consultations.

The Convener: When Peter Peacock did the further consultation on the draft bill, there was certainly a recognition that any unsatisfied issues had been swept up.

Fiona Hyslop: The main issue is how we ensure that parents have had input and whether that input has come from representatives of parents or whether there are other ways. There has been a great deal of consultation on the bill, but there is a suggestion that individual school boards should be contacted to make sure that parents are aware of things. We as a committee are probably as guilty as the Executive. If we have a genuinely participative democracy, we should do such work to make sure that people are aware. There are only 4,000 children with special needs in Scotland—that is not a huge number.

The Convener: I think that that probably deals with the consultation, thank goodness. That was a good session and I thank members for their time. Next week, or possibly during the next couple of sessions, we will deal with the draft report. We do not have it yet, but members will receive it before next week.

Fiona Hyslop: Are we still to get the Equal Opportunities Committee report?

The Convener: Some of the ministerial stuff and other information is here. We might have that for next week—we will do what we can to make sure that we get it.

Martin Verity: There is also the report of the Subordinate Legislation Committee.

The Convener: When will we get that?

Martin Verity: I have been advised that it should be available this week.

The Convener: That is good. Before we finish, we will move into private session to consider agenda item 4.

12:48

Meeting continued in private until 12:49.

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