EDUCATION COMMITTEE

Wednesday 9 November 2005

Session 2

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CONTENTS

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EDUCATION COMMITTEE
19th Meeting 2005, Session 2

CONVENER

*Iain Smith (North East Fife) (LD)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

Richard Baker (North East Scotland) (Lab)
Rosie Kane (Glasgow) (SSP)
Michael Matheson (Central Scotland) (SNP)
Mr Jamie McGrigor (Highlands and Islands) (Con)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Graham Donaldson (Her Majesty's Inspectorate of Education)
Robin McKendrick (Scottish Executive Education Department)
Peter Peacock (Minister for Education and Young People)
Shona Pittilo (Scottish Executive Education Department)
Douglas Tullis (Scottish Executive Legal and Parliamentary Services)
Maureen Verrall (Scottish Executive Education Department)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Mark Roberts

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 6

Scottish Parliament

Education Committee

Wednesday 9 November 2005

[THE CONVENER *opened the meeting at 11:02*]

Items in Private

The Convener (Iain Smith): Good morning, colleagues, and welcome to the 19th meeting in 2005 of the Education Committee. I have received apologies from Rosemary Byrne. I hope that some of the other committee members will turn up in due course. At the moment, we are outnumbered by Scottish Executive officials, which is never a good thing.

The first item on the agenda is consideration of whether to take items 4 and 5 in private. Item 4 is consideration of witnesses and the committee's handling of the Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill. I recommend that we take that item in private, so that we can discuss the individuals from whom we may wish to take evidence. Are members content with that?

Fiona Hyslop (Lothians) (SNP): Yes, that is fine.

Members *indicated agreement*.

The Convener: Agenda item 5 is our draft report on the budget. The normal practice of committees, which I would recommend, is to consider draft reports in private.

Fiona Hyslop: The committee has discussed reports in public when there has been agreement to do so. Obviously, if there are concerns or issues of confidentiality, members raise those matters. However, I do not think that there is anything in the budget report that means that we have to discuss it in private. The committee tries to discuss things in public when it can. I will not go to the wall about it, but that is the committee's history.

Dr Elaine Murray (Dumfries) (Lab): I do not have any strong feelings about it.

The Convener: Lord James, do you have any preference for taking the item in private or in public? As Fiona Hyslop said, there is nothing in the budget report that is particularly controversial, although at this stage it is a report to the Finance Committee.

Lord James Douglas-Hamilton (Lothians) (Con): In general, discussion of drafting measures and minor details should be taken in private. That makes for more rapidity and efficiency in dealing with the matter. However, if Fiona Hyslop feels strongly about it, I will not stand in the way on this occasion.

Fiona Hyslop: I am keen for the Parliament to adopt a more open and accessible approach when it is able to, although I acknowledge the concerns that committee members have raised. However, in this instance, I think that we should take the item in public. It will not take very long.

The Convener: I agree that it will not take very long.

Good morning, Ken. We are discussing whether to take agenda item 5—our draft report on the budget—in private. Fiona Hyslop does not think that there is anything in the report that needs to be discussed in private. I am asking whether members have any views on the matter.

Mr Kenneth Macintosh (Eastwood) (Lab): I would rather that it be discussed in private.

The Convener: Do you wish to put the matter to a vote, Fiona?

Fiona Hyslop: No, I will not put it to a vote.

The Convener: Do members agree to take item 5 in private?

Members *indicated agreement.*

Subordinate Legislation

Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005 (SSI 2005/501)

Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2005 (SSI 2005/514)

Additional Support for Learning (Placing Request and Deemed Decisions) (Scotland) Regulations 2005 (SSI 2005/515)

Education (Additional Support for Learning) (Scotland) Act 2004 (Transitional and Savings Provisions) Order 2005 (SSI 2005/516)

Education (Additional Support for Learning) (Scotland) Act 2004 (Consequential Modifications of Subordinate Legislation) Order 2005 (SSI 2005/517)

Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005 (SSI 2005/518)

11:05

The Convener: No motions to annul have been lodged in relation to the instruments. The Subordinate Legislation Committee has considered the instruments and has raised points with the Executive on SSI 2005/514, SSI 2005/515, SSI 2005/516 and SSI 2005/518.

The Executive has responded to the Subordinate Legislation Committee, but the committee still has concerns and will not formally report on the instruments until the end of the week. That means, in effect, that we cannot make a formal decision on the instruments at today's meeting. However, as we have invited a group of officials to talk to us about the instruments, I suggest that we consider them today but accept that we will have to make a decision on them next week. I have a note from the Subordinate Legislation Committee of its concerns, which appear to be largely of a technical nature. I will raise those issues at the appropriate points.

Do we agree to ask the officials any questions that we might have and to defer our decisions until our meeting next week?

Members *indicated agreement.*

The Convener: With us from the Scottish Executive are Robin McKendrick, the team leader in the additional support needs division and Sandra Manning, Andrew Mott and Shona Pittilo, who are policy officers in that division. With them is Douglas Tullis, who is a solicitor from the Scottish Executive Legal and Parliamentary Services; he will assist the team with our technical questions.

I invite our guests to make some introductory remarks.

Robin McKendrick (Scottish Executive Education Department): On SSI 2005/501, I should point out that the use of dispute resolution procedures by parents and young people is voluntary and that they cannot be required to pay any fee or charge for using the procedure.

In the context of the Education (Additional Support for Learning) (Scotland) Act 2004, dispute resolution is a process of formal review of an individual case by an independent third party, external to the local authority, who makes a written report with recommendations to the education authority with regard to how the dispute should be resolved. The schedule to the regulations prescribes the disputes that can be referred to the dispute resolution process. On receiving an application, the authority checks that it relates to a specified matter and that all the supporting material that is required under the regulations has been provided by the parent or young person. If that is the case, the authority must, within 10 working days of receipt of the application, send the applicant confirmation of acceptance. The date on that correspondence is the start of the statutory process of dispute resolution.

At the same time as sending confirmation to the applicant, the education authority must send a request to the Scottish Executive for nomination of an individual who must be appointed as an independent adjudicator. That person must be drawn from a panel of individuals that is established and maintained by the Scottish Executive on behalf of Scottish ministers.

The education authority must, within a period of 25 working days, provide the independent adjudicator with the necessary documentation as specified in the regulations. Within that timescale, the education authority must send its response to the applicant for comment—the parents must be made aware of what the education authority intends to say to the independent adjudicator and have an opportunity to comment on that.

The adjudication process will normally be a paper-based exercise. However, where it is necessary to do so to carry out the review, the adjudicator can ask for further information or advice as they consider appropriate. In extremely

rare and exceptional circumstances, they can arrange to meet either or both of the involved parties.

The education authority must, within 10 working days of receipt of the independent adjudicator's report and recommendations, give notice of its decision in writing to the applicant and any other person that it considers appropriate. That allows the education authority to receive the adjudicator's report and recommendations; to consider the implications of agreeing or not with his or her recommendations; and to send the parents a copy of the report along with its decision.

If the education authority becomes aware that a statutory timetable cannot be met, it must establish a new date that must not exceed the time limit by any longer than is necessary. In any case, there must not be more than 60 working days between the beginning of the process, when the authority accepts an application and asks for an independent adjudicator to be appointed and its end, when the adjudicator responds to the authority. As we say in chapter 7 of the code of practice, the guidance that will be sent out to local authorities is being prepared and should be ready by the end of the week.

Members will be pleased to learn that, as the provisions in the Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2005 (SSI 2005/514) are fairly extensive, I will not explain the purpose and consequence of each and every rule. However, I will give a general overview of what they seek to achieve.

The rules set out how the new additional support needs tribunals for Scotland will deal with cases that are referred to them in respect of specified decisions on, information about or failures of co-ordinated support plans. Paragraph 11 of schedule 1 to the 2004 act requires Scottish ministers to make rules on the tribunals' practice and procedure. The rules do not cover some matters that are either spelled out elsewhere in the 2004 act, especially in schedule 1, or detailed in other legislation, such as the Education (Scotland) Act 1980.

The 2004 act brings the tribunals under the supervision of the Scottish Committee of the Council on Tribunals, which keeps under review, and reports on, the constitution and working of the tribunals under its supervision. The drafting of the rules has followed, as far as it is relevant, the council's guide to drafting tribunal rules, which was produced in November 2003. The Scottish committee was consulted on the rules and the Executive has largely accepted its recommendations on finalising them.

As far as the procedures are concerned, on receiving the notice of reference, the secretary of the tribunal sends a copy of it to the education authority. A convener decides whether the tribunals can deal with the reference and if the appellant has not provided enough information, he or she writes to ask them for the missing information. The appellant then has 10 working days in which to reply.

The secretary then writes to both parties to advise them that the case statement period has begun. During that period of 30 working days, the education authority must provide a response and both parties may provide further written evidence. Before the end of the period, both parties must provide the secretary with a list of the witnesses whom they intend to bring to the hearing. However, the parties can also ask the tribunal for more time.

At the end of the case statement period, the secretary sends the appellant a copy of the education authority's response. Again, because all the information is available to all parties, the parent is aware of what the authority intends to say at the tribunal and vice versa. The secretary asks the appellant and the education authority about hearing dates and subsequently writes to inform both parties of the place and date of the hearing. That ensures that the arrangements are suitable for the parent. Finally, the secretary confirms the place, date and time of the hearing about 10 working days beforehand and sends a written decision to both parties, usually within 10 working days after the hearing.

The Additional Support for Learning (Placing Request and Deemed Decisions) (Scotland) Regulations 2005 (SSI 2005/515) brings the procedure for placing requests and deemed decisions for children with additional support needs into line with the procedure for children elsewhere. Paragraph 4(3) of schedule 2 to the 2004 act allows Scottish ministers to make regulations that apply to an education authority's failure to notify in writing the parents or young person making the placing request of its decision within a set timescale. Paragraph 6(6)(b) of schedule 2 to the 2004 act allows Scottish ministers to make similar regulations if an appeal committee fails to notify the parents or young person of its decision or to take other specified action. Those are referred to as deemed decisions.

11:15

The purpose of making the regulations in respect of deemed decisions is to allow the parents of children or young people with additional support needs to move the reference on to the next appropriate stage of the appeal process when a decision has not been reached within a prescribed period, rather than having to wait

indefinitely for an outcome. Although that offers nothing new in the process of placing requests and deemed decisions, it gives parity to children with additional support needs as well as definite timescales.

The regulations deal with the provision of information by an education authority with the purpose of ensuring that the appeal committee has all the relevant information for consideration as quickly as possible, and that the parents or young person are fully aware of the information that is relied on by the education authority in reaching its decision, prior to the hearing.

Next is the Education (Additional Support for Learning) (Scotland) Act 2004 (Transitional and Savings Provisions) Order (SSI 2005/516). As many members of the committee will be aware, section 30 of the 2004 act addresses the transition from the current system to the new one that was introduced by the 2004 act, in respect of children and young people who have a record of needs immediately prior to the commencement of the 2004 act. There will, however, be a small number of appeals that relate to children or young people with records of needs that were not concluded by the time of commencement of the 2004 act.

Provision is made in the order to allow records of needs appeals and placing requests in respect of recorded children or young people, made under the 1980 act before commencement of the 2004 act, to continue to be considered and determined by the Scottish ministers, an appeal committee or a sheriff, as appropriate, depending on the nature of the appeal. Time limits apply to references that are made to the appropriate body after commencement. After those time limits, appeals that are made under the 1980 act will no longer be competent and the provisions of the 2004 act will apply instead.

Perhaps it is simpler to say that in all cases, determinations will be taken to have been made immediately before the commencement of the 2004 act. We will provide more detail about that if necessary. The order also provides for the preservation of records of needs for reference purposes only for five years from the act's commencement.

The purpose of the Education (Additional Support for Learning) (Scotland) Act 2004 (Consequential Modifications of Subordinate Legislation) Order 2005 (SSI 2005/517) is to modify secondary legislation, which is supplementary, incidental or as a consequence of the 2004 act. The order is largely technical, but it brings all the relevant secondary legislation up to date.

The Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005 (SSI 2005/518) are in line with the Executive's commitment to the Subordinate Legislation Committee to lodge an amendment to the previous instrument before commencement of the act and, in drafting that amendment, to have regard to the committee's helpful comments. As the instrument is not yet in force, the Executive believes that it would be of assistance to users to replace the regulations that were laid in May 2005. The regulations therefore revoke the previous instrument and a copy of the explanatory note is attached for the interest and reference of the committee.

I hope that the committee found that explanation of the regulations helpful.

Lord James Douglas-Hamilton: I have three questions. If there is no response today, I would be grateful if my questions could be considered and a response made in due course.

My first question relates to SSI 2005/514. Regulation 5(2)(e)(i) states that in referring to a tribunal, a parent must state the date on which they were notified by the local authority that their request for a co-ordinated support plan had been refused. However, it appears that there have been representations that suggest that there are cases in which local authorities do not provide written notification to parents about their request in the specified time limits. The regulations appear to make no provision for that situation. I wonder whether that matter can be considered.

My second question, which also relates to SSI 2005/514, concerns expenses that could be incurred by parents. Regulation 39 states:

"A Tribunal shall not normally make an order as to expenses".

However, it would be appropriate for parents to be made aware of the possibility that expenses could be charged. The fear is that parents may be put off taking their child's case to the tribunal due to lack of funds and the possibility that expenses could be awarded against them. Could that be taken into consideration either in later versions of the regulations or in guidance to parents, so that they will know what the prospects are before they embark on an action?

Robin McKendrick: I will respond to your last point, on expenses, first. The tribunal will make an order for expenses against a parent only in exceptional circumstances—for example, when the parent has deliberately wasted the tribunal's time. It is difficult to imagine when that might happen. We believe that it is right and proper that the tribunal has the power to do that. Incidentally, that power enables the tribunal, equally, to make an order for expenses against a local authority. The parents guide that will be produced by the tribunal administration will tell parents about those

provisions and make it clear that anyone who makes a reference in good faith has nothing to worry about. I hope that that answers your question.

We recognise that there is a substantive point in relation to regulation 5(2)(e), on the notification of deemed decisions. We note that and will consider the matter further. It may be that something could be included in the regulations; it may be that we need to look further and discuss with other policy colleagues the implications for placing requests. We will be happy to look into that. On 3 November, in response to the Subordinate Legislation Committee's earlier comments, we stated that we would produce an amending regulation as quickly as possible. We will reflect on the point that you raise when we do that.

Lord James Douglas-Hamilton: Thank you very much for those replies, which are extremely helpful. When you have made your decision, it would be helpful if you would come back to us.

Robin McKendrick: You have written to the Minister for Education and Young People and will receive a substantive response to all the points that you raised in your letter.

Lord James Douglas-Hamilton: Thank you.

My third question relates to the Additional Support for Learning (Placing Request and Deemed Decisions) (Scotland) Regulations 2005. Is clarification needed on the status and duties of authorities when cross-boundary placing requests are made? For example, if a child lives in East Lothian but attends secondary provision in Midlothian, the child's co-ordinated support plan is the responsibility of Midlothian Council. However, if the child's parents wish to make a placing request for a special school in Edinburgh, it is unclear whether the placing request should be made to East Lothian Council or Midlothian Council. If the home authority refused a placing request, would responsibility lie with the home authority, which made the decision to refuse the placing request, or with the host authority, which had responsibility for the co-ordinated support plan?

The regulations do not cover those scenarios. Might it be possible to have some clarification on which authority could be taken to the tribunal by the parents? I do not necessarily expect an answer to that question this morning.

Robin McKendrick: We are rather relieved to hear that. We do not believe that it is appropriate to reflect that issue in the regulations, but Shona Pittilo will give a short response to the points that you have raised.

Shona Pittilo (Scottish Executive Education Department): The scenario that you have described is fairly complicated and the exact circumstances surrounding it are not particularly clear. If you sought further clarification, we would consider the matter, but schedule 2 to the Education (Additional Support for Learning) (Scotland) Act 2004 and the code of practice provide what we believe is clear information about making and appealing placing requests, about co-ordinated support plans and about home and host authority responsibilities in relation to those.

Education authorities will have to apply the provisions of schedule 2 and the guidance in the code of practice when they consider individual cases. The further clarification that they seek may be contained in the guide for parents that the advice service, Enquire, is producing on placing requests. Enquire has already prepared a parents guide, but it is working on a specific booklet about placing requests. The advice that is in the code of practice can be expanded and made clearer to help parents to deal with some of the issues that you raised, such as to which authority they should make a request and which authority would have responsibility.

Lord James Douglas-Hamilton: Thank you very much. I am glad that such matters will be taken into account.

Dr Murray: I, too, have a question about SSI 2005/515. It is about the deemed decisions. I may have read the explanatory notes wrongly, but it appears that if the education authority does not respond to the parent's request for a placing request within a certain period of time, it is deemed to have refused it. If the parent takes that refusal to the appeal committee and the appeal committee does nothing, the appeal committee is deemed to have agreed with the education authority. What does the parent do then? Their request could be blocked simply because of inaction on the part of the education authority and the appeal committee. I know that that scenario is probably highly unlikely, but the parent and the child could lose out because other groups of people just did not bother to meet. Where would the parent go next?

Shona Pittilo: If the appeal committee took no action within the relevant timescale, the parent could take the matter to the sheriff.

Mr Adam Ingram (South of Scotland) (SNP): On SSI 2005/501, you made the point that the dispute resolution exercise, which involves the appellant and the local authority, is voluntary. Under regulation 10(1)(c), what recourse does a parent have if the local authority does not follow the recommendations of the independent adjudicator?

Robin McKendrick: The independent adjudicator will write to the education authority

with their report and recommendations, after which the education authority has 10 days to consider the terms of the report and the recommendations before it must write to the parent with its decision and the report. If the parent continues to be unhappy about that, the guidance that we are issuing to authorities will say that the authority should offer to meet the parent to discuss the issue. The authority should not just provide the dispute resolution report and state its decision without offering to discuss matters with the parent.

At the back of the dispute resolution process, under section 70 of the Education (Scotland) Act 1980, the parent would have the opportunity to make a complaint to Scottish ministers about the inadequacy of the additional support that the education authority was providing for the child or young person concerned.

Mr Macintosh: I have a general concern about disputes—between authorities, rather than between parents and authorities—about who is responsible for funding the placement of a child with additional support needs in a school in another authority area. I have raised the issue before in committee and with ministers and I believe that, following discussions, it is close to being resolved. If you can shed any light on that, that would be most welcome.

If the stumbling block was a dispute between local authorities, would the parents be able to refer the case to the tribunal? Would that mechanism be appropriate? In my constituency, a case that involves a dispute between authorities has taken a long time to resolve and has now been referred to the Scottish Executive. Would such a case go through the tribunal system from now on?

11:30

Robin McKendrick: A decision on whether to review a CSP would depend on the stage that it was at with the home authority. You referred to disputes between local authorities. Since the minister wrote to you on that issue, Glasgow City Council and East Renfrewshire Council have attended a meeting with the Convention of Scottish Local Authorities. As a result, both councils are to produce a written note of how the issue might be handled, which we await. In addition, COSLA has undertaken to write a convention of understanding between local authorities with regard to issues arising from the 2004 act.

As he has done previously, the minister will write to the Education Committee with an update on the position. We hope to be able to meet COSLA in the not-too-distant future in order that we can have a resolution at that level, so that parents do not start to get involved by asking which authority is responsible. Under the umbrella of COSLA, local authorities can agree among themselves how to handle such issues.

Mr Macintosh: It is encouraging to hear that and I hope that a satisfactory outcome is reached in the case to which I referred. However, I want to consider a hypothetical situation. Even with the memorandum of understanding or the protocol that has been drawn up, if a case arose in the future about a placing request—the issue is not about opening a CSP—does a parent have the right to appeal to the tribunal about it?

Robin McKendrick: No. The 2004 act is clear that that can happen only with a CSP. If a CSP has been opened, or if a local authority has indicated that a CSP will be opened, when a decision is taken to refuse a placing request, the 2004 act allows the issue of the CSP to be referred to the tribunal. Disputes between authorities cannot be referred to a tribunal by a parent, but a decision relating to a CSP can be so referred.

Mr Macintosh: That was helpful.

The Convener: We look forward to the minister's words on that issue. I do not know whether you want to add, for the committee's clarification, a few words about the issues that the Subordinate Legislation Committee raised on the instruments.

Robin McKendrick: Certainly.

First, we respect the Subordinate Legislation Committee's advice and are grateful for its constructive input. We would like to consider the terms of its formal comments on SSI 2005/514, which we have yet to see. As I said, the Executive's response of 3 November to the Subordinate Legislation Committee undertook to produce amending rules to address the points that were raised in respect of rules 37(2), 39(2)(b) and 39(5). We would wish to consider the terms of the Subordinate Legislation Committee's formal response in order that we might consider amendments to the rules and the associated implications. We would thereafter introduce, with all due speed, amending rules.

As you said, the Subordinate Legislation Committee's concerns may be more technical. We do not consider that they go to the root of the rules; they are more about points of detail. However, they are extremely important. As I said, we will introduce with all due speed amending rules and, when we do so, we will consider the points that Lord James Douglas-Hamilton raised.

The Convener: Thank you.

Mr Macintosh: I seek clarification on an issue that the Subordinate Legislation Committee raised and which touches on a policy aspect.

Paragraph 37 of SSI 2005/514 is about voting in tribunals. In effect, that paragraph says that if one member of a tribunal of three members was missing, the chair would have a casting vote, which would mean that the chair could just decide by themselves without reference to the other member. Obviously, we would not expect that to happen as good practice, but does it happen in other tribunals and is that why the provision is in paragraph 37? I thought that the original intention was to have unanimous rather than majority decisions in tribunals and, in particular, not to have majorities of one.

Douglas Tullis (Scottish Executive Legal and Parliamentary Services): There is considerable diversity of practice in tribunals throughout the United Kingdom. Some seem to require unanimity, some require a majority and certain tribunals, including the one that we are discussing, have legislative provision for a two-person tribunal to continue to operate in the event of the unexpected absence of one member. In the light of the Subordinate Legislation Committee's observations, we must consider its particular reservation about the casting vote. We must take that away and think about it.

The Convener: There are no further questions from members. I thank Robin McKendrick and his team for coming along to answer questions and for the responses that they gave.

Robin McKendrick: Thank you.

The Convener: We look forward to the additional information that will come in due course. I remind members that we will make our decisions on the SSIs at our next meeting, once we have received the Subordinate Legislation Committee's formal report.

We will have a brief suspension to allow for the change of witnesses.

11:36

Meeting suspended.

11:39

On resuming—

Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill

The Convener: Okay colleagues, we can resume the meeting. Agenda item 3 is the Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill. I am pleased to welcome our second panel this morning.

I welcome the Minister for Education and Young People, Peter Peacock, back to the Education Committee. He is accompanied by Graham Donaldson, Her Majesty's senior chief inspector of education in Scotland; Maureen Verrall, the head of the children and families division in the Scottish Executive Education Department; and Jackie Brock, the head of the inspection and quality improvement branch of the children and families division in the Education Department. I thank you, minister, and your supporting cast for coming, although we are feeling under siege by the Education Department this morning.

The Minister for Education and Young People (Peter Peacock): That is not a bad thing.

The Convener: I would be grateful if you could give us a few words to introduce the bill, explaining the reasons behind it and why the Executive seeks an accelerated timetable for it.

Peter Peacock: I will try to be brief, but, as you suggest, it is important to set things out for the record and so that members can ask legitimate questions. Members might want to ask about the timetable in particular. I think that I am returning to the committee on 23 November to give more evidence on the bill's policy content.

First, the bill seeks to secure powers that will allow the Executive's police, education, social work and health inspectorates and others to conduct joint inspections. Secondly, it will give powers to access information during those inspections and to share that information among inspectors and, when doing so at an organisation level is necessary, among inspectorates. Thirdly, it deals with powers for the Social Work Inspection Agency to conduct general inspections of social work services at the local authority level.

The committee will be aware that joint inspections of children's services and of child protection in the first instance are major planks in our child protection reform programme, which we are well through. We need the powers that we seek in order to proceed with our planned joint inspections programme.

The committee will rightly ask why we are so

urgently seeking an accelerated process from the Parliament. I reiterate that we are committed to joint inspections, starting with child protection inspections, and that they should be completed by 2008. We have a clear timetable to allow that to happen; indeed, the Education Committee has pushed us hard on child protection reform and encouraged us to make progress for months and years.

A major consultation has taken place on the joint inspection process for children's services, which involved several hundred social work, police, education and voluntary sector professionals, as well as others. Graham Donaldson—who is leading the process for the Executive—and his people designed the inspection process as a consequence of that consultation. Pilot inspections took place in two local authority areas. They were highly successful; they generated lots of enthusiasm among people in a range of professions in the areas in which the inspections took place and gave us a clear signal that people want, and are enthusiastic about, inspections. People are enthusiastic about what they can contribute to improving practice and flushing out problems.

The pilots aimed to flush out issues relating to the design of the inspection process and how that process can be improved in the future. Issues to do with the practice of making inspections and how that can be improved were flushed out, as well as major issues to do with inspectors' current powers to access and share information and to work jointly.

Notwithstanding the fact that health boards in the inspection areas told the inspection team that they wanted to participate and to give information on health, we discovered that they did not have the power to give access to that information. That gave rise to an Executive exercise. We considered in fine detail the powers of all the inspectorates to access information in other areas and I was advised that the inspectorates do not, in effect, have the powers to operate jointly or to access or share information in a way that is required to conduct the inspection process. The inspectors need such powers to proceed with the planned inspection programme and are currently working to prepare the ground for that.

If the bill goes through the Parliament by the end of the year and receives royal assent early next year, we can get the inspection process fully back on track and it can be completed by the 2008 deadline. However, the timetable is tight and any significant delay will jeopardise the whole programme and its timetable.

The issues that came to light as a result of the pilots arose late in our planning process for our legislative programme and I know that the Education Committee has major legislative commitments later this year. We considered the possibility of tacking the issues on to another bill that is going through the Parliament, but that could not be done because of scope issues to do with the other bills—no easy vehicle was available.

11:45

We have deliberately produced a short, focused bill and its technical content is uncomplicated. We seek to get the bill through by the end of the year so that we have the necessary powers to meet the commitments and to improve child protection practice across the board.

There is a need to proceed with urgency—hence the timelines that have been suggested. In view of the circumstances, we took the fairly unusual step of speaking to all the party spokespeople in the different parties and arranged briefings by officials for them all on the detail of the bill and the logic behind what we seek to do. We also gave Opposition members copies of the draft bill before it was lodged in the Parliament to allow them to see what we were considering. We have subsequently made available to the Parliament all the regulations that are attached to the bill, so that members can scrutinise them at the same time as they consider the bill. One of the sets of regulations gives rise to an operating protocol, which we have also made available. Those steps will be significant in enabling members to scrutinise the bill. We have tried to ensure that members get all the data that they require to allow proper parliamentary scrutiny, notwithstanding the fact that we are on an accelerated timetable.

We have also made significant efforts to contact and have dialogue with all the key interests, including the police, social work, education and the various parts of the health service that the bill will affect. There have been full briefing sessions. Andy Kerr chaired a meeting with health interests to talk through all the issues. Those groups are being consulted about the detail of the bill, the protocols and the regulations. When I come back to the committee on 23 November, I will be able to tell members about the comments that we have received, although I am sure that the committee will have taken evidence from a number of those groups before I come back.

We have specifically created a requirement in the bill for the main regulations to be dealt with by the affirmative procedure, to give the Parliament the opportunity to scrutinise them separately from the bill. Therefore, the bill does not conclude the process; it gives rise to further parliamentary scrutiny. That is the broad position. I am happy to answer members' questions.

The Convener: Thank you. Before we have questions, perhaps Graham Donaldson would like to comment on the pilot projects.

Graham Donaldson (Her Majesty's Inspectorate of Education): I will sketch out some of the work that we have been doing on the matters that the minister mentioned. The commission that I and colleague inspectorates were given was twofold. By 2008, we are to have a much more streamlined and integrated approach to children's services inspection, but initially we are—as the minister said—to lead with a programme of child protection inspections.

We have devised an inspection methodology for child protection. That essentially involves taking the local authority area as the unit that we examine, but we consider all the relevant services that operate within that area, such as health boards and the police.

We examine the way in which child protection operates in the area at three levels. At a strategic level, we consider the broad intent in respect of child protection and, at an operational level, we examine the processes that are used to try to ensure that young people are protected. A crucial part of the process is to look directly at the experience of individual young people and to establish to what extent the theoretical structure and the management processes have operated together to serve them well.

As the minister said, we held two pilot inspections—one in Highland and one in East Dunbartonshire—in which we tried out the methodology. The results of the pilots were positive. The people involved in those inspections—those who inspected and those who were inspected—have played a crucial part in letting other people know about the inspection process; they have participated in consultation conferences throughout the country to discuss the nature of what we are doing.

The overall response to the process has been extremely positive, as the minister said. My assessment is that those who are engaged in the system want the inspection process to be put in place as quickly as possible—a number of people have said that to me very directly.

The pilots were only partially successful, however, as we could not get access to medical information. I am not talking just about the information itself; on the ground of patient confidentiality, the health service staff who were engaged in the process were instructed by the chief executives of the health boards not to discuss individual cases with members of the inspection team. The chief executives believed that, in the context of their responsibilities, it would not be appropriate to release that information.

All the other services that were engaged took the view that the public interest was served by allowing the inspection team access to information, as that enabled us to establish how well the system had operated for individual children. I have to say that the chief executives of the health boards and many of the health professionals on the ground reluctantly said that they could not participate in the process; they indicated that they would like to participate but believed that it would not be appropriate for them to do so under the current legislation.

As a result of those two pilot inspections, I was able to say that we had tested a methodology that had worked well as far as it went. However, I could not report with confidence that children in those two areas were fully protected, because we had not been able to pursue that critical interface between the health service and other services.

There have been a variety of tragic cases in the United Kingdom, recently and stretching back over 25 years—there have been 26 child deaths in that period as well as other cases of serious abuse. We know from that experience that one of the critical interfaces has been between medical professionals and other professionals on issues to do with the sharing of information. A number of issues emerged during the pilots that we would have liked to follow through and discuss with medical professionals, particularly health visitors, but we could not do so.

I have been given responsibility by ministers to put in place a child protection inspection process, but I am in a position in which I cannot confidently say that the process, operating within the existing powers, would give the kind of assurance that we need to give about whether children in a particular area are being protected. It is my judgment that, in such circumstances, inspection could do more harm than good. If we give false confidence about the way in which the child protection system is operating in a local area, inspection could be counterproductive. That is why I came to ministers and said that, in order to proceed, we need to resolve the issue of access at the specific interface between health and the other services. Legal advice was taken on that, hence the bill that is before the committee today.

The Convener: Before I invite members to ask questions, I remind everyone that there will be another opportunity to question the minister on the detail of what is proposed; what we are considering today is the general need for the legislation and the timescale involved.

Ms Wendy Alexander (Paisley North) (Lab): I have just one question, but I want to provide a little background because, as we know, the committee has been interested in the issue. I appreciate that speed is required at this stage and I welcome the minister's commitment to act. However, there has arguably been some tardiness and I would invite officials who have been involved in the matter to comment.

In November 2002—three years ago—Scotland led the United Kingdom in suggesting that, in our child protection reform programme, we would move towards joint inspections. It was another year before the United Kingdom made the same commitment; it made the commitment to joint inspections in 2003. However, England legislated for joint inspections in the Children Act 2004. Consultations on regulations were held between March and June of 2005. Joint inspections were introduced in September this year and there is a commitment to complete joint inspections for the whole of England—with a population 10 times the size of Scotland's—by September 2008.

As I said, although in Scotland we made the commitment to joint inspections in 2002, before England did, the timetable that we have before us gets us to the position where we will be embarking on a full range of inspections only by the end of 2008. By that time, a full range of inspections will have been completed in England. I am looking for an explanation. A year ago in committee, I asked on a number of occasions whether legislation comparable to the Children Act 2004 would be necessary and I was assured that legislation was not necessary. I am happy to see movement, but I have some concerns.

We started ahead of the UK and, as things stand, although it is important to make progress, the rest of the UK will have completed the first complete joint inspections when we are just embarking on our all-Scotland inspections in 2008. The committee has raised the issue in the past; perhaps we should invite officials to comment on it. However, it is encouraging that there will be speedy progress henceforth.

Peter Peacock: I think that I should comment before I invite my officials to speak. There is a danger that I will be drawn into making comparisons between the English and Welsh inspection process and system and our process and system. We have sought to integrate the thinking about children's services inspection with, in this instance, the much wider child protection reform programme. We have been thorough in carrying out all the consultations with people and in undertaking the pilot schemes. I am not sure that the same process has been followed in England. We have sought to move the matter forward in a thorough and comprehensive way as quickly as we could.

If the implication of your question concerns tardiness, it would be fair to ask why we did not spot the legislative gaps three years ago. My answer to that would be that I would much rather not be here today answering questions on that. Nobody at any point questioned whether we had the powers and we acted in good faith throughout. It was only on close examination, following one issue arising, that we flushed out the wider issues. As soon as we knew that we did not have the powers, we had a clear obligation to come to the Parliament and seek those powers. As I say, I would rather not be in this position. In the best of all circumstances, we would have spotted the gaps and taken the powers much earlier so that the question would not have arisen. However, we are where we are and we are trying to sort it out now.

Graham Donaldson may have more insights into what is happening in the south and what is happening here.

Graham Donaldson: In England, child protection inspection forms a relatively small part of a children's services inspection. Child protection inspections are not as rigorous as they are here—the process is different. The judgment here—one that I have been taking forward—is that it is critical for child protection to ensure that the services are working together in a way that provides the maximum support that those services can provide for individual vulnerable young people. That is seen as a priority.

That does not mean that the children's services inspection process is on hold until 2008. We have produced a framework of quality indicators and a self-evaluation guide. Between now and 2007, when we will undertake pilots of children's services inspection, we will work with the services throughout Scotland to get them to evaluate their own performance on children's services in the context of the developing policy agenda. An interesting issue is whether inspection leads policy or whether inspection reflects policy. In this case, it is important that the inspection process is able to take place in the context of a developing children's services regime. That is more effective than our simply going in and saying, "You have not yet implemented the policy," which would be unsurprising, given the timescale.

Child protection inspections will be done in 2008, assuming that we get the powers. Children's services will be inspected in parallel. A programme of pilot inspections will start in 2007 and joint inspections involving all the relevant inspectorates will be under way in 2008.

Ms Alexander: I appreciate the minister's candour. These things happen and we should move forward. However, the committee has an on-going concern that, whereas the rest of the UK will be finished in three years from now, we will just be starting in three years and two months from now. The process may be less rigorous elsewhere, but it is easy to allege that other places are less rigorous. Perhaps that is something that, in the subsequent evidence stages, you can write to us about or which we can explore further. However, I am happy to leave the matter there.

Fiona Hyslop: Joint inspection to ensure that child protection is working is one of the key recommendations of the 2001 report "It's everyone's job to make sure I'm alright". We raised the issue with the minister in May last year as part of our child protection inquiry, looking at the outcomes and outputs of that report. I asked specifically about the need for legislation in the context of what was happening down south. Obviously, the joint reviews there recognised the different authorities, such as Her Majesty's Inspectorate of Education and the Healthcare Commission, as entities in themselves. I am assuming—from the explanations and briefings that we have had, for which I am grateful—that the reason why we cannot progress in Scotland is that the joint inspectors are not recognised as a body in law, which means that they must be established as such. The point that Wendy Alexander made was that 150 local authorities in England will have been inspected by 2008. My understanding is that you still intend that all 32 of the Scottish local authorities will have received a joint inspection by the end of 2008. Is that correct?

Graham Donaldson: Yes.

12:00

Fiona Hyslop: We have a delay in the process that we are having to rectify in law. The committee has to deal with a lot of legislation from the Executive and does not invite extra legislation but, in this case, the committee highlighted the need for the law to be rectified. I hope that the Executive reflects on that fact.

I have a concern about the issue of confidentiality. Graham Donaldson made an interesting point about whether policy leads or reflects inspection. Is it your view, based on your pilot studies, that the concerns about sharing confidential medical information with the joint inspectorate that does not yet exist in law reflect a deeper concern about sharing medical information? We know from tragic case studies that this is the interface. If there is a reluctance to share confidential medical information with well-regarded and professional inspectors who have been sent in from the Executive, what chance does the health visitor or social worker on the ground have of receiving that support? I understand the need to legislate on this matter in order to get the national body recognised, but do we need to legislate to ensure that practitioners on the ground have access to this vital information?

Peter Peacock: I will get Graham Donaldson to address the points that Fiona Hyslop specifically addressed to him.

If we get the powers that we are seeking, child protection inspection will be completed by 2008. It is all set and ready to go. I think that Wendy Alexander was referring to the wider children's services inspection, not just child protection inspection.

I confirm that your description of the legal powers that we are seeking is correct. As I said to Wendy Alexander, I would rather that we were not in the position of seeking these powers, but that is where we are.

It is better that Graham Donaldson deals with the issue of confidentiality, but I might add something once he has spoken.

Graham Donaldson: In a sense, the issue that Fiona Hyslop raises relates to one of the key reasons why we need the inspection process. The advice from the chief medical officer is quite clear. Child protection trumps confidentiality and information on an individual patient should be shared where that is in the interests of the patient. We do not know the extent to which that is happening across the country. We know of examples in which it has not happened, but we do not know whether those are exceptions or are indicative of a steeper problem. That is one of the key reasons why we need this inspection process. We need to find out more about what is happening at the interface and what might be inhibiting people from sharing information. In due course, I suppose that the inspection process could inform the answer to your question about whether we need legislation to ensure that that is taking place.

Peter Peacock: Graham Donaldson has covered the situation adequately, but I should say that I have no reason to believe that the operational tools that are in place should inhibit the proper sharing of information anywhere in Scotland if that is what is in the interests of a child. As Graham Donaldson said, from inspection reports and other forms of inquiry, we know of cases in the past where that has not happened. That is part of the reason why we need the inspection process. If, at any point, we felt that we needed further clarifications, we would not hesitate to seek them. At the minute, however, we are clear that there is no inhibition on the proper sharing of information, operationally, where that is required to protect children.

I think that I am correct in saying that we have issued guidance on the implications of data protection rules for the issue that we are discussing. Maureen Verrall can confirm that.

Maureen Verrall (Scottish Executive Education Department): There is no end of guidance about agencies' ability to share information for the purpose of providing a service to a child. To return to Graham Donaldson's point about policy and inspection being part of a piece, another set of issues that have been raised relates

to the agenda of integrating children's services. Integrated children's services planning and the proposals that are set out in "getting it right for every child" for collective case conferences that will lead to one assessment, one record, one care plan and one individual who is responsible for delivering it are part of the package of ensuring that services work together properly.

Fiona Hyslop: I represent the Lothians, where we had the case of Michael McGarrity. I hope that the lessons in the report on that case will help to inform the on-going discussions and reflections on the bill.

Peter Peacock: The purpose of any report in whatever form on any case is exactly that: to flush out procedures that we need to tighten up. We constantly tighten up procedures, practices and guidance to ensure that perceived loopholes are removed. The recent case in the Western Isles has given us cause to consider some of the guidance that has been issued in case it in any way gives the impression that people should not act in particular ways. In that case, the issue was not about sharing confidential information; it was about the interpretation of other parts of the law. We are always learning about how we need to move forward.

Fiona Hyslop: It is not guidance that protects children, but people.

Peter Peacock: Indeed.

Fiona Hyslop: I have a question on an issue to which we will return in more detail later. The reason for part 1 of the bill is self-explanatory, but why is part 2 included? I know that you want to deal with the matter speedily—you will have the committee's co-operation in that—but will you explain the reason for part 2? I suspect that it could have been included in another bill. Does part 2 arise from a reflection on the Borders case?

Peter Peacock: When the health board issue came to light, we considered the legal issues in great depth and in doing so realised that the Social Work Inspection Agency does not have all the powers that it requires to carry out general inspections of social work authorities. Given that knowledge, we thought that we should seek those powers in the bill, because we need progress on that matter, too.

Fiona Hyslop: What has led you to think that the agency does not have the power to carry out general inspections? It seems odd that a national agency that was set up to inspect social work does not have the power to inspect social work services.

Peter Peacock: Indeed, but that is the advice that we have received and exactly why we now seek the powers explicitly. The Social Work Inspection Agency has many powers through other acts of Parliament. For example, in the work that was done on the Borders case, ministers used their power to commission a specific piece of work. However, the agency is only now moving into the territory of general inspections of local authority social work functions—HMIE has begun similar inspections, although only recently. The purpose of the inspections and the way in which they are conducted are new territory. We must be certain that the agency has the necessary powers, which is why we seek them in the bill.

Dr Murray: The explanatory notes state that inspections will be done at three levels: strategic, operational or individual, where there are concerns about specific children. I presume that the concerns about sharing medical information without consent relate to the individual level of inspection, because it is difficult to anonymise them at that level. Will the medical records that can be accessed without consent only be those of the child, or will they include records of the parents or people who care for the children?

Peter Peacock: I ask Graham Donaldson to answer that, as he has considered the specific details.

Graham Donaldson: We would look at the medical records of the child, to follow a child protection audit trail. The critical issue is to be able to look at, discuss and analyse what has happened in relation to an individual child. I emphasise that that investigation is not about second-guessing how the child was dealt with; it is about considering how the process operated, whether people understood the necessity of sharing information and whether the right interchange took place. In the pilot inspections that we undertook, we found references in social work records to discussions with health staff, but those discussions had not been followed through and nor could we follow them through in the inspection process. The critical point is that we will look at children's records.

Dr Murray: I raise the issue because if a parent or a carer has an addiction problem, that may show up in their medical treatment. Someone who has been on a methadone programme may no longer be on it and it may be necessary to establish why that is the case. Someone may be abusing prescribed drugs. Information in the medical records of the carer could indicate that there is a child protection issue, but the bill would not change the situation.

Peter Peacock: I am not clear whether you are talking about the situation in an operational sense now.

Dr Murray: My point is more about the sharing of information for child protection. In many of the

tragic cases that have taken place, a parent or carer has had an addiction. If that information could be shared with social services, it might alert people to the fact that there is a possible child protection issue.

Peter Peacock: I do not think that there is any difficulty in sharing such information operationally now. In fact, where intelligence about the way in which a family operates or does not operate indicates that the family has become dysfunctional, it would be expected that that would be included in the everyday dialogue between professionals in the interests of the child. The bill is to do with having access to information after the event and picking things up during inspection.

Dr Murray: So it is currently possible for a social worker to ask a general practitioner whether there is an addiction problem within the family and the GP cannot hide behind data protection or whatever and refuse to give the information to the social worker.

Peter Peacock: We are getting into very specific and complex matters. If it were judged that the interests and protection of the child were in any way jeopardised because of certain factors, the GP should share the information. The interests of the child must drive the approach. We know from some inspection records that such dialogue properly takes place to try to protect the child, but we also know that it sometimes does not take place. That is often the root cause of something going wrong. I am in no doubt about the contemporary capacity of people to share the information if that is in the interests of the child.

Dr Murray: It seems a little odd that the inspectors can get access to the information but individual practitioners would not feel themselves to be bound by law to share the information. Such sharing of information does not always happen; in many cases information has not been shared properly.

Peter Peacock: We seek to give the inspectors these powers to make it clear what access to information exists and the legitimacy of such access. When members look in detail at the protocol and the regulations that structure it, they will see that we seek to ensure that client confidentiality is upheld and that information on clients' circumstances and interests remains within the confines of the confidential bond that unites all inspectors, who are—as Fiona Hyslop rightly said—highly expert professionals. Every day, inspectors undertaking investigations in schools and social work look at children's records and they are already bound by rules of confidentiality. We will go to great lengths to maintain the overall protection of an individual's information, while ensuring that we can track what happened to a child and learn the lessons from things that have not been done.

I am sure that the committee will hear some detailed, intricate arguments about the issue when it takes evidence. There are obvious concerns as we must ensure that we protect information about clients generally while enabling the processes to go forward.

Lord James Douglas-Hamilton: I have two brief questions. First, will the minister tell us whether he would be prepared to consider a sunset clause in case any imperfections in the bill were to become evident in the 12 months after enactment?

Peter Peacock: Lord James Douglas-Hamilton has written to me on the issue and we have considered the matter. We genuinely hope that, with the committee's help, there will be no imperfections in the bill by the time that it is passed. We want the legislation to be a solid piece of law on which we can depend. Having said that, I am aware that the committee is still to take a lot of evidence on the matter; although I am not inclined to bow to Lord James's point, I will listen to what the committee says once it has heard the evidence.

12:15

Lord James Douglas-Hamilton: Does the minister accept that it is my position and that of the Tory group—of some 17 members—that the bill must go ahead, because we believe that the overwhelming and paramount consideration must be the protection of children, but that we should have the right to revisit the subject a year after enactment if, in spite of all our efforts, any imperfections were seen to arise?

Peter Peacock: I recognise that that is the position that is taken by the Tory group. However, I thought that it had 18 members.

Ms Alexander: "Had" is the appropriate word.

The Convener: Now, now.

Mr Macintosh: The minister has answered one of the questions that I had. What is the status of the robust protocol on protecting medical confidentiality? Does it qualify as subordinate legislation? Is it a guide? Is it a code of practice?

Why is the power to create offences being delegated to subordinate legislation rather than being included in the bill? The matter is quite serious and I would therefore expect it to be dealt with in the bill. The Subordinate Legislation Committee raised that issue as well.

Peter Peacock: On your latter point, we depend on advice about how bills should be structured and drafted. Our advice was that that was the most appropriate way of dealing with the issue. If, in the course of taking further evidence, you want to

make mention of that again, you should do so. I will go back to the ranch now and get some information that will enable me to give you a firmer answer on what the position is.

On your question about the protocol, one of the sets of regulations sets out clearly the framework for the protocol, but the protocol itself will be a flexible document that will be able to adapt to changing circumstances and times. The protocol per se is not subject to parliamentary approval, but the regulations under which the protocol is agreed are clear about what it ought to contain and what issues it ought to cover.

Mr Macintosh: We will come back to this issue at a later evidence-taking session, because many aspects of the proposals will be dealt with in subordinate legislation rather than in the bill. It is important that we get a grasp of what status that will have.

Peter Peacock: That is precisely why we have published the regulations at the same time rather than sequentially, which would be the normal practice. We want the committee to have a complete picture of what we are seeking to do and be able to debate it.

The Convener: Adam, did you want to ask a question?

Mr Ingram: The questions that I wanted to ask have already been asked and answered.

The Convener: Minister, what consultation are you conducting on the draft regulations? When do you expect to be able to report back on that? You mentioned the matter briefly in your evidence, but it would be helpful to have the information clearly on the record.

Peter Peacock: I will ask Maureen Verrall to answer that.

Maureen Verrall: The bill, the regulations and the draft protocol have gone out to all the various health interests and to organisations such as the Association of Directors of Social Work, the Convention of Scottish Local Authorities and the Association of Chief Police Officers in Scotland. The bill, the regulations and the protocol had been consulted on informally before they were prepared and now they are available. They were sent out in writing in the week in which they were submitted to you and we have asked people to let us have comments on any element, particularly the protocol, which contains the detail of how information will be handled, by 17 November. We will be in a position to answer any questions about what people have told us about the various aspects by 23 November.

The Convener: As there are no further questions, I thank the minister and his team for coming along this morning. We look forward to seeing them again soon, perhaps in two weeks' time.

12:19

Meeting continued in private until 12:54.

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