EDUCATION COMMITTEE

Wednesday 15 September 2004

Session 2

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EDUCATION COMMITTEE
19th 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

Bill Aitken (Glasgow) (Con)
Richard Baker (North East Scotland) (Lab)
Rosie Kane (Glasgow) (SSP)
Tricia Marwick (Mid Scotland and Fife) (SNP)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Euan Robson (Deputy Minister for Education and Young People)

CLERK TO THE COMMITTEE

Martin Verity

SENIOR ASSISTANT CLERK

Mark Roberts

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 1

Scottish Parliament

Education Committee

Wednesday 15 September 2004

[THE CONVENER *opened the meeting at 09:46*]

Petition

Technology Teachers Association Petition to Advance Technical/Technology Education Within Scottish Secondary Schools (PE233)

The Convener (Robert Brown): Good morning and welcome to the Education Committee. I am struggling to get the hang of the new technology. As we are in public session, I ask everyone to ensure that their mobile phones and pagers are turned off.

At this first meeting in the new building, the enormous sense of power that I have sitting at the top of this table is nobody's business, so I will probably act in a totally different fashion to how I did in the old building.

The first item on the agenda is the review of the Technology Teachers Association petition, which was considered by the previous Education, Culture and Sport Committee. It has been drawn to our attention that there has been a hiatus in finishing consideration of the petition. I asked the clerks to obtain an update of the Executive's position and members will note the correspondence among their papers this morning. Subject to the committee's agreement and following any comments that we make, I intend to write to the petitioners, with a copy of the Executive's response, asking them whether they are happy with the position, whether they wish to raise any other issues at this point and telling them that we are about to conduct a review of the curriculum during which we might take on board one or two of their issues. Does anyone have any observations on the correspondence from the Executive?

Mr Kenneth Macintosh (Eastwood) (Lab): I echo your point about the importance of drawing to the association's attention the curriculum review. I am slightly disconcerted by how long petition PE233 has been before the Parliament and I am a bit concerned that the petitioners will not be overly impressed by that. At the same time, there has been some progress and a curriculum review is the first point of action that the petitioners seek. If the association wants to make its views known, not only to the Executive but to us, it would be more than welcome.

The Convener: I should explain that I was unaware of the existence of the petition. It was not covered by the legacy paper that we received from the previous committee and it was only when the petitioners wrote to ask me what was happening that I asked for it to be reconsidered. I am sorry that there appears to have been a hiccup on the Parliament's part, but we are now squaring the circle and advancing the petition. The central issue is to see whether we can satisfy the petitioners' concerns or put pressure on the Executive to deal with some of the issues that have been raised.

If no one has anything else to say on that point, with members' agreement we will write to the petitioners after the meeting. I am conscious that some of their representatives are here this morning and I am happy to welcome them to the meeting.

School Education (Ministerial Powers and Independent Schools) (Scotland) Bill: Stage 2

09:49

The Convener: Item 2 is the main business of the morning—consideration at stage 2 of the School Education (Ministerial Powers and Independent Schools) (Scotland) Bill. Before we proceed, I will explain how we deal with bills at stage 2. Members should have before them several documents to assist their consideration of amendments. The first, obviously, is the bill itself; the other important documents are the marshalled list of amendments and the groupings of amendments. I ask members to check whether they have all those documents. If they have not, the clerks will be able to give them copies. Is everyone fully equipped?

Members *indicated agreement*.

The Convener: The amendments have been grouped, as always, to help the debate to proceed logically and to ensure that amendments that address similar areas are considered at the same time. The amendments will be called in turn in the order in which they are found in the marshalled list, and we will debate all the amendments in one group together. When we move on, that will be the end of the debate on those amendments. It should be possible to complete stage 2 today, although a further meeting is available if necessary.

There will be only one debate on each group of amendments. Members may speak to amendments in their names that are in the group under consideration, and some groups contain several amendments. During the debate on any group of amendments, I will call first the member who lodged the first amendment in the group, who should speak to and move that amendment. I will then call all other members who wish to speak, including those members who lodged the other amendments in the group. However, those members should not move their amendments at that stage, but only speak to them; I will call members to move their amendments at the appropriate time. Members other than those who have lodged amendments should indicate in the usual way their desire to speak, and I will also call the minister to speak to each group of amendments.

Following the debate, I will clarify whether the member who has moved the first amendment in the group wants to press that amendment to a decision. If the member does not wish to do so, he or she may seek the committee's agreement to withdraw it. If the amendment is not withdrawn, I will put the question on it, and if any member disagrees, we will proceed to a division by a show of hands. It is important to stress that every member should keep his or her hand raised until the clerk has recorded the vote. Only members of the committee may vote; other members of the Parliament who are present—I do not think that there are any—are entitled to speak and move amendments, but they may not vote. If a member does not want to move his or her amendment, when the amendment is called they should simply say, "Not moved."

The committee must also decide whether to agree to each section and each schedule. Members are not permitted to oppose agreement to a section unless an amendment to delete the entire section has been lodged. That will be familiar to members from the Education (Additional Support for Learning) (Scotland) Bill, which we considered before the summer. If a member wants to oppose an entire section, it would be competent to lodge a manuscript amendment, but it is up to me as convener to decide whether to accept it.

Only MSPs are able to speak during a stage 2 debate. Executive officials are here to support the minister, but cannot speak themselves. That was an issue the last time that we considered a bill at stage 2.

I welcome Euan Robson, the Deputy Minister for Education and Young People, to the meeting. If there are no questions about consideration of the amendments, we will begin. It is fairly straightforward.

Section 1—Power of Scottish Ministers to require action by managers of certain schools

The Convener: Amendment 44, in the name of Lord James Douglas-Hamilton, is grouped with amendments 30, 55, 45, 46, 56, 47, 57, 48, 31, 58, 49, 50, 59, 51, 60, 52, 53 and 54. It sounds formidable, but there is a lot of repetition in different sections. I point out that amendment 44 pre-empts amendment 30, amendment 47 pre-empts amendment 57, amendment 48 pre-empts amendment 31 and amendment 51 pre-empts amendment 60.

Lord James Douglas-Hamilton (Lothians) (Con): The principal amendment is amendment 44. If it succeeds, I will move consequential amendments, but if it does not, amendments 45 to 54 will not be moved.

The effect of amendments 44 to 54 is to delete all mention of enforcement directions from the bill. The amendments reinforce and address arguments that were put at stage 1 of the bill's consideration. Many local authorities feel that the powers in part 1 of the bill are unnecessary. The arguments for that are fivefold. First, powers of enforcement already exist under section 70 of the

Education (Scotland) Act 1980. Secondly, there is no evidence that local authorities are not taking seriously the recommendations of Her Majesty's Inspectorate of Education. Thirdly, the new proportionate inspection system ought to be afforded time to prove itself before being subject to further reforms. Fourthly, the bill undermines local democracy by imposing a centralising agenda that is reminiscent of Big Brother in George Orwell's "Nineteen Eighty-Four". Lastly, the Convention of Scottish Local Authorities sees the bill as a waste of parliamentary time.

The amendments are supported by a number of local councils, in particular, West Lothian Council, but also including East Renfrewshire Council, East Ayrshire Council and Glasgow City Council. The evidence that West Lothian Council submitted to the Education Committee stated:

"West Lothian Council considers the proposals an unnecessary intervention in the role and responsibility of local government and does not believe that ministerial intervention is necessary. … West Lothian Council sees no useful purpose in introducing any enforcement direction as Councils already comply with the recommendations of HMIE."

It is the view of West Lothian Council that

"the Bill would be improved by a fundamental change in approach"

and the council suggested that that fundamental change might best be achieved by removing the sections relating to enforcement direction.

However, it is not just West Lothian Council's councillors who are prepared to put their heads above the parapet. I notice that East Renfrewshire Council stated:

"There is to date no demonstrable evidence which would suggest that such intervention is necessary or indeed desirable".

East Ayrshire Council is worried that the bill

"would substantially alter the nature of the present relationship between the Scottish Executive, HMIE and education authorities in a way which would not be helpful to any of the partners concerned".

Glasgow City Council stated:

"Existing powers of inspection and monitoring are sufficiently strong",

while South Lanarkshire Council stated that since 1996 there have been no occasions when HMIE has advised that schools and the authority have failed to make satisfactory progress on all recommendations contained in their reports.

Amendments 44, 45, 46, 48, 49, 50, 52 and 53 seek to delete the phrase:

"an enforcement direction is justified".

Amendments 47 and 51 seek to delete sections relating to enforcement directions and to substitute the phrase "further action required". Amendment 54 seeks to alter the long title of the bill and to change the phrase:

"direct the school managers or the authority"

to "recommends" that the school managers or the authority take action. Our amendments seek to uphold local accountability and to deter the Executive from taking an increasingly interventionist approach. I will be testing the mood of the committee on the matter by asking for at least one vote. After all, all the amendments were lodged on behalf of local democracy and they are supported by many local authorities, not to mention COSLA. It will be interesting to discover who in the committee wants to stand up and champion local democracy.

I move amendment 44.

The Deputy Minister for Education and Young People (Euan Robson): I invite the committee to accept amendments 30 and 31. They clarify that in making a referral HMIE takes account of the seriousness of the failure.

During stage 1 we indicated that we would re-examine the trigger point—as it came to be described—contained in part 1 of the bill for HMIE referral of a school or an authority to ministers. That was raised by the convener and by Adam Ingram, if my memory serves me correctly. It is vital that we make the procedure as transparent as possible to those who are affected by it, and we must ensure that it works effectively.

The committee asked us to reconsider the process by which HMIE makes a referral to ministers, particularly to make clearer the instances in which the process would be used. Amendments 30 and 31 address the committee's recommendation. In drafting amendment 30, it was necessary to ensure that the power allows action when that is necessary. To make the power any more prescriptive would run the risk of setting up unhelpful barriers so that HMIE would be unable to make referrals to ministers when it needed to do so.

The amendments therefore clarify that account must be taken of the seriousness of the failure in assessing whether an enforcement direction is justified before making a referral. That will be a matter of judging the facts of each case. A serious failure would range from a total failure to take action in relation to any area for improvement, to a situation where some action had been taken, but it was insufficient given the seriousness of the failure. I therefore invite the committee to accept amendments 30 and 31.

I turn to amendments 44 to 54 and invite members to reject them. It is perfectly clear that they would fundamentally alter the effect of part 1

of the bill. I listened carefully to Lord James and, at some stages, I thought that he had his tongue firmly in his cheek, but there we are.

In part 1, we have proposed a proportionate two-stage process to ensure that schools and authorities take action to secure improvement. On HMIE's recommendation, ministers will have the power to direct an education authority to take action to secure improvement at either school or authority level if—it is important to emphasise the "if"—the established steps of inspection, professional support and development have not already done so. As I say, the bill will create a two-stage process of preliminary notice and enforcement direction and a duty to comply with any enforcement direction.

10:00

Lord James Douglas-Hamilton's amendments would remove the power to serve an enforcement direction and, in its place, introduce a power for ministers to make recommendations to schools and education authorities. However, such recommendations would have no force and it is difficult to see how they would add to the existing arrangements—one could say that we would be going round in circles. The problem that part 1 of the bill seeks to address is that, while ministers can at present make recommendations, there is no power to ensure that a school or authority takes action to meet those recommendations and no duty on them to comply. That is why we consider that the two-stage process of preliminary notice and enforcement direction must be retained in the bill.

Amendments 44 and 48 would remove one of the tests that would have to be applied before HMIE decided to refer the manager of a school, or an education authority, to ministers. Before making a reference, HMIE would need to consider only that the manager or authority had failed to take satisfactory action to secure improvement, having been given sufficient time to do so. However, the bill as drafted will ensure that HMIE must also consider whether an enforcement direction is justified. Similarly, amendments 45 and 49 would remove from the ministerial decision to serve a preliminary notice the test of whether an enforcement direction is justified.

Amendments 47 and 51 would remove the power to make an enforcement direction and the related processes. I have said before, and I emphasise again, that those provisions are essential. They include the requirement that, before making an enforcement direction, ministers will have to consult HMIE. Additionally, the bill provides that ministers will have to report to the Parliament on any use of an enforcement direction, but the use of recommendations, as proposed in amendments 47 and 51, would not require that.

When the system works well, there is no need for enforcement. We maintained throughout stage 1, and in the preliminary discussions, that we hope that we will not have to use the powers. However, what would be said if we did not have the powers and a problem arose? What would we do if an education authority refused to accept our recommendations? If amendments 47 and 51 were accepted, ministers would be in the same situation that they are in at present: we would have no way of ensuring that schools or authorities took satisfactory action. Part 1 seeks to remedy that gap in the current arrangements and it is the key reason why we introduced the bill.

Amendments 55 and 58 are in the convener's name. Under part 1, HMIE will be obliged to make a reference to the Scottish ministers if it appears that a school or education authority has not taken action to secure improvement. The bill sets out that any reference by HMIE must be made in writing and must include recommendations as to the action that HMIE thinks must be taken to remedy a failure or prevent its recurrence. Amendments 55 and 58 would add the requirement that a reference must also specify the failure or failures that are behind the referral. The new requirement that the convener proposes would complement the existing provisions and ensure that all parties are absolutely clear about what needs to be done. I thank him for lodging the amendments, which will make the process more transparent. I am pleased to accept amendments 55 and 58 and I commend them to the committee.

Amendments 56 and 59, which are also in the convener's name, are in line with our amendments to make it explicit that HMIE, when considering making a reference to ministers, must have regard to the seriousness of the failure. Those amendments also mean that ministers must take the seriousness of the failure into consideration when they take their decision that an enforcement direction is warranted. I again say that those amendments add clarity to the bill. I am happy to accept amendments 56 and 59 and I commend them to the committee.

I appreciate the intention behind amendments 57 and 60, in the name of the convener. I understand that they are intended to make it clear that the action that ministers require the relevant person or authority to take should be "reasonably" calculated to remedy or prevent a recurrence of the failure involved. That is very clear and I am clear that that is the intent behind the amendments.

If we have reached the stage of an enforcement direction, it is clear that a school or authority has failed to take action to secure improvement. A

direction will specify what form that action will take so that no one is in any doubt as to what is required of them. I completely agree that ministers must act reasonably at that stage of the procedure—and indeed in any decisions that they take.

I hope that I can reassure the committee that there is no intention on the part of Scottish ministers to act unreasonably at any stage in the process. I can confirm that ministers will not require schools or authorities to take any unreasonable action in order to meet the requirements of an enforcement direction. If ministers were to act unreasonably they would be open to challenge. Under part 1, for example, ministerial decisions are open to judicial review.

If the committee accepts those amendments we would, in effect, only be reiterating what I think is already implicit in law. I am also concerned about the effect in relation to the interpretation of other ministerial decisions in the same legislation, which do not have explicit reference to "reasonable". Although the amendments cover a number of areas, there are others, and in that context the absence of the word "reasonable" might lead to some difficulty.

Although I appreciate the intention of the amendments, I hope that I have been able to reassure both the convener and the committee that ministers intend to act reasonably in relation to all their decisions. If you have further concerns I will be happy to address them between stage 2 and stage 3, but I hope that you feel that you are in a position to not move amendments 57 and 60.

The Convener: I will speak to amendment 55 and the other amendments in the group.

In general, my concerns are to ensure that due process is implemented and that there is no allowance for arbitrary action by ministers—I hasten to say that I am thinking not of the current ministers but perhaps other ministers in the future—on the basis of the powers in the bill. That is what my amendments are directed towards achieving and it echoes some of the points made by the committee—as was touched on by the minister earlier.

I am grateful to the minister for accepting amendments 55 and 58. The logic of those amendments is that it is important that the authority should know not only what they have to do to put things right, but what they did wrong in the first place. The bill is slightly defective in not stating that in the first place.

Similarly, the logic of amendments 56 and 59 is that the phrase "having regard to the seriousness of that failure" was put into the duty of the inspectors but not into the duty of the ministers and it seems to me that it is appropriate at both stages. I am grateful to the minister for accepting those amendments.

The reasonableness point is probably taken on board by virtue of the fact that the minister has made statements about that in the debate, which can of course be referred to at a later point, so I am grateful for that.

I will make one other point, which arises from correspondence that members had from COSLA, which has particular concerns about the matter. COSLA suggested that there might be some advantage, against the background of the school improvement agenda, in making specific reference in section 1 to linking the ministerial powers in the bill to securing improvement, in particular under the Standards in Scotland's Schools etc Act 2000. That potentially has merit and I would be interested in whether the minister could think about that suggestion between now and stage 3 to see if a closer link can be achieved.

The concern—part of which you have dealt with, minister—was that ministers could, without regard to anything that had gone before, make orders that seemed to them to be right, even though the process did not fit in with major and substantial objectives under the Education (Scotland) Act 1980. Although the committee readily accepted that the additional aspect of the Standards in Scotland's Schools etc Act 2000 was the improvement agenda, and that that had to be taken on board, there is an argument about the linkage.

COSLA also referred to the question of what form the intervention would take. That is not something on which we had much evidence in the stage 1 debate. COSLA suggested that peer support from professional colleagues might be one aspect of the matter, and that seems to me to have an element of merit. I would be grateful if the minister could take that on board between now and stage 3.

Those are the only comments that I have to make, apart from saying that I oppose Lord James Douglas-Hamilton's amendments, which I think are designed to wreck the effect of the bill and do not fit with the committee's view, based on the evidence that we took at stage 1. I realise that we have differing views, but if we take out the enforcement powers, the bill will not be worth proceeding with, because that would take out the sting—the important bit that enables the bill to work. I had personal concerns about the extension of ministerial powers in that regard, but if that is linked in—as it now substantially is—to process and to some degree of restriction of ministerial powers, that seems to me to be a reasonable addition to the powers that ministers have in that regard.

Thank you for your forbearance. Do other members want to comment?

Ms Rosemary Byrne (South of Scotland) (SSP): I speak in support of amendment 44, in the name of Lord James Douglas-Hamilton, and of the consequential amendments. I do not think that the inspectorate needs those extra powers. I feel strongly that HMIE is taken seriously when it goes into schools and that local authorities take its recommendations seriously, and there is absolutely no need to cause a difficulty with democracy. At the end of the day, that is what the extra powers would cause; Lord James is absolutely right about that. We elect representatives to sit on local authorities and they are ultimately in charge of running the schools. In 27 years of teaching, I have never seen an example of any local authority or school taking lightly recommendations by HMIE. They always carry out the recommendations that are put in front of them, and I do not think that we heard any evidence to the contrary. In my opinion, and in the opinion of other committee members, that part of the bill is totally unnecessary. I hope that other members of the committee will consider supporting the amendments.

Mr Adam Ingram (South of Scotland) (SNP): I very much support Lord James Douglas-Hamilton's amendments. As was said at our stage 1 debate, we got feedback from local authorities effectively saying, "If it ain't broke, don't fix it." That is the situation that we face with this bill. It has always struck me that if ministers are concerned about a school or education authority failing to secure improvement, there are other, more political, influences and pressures that can be brought to bear without the need for legal recourse to address the situation. It seems to me that what we have in the bill is an excessively bureaucratic sledgehammer to crack a rather inoffensive nut. The committee, and indeed the Parliament as a whole, must have far more pressing educational issues to be concerned about, so I fully concur with Lord James's amendments and I support them.

Mr Macintosh: I would like to speak in favour of amendments 30, 31, 55 and 56, and against the amendments in the name of Lord James Douglas-Hamilton. Lord James's amendments would undermine the spirit, if not the point, of the bill entirely, and we had that debate at stage 1, when the committee agreed with the Executive that that measure fills a gap in the legislation.

At stage 1, forceful arguments were put by Councillor the Rev Ewan Aitken on behalf of COSLA—our colleagues in COSLA will be delighted that Lord James has become the champion of freedom in local government, although the irony will not be wasted on them—but those arguments were mostly concerned with the motivation behind the Executive's proposals. It was stated that the Executive was trying to centralise powers, but no evidence was produced to back that up. Clearly, I do not agree with that interpretation of the Executive's motivation in introducing the bill, but I am conscious of the fact that we wish to work with colleagues in local government. I am pleased that amendments 30, 31, 55 and 56, which the minister has said he will accept, will clarify the triggers that could lead HMIE to recommend ministerial intervention, as we recommended in our stage 1 report. Echoing the convener's words, I believe that we should continue to maintain a dialogue with COSLA as we move to stage 3 to ensure that COSLA is clear about the motivation behind the bill and the terms under which it would be used.

Rosemary Byrne said that she could not imagine any circumstances in which the bill would be used, but during the summer there was a high-profile example of a school that had not improved. After it received a bad first report from HMIE, that school was also marked poor in the follow-up report. Had we had that example earlier in the year, it might have helped to clarify matters.

10:15

Lord James Douglas-Hamilton: Let me respond briefly to the points that have been made.

The powers under section 70 of the Education (Scotland) Act 1980 are very substantial. Section 70 states:

"If the Secretary of State"—

that would now be the Scottish ministers—

"is satisfied … that an education authority … or other persons have failed to discharge any duty … relating to education, the Secretary of State may make an order declaring them to be in default in respect of that duty and requiring them before a date stated in the order to discharge that duty."

Given that ministers already have substantial powers, the case for local democracy should not be allowed to go by default.

If amendment 44 is not agreed to, I will not press the consequential amendments. I recommend that the committee agree to the amendments in the name of Robert Brown and to the amendments in the name of the minister. I ask the minister to consider the point that the convener made about COSLA's further representations.

The Convener: The question is, that amendment 44 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Brown, Robert (Glasgow) (LD)
Alexander, Ms Wendy (Paisley North) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 44 disagreed to.

Amendment 30 moved—[Euan Robson]—and agreed to.

Amendment 55 moved—[Robert Brown]—and agreed to.

Amendments 45 and 46 not moved.

Amendment 56 moved—[Robert Brown]—and agreed to.

Amendment 47 not moved.

Amendment 57 not moved.

Section 1, as amended, agreed to.

Section 2—Power of Scottish Ministers to require action by education authorities

Amendment 48 not moved.

Amendment 31 moved—[Euan Robson]—and agreed to.

Amendment 58 moved—[Robert Brown]—and agreed to.

Amendments 49 and 50 not moved.

Amendment 59 moved—[Robert Brown]—and agreed to.

Amendments 51 and 60 not moved.

Section 2, as amended, agreed to.

Section 3 agreed to.

Section 4—Registration of independent schools

The Convener: Amendment 1, in the name of Lord James Douglas-Hamilton, is grouped with amendments 2 to 29.

Lord James Douglas-Hamilton: The purpose of the amendments, especially amendment 1, is solely to protect children. The amendments are designed to alter the bill to require all employees of independent schools, and not just teachers, to satisfy the child protection criteria for working with children. The bill currently refers to a "proposed teacher", but the amendments would change all those references to "proposed employee". There are legitimate concerns and I believe that any ambiguity in the legislation should be removed. The amendments would do precisely that. They would mean that all persons employed in an independent school—not just teachers—would have to undergo the necessary checks to ensure that they are proper persons to work with children. We cannot afford to take risks that could end in tragedy.

I cannot help recalling that one of my first history lessons at school in Scotland related to two young children of the Douglas family being confronted with a boar's head at dinner in Edinburgh Castle, which was the signal for them to be taken out and stabbed to death in the courtyard. Many years later, I was proud to pilot the Children (Scotland) Bill through the House of Commons, to provide stronger protection for children against abuse. The lead minister was Lord Fraser of Carmyllie, whose activities this morning may be of interest for other reasons.

The Convener: I must rule that comment out of order.

Lord James Douglas-Hamilton: I will proceed quickly.

Section 4 of the bill concerns legislation governing independent schools. We have lodged 29 amendments, all of which relate to one basic principle. My chief concern in lodging those amendments is that it should be stated explicitly that all persons working in schools should be proper persons—that is to say, that they should be qualified in child protection terms to work with children. Currently, the bill refers to every "proposed teacher", but our amendments would expand the provision to cover any "proposed employee". After all, the tragedy at Soham involved a member of the school staff who was not a teacher. The amendments would ensure that non-teaching staff, support staff and teachers who for whatever reason have not been registered with the General Teaching Council for Scotland were covered by the legislation. One cannot be too careful when putting in place necessary protections for children.

Under amendment 1, Scottish ministers may grant an application for registration only if they are satisfied both that

"every proposed teacher in the school is a proper person to be a teacher in any school"

and that

"every other proposed employee in the school is a proper person to be an employee in any school".

We are supported in lodging the amendments by the Scottish Council of Independent Schools. In our consultation with the council, it was pointed out that there is no reference in the bill to the need

for non-teaching or support staff to be proper persons, an omission that the council fails to understand. The issue is of prime importance in independent schools, as they may employ excellent teachers who cannot be registered with the GTC, perhaps because they were educated or trained outside Scotland. Under the terms of our amendments, non-teaching staff would be subjected to closer scrutiny before an independent school's application for registration was granted.

Our amendments ensure that schoolchildren will be properly safeguarded. The aim is to prevent a tragedy similar to the events in Soham from happening again. I urge the committee to support the amendments, which are sensible precautions in a world in which the unfolding of events is not always certain or predictable. If the minister objects that school employees are already covered by the Protection of Children (Scotland) Act 2003, my response and that of the SCIS is that reference should be made in the bill to the statutory protections. In other words, amendments of a clarificatory nature would assist in placing the matter beyond any possible doubt.

I am not proposing a two-tier system. On the contrary, my aim is to ensure that children in independent schools are afforded the same protection as children in state schools receive. Non-teaching staff ought to be covered explicitly by the bill or, at least, mentioned so that children throughout Scotland will have all necessary protections.

I move amendment 1.

The Convener: We may need some background on the matter from the minister. Do other members have comments to make?

Dr Elaine Murray (Dumfries) (Lab): I have a point for clarification, which the minister is probably the best person to address. I understand that part 2 of the bill is about the educational fitness of teachers and their ability to teach, not about child protection. I would have thought that the staff in independent schools would be covered by disclosure checks in exactly the same way as those in the state sector are. Perhaps the minister can clarify that for us.

Mr Macintosh: I echo that point. If Lord James is correct, I am concerned about the points that he has raised. I do not think that there is any doubt about his motivation, but I cannot remember the SCIS giving us at stage 1 the information that he has cited. Perhaps Lord James can clarify that.

The Convener: It is my recollection, too, that we did not receive any evidence to that effect. Lord James may have received that information in a private conversation or in correspondence.

Lord James Douglas-Hamilton: It was at a meeting of the SCIS on 21 May, which I attended.

The Convener: We need some clarification on the matter from the minister.

Euan Robson: I should perhaps start by offering my condolences to Lord James on the loss of his relatives all those years ago.

We all share the concern that only suitable staff should work with children in our schools—that is clear. Child protection is high on all our agendas, especially after the terribly distressing events in Soham; we cannot overstate its importance. I appreciate entirely the intention behind Lord James's amendments.

The issue was raised in the committee at stage 1, when we said that we would consider it again. We have done so and have concluded that there are already sufficient safeguards for ensuring that all people who work in schools—whether in the public or the private sector—are suitable to work with children. That applies not just to those who are employed by the schools, but to those who work there as volunteers. The Protection of Children (Scotland) Act 2003 imposes a duty on ministers to keep a list of people who are unsuitable to work with children, making it an offence for such disqualified people to work with children or to try to do so. To avoid the risk of committing an offence, employers must ensure that, in relation to such child care positions, appropriate disclosure checks are carried out on their employees and proposed employees.

The Protection of Children (Scotland) Act 2003 covers anyone whose normal duties include work in any school. That includes employees and volunteers who work in the school as well as employees of other organisations whose normal duties include work in a school. As part of the preparations for the implementation of that important new legal safeguard, later this year we will publish guidance for all schools on child protection in education to ensure that all schools are doing all that they can in this very important area.

With respect, we cannot see why we should introduce different controls for people who work in the independent sector from those that apply to people who work in the public sector, nor do we see what information ministers would be able to gather to satisfy themselves of the propriety of employees other than information that is already gathered under the Protection of Children (Scotland) Act 2003 and the other legislation.

10:30

The variety of people who work in schools is of course large—it includes catering staff, janitors

and classroom assistants, as well as teachers. We are interested in ensuring that all of them are suitable to work with children, but we do not see what additional standards we would want them to meet.

The "proper person" standard that the bill imposes is for wider purposes than those of the standard of being suitable to work with children; it is specific to the regulation of schools in the independent sector. As the committee has noted, teachers in the independent sector are not currently required to be registered with the GTC for Scotland, so it is appropriate to consider the propriety of teachers as, unlike those in the state sector, not all such teachers' propriety will have been checked by the GTC. Similarly, the state sector has no proprietors, so it is appropriate to have a test for them that takes into account factors beyond child welfare.

The Bichard report highlighted the importance of schools' selection and recruitment arrangements. Recruitment of employees is a matter for schools rather than ministers. It is important to remember that it is schools that hold information on staff and proposed staff. Schools conduct interviews, check references and run disclosure checks on prospective employees. It is right that the people who take the recruitment decisions and manage employees are the people who judge whether a person is right to work in their school.

The Executive's interest is in ensuring that independent schools in Scotland are subject to appropriate regulatory controls so that the care and welfare of pupils is safeguarded adequately. It is not for ministers to check the suitability of each employee.

The registrar of independent schools—she is sitting to my left—tells me that she has not been advised of any instance in which concerns about a member of staff could not be resolved by using the existing powers. When concerns have been expressed about the care and welfare of children, the registrar has asked for and been provided with a list of the names of all staff who work in the school and with confirmation that appropriate checks have been undertaken. If the information that a school provides does not satisfy ministers that the welfare of children is being safeguarded adequately, they can refuse registration or, if a school is registered, they can take action under the complaint procedure.

We must be clear that the bill does not cover all the legislative obligations that are in place for the independent schools sector and others. The sector is covered by other legislation, not only on the child protection instances that I have mentioned, but on health and safety and disability discrimination, for example.

We have discussed further with the SCIS how all those obligations can best be made clear. We have undertaken to update guidance to draw attention to the range of legal obligations that are most relevant to the sector and to issue new guidance to all existing schools and to new schools that seek registration. We will also consider whether explanatory notes need to be expanded to make it clear how the bill fits with other relevant legislation, such as the Protection of Children (Scotland) Act 2003.

In summary, it is important to consider the overall legal framework that is in place to ensure that only suitable people work in schools. If Lord James's amendments were agreed to, we would have a different standard for employees in the independent sector from that for those in the state sector. We see no case for that. We would also take a new regulation-making power that we do not envisage needing. We are reluctant to do that. We are often told that we have too many regulations, so we do not want to take a power without a demonstrable need. We also do not wish to duplicate existing powers and processes with the inevitable bureaucratic burden for independent schools that that would create.

Having given reassurances that child protection has always been at the forefront of our minds when drafting the bill and that adequate coverage is provided in other legislation that covers all those who work in schools, I hope that Lord James will withdraw amendment 1 and not move his other amendments.

I appreciate that that is an intense passage and that members can read it in the *Official Report* later, but I would be happy to write a letter to the committee on that specific point, between stages 2 and 3, if you feel that it would be helpful to provide further clarification, convener.

The Convener: That was helpful. Perhaps Lord James will be reassured by your comments, as he has received a fair degree of movement from you on the issue.

Mr Macintosh: May I clarify a point? I was unfair to SCIS, because it did indeed raise the issue at stage 1. Judith Sischy said that she was confused about introducing two sets of standards.

Lord James Douglas-Hamilton: I warmly welcome the minister's assurances. It will help the committee if a letter is sent setting out the sufficient safeguards. I also welcome the fact that guidance is to be published. I ask the minister to consider lodging an amendment to clarify the position by referring to relevant provisions. I appreciate that ignorance of the law is no excuse, but it helps educationists and practitioners if the law is clearly expressed and apparent from appropriate references in a new act. I will not

press amendments 1 to 29 at this stage. I am grateful to the minister for his reply and will be most grateful if he considers lodging a clarificatory amendment at a later stage.

Euan Robson: On Lord James's last point, at this stage we feel that the guidance will cover the issue explicitly. However, I will consider his point about a specific amendment. The committee will have the letter before stage 3.

Amendment 1, by agreement, withdrawn.

The Convener: Amendment 61, in my name, is grouped with amendments 32, 38, 62, 39 and 63.

A slightly different matter arises on the issue of reasonableness. I refer members to section 4, page 6, line 37, at which proposed section 98A(4) states:

"The Scottish Ministers may, on granting an application for registration, impose such conditions on the carrying on of a registered school as they think fit."

I am willing to receive clarification from the minister, but that is a pretty wide definition of ministerial power and I am not vastly enthusiastic about agreeing to it without it being placed in some context.

Against that background, I ask that the word "reasonable" be inserted. I am not thralled to that in particular, because there may be other ways of achieving the aim. However, the matter was raised at stage 1, when it was suggested that we should pin down the issue and indicate the conditions and circumstances that might apply. Has the minister thought about that? Is he able to respond?

I do not intend to press amendment 61 today, but it raises a valid issue, perhaps in a wider dimension than in our previous discussions on ministerial powers, as the condition to which the amendment refers is fairly unrestricted. The issue is echoed in amendments 62 and 63.

I move amendment 61.

Mr Macintosh: The point was raised by Judith Sischy at stage 1. She was looking for, if not an amendment, guidance from the Executive to clarify when the powers would be used.

Euan Robson: I invite the committee to agree to amendment 38, which ensures that conditions would be imposed on a school under new section 98(E) of the 1980 act only to prevent the school becoming objectionable—that is the technical term—on any of the notice of complaint grounds in new section 99(1A) of the 1980 act. The committee was concerned that the power as drafted was not sufficiently focused and the SCIS told us that there were concerns in the sector that the power to impose conditions would be used to set standards on the independent schools sector. That was not the intention; the power was proposed to make available to ministers a proportionate response as an alternative to the notice of complaint procedures, if such a response was appropriate.

I welcome the opportunity to lodge an amendment on the committee's prompting that makes the intention clear. Amendment 38 makes it explicit that the power was designed to be preventive rather than punitive; the intention is to offer the advantage of allowing a school to continue to operate while it addresses a specific concern. For example, if there were concerns about the safety of the sports hall, the school could continue to operate on the condition that the hall should not be used until those concerns had been satisfactorily addressed. The committee rightly raised concerns about the issue. The power also provides the option of varying a condition if an existing condition has not been fully met, as an alternative to going straight to the notice of complaint procedure. I invite the committee to agree to amendment 38.

I invite the committee also to agree to amendments 32 and 39, which clarify that the powers to impose conditions in proposed sections 98A(4) and 98E(1) of the 1980 act would be specific to an individual school and its circumstances. The SCIS raised the issue with us—I think that Ken Macintosh and the convener alluded to that—and Lord James Douglas-Hamilton took up the matter at stage 1. Amendment 32 relates to the use of conditions at the time of registration and amendment 39 relates to the use of conditions on a school that is already registered. Amendments 32 and 39 make it plain that in both cases such conditions would apply in respect of individual schools and could not be applied to all schools—that is the vital point. I hope that amendments 32 and 39 satisfy the committee's concerns and I would be grateful if members would agree to them.

On amendments 61, 62 and 63, I appreciate the convener's point and I am grateful that he does not intend to press the amendments, because we have residual concerns about the word "reasonable". I will not repeat the reasons that I gave earlier, but I note that the convener says that he is not thralled to the adjective. We will consider the point in the context of his remarks, but I think that amendments 38, 32 and 39 address the concerns that he raises. Perhaps that will be clearer when we see the bill in its amended form after stage 2. The Executive wants to make it clear that conditions will be attached to individual schools and used only in relation to registration or to prevent a school from becoming objectionable on notice of complaint grounds. I hope that the Executive amendments go some way towards addressing the convener's concerns.

Although I do not envisage that we will lodge further amendments on the matter, we will be happy to have another look at it before stage 3. Ministerial decisions can always be challenged if they are considered to be unreasonable. Under part 2 of the bill, ministerial decisions can in fact be appealed to sheriff principals. I do not wish to dwell on the point, but if we use the word "reasonable", we simply go back to reiterating what is implicit in law. However, we will consider the matter further before stage 3.

10:45

The Convener: I think that I did this the wrong way round. I should not have asked the minister to speak before members had made their observations on the amendments.

Mr Macintosh: I wonder about the use of the word "becoming" in amendment 38. I do not know whether that is the present continuous but, in any case, it is a very unusual word to use in legislation. For example, if a school fails an inspection or if ministers are concerned about it, they are bound to use the powers in the bill. However, how do they decide whether something is about to become objectionable? It strikes me that that will leave matters wide open to misinterpretation.

Dr Murray: I am not so concerned about how the word "becoming" is defined; after all, I understand that there is a process by which concerns are raised. However, I am not quite sure about the legal definition of the word "objectionable". In what circumstances could a school be described as "objectionable"?

The Convener: I will allow the minister to come back on those points—or perhaps he wants to ponder the matter between now and stage 3.

Euan Robson: I am advised that the word "objectionable" is used in section 99 of the Education (Scotland) Act 1980—I refer the member to where it is first used in that section. As the bill seeks to amend the 1980 act, we have to use consistent terminology in the two pieces of legislation. That is why the word "objectionable" has been used.

Dr Murray: Does it mean that an objection or complaint has been received?

Euan Robson: Yes, or it could mean that an HMIE report has highlighted a particular issue or difficulty.

Perhaps this area is quite technical. Before I make a comment that the lawyers later tell me is inaccurate, I should add that I am happy to write a letter to the committee—in addition to the earlier letter that I mentioned—to put in proper context the use of the words "objectionable" and "becoming". I understand both members' points, because the language is perhaps not as good as it could be. However, that is because we are amending the 1980 act and are required to be consistent in our use of terminology.

The Convener: I tempted to say that, in the circumstances, that is a very becoming commitment.

I do not propose to say anything further on the issue—I think that we have had a good go at it—and with the committee's agreement I will withdraw amendment 61.

Amendment 61, by agreement, withdrawn.

Amendment 32 moved—[Euan Robson]—and agreed to.

Amendments 2 to 8 not moved.

The Convener: Amendment 33, in the name of the minister, is grouped with amendments 34 to 37 and amendments 40 to 42.

Euan Robson: I invite the committee to accept these amendments, which will ensure that all persons or bodies that ministers think fit will be notified of decisions made about applications to be independent schools, together with the range of other decision-making orders made by ministers under this part of the act. Similar provision is also made in respect of the registrar to notify other persons or bodies when a school that is no longer operating has been removed from the register of independent schools.

Many bodies are involved in inspecting and regulating the independent sector and it is vital that they work together for the benefit of all. The registrar of independent schools, HMIE and the care commission are clearly key players. However, in other circumstances, the fire brigade, the Health and Safety Executive and the social work services inspectorate will also have a part to play.

Additionally, there are bodies that might have an interest in certain decisions. For example, an education authority will have an interest in decisions at a school at which it has placed pupils. Similarly, the GTC Scotland will be interested in a decision to disqualify a GTC registered teacher.

The need for good communication and an integrated approach was brought up during stage 1 by Elaine Murray and Lord James Douglas-Hamilton. We have also discussed the issues with the Scottish Council for Independent Schools and the care commission. The amendments ensure that, when ministers make decisions, they must notify anyone they think fit. Given the range of bodies with a potential interest, the amendments do not attempt to identify particular bodies, which might result in one or more being overlooked. The proposal imposes a duty on ministers to notify

such bodies but allows them to determine which ones are appropriate in a particular situation, thereby avoiding overburdening particular bodies with unnecessary or irrelevant information.

It is essential that those bodies work together to ensure not only that the independent sector is not unnecessarily burdened but, more important, that good outcomes are secured and safeguarded for the children in this sector. During stage 1, there was a lot of debate about the way in which the care commission, the registrar and HMIE would interplay to ensure that the regulatory regimes would operate seamlessly and in a co-ordinated way. I hope that the committee will judge that the amendments extend statutory notification provisions to assist in ensuring that everyone has the right information at the right time. The proposal will be supported by the memoranda of understanding that are being developed between the relevant bodies and the commitment of those bodies to streamline the administrative procedures of schools that will have to register with the registrar and the care commission.

I invite the committee to agree to these amendments, which I hope it will feel are in line with its recommendations at stage 1.

I move amendment 33.

Mr Macintosh: I welcome the fact that the minister has lodged these amendments in line with the recommendations in our report at stage 1.

The Convener: I do not think that the minister has to respond to that.

Amendment 33 agreed to.

Amendments 34 and 35 moved—[Euan Robson]—and agreed to.

Amendments 9 and 10 not moved.

Amendments 36 and 37 moved—[Euan Robson]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Regulation of registered schools

Amendment 38 moved—[Euan Robson]—and agreed to.

Amendment 62 not moved.

Amendments 39 and 40 moved—[Euan Robson]—and agreed to.

Amendments 11, 63 and 12 to 14 not moved.

Amendment 41 moved—[Euan Robson]—and agreed to.

Amendments 15 to 18 not moved.

Section 5, as amended, agreed to.

Section 6—Appeals

Amendment 42 moved—[Euan Robson]—and agreed to.

Amendments 19 to 22 not moved.

Section 6, as amended, agreed to.

Sections 7 and 8 agreed to.

Schedule 1

MINOR AND CONSEQUENTIAL AMENDMENTS

Amendments 23 to 29 not moved.

The Convener: Amendment 43, in the minister's name, is in a group on its own.

Euan Robson: I invite the committee to accept amendment 43, which provides for a statutory obligation to consult on a draft of the regulations that define prescribed persons. It will also make those regulations subject to the affirmative resolution procedure, which will ensure rigorous parliamentary scrutiny. The Education Committee endorsed the Subordinate Legislation Committee's recommendation that the regulations should be subject to that procedure.

The regulation-making power will allow ministers to define people who are not considered suitable to be a proprietor of an independent school or a teacher in a school and we accept that if the power is used, it will prevent some people from holding such positions. It is therefore appropriate that it should be subject to the more rigorous parliamentary scrutiny that the affirmative resolution procedure involves.

The Executive already operates a best-practice policy of consulting on all regulations, but we see that placing the requirement to consult in the bill is an appropriate accompaniment to the affirmative resolution procedure that is to be followed under the amendment. I invite the committee to agree to the amendment, which meets its requests and those of the Subordinate Legislation Committee at stage 1.

I move amendment 43.

The Convener: I welcome the amendment on the committee's behalf. The minister and the committee have been in astonishing harmony on the detail of such matters today.

Lord James Douglas-Hamilton: The matter is sufficiently important to justify the affirmative resolution procedure and we are grateful to the minister for responding to legitimate concerns.

Amendment 43 agreed to.

Amendments 52 and 53 not moved.

Schedule 1, as amended, agreed to.

Schedule 2 agreed to.

Section 9 agreed to.

Long Title

Amendment 54 not moved.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill.

Before we close, I would like to make an observation on the fact that Fiona Hyslop is not with us today. With the committee's agreement, I propose to send good wishes to Fiona on the recent birth of her son. I have already sent a card, but I think that it might be worth while and pleasant formally to acknowledge the event and to wish Fiona happiness in her maternity. I have no doubt that we shall see her on her return to the committee in due course.

Euan Robson: I am happy to be associated with those comments, if that is in order.

The Convener: Thank you very much. There is no meeting of the Education Committee next week in consequence of our finishing stage 2 of the bill today, so you have a half hol next week.

Meeting closed at 11:01.

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