

EDUCATION, CULTURE AND SPORT COMMITTEE

Tuesday 8 January 2002
(Afternoon)

Session 1

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CONTENTS

Tuesday 8 January 2002

Col.

SCOTTISH BORDERS INQUIRY	2908
LAND REFORM (SCOTLAND) BILL	2919
EDUCATION (DISABILITY STRATEGIES AND PUPILS' RECORDS) (SCOTLAND) BILL	2933
SCOTTISH AFFAIRS COMMITTEE INQUIRY (DEVOLUTION AND BROADCASTING)	2934

EDUCATION, CULTURE AND SPORT COMMITTEE

1st Meeting 2002, Session 1

CONVENER

Karen Gillon (Clydesdale) (Lab)

DEPUTY CONVENER

*Mr Frank McAveety (Glasgow Shettleston) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)

*Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD)

*Irene McGugan (North-East Scotland) (SNP)

*Mr Brian Monteith (Mid Scotland and Fife) (Con)

Michael Russell (South of Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Christine Grahame (South of Scotland) (SNP)

WITNESSES

Lee Cousins (sportscotland)

Mike Ewart (Scottish Executive Education Department)

Peter Higgins (University of Edinburgh)

Mary Newman (Scottish Executive Finance and Central Services Department)

Fran Pothecary (Scottish Sports Association)

Nicol Stephen (Deputy Minister for Education and Young People)

CLERK TO THE COMMITTEE

Martin Verity

SENIOR ASSISTANT CLERKS

Susan Duffy

Judith Evans

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 1

Scottish Parliament

Education, Culture and Sport Committee

Tuesday 8 January 2002

(Afternoon)

[THE DEPUTY CONVENER *opened the meeting at 14:32*]

The Deputy Convener (Mr Frank McAveety): I thank everyone for attending the first Education, Culture and Sport Committee meeting of the year. I hope that the committee will be as gentle as it was last year. That should strike fear in the heart of the Deputy Minister for Education and Young People, given that we gave Nicol Stephen a thorough but enjoyable grilling just before Christmas. I welcome everyone and wish you all a happy new year.

We are a wee bit short on committee members today; the convener and Mike Russell are not here because they are ill, although not with the same illness. Christine Grahame, who is a regional MSP for the Borders, is attending the committee because of her interest in education in the Borders. I welcome her to the committee.

Scottish Borders Inquiry

The Deputy Convener: The first item on this afternoon's agenda is oral evidence from Nicol Stephen, the Deputy Minister for Education and Young People, on the Scottish Borders inquiry. Assisting Nicol Stephen are Mike Ewart and Mary Newman, who are Executive officials.

The Deputy Minister for Education and Young People (Nicol Stephen): Thank you very much. Mike Ewart is the head of the schools group in the Scottish Executive education department. Mary Newman is in charge of the best value in local government unit in the Scottish Executive finance and central services department.

I add my happy new year wishes to the committee and echo the sentiments that were expressed in the convener's remarks.

I will start by making a statement, a copy of which was provided to the clerk to the committee yesterday, so that members might have it. It is, however, important that the statement is available in the *Official Report*.

The Scottish Executive welcomes the inquiry into the education budget of Scottish Borders Council, particularly given that the situation has caused such widespread concern for pupils and parents in the Borders. We agree with the interim conclusion of the committee that the educational well-being of young people in the Borders must be the top priority. We hope that the lessons that are learned from the inquiry will be of general benefit and, together with other measures that are being taken by the Accounts Commission for Scotland and the Executive, that they will emphasise the importance of stewardship and governance in local government.

The Standards in Scotland's Schools etc Act 2000 puts a duty on education authorities to ensure that the education that they provide is directed at developing the fullest potential of the child or young person. Parents and others understandably want to see that duty fulfilled and are concerned when they see budget difficulties, especially on the scale that has been experienced in the Borders.

Local authorities have autonomy as to how they meet their obligations and how they manage their budgets, particularly in focusing on the needs of their local areas. It is therefore for the council to consider how it deals with the historic £3.9 million overspend and the potential for overspends in the future—also its responsibility—while maintaining the quality of the education service and fulfilling its statutory obligations.

There is no immediate role for ministers in the

council's financial difficulties beyond the specific issue of virement within the excellence fund, which Scottish Borders Council has raised with us. Responsibility for consideration or investigation of broader issues rests in the first instance with the council, its auditors, the controller of audit and the Accounts Commission for Scotland.

Nevertheless, the Executive has been concerned by the case and wishes to see the situation addressed appropriately as soon as possible. Diverting central grant to the Borders is not, however, an appropriate solution. The Executive cannot simply provide extra grant to local authorities when they overspend or mismanage their resources. Ministers have, however, taken a particular interest in the case by meeting the council to discuss its future plans.

The council has set out plans that show how it seeks to get back on track financially without compromising education quality. Although the Executive will monitor implementation of those plans, it is for Scottish Borders Council to rectify the situation without compromising its statutory obligations across the full range of its activities. Her Majesty's Inspectorate of Education will report on the functioning of the education service and if there are concerns following that inspection, which has not yet commenced, the council will be required to take further action.

We understand that the Accounts Commission for Scotland, which published a report on the budget deficit in the autumn of 2001, will also monitor closely the council's progress.

Those were my introductory comments. I am happy to take questions from members of the committee.

Jackie Baillie (Dumbarton) (Lab): Happy new year to you, deputy minister.

I have a number of questions to ask. I acknowledge entirely that local authorities rightly have autonomy in those issues and that the council has found itself in a position in which it has a £3.9 million deficit. Does the Executive have a view on the committee's interim recommendations, of which you will be aware?

Nicol Stephen: As I said in my opening remarks, we support the committee's conclusion in so far as it relates to the educational well-being of young people in the Borders. It is clearly vital to protect the quality of education; indeed, the issue was uppermost in our minds in our discussions on virement within the excellence fund. We sought and received reassurances from the council on that point, and I am sure that we will go into the subject in more detail later.

As an education minister, I want the quality of education within every council in Scotland to be

not only protected but improved. Furthermore, I want to ensure that the additional resources that we have made available to local councils for investment in our schools are delivered on the ground. That is my top priority.

As for the action plan, it would be beyond my remit—and wrong of me—to comment on the detailed line-by-line plan that was agreed by the council.

Jackie Baillie: My follow-up question concerns the Executive's additional resources for education. We have heard evidence that some of those resources were not finding their way into the appropriate pots. Although we do not want a huge discussion about ring fencing, I am interested in teasing out how the Executive monitors implementation of measures within education. You referred to HMIE and the Accounts Commission. The Accounts Commission will obviously examine the budget deficit, whereas HMIE has responsibility for the education service. Across what range of targets will they carry out their monitoring? Furthermore, will they monitor where money goes and how effectively it is spent? Once local authorities receive that money, what can the Executive do if it picks up concerns on the ground that are subsequently validated?

Nicol Stephen: I will ask Mike Ewart to supply some of the detail on that. However, I think that your question has two answers, the first of which relates to excellence fund moneys and the second of which relates to money that is given to councils through grant-aided expenditure.

On the first point, we pay very close attention to the spending of excellence fund moneys, which is why we had detailed discussions with Scottish Borders Council and, in order to ensure that educational interests were protected, sought its detailed assurances about the virement that it wanted. As for the other expenditure, a general allocation is made to local authorities. If we increase the funding that is available for schools—as we have done—there is no absolute guarantee that that money will be spent on education. As an education minister, I must ensure that that happens and that we examine the outputs and how the money that has been made available to councils is spent.

For example, we make certain that money for funding the McCrone agreement is spent on the purposes that we agreed with the teacher associations and the Convention of Scottish Local Authorities. However, there is no cast-iron guarantee that the money will be spent on education instead of on other public services for which local authorities are responsible. All I can say is that I am unaware that any authority—including Scottish Borders Council—is seeking to take money away from education. Over the next

few years, money should be available to increase investment in education in Scottish schools through the budget allocation that we have made for local government through GAE.

Mike Ewart (Scottish Executive Education Department): Without going too far into the detail of the specific grant and other arcana—as Jackie Baillie requested—I should point out that where we have provided additional resources over and above the allocations that have been made through the revenue support grant settlements in the form of specific grants, those grants usually contain specific requirements to report back to the Executive.

The example that the minister quoted—the excellence fund programmes—is a case in point. Alternatively, in some cases where additional money has been made available in year for payment directly to schools, there has been a requirement for authorities to publish locally what allocations they have made to schools and how the money has been used.

14:45

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): You will remember that last financial year there was a substantial pay-out of £400,000-odd to schools in the Borders. The schools then told us that the authorities clawed back money from them. Although on paper it could be said that the money had gone to schools, clawing it back made it feel as if no extra money had been paid. Am I right in thinking that when Mr McConnell was Minister for Education, Europe and External Affairs he attached conditions and asked for assurances about the money that was paid in this financial year, which amounted to £200,000-odd then another £200,000-odd and now, I think, another £417,000? Am I right in thinking that that money will not be diverted to pay for cuts in expenditure but will get to the schools where it is seen as a lifeline in the current circumstances?

Mike Ewart: That is entirely right. One of the conditions of the grants to which you have referred is that they should be additional to existing or planned expenditure.

Christine Grahame (South of Scotland) (SNP): That is correct. The director of finance of Scottish Borders Council signalled that that was the case. When £416,000 was allocated, within a month £350,000 had been cut from—as I understand it, in layman's terms—the planned expenditure for education in the Borders. That left a net total of £66,000. Do you accept that? What penalties can be incurred by a council, such as Scottish Borders Council, for doing just that? It seems to me to be a breach of the contract on funding with the Executive.

Mike Ewart: My understanding is that when the funds that were budget 2000 consequentials came through to schools and Scottish Borders Councils allocated those funds to individual schools, the council was also reclaiming staffing allowances that had already been made to the schools. The council dealt with those two sums of money at about the same time and, in some schools, within the same letter. That was perhaps not a great success in terms of presentation. The Executive was assured, however, that they were two separate exercises. We are convinced that the clawback of the staffing adjustments was a legitimate claim. It is unfortunate that it should have appeared as if the two sets of money were being offset against one another.

Christine Grahame: You were talking about the excellence fund and the virement of £525,000 that was made that included certain categories in education. One of the assurances was to do with early intervention. Supporting parents was also a category. The assurance that was given to the minister and the Executive was that the virement would not impact on children who have special educational needs. How are you monitoring that?

Mike Ewart: The transfers of money that were involved in the virement in the summer of last year did not include any virement out of the inclusion programme or the provision for special educational needs. Indeed, there was—as a result of the virement—an increase of £31,000 in the amount that was made available to the inclusion programme.

Christine Grahame: I am at a loss. I have in front of me proposed budget adjustments from the council. In the categories that make up the £525,000, classroom assistants, early intervention, support for teachers, supporting parents, inclusion and alternatives to exclusion are listed under spending.

Nicol Stephen: The figure that was given in Jack McConnell's written answer to Ian Jenkins was a total of £358,000 being transferred into the national grid for learning programme from resources that were, at that stage, uncommitted in the Scottish Borders Council budget. I wonder whether those figures tally with Christine Grahame's. The figures are as follows: £100,000 for early intervention; £10,000 for supporting parents; £198,000 for classroom assistants; and £50,000 for support for teachers. In his written answer, Mr McConnell refers to:

“Separately, £31,000 to be transferred from the Alternatives to Exclusion Programme into the Inclusion Programme.”—[*Official Report, Written Answers*, 14 September 2001; p 60.]

That is the additional money that was made available to special educational needs pupils. Is Christine Grahame talking about the same

figures?

The Deputy Convener: Will Christine Grahame provide the official report with a copy of her figures?

Christine Grahame: I have only brought some of them from my vast files.

The Deputy Convener: It would help if you could supply the official report with that information at the end of the meeting.

Christine Grahame: I will do so.

Ian Jenkins: The figure of £525,000 was an initial figure, but money relating to the autism unit did not feature in the final settlement, as the council withdrew its request for that money. The figure that Nicol Stephen gave was the final figure. Christine Grahame gave the initial, notional figure of £525,000.

Christine Grahame: We are moving away from the key point. Members may correct me if I am wrong, but the assurance was given that this crisis would not impact on children who have special educational needs. I would like to know whether the minister is satisfied that that is not happening at the moment. How will he monitor whether that remains the case?

Nicol Stephen: We are committed to continuing discussions with Scottish Borders Council. I have had a meeting with representatives of the council and Mike Ewart has had several meetings with them. We have a commitment in writing from Scottish Borders Council that it will ensure that the interests of children who have special educational needs are protected. If we received information that the council was failing in any way to meet its commitment, we would treat that extremely seriously and take appropriate steps.

Christine Grahame: Are you actively monitoring the situation, rather than waiting for someone to come to you with information?

Mike Ewart: The obvious source of information for us is the investigation by Her Majesty's Inspectorate of Education, which will take place later this year. We also have regular contact with the authority and the local inspectors, who themselves have regular contact with parents and schools in the area.

The Deputy Convener: Our time with the minister is limited and there are other issues that we would like to discuss with him.

Christine Grahame: I do not want to dominate the discussion.

The Deputy Convener: You referred to the investigation that will be carried out by HMIE. What is the likely time scale for that?

Mike Ewart: It will take place early this year.

Nicol Stephen: When an HMIE inspection of a local authority is to take place, a letter is sent to the council giving notice—normally, eight weeks' notice—of the commencement of the inspection. It is only proper that that letter should come from HMIE. However, Jack McConnell indicated that he was anxious that the inspection of the education department of Scottish Borders Council should proceed once the Accounts Commission had completed its report. That inspection has not yet taken place, but we expect it to happen soon. It will be under way in the early part of this year.

The Deputy Convener: What is the time scale for the inspection?

Nicol Stephen: If it is to take place in the early part of this year, it will have to be under way by spring.

Mr Brian Monteith (Mid Scotland and Fife) (Con): Has the council received the letter from HMIE yet?

Nicol Stephen: It has not.

Mr Monteith: So it will be at least eight weeks before the inspectors visit.

Nicol Stephen: That is correct. However, the inspection will take place early this year. It would be wrong for me to indicate today exactly when it will happen and thereby to change the normal protocol, but the inspection will take place soon.

Irene McGugan (North-East Scotland) (SNP): You said that there is no immediate role for ministers beyond the specific issue of virement. From the way in which you phrased that statement, I assume that you are not ruling out further involvement by ministers. Under what circumstances do you feel that it would be appropriate for you to intervene?

Nicol Stephen: Ministers would have powers under the Standards in Scotland's Schools etc Act 2000. If additional concerns were raised as a result of the inspectorate's report, our interest would be in ensuring that the recovery plan that the council agreed was implemented in such a way that it protects the quality of education that is provided to pupils in the Borders. We would be concerned that the plan should be carried out and managed with a high degree of quality; we would act speedily if the inspectorate made further concerns known to us.

Irene McGugan: I will ask more about the recovery plan. You have said that you and Mike Ewart have met Borders Council several times. Can you give us more details? Were those meetings at the invitation of Borders Council or were they initiated by the Executive? Was the intention specifically to talk about the council's

recovery plan? Did the Executive have an input to the plan? Are you broadly content with the proposals, and can you expand on the issues involved?

Nicol Stephen: It is important to emphasise that the meetings have been at the request of Borders Council in relation to the virement of the exclusion fund moneys; they did not take place as a result of a proposal to the council by the Executive. If there are budgetary problems, overspends and mismanagement in a council, the primary responsibility lies with that council; it is not for the minister to intervene. If we see that there are problems and believe that we can help—help was requested by the council in relation to the excellence fund—we will do that. If those problems are sufficiently serious we will take further action. That is what we have done in relation to the HMIE inspection. That is the appropriate route for ministers to take, rather than sending in officials from the department. It is appropriate that the inspection is carried out by HMIE, which brings objectivity to the situation. HMIE is respected by everyone who is involved in the education process. We look forward with interest to receiving its report when it is made available later this year.

Irene McGugan: I understand that. Have you seen the plan that Borders Council has accepted as a way forward?

Nicol Stephen: I have seen it—Andrew Tully spoke to it when he met me with his senior officials and he talked me through the detail of what they propose to do. He also raised some other, wider issues relating to the particular circumstances of Borders Council, and the situation of rural councils and other smaller councils in Scotland. He raised a range of devolved and reserved issues.

Ian Jenkins: Does the Executive recognise that there are budgetary problems in special educational needs? Most of what we are dealing with today has arisen from a lack of good financial monitoring and so on. However, in special educational needs—for reasons that we need not go into—there is an inherent difficulty in budgeting. Pupils carry heavy financial needs that can easily throw a budget off. Is the Executive prepared to consider such an issue, in respect of the provision and grant funding of education as a whole, and not just in relation to the Borders? Does the Executive recognise that a bit of flexibility and support is needed in that regard?

Nicol Stephen: We are considering that at the moment, in relation to the development of the national strategy for children with special educational needs. If any council wants to make representations on that issue, we would be happy to receive them. A variety of representations have already been made to me on that point.

Rural and smaller councils have emphasised strongly the impact on their budgets of a rise in the number of children with severe special educational needs, especially if a child requires to be sent to an independent special school. We will examine those issues throughout the early part of 2002 and we will publish a draft national strategy on special educational needs.

15:00

There is no easy solution to the problems. Urban councils have particular concerns about issues that impact on them. It is important to emphasise that any changes to a GAE allocation have to be agreed with COSLA. Currently, COSLA reaches agreement on a range of factors, some of which can be seen to be to the advantage of urban authorities and others of which can be seen to be the opposite. It is a difficult set of negotiations, but in general a sensible agreement is reached. Nevertheless, we are ever more conscious of the rising demand for services for children with special educational needs. That is not particular to Scottish Borders Council or to rural councils, but it clearly has a significant impact in such areas. We will keep that under review through the new national strategy.

Ian Jenkins: It is also a problem because of the smallness of the council. Such provision impacts disproportionately on a smaller budget.

Nicol Stephen: Absolutely. When I refer to rural councils, I should say rural and/or smaller councils.

Ian Jenkins: Rural councils have a particular problem with transport, in terms of the need both to transport the special educational needs youngsters—who might need to travel in individual vehicles—and to bus youngsters in general considerable distances around the country.

I know that Mr Tulley has spoken to you about a reserved matter in relation to taxation and the waiving of certain fuel duties for public transport, but not for school transport. Perhaps we can put it on record as something on which we might seek help from another place.

Christine Grahame: Can I ask another question, convener?

The Deputy Convener: I am conscious that other members want to ask questions, so this will have to be your final question, Christine.

Christine Grahame: I have a couple of questions. Thank you for being so tolerant, convener—I will reciprocate if you ever come to my committee.

The Deputy Convener: I will let you have one question and then decide about the second.

Christine Grahame: In that case I will hedge my bets and ask one question in two parts.

The minister talked about the additional resources for special educational needs wherever, because of the change in presumption of inclusion under the Standards in Scotland's Schools etc Act 2000. I want to ask you about money, minister. I do not think that you answered Jackie Baillie's question about the second part of our recommendation, that

"the Scottish Borders council should not claw back any of the £3.9 million taken from reserves from the Lifelong Learning Department budget in this or subsequent years."

Do you have a view on that? Will you tell us what it is?

In your opening statement, you said that it is not appropriate to divert central grant to Scottish Borders Council. In other words, you consider it inappropriate to bail a council out of a difficulty of its own making. Perhaps there is an alternative when a council—not just the Borders—gets itself into a real mess that has a serious impact on some area of its service delivery. Ministers should consider giving such councils borrowing powers under certain constraints, with low or no interest over a certain period. Would that be an appropriate idea to consider after the HMIE report has appeared? That report might show that special educational needs are being affected. How can the Executive deal with that without putting in more money?

Nicol Stephen: I would like Mary Newman to answer your second question. I am not seeking to provide an answer for all councils in all situations at all times. All MSPs agree that we would not be setting a good precedent if the Executive stepped in and provided additional funding because of mismanagement or the sort of reasons that we have heard about from Scottish Borders Council, and—

Christine Grahame: It would be borrowing, not a grant.

Nicol Stephen: I will ask Mary Newman to comment on borrowing and the other approaches that could be taken.

As to the committee's recommendation, as you rightly identified I was careful not to—

Christine Grahame: Not to answer?

Nicol Stephen: No—not to give a view. I do not think that I should give a view on the detail of the recovery programme, which is a matter for Scottish Borders Council and for the local electorate. All I can say as a minister is that I do not want the education of any child in Scotland to be prejudiced by cuts in a council's education budget. The Executive has made available

sufficient resources to allow councils to expand education funding. Indeed, the McCrone pay and conditions agreement represents a major investment in the education system. All 32 councils have access to the additional funding that the Executive has made available.

My priority is to secure high-quality education in Scotland and to ensure that the education system is improved. The scale of our investment will make that improvement possible—it is not just about investment, but investment is an important part of our work in education.

Mary Newman will talk about schemes to assist councils that are in difficulty.

Mary Newman (Scottish Executive Finance and Central Services Department): I am afraid that I cannot profess to be an expert on that subject. In a sense, the deputy minister is right, as it is for Scottish Borders Council to decide how to rebalance its budget, which the action plan that it has put to the Accounts Commission is designed to do. The Accounts Commission will monitor how well the authority rebalances its budget across the range of its activities and statutory obligations. The plan that the council put to the Accounts Commission involves a rebalancing of the budget from existing resources. Grant from the Executive is only one source of income for the council; it will make other borrowings and it will use its local tax-raising powers.

I am not aware of a precedent following which the Executive could get involved in a council's borrowings, apart from the Western Isles case of several years ago. I am not familiar with the grounds on which loans from the Public Works Loan Board were taken out, but I will find out and write to you.

Christine Grahame: That would be very helpful—that is the furthest that I have got with that question.

The Deputy Convener: I will not let you ask any more questions.

Nicol Stephen: We will provide that information to the committee.

The Deputy Convener: That would be helpful. We have had a fair blast on the Scottish Borders inquiry this afternoon. I thank the minister and the Executive officials for their contribution.

Land Reform (Scotland) Bill

The Deputy Convener: The next item on the agenda is the Land Reform (Scotland) Bill. We have been asked to take oral evidence on the bill from Lee Cousins, who is head of strategy at sportscotland, Peter Higgins, who is from Outdoor Learning Scotland, and Fran Potheary, who is from the Scottish Sports Association. I thank the witnesses for their patience during the earlier item. Members have received a Scottish Parliament information centre briefing paper and a written submission. We are not the lead committee, nor even the second committee on the bill, but it contains elements that cut across our remit on the sports development strategy in Scotland. That is the point for discussion this afternoon. After the witnesses' opening statements, we will proceed to questions.

Lee Cousins (sportscotland): Thank you for inviting us. The bill will have a substantial impact on sport in Scotland and it involves all the people in Scotland, not only those in rural areas; the right of access is for those who live in urban Scotland as well. The bill has tremendous implications for education.

We gave the committee a short paper, which I do not propose to go through. I will highlight areas that are of concern to us. We want to stress how pleased we are that the bill has come into existence. There is a strong need for it in Scotland, which is well understood and well explained in the SPICe briefing paper.

Our statement contains 10 issues of concern. We believe that public debate on them is required before the bill is finalised. We understand that access must be regulated, but if regulation—by byelaws or some other power—is to work, the people to whom the regulation applies must accept it. The more people are involved in the derivation of the regulations, the more effective they will be.

The first four concerns in the submission are about matters on which there is not a lot of opportunity for public consultation or community involvement. Two sections of the bill give the minister power to modify the bill's content dramatically by public order, which does not guarantee public discussion. The power to change the bill is necessary. For example, between the bill and the draft bill, a change was made to ensure that the use of metal detectors would not fall within the right of access. That positive change came about by discussion, but it is possible to make major changes by order without a lot of public discussion, which would be against the spirit of public consultation and consensus with which the bill has developed.

Another point is the need for clarification on the different approaches to the bill and the Scottish outdoor access code. The code, which defines responsible behaviour, can be changed readily. Small changes that are required should be kept to the bill and not done by ministers. We are concerned about that.

The bill gives local authorities the power to exempt land and conduct from the right of access. It is not clear why that power must exist. The equivalent section on byelaws states that they can be made for

"The preservation of order; ... the prevention of damage; ... the prevention of nuisance or danger"

and

"the preservation and improvement of amenity".

It is difficult to think why local authorities need extra powers to exempt land or conduct. If there is no guidance on exemption, different situations might pertain in different parts of the country.

One of the points of the bill was to achieve clarity and consistency that people would be comfortable with. It would be difficult if you found that people had to do in the Dollar area something different from what they had to do in the Dumfries area, and I am not sure that a visitor to the countryside would automatically understand why that should be.

Before you can make byelaws that pertain to inland water, you have to consult recreational users; to make byelaws that pertain to land, you do not have to consult recreational users. That is a weakness.

The powers for Scottish Natural Heritage are unfettered. No one is suggesting that SNH should not have some ability to protect flora and fauna, but it seems that it can take any steps that it considers appropriate. It does not have to consult anyone and there is no right of appeal to ministers, as there normally would be.

Those are some of the concerns about the amount of public consultation on, and involvement in, the powers in the bill. Fran Potheary will talk about the next area that we would like to highlight.

15:15

Fran Potheary (Scottish Sports Association): I am the access officer for the Scottish Canoe Association. Today, I am representing wider recreational interests as a member of the Scottish Sports Association.

My background is in youth and social work, working particularly with young people at risk. I moved into outdoor education and recreation and I have worked in a wide variety of environments such as colleges, community projects and outdoor

centres. I say that to let members understand that I am a practitioner. That will become clear when I talk about some of the issues.

The main thing that I would like to bring to the committee's attention is the fact that the Land Reform (Scotland) Bill specifically excludes

"business or other activity which is carried on commercially or for profit"

from the right of access. That is of great concern to members of the recreation and education community. It has the potential to jeopardise the livelihoods of people who depend on access to the countryside. The particular section I quoted from was not part of the draft bill and there has been little opportunity for full public debate on it.

I will outline a few of the problems that we foresee because of this exclusion. First, there is the issue of definition. As we indicated in the paper that members received at lunch time, there are many ways in which people deploy their professional skills in the countryside—as teachers, as leaders, as guides or as instructors of outdoor activities. They work for educational establishments, for community projects or for private businesses and trusts. Many people work for themselves as well.

It is important to acknowledge that even local authority education centres have a requirement these days to wash their faces financially. In reality, much outdoor education is provided through the private and commercial sector. As a result, the boundaries between education and commerce are blurred. How can the term "commercially or for profit" be workably defined when so many facets of educational and outdoor activity provision are underscored by commercial transactions?

The second problem that we foresee is the potential detriment to tourism in Scotland. When he introduced the bill in November 2001, the First Minister stated that it provided for local businesses and tourism. It is hard to see how that can be when so many businesses and individual operators would fall without the right of access. They would be affected by the whims of those who may simply want to prevent their access to the countryside. We believe that the right of access should be available to all. How that access is exercised should be subject to the Scottish outdoor activity code.

We refer to the Scottish outdoor activity code a lot. It contains an extensive section on how the right of access to the countryside should be exercised—particularly by those whose use of land or water is intensive, regular or high impact. For example, it is envisaged that the greater the impact of an activity, the greater the responsibility would be on the provider or the organiser to

consult the landowner. In practice, that principle is widely understood and implemented.

I have a letter that was forwarded to me. It is part of the evidence submitted to the Justice 2 Committee and it is from an affiliate member of Activity Scotland and of the Scottish Canoe Association. The author states:

"There is always a degree of negotiation involved with landowners in discussing planned use by companies such as our own. Any such negotiation can only be successful, just and fair for both parties if each is able to present its case from a position of inherent strength, either in law or precedent."

We believe that excluding those companies, their employees and other people who work in the outdoors would remove the level platform necessary for achieving that. If the provision in question goes through, there is a real chance that those who operate in commercial and educational concerns would be worse off under the new right than they are at present. That is one reason why there is such concern about the bill.

There are several practical difficulties. An example of a common activity that colleges or centres undertake is a multiday journey down the River Tay, from Loch Tay to the sea, which involves passing by the land and the banks of 110 riparian owners. Under the bill, it would be incumbent on the organiser or provider to contact each of those 110 people to establish permissions. That is one of the difficulties that would be thrown up.

It is likely that the conflict and challenge that would arise would be experienced at a grass-roots level—at the point of contact between the landowner and the user group. It would be a real mistake for the bill to introduce such potential for conflict when its avowed purpose is to improve dialogue and create better understanding and a more confident public attitude to access. Thank you for listening.

Peter Higgins (University of Edinburgh): Like Fran Potheary, I will introduce myself to give some background. My current responsibility is for outdoor and environmental education at the University of Edinburgh. Technically, I am here in that capacity rather than as a representative of Outdoor Learning Scotland—although I am a member of that body and of a number of other advisory bodies in Scotland, as well as European bodies in related fields.

I am an environmental scientist by training. I have spent a lot of time as a salmonid and freshwater ecologist, so I have considered access from a completely different perspective—the perspective of the fishery. After that, I trained as a teacher and an outdoor educator. I have spent much of my career in that field, working with children and adults as an instructor of canoeing,

mountaineering and various other activities.

As well as training people who work in the countryside as outdoor educators, I am involved in research on, for example, the socioeconomics of outdoor recreation, outdoor education and Highland sporting estates, which is another dimension to the work with which we are dealing.

Although I give a broad welcome to the bill and endorse the points that were made earlier, I have some concerns. The bill seems to be overly complex, which I suspect will lead to difficulties in interpretation in the long run—particularly in terms of public understanding—and might result in legal arguments. It was always intended that the bill would have a simple structure, with the detail being contained in the Scottish outdoor access code. Much detail that should be retained in the code seems to have crept into the bill. The advantage of that is that the detail can be changed and modified with consultation, as Lee Cousins described earlier.

The outdoor access code has recently been redrafted by Scottish Natural Heritage. Originally, the code was worked on for a number of years and produced by the access forum. After the initial consultation, the code was redrafted without the involvement of any other bodies. Certainly on the recreation side of the discussion, no consultation was undertaken. Indeed, the bill states that there is no explicit requirement for SNH to conduct any consultation with recreational interests in that process, and that causes me some concern for the future.

The organisation that produced the guidance for the draft bill was the national access forum, which comprised a wide range of land management and recreational interests. The forum had many meetings and spent many years producing that guidance, but little note seems to have been taken of that guidance during the drafting of the bill. That is a concern.

Nonetheless, we have a bill that has been through one consultation phase and that requires local authorities to set up local access forums. Those forums will be established without any national guidance or overview; it is for each local authority to decide on their structure and format. That leads to concern that there will be significant variation across the country in the ways in which the forums work. There is a role for a national access forum to consult ministers, SNH and other agencies that have a responsibility for changing the code in the long term. I argue for the re-establishment of the national access forum. Educational representation was notable in its absence from the access forum in the first place, despite points being made about that. If such a body is re-established, I urge that educational representation be included.

I would like to say something about education; after all, this is the Education, Culture and Sport Committee. To my mind, all access issues are people issues. In the end, access is about people and the ways in which they relate to one other and to the countryside. The bill charges SNH with promoting compliance with the access code. That does not strike me as being very educational. From my understanding of educational processes, promoting compliance is not the most effective way of getting people to behave in the way that you want them to behave. That is the only mention in the bill of anything associated with education. The bill misunderstands the ways in which people learn and misses a significant educational opportunity. The irony of excluding commercial groups is that if they involve educational provision, they are the very bodies that would help people to understand their rights and responsibilities in the countryside.

We have to consider understanding and awareness as the key themes of education in the countryside. That is about getting people such as teachers, instructors and those from the voluntary sector in the right place—the countryside—with the people they are working with, to participate in the right activities in an educational context. In that way, people can understand how the countryside works, the ways in which recreation is taken in the countryside and the ways in which others make their living from the countryside.

The central theme of taking responsibility for one's actions as a visitor or a land manager in the countryside requires far more than public information campaigns. It is an aspect of citizenship. It requires learning and mentoring in that landscape, which is best effected through school visits with a teacher or during residential courses at outdoor education centres, where opportunities to encourage understanding of the natural and cultural heritage can be maximised. Such provision has been a long-standing feature of Scottish education, but it has been in decline in recent years for a number of reasons. The formal and informal education sectors can play a key role in increasing public understanding of the issues, but that can only be done through proper recognition of the importance of such education.

Access to the countryside is about education, culture and sport—it is about physical engagement in that landscape. We are due to make representations on the future progress of the bill, because that concerns this committee.

The Deputy Convener: I will start the questioning, but I am sure that other members want to ask questions. Fran Potthecary mentioned the definition of commercial activity and the problems that may emerge as a result. That definition was not originally included in the bill.

Where did the change come from?

Fran Potthecary: The issue of groups and commercial activity was debated in the access forum, but was not included in the draft bill. The access forum felt that the issue of group access would be best dealt with in the Scottish outdoor access code. We assume that the Executive decided to define commercial activity in the bill because of lobbying during the consultation period. We imagine that that lobbying was done by land managers and land users who are concerned about what they believe to be exploitation of their land or water.

The Deputy Convener: That was helpful.

15:30

Ian Jenkins: I have a follow-up question. Is it your impression that the provision has been introduced into the bill not to catch education people and people who are doing existing activities, but to stop big commercialisation? Could the issue be dealt with by negotiation before it goes beyond the pale into the area of legal rights and suchlike? Your example was good, because no one sensible would expect folk to contact 105 or so landowners. However, the idea behind the bill is to prevent large-scale commercial activities that might trample on other people's businesses. Can the issue be negotiated or do you want that provision scrapped altogether?

Fran Potthecary: I have drawn attention to the fact that there are many practical difficulties involved in trying to define commercial activity. The access forum discussed the issues extensively. The broad opinion—with which we agree—is that such issues would best be dealt with through the Scottish outdoor access code. I do not have a copy of the code on me, but different paragraphs refer to different types of groups, from the small-scale informal group right up to the mass event. We believe that such details should be removed from the bill.

Ian Jenkins: Those definitions, however, are worth working at to get them right, because, as you recognise, there is a threat from over-commercialisation.

Fran Potthecary: A lot of time could be spent further defining commercialism and business. The issue of small-scale, local problems would have to be taken into account. For example, the issue of the use of land by riding schools came up in the access forum. The fact that the bill's definition could affect such a large number of people needs to be carefully considered when deciding whether it is possible to come up with a workable definition that would not jeopardise people's livelihoods and the future economic basis of tourism and education in Scotland.

Mr Monteith: I want to pick up on the same issue. Your example was that a group that was canoeing down, say, the River Tay might in future have to consult more than 100 riparian owners. What are the current arrangements for such an exploit or adventure trip?

Fran Potthecary: Current access in Scotland is based on a long-standing tradition or custom of access to the outdoors, whether land or water. There is little law involved in arrangements of access to the countryside, other than that which involves securing access orders through local authorities. Such law is based on an understanding that access is used responsibly and that no damage or disturbance is caused to a land manager's activity. A raft of other legislation can be used to regulate and monitor people's behaviour when that behaviour strays into irresponsibility, from littering to vandalism. A landowner can also take out an interdict against someone who persistently causes problems or whom he or she wants not to return to the land.

Mr Monteith: I presume that, if a group of people is currently exercising its right of access to the River Tay, it does not have to contact more than 100 riparian owners. What process do such groups have to go through? Do they have to get clearance? You talked about negotiation being common and the existence of informal arrangements.

Fran Potthecary: There is no formal or legal requirement on anyone who is undertaking a multiday trip on the Tay or any other river or land to consult a landowner or land manager. The example that I gave comes from a company that uses various sections of river or coast regularly. As the company points out, it already undertakes extensive consultation. It is not in its interests to be denied access—it does not want access problems to arise when people are out on the trips. Therefore, although there is no formal or legal requirement on the company to seek such permission, it does so to establish good practice, good understanding and good countryside relationships.

Mr Monteith: That is an interesting answer, as it backs up a great deal of what I have heard. Many such arrangements exist between people who access the land and those who own or manage it. There is concern on both sides, as those who want access to the land and those who manage it feel that the bill could cause difficulties for both groups.

As I said, informal, negotiated arrangements already exist. There may be an exchange of money, but I am not particularly interested in that. However, if the bill does not contain the provision on commercial activity that you want it to contain, people may have access as of right and their

ability to negotiate will be taken away. Early in your paper, you comment on the need for increased resources for local authorities for the management of access, for example. I understand why landowners and land managers might be concerned that, if there is an increase in access, there may be an increase in cost to them and that, without the ability to have any leverage—to enter into negotiations—all that they will get will be that greater cost. Their fears and concerns are being ignored. I do not see an obvious solution to the problem, but I am trying to explore what is at the root of the provision. I suspect that its purpose is to put on a fundamental legal basis the informal relationship that currently exists. Including the provision in the bill may be a clumsy route to achieving that, but I suspect that that is its intention.

Fran Potheary: The access forum's intention was that the bill should codify the current arrangements. We believe that the provision would make the position worse for commercial educational operators. If someone is excluded from a right of access at the first hurdle, they have no way of moving forward from that position. If they have a right of access but the issue concerns the way in which that right is exercised and the impact that it has, they will be on a much stronger footing. That is why we are trying to move away from the definite exclusion, with all the definitional and practical problems that that would present, to a provision that considers not who has the right, but how that right is exercised.

Mr Monteith: If your example were taken literally, someone could enter into negotiations with 115 owners but find that one owner did not agree to any use at all. Essentially, they might have to get out of the water, go down the road and get back in again. That is the absurd situation that could occur.

Fran Potheary: That is true. We would wish to avoid that. A small-scale, low-impact activity that was planned could be refused permission on the basis that it was commercial or a commercial educational transaction. That is one big risk of leaving the provision in the bill.

The Deputy Convener: Irene McGugan wanted to speak—was it about a similar issue?

Irene McGugan: No.

Lee Cousins: Mr Monteith mentioned the requirement for local authority resources. Much of that concerns where the major part of the access provisions will impact, which is on simple trips such as walking and cycling trips from in and around towns, and on countryside activities.

It is important that paths are considered a way of managing access. Paths that ease the way and make it easier for people to enjoy the countryside

will be willingly used. Creating paths will require the resources that we are talking about. That reflects the point that Mr Monteith made: the creation of a path can be held up easily if there are 114 agreements and one non-agreement. The prospect of any new path is sunk at that point. People often desire to have circular walks.

Irene McGugan: Lee Cousins spoke about the potential for changes—perhaps radical changes—to be made without the process of community involvement being safeguarded. How seriously concerned are sporting and recreational users that changes might be made without consultation to safeguard all interests? How would you like the bill to be amended to accommodate such concerns better?

Lee Cousins: The seriousness comes from the potential for changes—if I can describe it that way—in as much as the minister can make quite radical changes. For instance, it would be in the minister's power to modify the right to apply only in daytime. As I understand it, he would do that with an order, which would go to a committee that had the right to veto it but could not have a great discussion about why the order was introduced or whether it was appropriate. No forum for such discussion seems to exist.

We are not saying that, as use of the bill evolves, no changes will be needed for conflict resolution and the easiness that we seek, but how will public debate be stimulated? I do not think that laying an order ensures debate, because as I understand it—I could be wrong about the procedure—a committee cannot debate an order; it can only accept or reject it.

It is not suggested that a proposed change might be presented to a national access forum, such as that to which Peter Higgins referred, for debate and consensus-building about whether it is required. There is no obvious way of consulting all the local access forums to find out whether a problem is real and countrywide, rather than a particular problem that someone has raised directly with the minister. The potential for misuse is quite high.

Recreational users should feel that they have been a part of the discussion through their representatives, as they have been through the access forum. The access forum involved a number of individuals, but we all went back to our constituencies and discussed whether we were doing the right thing. We built up an understanding of where we were trying to go, and therefore an understanding that when we got into the practical implementation of the access right it was most likely to work.

Jackie Baillie: I have a couple of questions. I thank you for your presentation, which I found

enormously helpful. I am sure that some of my colleagues agree that ministers are not in the habit of regularly abusing their powers.

Lee Cousins: I spoke about potential abuse.

15:45

Jackie Baillie: I listened extremely carefully. I am new to committee procedure, but I understand that although orders cannot be amended in a committee, they can certainly be discussed and debated—members of the public therefore have an opportunity to make their views known. I hope that there is a debate on the consensus around issues before orders are laid—that seems to be standard practice in the Executive. However, I understand your point.

There is a related issue. You seem to be keen on a national access forum. I think that I know why, but how would it play a different role in co-ordinating local access forums from that which SNH or another body that is already in existence might play?

Lee Cousins: The strength of the access forum derives from the fact that it has three parts—Peter Higgins said that it should probably have had a fourth part. It is a combination of recreational users, land users and managers and the statutory agencies. As Peter Higgins said, it should probably have included outdoor education representatives too. The forum debates and tries to achieve consensus. That is what gives it its strength. Not just one body or view is asked to lead a process: a joint process evolves and educates itself as it goes along. That gives strength to the forum.

A national access forum's ability to link the local access forums is the other reason why there is a need for it—Peter Higgins implied that. We want to ensure that it is possible for a visitor to Scotland or a visitor who is resident in Scotland to go to the countryside with a certain amount of confidence. We tend to vary our pattern of trips across Scotland. Whether we go out in Angus, Fife or the Highlands, if there is no consistency there is a potential to create more confusion through the bill. There is a role for co-ordination and informing. A level playing field should be aimed for—if that is the right expression.

Jackie Baillie: You spoke about consistency in respect of local authorities' powers and your submission lists local authorities' powers as an area of concern. You have two concerns—a duplication of powers and consistency. Surely there could be guidance. Would that satisfy your concern? You propose that the national access forum should provide guidance and consistency, but guidance might solve your concern.

Lee Cousins: Local authority power is so undefined that an authority could decide to take an activity out in one place, but not in another. It could be decided that an activity can take place only during daylight hours in one place, but time for it could be extended elsewhere. It is not clear to me why that power is needed at all—the bill would work if it were removed. I accept that I might not have thought of situations in which a local authority might need such a power. For instance, I suppose that if the City of Edinburgh Council granted a licence for a circus on the Meadows, it might want to take away the right to walk freely through the area of the Meadows that was handled by the circus for 10 days. However, I do not understand why the bill cannot contain reasons why the local authority can do that.

Jackie Baillie: Let me come back to you on that point. Throughout our consideration, we have struggled with what goes into the bill and what goes into guidance. That difficulty has come through in every point that you have made. As far as commercialisation is concerned, on the one hand you are arguing that something complex, particularly in its definition, should be included in guidance—the Scottish outdoor access code is available for that purpose—but on the other you are arguing that we should pile more detail into the bill.

It might be useful, given that many of these issues are complex and that there are many exemptions and exceptions, for much of this to be dealt with in guidance rather than defined in the bill. Some of your concerns, if they are met through the guidance, would then be taken care of. Do you agree with that?

Lee Cousins: The short answer is yes.

Jackie Baillie: I like short answers.

The Deputy Convener: To long questions.

Jackie Baillie: Sorry, Frank: it takes a while, but that is me finished.

Peter Higgins: I would like to amplify that reply, if I may. The thing that we would like to be included in the bill would facilitate good use of the code, so we would be able to see how the code could be changed in the future. It is a complex issue and the populace is not used to engaging in it, unlike in other countries in Europe, where freedoms of access have been established and enshrined for years and where everybody knows where they can go and where they cannot go and what they can do and what they cannot do.

We should always bear in mind that the bill was originally intended to enshrine a customary understanding of what access is and how it could be enjoyed. The question seems to have become overly complex already. Because of the

educational and public guidance aspects of the bill, there will be a period of many years when there will be discussion and debate during which parameters will undoubtedly change.

I envisage the access forums having a real job on their hands. For a start, getting 20-odd people into a room for a discussion, taking into account all the vested interests in given areas, will be logistically complex. If we multiply that across the country, it is clear that the forums will need some guidance. We need always to remember that the bill was initially intended to establish a customary right of access.

When a tourist arrives in this country from anywhere else in the world, I would like them to be able to go up to an information desk and pick up a leaflet, as they can in Norway and Sweden—I have an example with me—that simply tells them that they can go out and enjoy the countryside. The people of this nation should understand that they can enjoy the countryside. In that way, they will understand the natural and cultural heritage and we will thereby end up with a better educated populace with a broader understanding of a range of environmental, social and cultural issues. That would also enhance the health of the rural economy, which could well do with it, particularly following the foot-and-mouth disease outbreak.

The Deputy Convener: I was going to try and end on a positive note, but I am aware that Brian Monteith wants to ask a question.

Mr Monteith: Such impartiality, convener. [*Laughter.*] I wanted to pick up on your last point, Mr Higgins, about the rural community and helping the rural economy. I notice that your paper, under the paragraph headed “Bill welcomed”, points out that the access forum said that

“a tripartite basis of legislation, education and an increase of resources to local authorities for the management of Access”

would be needed. I am not saying that any of you can speak for the access forum per se, although I understand that you may be individual members.

It strikes me that landowners or land managers will be concerned about the cost of managing access. They will be concerned, for example, about erosion and about providing better information in the form of improved signage to guide people to the paths that we have mentioned. Not all of that will be the task of local authorities. Was anything said about compensation or financial support for bodies that are not local authorities, to help them work in the tripartite manner described in your paper—increasing resources alongside education and legislation?

Lee Cousins: I do not think that it was expected that landowners and managers would have to make a great investment in the management of

access. It was always expected that the voluntary bodies would be involved. A number of existing access forums and trusts exist and they raise money from all sorts of funding sources to help with signposting and footpath repair.

I think that it was always clearly understood that local authorities would have a particular role in how the access forums made progress. That would ease the difficulties to do with consultation, with legislation and with sometimes going to court to create paths. That has been a difficult and costly process and it has been heavy on staff time, but pressure would be eased by the fact that a right of access would encourage landowners to manage that access and to create paths. Most of the resource implications are to do with paths, although some are to do with signposting. As I have said, most of the paths in the countryside are around towns.

The land-owning interests on the access forums were always very strong, but it was always known that investment by local authorities would be required to manage the process.

The Deputy Convener: We seem to have exhausted our questions so I thank the witnesses for their time this afternoon.

Mr Monteith: Convener, will you be seeking additional suggestions of people from whom we might take evidence?

Martin Verity (Clerk): There is no more time for oral evidence to this committee, but people can still submit written evidence.

Mr Monteith: I am thinking about the recreational and sporting aspects of the bill. Would it be possible to ask that the Justice 2 Committee take more oral evidence? I could sit in on any such meeting.

Martin Verity: Yes, that could be done.

Mr Monteith: I can think of a number of sporting organisations that may want to give evidence.

The Deputy Convener: If you want to make suggestions to Martin Verity, he will pass them to the clerk of the Justice 2 Committee.

Education (Disability Strategies and Pupils' Records) (Scotland) Bill

The Deputy Convener: The next agenda item is consideration of the timetable for the Education (Disability Strategies and Pupils' Records) (Scotland) Bill.

Mr Monteith: Are we in private session?

The Deputy Convener: No.

Mr Monteith: It is just that we have been deserted.

The Deputy Convener: The paper that we have in front of us invites us to agree on the witnesses we want to invite to give oral evidence to the committee on 22 January. A number of suggestions have been put to us, and Irene McGugan has identified a number of organisations from which we may want to hear. We have reduced the list to four: the Minister for Education and Young People, the Disability Rights Commission, Children in Scotland, and the Convention of Scottish Local Authorities. We would invite them to give oral evidence. Other organisations could be invited to submit written evidence.

Mr Monteith: I may not have heard correctly, but were any teachers' unions mentioned? Was the Educational Institute of Scotland mentioned?

The Deputy Convener: The list that the Scottish Parliament information centre drew up—of people from whom written evidence, and perhaps oral evidence, should be sought—included the National Association of Head Teachers, but not the EIS.

Mr Monteith: I am not fussed about getting oral evidence from the EIS, unless it makes a request to give oral evidence, but the main teachers' unions should all be invited to submit written evidence.

The Deputy Convener: Members should liaise with Martin Verity on organisations that they feel should be invited to submit written evidence.

Do members agree with the suggestions made?

Members *indicated agreement.*

Scottish Affairs Committee Inquiry (Devolution and Broadcasting)

The Deputy Convener: The next agenda item concerns the Scottish Affairs Committee inquiry into devolution and broadcasting. The committee is due in Glasgow on 4 February and it is looking for a representation from members of the Education, Culture and Sport Committee. I suggest that the convener and a representative from each of the four political parties attend.

Members *indicated agreement.*

The Deputy Convener: That is everything—except that I would like members to stay for a couple of minutes to discuss the response that we have received from Mr Christie on the Borders inquiry. The convener and I have received an e-mail, which I mentioned this morning to Jackie Baillie. Are we in private session?

Martin Verity: No. We are still in public session.

The Deputy Convener: In that case, we will formally move into private session.

16:00

Meeting continued in private until 16:08.

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