EDUCATION, CULTURE AND SPORT COMMITTEE

Tuesday 22 January 2002
(*Afternoon*)

Session 1

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EDUCATION, CULTURE AND SPORT COMMITTEE
3rd 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:

Mr Gil Paterson (Central Scotland) (SNP)

WITNESSES

Maggi Allan (South Lanarkshire Council)
Sam Baker (Scottish Executive Education Department)
Heather Fiskin (Disability Rights Commission)
Adam Gaines (Disability Rights Commission)
Susan Grant (Children in Scotland)
Kate Higgins (Capability Scotland)
Sandra Kerley (Capability Scotland)
Councillor Helen Law (Convention of Scottish Local Authorities)
Boyd McAdam (Scottish Executive Education Department)
Linda Sneddon (Office of the Solicitor to the Scottish Executive)
Nicol Stephen (Deputy Minister for Education and Young People)
Kay Tisdall (Children in Scotland)
Neil Todd (Children in Scotland)
Lynn Townsend (West Dunbartonshire Council)
Martin Vallely (Children in Scotland)
Lindsey Wright (Scottish Executive Education Department)

CLERK TO THE COMMITTEE

Martin Verity

SENIOR ASSISTANT CLERK

Susan Duffy

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 3

Scottish Parliament

Education, Culture and Sport Committee

Tuesday 22 January 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:32*]

Item in Private

The Convener (Karen Gillon): Do members agree that we should go into private session to discuss agenda item 2?

Members *indicated agreement.*

13:32

Meeting continued in private.

14:36

Meeting continued in public.

The Convener: We are now back in public session. Will members please ensure that all mobile telephones and pagers are switched off or are in silent mode?

Education (Disability Strategies and Pupils' Records) (Scotland) Bill: Stage 1

The Convener: This afternoon we are taking stage 1 evidence on the general principles of the Education (Disability Strategies and Pupils' Records) (Scotland) Bill. I welcome Nicol Stephen, who is the Deputy Minister for Education and Young People, and officials from the Scottish Executive. Before we move to questions, minister, would you like to make any introductory remarks?

The Deputy Minister for Education and Young People (Nicol Stephen): Yes, thank you, convener. First, I will introduce my team of officials. Sam Baker is responsible for the overall co-ordination of the bill in the Executive. Sam works in the special educational needs unit of the education department. She has a particular interest in the detail of the disability strategies element of the bill. Lindsey Wright is responsible for the access to the pupils' records element of the bill. She works in the teachers and schools division of the education department. Shirley Ferguson works in the office of the solicitor of the Scottish Executive and has special responsibility for the bill.

The two elements of the bill—the disability strategies and the pupils' records—are not related. In my opening remarks, I will pay more attention to the first element. The second element, on pupils' records, is intended to sort out what legal draftsmen like to call an "unintended effect" of a previous piece of legislation—the Data Protection Act 1998. That act removed a right from parents that no one, I think, wanted to be removed.

It is estimated that around 800,000 adults in Scotland have a disability. Many become disabled during their adult life but many others will have had a disability since birth or since a young age. The bill will be important in helping to ensure that everyone in Scotland gets the best possible start in life and can go on to make a significant contribution to our society.

Section 2 of the Standards in Scotland's Schools etc Act 2000 requires education authorities

"to secure that the education is directed to the development of the personality, talents and mental and physical abilities of the child … to their fullest potential."

The bill is needed to help education providers to deliver that requirement for children with disabilities. Although many examples of good practice exist throughout Scotland, in many areas a lot of work still has to be done.

The inclusion of pupils with disabilities will not happen simply by moving children from special to

mainstream schools. We will need plans to remove barriers to participation in schools and nursery schools across Scotland to ensure that pupils can benefit from mainstream education. The bill will support the new duties not to discriminate against pupils on the ground of a disability. Those duties will come into force across Great Britain in September this year; they will make it unlawful for schools or education authorities to discriminate against any child. The Disability Strategies and Pupils' Records (Scotland) Bill will complement and support those duties.

The bill will require responsible bodies to take positive action, rather than simply not to discriminate. That positive action must involve proactively planning for the future of all pupils with disabilities in all the education establishments for which the bodies are responsible.

Accessibility strategies will consider accessibility in the broadest sense—I especially want to emphasise that point. Physical access to buildings will, of course, be an important part of accessibility strategies, but access to the curriculum and to information are equally important—some would say more important. Being able to get around a building is not, on its own, enough. Children should be involved in lessons and should be able to learn in ways that are suitable for them.

Some people seem to view the bill, and accessibility strategies, as being about physical disabilities only. That is not the case. The strategies include all pupils with all kinds of disabilities. Education providers must plan for pupils with problems such as dyslexia or autistic spectrum disorder. With the right support, those children should be able to get far more from their education than is sometimes the case at present.

Other disabilities are often not considered in planning. For example, children with severe disfigurements may not need physical adaptations or learning support, but they will need support and understanding from teachers, staff, pupils and others so that they can be happy in their school and can access their education fully.

Improvements in attitudes as well as in facilities are already being made. The curriculum is becoming increasingly accessible through work that is being carried out at a number of levels—in schools and in pre-school education, in local authorities, in voluntary organisations, in the Scottish Qualifications Authority, in Learning and Teaching Scotland, and, indeed, in the Executive.

The bill is not starting something new; it is not starting from zero. However, it will ensure, from now on, far greater progress and consistently high standards of accessibility across Scotland.

I will comment briefly on the pupils' records element of the bill. Through the bill, the Executive wants to take the opportunity to create the necessary powers to enable us to reinstate an independent right for parents in Scotland to access their children's school records. Parents were given that independent right back in 1990, but it was unintentionally removed when the Data Protection Act 1998 extended data protection legislation to manual as well as to electronic files. The bill intends to sort out that problem.

I will stop there. I am happy to answer questions.

The Convener: Thank you, minister. Before we move to questions, I welcome Gil Paterson, who is here as a reporter on behalf of the Equal Opportunities Committee. You are very welcome, Gil, and I hope that you will be able to participate in our discussions.

Mr Frank McAveety (Glasgow Shettleston) (Lab): A number of submissions to the committee have raised the issue of the format of information, and we will take further evidence on that issue. At least two or three submissions have mentioned references to information being in writing only. Is there a willingness to reconsider the matter to see whether we can find other accessible formats to suit people's needs?

Nicol Stephen: The answer to that question is yes. It is important that the bill specifies that the information is to be provided in a written format. That does not exclude making information available in the other ways that we would expect from a bill that deals with individuals with disabilities. The only issue is whether those other ways should be defined in the bill or whether that can be achieved through regulation or guidance. Perhaps Sam Baker will say something about that.

Sam Baker (Scottish Executive Education Department): We plan that the guidance will state that, although strategies should be prepared in writing, they should be made available in alternative formats as necessary. We felt that to stipulate such a requirement in the bill would be too complex, as the exact formats in which the information had to be made available would then have to be defined.

14:45

Mr McAveety: Forgive my ignorance, but how would that make the bill more complex?

Sam Baker: The bill would be made more complex because it would need to include a long list of the different formats and languages in which the strategy should be provided.

Mr McAveety: Could a qualifying phrase such as "where appropriate" be included so that the bill would not need to go into the specifics? Would that be possible?

Sam Baker: That would be possible, but it might lead to misinterpretation about what the responsible body considered appropriate.

Mr McAveety: Have there been examples of other bills in which such a presumed lack of precision has led to folk challenging the provision?

Nicol Stephen: No one is suggesting that the strategy should not be set down in writing in the first instance. Everyone is agreed on that. We all want to ensure that the strategies are accessible to those such as the blind who would be unable to read the strategy. The issue concerns what extra work would need to be done.

I am happy to take further advice on the issue and to give assurances to the committee or the Parliament about what the regulations or guidance will specify. Alternatively, we might find a way in which some appropriate reference to other formats can be made on the face of the bill. However, as I sit here at the moment, I do not know whether any precedent has been set in other acts of Parliament of either the Westminster Parliament or the Scottish Parliament. I am sure that Shirley Ferguson will be able to assist us on that. We will report back.

The Convener: That would be helpful, as a number of agencies have raised the issue with us. When we are out discussing things with people, the lack of materials in the appropriate accessible format is becoming an issue. It would be helpful to move that debate forward with a bill of this nature. The bill could then become a template for moving the debate forward in other areas. It would be helpful if the minister could come back to the committee before stage 2, when we might want to consider that issue further.

Nicol Stephen: I will come back to the committee prior to stage 2. Obviously, we can discuss the issue at stage 2, if necessary.

The Convener: Given our record with bills, I am sure that the minister will want to come back to us sooner rather than later.

Gil Paterson has some questions.

Mr Gil Paterson (Central Scotland) (SNP): I thank the convener for welcoming me to the committee.

I have a couple of questions about the guidance. The intention appears to be that much of the meat of the provisions will be covered by the guidance. I understand that, before issuing the guidance, the Executive intends to consult widely on it—more widely than it did on the draft bill. Will the Parliament be able to scrutinise the guidance to assess its suitability before it is issued?

Nicol Stephen: If the committee or the Parliament wishes to see the guidance, we will provide it at whatever stage members want. In the past, we have made regulations or guidance available at a draft stage, where that was helpful, or when the guidance or regulations were formally issued. I am happy to work with the committee and offer whatever most appropriately ties in with the committee's scrutiny and timetabling requirements.

The Convener: It might be useful for us to see the draft guidance, so that we can feed into the process. We would do that whenever it was appropriate. I am sure that we can make time available on our agenda to consider the issue. We could also invite a representative of the Equal Opportunities Committee to consider the guidance with us.

Nicol Stephen: I am told that the guidance will be ready at stage 2. If so, that will be useful.

Mr Paterson: I thank the minister for that. What powers will be available to deal with responsible bodies that do not comply with the guidance?

Sam Baker: At the moment, we are exploring with Her Majesty's Inspectorate of Education the powers that it has when it carries out inspections of schools and education authorities and whether it could also examine the implementation of accessibility strategies. We are still considering the level of detail that the inspectors should go into. The accessibility strategies will be linked to the quality indicators, which already refer to how well a school is implementing legislation on special educational needs and disability.

There is also the possibility that people may be able to complain directly to the Executive, which could investigate any concerns that were highlighted. Alternatively, if someone had a serious concern about the accessibility strategy of an authority or a school, they could initiate an appeal under section 70 of the Education (Scotland) Act 1980.

Mr Paterson: Are you saying that bodies that do not comply will be dealt with by the powers that would be attached to section 70 of the 1980 act?

Nicol Stephen: Those powers already exist.

Sam Baker: We envisage that, as most appeals for individual children would be cases of discrimination, they would be brought under the new draft code of practice for Great Britain, which will be published fairly soon. Such appeals would therefore go to the sheriff court.

Nicol Stephen: In effect, those appeals would be made under a piece of UK legislation.

Jackie Baillie (Dumbarton) (Lab): Let me start by welcoming the bill. I also welcome the fact that the minister said that the bill is about more than simply providing physical access and that it is

about providing access to the curriculum as well.

I want to ask about the curriculum and about activities that take place outwith the curriculum. The written evidence of several organisations, including Capability Scotland, suggests that the bill should cover extra-curricular activities that are organised by the school both within and outwith the school premises. Clarity on that point would be useful.

Others want to know whether the accessibility strategy will cover auxiliary services such as loop systems and interpreters. Are such things within or outwith the bill's scope?

Nicol Stephen: On the first point, activities that take place outside a school but are managed or organised by the school fall within the scope of the bill.

In keeping with what I said in my introductory remarks, things such as loop systems and interpreters should be included in the consideration that a school gives to its accessibility strategy. That is not to say that every school must have all the facilities that might be thought of; schools should plan for appropriate access, which means access that is appropriate to the needs of the pupils in the school.

Physical access is a good example. Some schools might not be able to provide the sort of access that we might wish. Such schools might find it extremely difficult to provide access to part or all of the school. As long as that was planned for, the school would not necessarily be in breach of the legislation, provided that it had a sensible strategy to meet its pupils' needs. The same principle applies to the provision of interpreters and loop systems, for example. Sam Baker will confirm whether that is a reasonable explanation.

Sam Baker: The minister is correct. You must remember that the bill will operate not on its own, but in the context of the Disability Discrimination Act 1995 and the existing SEN framework, part of which is being reviewed.

Services are normally provided through the SEN framework, but it is clear that they would also need to be considered as part of an accessibility strategy. Auxiliary aides would need to be considered as part of such a strategy because improving access to the curriculum for children with particular disabilities implies the need for auxiliary aides.

Nicol Stephen: Is that information helpful?

Jackie Baillie: Yes. I was under the impression that such provision was subject to resources. That was not explicit in what you said, minister, but I took it as implicit.

Nicol Stephen: Resources are being made available in 2003-04 to help local authorities to implement their accessibility strategies. The intention is that, when the bill receives royal assent, local authorities will spend their time preparing their strategies, which they will implement from 2003-04 onwards. Included in the grant-aided settlements for that year is £9 million to enable local authorities to implement those strategies.

I am conscious that the bill applies not only to local authorities, but to all schools in Scotland. At times there will still be difficult resource questions. It would be wrong to hide from that fact. There will be a need to balance resources to ensure that they are used most effectively to achieve the bill's maximum impact and that money is used widely to move forward all aspects of the bill. It would be wrong to think of the money being available only for physical adaptations. It is important that money is available for other aspects. There should be investment not only in access to the curriculum, interpreters and loop systems, for example, but in those issues that are sometimes forgotten, such as making education accessible to people with such problems as dyslexia or autism.

Jackie Baillie: My final point relates to the bill's impact. Section 3(5) places a requirement on local authorities or schools to provide information about accessibility strategies when requested. Have you rejected the possibility of those authorities actively promoting that information? If you want to ensure equality of opportunity, publishing that information in some form and ensuring that every parent has it might be a useful mechanism for promoting awareness. I wonder whether your intention is to be proactive or simply to respond to requests.

Nicol Stephen: The intention is to be proactive. However, our concern was that, if the information was to be published as part of a school report, for example, the length and perhaps the complexity of the strategy document—we want schools and education authorities to go into some detail—would be prohibitive.

I am happy to consider the notion of individual schools and responsible bodies indicating in some way to parents that an accessibility strategy exists or giving parents a summary of the strategy, rather than a full copy of the strategy document, as appropriate. Again, I could consider for stage 2 how we ensure that that information gets to not only teachers, but parents and others—including carers, health services and social workers—who have an interest in the issues and might be involved in the process.

The Convener: That is important, as we do not want the exercise to be meaningless. People should feel involved and should feel that we have responded to their needs and aspirations.

Nicol Stephen: That is a good point. Before stage 2, we will try to provide information to help the committee in its considerations.

The Convener: That would be helpful.

15:00

Irene McGugan (North-East Scotland) (SNP): The minister will be aware that, although many local authorities welcome the general principles of the bill, they are concerned about its financial implications. I would like to ask about pre-school provision outwith school premises, which is a very welcome part of the bill. Local authorities would appreciate some clarity about their responsibilities in respect of their partnerships with private and voluntary sector providers. I am thinking, for example, of a local authority that has commissioned places in playgroups in a rural area. In that situation, there would be concern over whether the voluntary sector would have the finances to implement everything that is required by the bill. What would you expect the local authority's involvement to be? Another concern is that if, to adhere to guidelines, the local authority has to take the lion's share of the responsibility for the financial provision, it may be discouraged from going into partnership with the other sectors. That would reduce the number of child care places available, which is not the outcome that you want. Will you comment on those complicated implications?

Nicol Stephen: This is a very important area. If I may, I would like to take time to consider those detailed points and then respond in writing. Private and voluntary sector providers of pre-school education that operate in partnership with a local authority will not be required to prepare accessibility strategies. Such providers are defined as providers of a service—that is, child care—for the purposes of the Disability Discrimination Act 1995, as amended. Part III of that act requires providers to make the physical environment accessible to children with disabilities.

It is important that I give the committee a clear idea of the complexities in this area. There is a move towards having a single integrated inspection of pre-school education by social work departments and HMIE. We will have to consider how such an inspection will link in with the requirements of the new bill. Sam Baker spoke earlier about the inspection role of HMIE for primary and secondary schools.

If I may, I will give Irene McGugan further information in writing on this whole area and consider the potential impact—not only on the voluntary groups but on the young children. We must ensure that everyone is clear about the proposals and satisfied with them.

Irene McGugan: That would be fine. Thank you.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): Some groups have said that they are not happy with the lack of details on time scales for introducing and implementing strategies. They are also concerned about the appeals mechanism. What will happen if it appears that strategies are not being implemented and the local authorities are not carrying out their duties? How do the new measures tie in with the minister's consultations on the assessment of our children's educational needs?

Nicol Stephen: As I have outlined, our intention is that the bill will allow strategies to be prepared in 2002-03. Implementation of the changes that we want to make to physical access and the curriculum should start in 2003-04. The intention is that the strategies will last three years. All this will be a lot clearer when you see the draft regulations, as they give more detail.

I think that Sam Baker has covered some of the points about the appeal mechanisms that Gil Paterson asked about and mentioned the ways in which parents and carers might be able to secure action on behalf of a child. Is that what you were referring to?

Ian Jenkins: Yes. However, you are obviously involved in changing the special educational needs framework anyway. I am interested in how that work is progressing and what the time scale is for the consultation. I am also interested in aspects of the process such as funding and training.

Nicol Stephen: In a few weeks, we hope to announce proposals on the review of the record of needs. We are considering the need for a national strategy for children with special educational needs. I have been closely involved in that through the special educational needs forum. The plan was to have a draft proposal to send out for consultation by or during the spring.

Much is being done. I wish that various complexities did not exist, but they do. One complication is the fact that disabilities tend to relate to reserved matters but special educational needs are the responsibility of the Scottish Parliament. Some aspects of disability legislation relate to the responsibilities of the Scottish Parliament as well, hence the need to consider the Education (Disability Strategies and Pupils' Records) (Scotland) Bill today. I was anxious to proceed with a national strategy for children with special educational needs because I wanted to bring those threads together, as far as that is possible, in an attempt to ensure that there is good co-ordination and clarity. I sense that the spirit of some of the questions that have been asked today is that we should attempt to give greater clarity

ahead of the announcement of the national strategy on special educational needs—we should make clear what rights parents have under which acts of Parliament and which of those rights are founded in disability legislation and which are founded in special educational needs legislation.

The Convener: Does anybody else want to talk about disability strategies?

Mr Paterson: I would like to talk about associated services, which relate to what Irene McGugan mentioned. The Disability Rights Commission recommended that section 2 should be extended to cover access to the school environment where pre-school education has been provided by the local authority in a non-school centre. Is there any reason why that requirement should not be extended to cover other local authority premises, such as museums? It is not the intention of the bill that a child should be unable to go to a museum with his or her peers.

Nicol Stephen: I think that Sam Baker will be able to answer that point, which relates to our powers and the interaction between reserved and devolved responsibility. We have clear responsibility for schools, but disability legislation is a reserved matter. There was much discussion about how the Scottish Executive could introduce a duty for responsible bodies to plan accessibility strategies in our schools and for our young people. Those are the limits of the bill. If we went beyond that, we might stray into reserved territory.

Sam Baker: The bill is essentially an education bill—that is its scope.

Nicol Stephen: I understand that if the bill were a disability bill, it would be outside the powers of the Scottish Parliament as set out in the Scotland Act 1998.

Sam Baker: As service providers, places such as museums are covered under part III of the Disability Discrimination Act 1995, which covers access to goods and services.

Mr Paterson: If the visit was made to a local authority museum, and if it was part of the curriculum, would the visit not come under the scope of the bill? Surely, if it did not, it would increase social exclusion for some individuals.

Nicol Stephen: There will be a duty on the education authority to plan for that aspect of the school's activities and to ensure that the provisions of the bill are taken into consideration. To place a duty on the museum to plan to improve progressively its access would stray outside the provisions of the bill. In drafting the Education (Disability Strategies and Pupils' Records) (Scotland) Bill, we could not place a duty on non-education—non-school—bodies or organisations.

The Convener: Will the minister clarify that when the bill becomes an act, education authorities or schools will not plan to take people to buildings that are inaccessible and cannot be accessed equally by all those involved? Is it part of the strategy that education authorities or schools should not go to places that other people cannot access because of physical or mental disability?

Nicol Stephen: I am not suggesting that schools should not plan to take children on trips including—for example—ski trips. However, if they do so, they should plan ways of including individuals with disabilities. People should not feel that the bill will prevent them from going to a museum. However, they should think about the routes to the museum, about accessibility for individuals with disabilities and whether individuals with disabilities will be able to hear or see the exhibits. Ways should be found of including those individuals. I do not want the bill to be seen as restrictive, but education authorities should, at all times, consider their responsibilities and the needs of young people with disabilities.

Mr Brian Monteith (Mid Scotland and Fife) (Con): I want to ask for clarification of section 4. A number of groups have raised points with us about educational records. First, will you clarify what is the intention with regard to pupil records? Will those records of needs include records of attendance? It has been pointed out to us that informal face-to-face or telephone discussions are included in pupil records. What is the scope of the records that will be made available to parents?

Nicol Stephen: The intention is to return to the situation that existed before the Data Protection Act 1998 came into force. We intend to give back to parents the powers that they had under the 1980 regulations.

We are not talking about the record of needs—that is a different term from different legislation. The reason for using the phrase "educational records" is that those are the words used in the Data Protection Act 1998—we are trying to reflect the wording of that act. I am not sure that I am the best person to give you a list of all the things that would be included in educational records. Perhaps Lindsey Wright can give you some indication.

Lindsey Wright (Scottish Executive Education Department): I shall try. We are probably not in a position to give a list at the moment because we have not yet made the regulations. There is a definition of educational records in the Data Protection Act 1998, to which we will cross-refer. There are further provisions in the School Pupil Records (Scotland) Regulations 1990 that we can perhaps keep. Some circumstances and situations in which information need not be disclosed are defined in those regulations and we will be considering how much

of that we can keep. One such situation is where the information is kept and intended to be kept by the employee of the education authority solely for that person's own use—a teacher's notes, for example. We will be considering that in more detail when we prepare the regulations. We hope to be able to provide a draft at stage 2.

15:15

Mr Monteith: The fact that some of the organisations that gave us evidence were concerned suggests that there may be some disquiet as to what was previously the understanding of educational records. That should be taken into consideration. Consideration should be given as to whether there may be any clear difference between educational records in England and those in Scotland under the Data Protection Act 1998. That may be worth investigating. If there is a difference in practice, it may throw up an irregularity that will need to be dealt with.

Nicol Stephen: I undertake to examine both the practice and the terminology. It could be that some of the words used in relation to education in England might not be used in Scotland or might have a different meaning here.

Mr Monteith: Okay. The second issue I will ask about was raised by South Lanarkshire Council and relates to permission. How will the bill fit with section 15(5) of the Children (Scotland) Act 1995, which allows children with legal capacity to control access to their records. There is concern that the new legislation might mean that parents will require their children's permission to gain access to their children's educational records. Can you clarify that issue?

Nicol Stephen: As I understand it, the 1995 act will stand in relation to that point and the bill will not change the situation. If people have concerns about the 1995 act, the Education (Disability Strategies and Pupils' Records) (Scotland) Bill is not the legislative vehicle to address them.

Mr Monteith: Finally, we have received conflicting evidence on charging for records. Local authorities are concerned about the cost of providing records if it becomes popular for people to seek out school records. On the other hand, there is understandable concern that charges might be prohibitive. What approach do you intend to take when issuing guidance on charging?

Nicol Stephen: We are going to consider the issue of charging, which is something in which I am sure the committee will take an interest. We believe that the situation that existed before 1998 was broadly satisfactory, but we will consider updating aspects where necessary and appropriate. We do not believe that reinstating that right of access to records will create any significant increase in demand for access to records, nor any significant cost implications for authorities.

Clearly, if there were a suggestion that significant fees would be charged, that would be a concern. We need also to consider the context of the Freedom of Information (Scotland) Bill, in which the charging regime and structure has been an issue of controversy and is likely to remain so as the bill progresses. The appropriate way to handle that is through regulations, so that changes can be made if any problems arise that are viewed as significant or unfair on parents who are appropriately trying to exercise the right that the Education (Disability Strategies and Pupils' Records) (Scotland) Bill returns to them.

The Convener: Will the Freedom of Information (Scotland) Bill have any impact on the Education (Disability Strategies and Pupils' Records) (Scotland) Bill?

Nicol Stephen: I will write to you on that matter too. I think that the answer is yes. The Freedom of Information (Scotland) Bill will extend the right to information to a whole range of individuals and organisations, and it is likely that the whole presumption of openness will have an impact on education, as well as on every other department and service.

It is important that, through the Education (Disability Strategies and Pupils' Records) (Scotland) Bill, we remedy the consequences of the 1998 act and give back to parents a right that everyone broadly accepted in the 1990s was sensible.

The Convener: I was not suggesting otherwise, but it would be helpful to have some guidance before stage 2 on the possible impact of the Freedom of Information (Scotland) Bill on the bill before us and on education.

Nicol Stephen: That is a good suggestion. In view of the commitments that I have made today, we will prepare a full document that addresses all your concerns. I am conscious that you will hear from other organisations after you have heard from my officials and me. If any other issues come up during the questioning of other organisations, please feel free to add those to your list of concerns, and we will ensure that they are addressed in the briefing that you will receive prior to stage 2.

The Convener: I undertake to write to you with a full list of the points of information that we are seeking. You can come back to us in due course.

I am afraid that I will have to cut the questioning to the minister there, as we have run over time and need to move on to our next set of witnesses.

We will now hear evidence from Capability

Scotland. I ask Frank McAveety to take the chair.

The Deputy Convener (Mr Frank McAveety): Karen Gillon has nipped off for a short time, so I welcome the witnesses from Capability Scotland. Sandra Kerley is the director of Capability Scotland and I presume that Kate Higgins is the senior policy officer.

Kate Higgins (Capability Scotland): I am the parliamentary manager.

The Deputy Convener: I apologise—I did not have your proper title. Thank you for correcting me.

We received a submission from Capability Scotland. Sandra Kerley will go through the key points that Capability Scotland wants to make.

Sandra Kerley (Capability Scotland): I thank the committee for inviting us to give evidence. As the deputy convener said, the committee has our written evidence, so I do not intend to go over it in detail.

Capability Scotland welcomes the Education (Disability Strategies and Pupils' Records) (Scotland) Bill and its intention to improve access to all aspects of education for children with disabilities. Capability Scotland is involved in the education of children with disabilities on several levels. We are a specialist education provider and, in partnership with local authorities, we provide specialist support for inclusive education. We also deliver out-of-school provision in specialist and mainstream settings.

We would like to focus on the accessibility strategies and emphasise access to extra-curricular activities. In particular, we want to focus on the definition of associated services; the need for meaningful consultation; the monitoring, evaluation and inspection of the strategies; and the means by which children, young people and their parents can have redress if strategies are not being fully implemented.

We were pleased to hear the minister say that there were on-going discussions with HMIE. However, we were concerned about the option of appeal to the sheriff as there are difficulties with that.

Unless the committee would like me to continue, we will now try to answer its questions.

Jackie Baillie: The introduction to your submission says that Capability Scotland is consulting parents, children and young people. If it is easy to produce information on that consultation, it might be of interest to the committee as we move to stage 2.

Kate Higgins: We conducted a consultation with parents, children and young people at the Scottish Executive's request. As there was a fairly short time scale, we conducted it using questionnaires. We developed two questionnaires, one of which was appropriate for children and young people to fill in. A report is available and I can ensure that it is forwarded to the clerks for distribution. I think that we sent the report as part of our written submission, but we can send it again so that the committee has copies. We are happy to come back and talk about the findings at any stage in the passage of the bill.

Jackie Baillie: I have a question that relates to what Sandra Kerley said. My recollection is that the minister said that the Executive is considering monitoring arrangements in respect of HMIE and that an individual could have redress through the Executive or section 70 of the Education (Scotland) Act 1980, which details rights of appeal—I think he said that there could be redress through either of those options. From a lay person's point of view, I think that requires an appeal to the sheriff court. Is that enough or are there still difficulties? What do you recommend?

Kate Higgins: Our concerns replicate those that we highlighted during the passage of the Special Educational Needs and Disability Act 2001 at Westminster. As Sam Baker pointed out, under that act too, the right of redress in Scotland is to appeal to the sheriff court. There is no halfway house for parents or, which is important, for children and young people. There are duties that extend to children and young people and not to local authorities or parents. We are talking about children's and young people's rights—it is incumbent on all of us to remember that in discussing the bill.

We are keen to see some form of mediation service that could resolve concerns and disputes amicably, rather than have a parent, child or young person insist on one thing and an education provider insist on something else, with the only resorts being a direct appeal to Government or court action. Concerns exist about the ability of people to access legal aid to take up cases under the Disability Discrimination Act 1995. There is no suggestion that accessing legal aid would be any less difficult for this purpose. We are keen to promote the idea of a mediation or conciliation service being available to resolve disputes adequately.

15:30

Sandra Kerley: We are concerned that the strategies should be properly monitored and evaluated. We would be keen to find out what happens if monitoring reveals that the strategies are not being implemented. What possibilities are there to take action against local authorities or other education providers?

Irene McGugan: I note your comments about associated services and extra-curricular activities. Were you reassured by any of the minister's comments, or do you still think that there is a need for clarification and the inclusion of those activities?

Sandra Kerley: Further clarification is probably required. It should be made clear which definition is being applied to associated services and whether it relates to what is stated in the Special Educational Needs and Disability Act 2001 and the Standards in Scotland's Schools etc Act 2000. There must be clarity in the definition, which must be stated clearly at the beginning of the bill, so that people know what to expect.

Mr McAveety: Are the definitions in the acts consistent?

Sandra Kerley: Perhaps they are not entirely consistent.

Kate Higgins: We raised concern about definitions when education and associated services were defined in the Special Educational Needs and Disability Act 2001, which was dealt with by the Department for Education and Skills. It was like being back in the Westminster days of Scottish issues being an add-on rather than built in at the centre. We were not convinced that the Department for Education and Skills had considered the definition of education—I think that it is referred to as school activities—in the Standards in Scotland's Schools etc Act 2000.

The Disability Rights Commission has provided a helpful list of the activities that are covered by "associated services" in the code of practice, which states that extra-curricular activities and school trips are covered. We are not sure which legislation takes precedence in Scotland. Is it the Standards in Scotland's Schools etc Act 2000, which has a fulsome definition—to which the minister referred—of education and school activities or is it the UK act? It would be helpful for that point to be clarified and for the Education (Disability Strategies and Pupils' Records) (Scotland) Bill to contain a reference so that we all know what the relationship is.

The Convener: We will seek clarification on that from the minister and will forward to you any information that we receive.

Ian Jenkins: I do not want you to misinterpret my motive in asking this question. We are all on your side. We discussed with the minister at what point it would be wrong for a local authority or a school to organise a trip that would disadvantage disabled youngsters. When would a school be in breach of its duties in running such a trip? It might be a superb educational opportunity that would not otherwise be available to disabled youngsters.

Do you understand what I mean? There are dilemmas in making such decisions.

Sandra Kerley: Our view is that education is for all and that, therefore, all attempts should be made to ensure that any opportunities that are offered to children and young people in schools are available to all those children and young people, not only to some of them. We would expect schools to do whatever they could to ensure that all children could be included.

Kate Higgins: The Standards in Scotland's Schools etc Act 2000 contains a presumption to mainstream. When the bill was being scrutinised, everybody said that the presumption to mainstream must mean more than simply having disabled children in a mainstream school setting. That is why the Education (Disability Strategies and Pupils' Records) (Scotland) Bill is welcome. The extent to which it will cover the curriculum, information and the physical environment is very much welcomed, because that is an issue on which we have been campaigning for a long time. It is the whole education of the child that matters.

Our consultation found that the problems in mainstream school settings are to do with extra-curricular activities, outside school trips and even the less core facilities such as access to the dining hall, the playground and the playing fields. Those are important parts of children's education and childhood, and children with disabilities are missing out. If the accessibility plans address that, that is to be welcomed.

We should not view the changes in education in isolation. By 2004, all providers of services and goods will have to provide full access to those services and goods to people with disabilities. There should be some dovetailing, so that the providers of the trips that you mentioned will have had to make changes to comply with the Disability Discrimination Act 1995. If that is the case, it will be much easier for schools to facilitate such trips for children with disabilities.

Ian Jenkins: Thank you. I hope that you did not misinterpret my question; I just wanted to clarify the situation.

Mr Monteith: In addressing that delicate issue, the minister specifically mentioned skiing trips as an example. Some children with disabilities would have no difficulty in skiing, but others would have profound difficulties. How would the strategy seek to resolve a situation in which a school's facilities were fine and its provisions complied with the strategy, but the school discriminated against a child's going on a skiing trip to Hillend or abroad?

Sandra Kerley: Sometimes a change in attitudes is required to make a trip happen. There are ways to ensure that even children with severe physical disabilities can go skiing. The issue is

about having the information to hand and finding out whether that is a possibility.

Children make different choices anyway, and not all children would choose to go on such trips. Schools must give children a range of choices to cover their broad range of interests. Schools should think about what kinds of activities might be offered that could interest a broader range of children.

Mr Monteith: Just over two years ago, my children went on such a trip. They had a say in where they went, based on the choices with which they were presented. One of the reasons their class decided to go to a certain activity centre was that it had facilities for disabled people. However, I think that, behind the minister's raising that specific example, there is a concern that people might seek to take legal redress if certain trips were ruled out. Do you have any view on that?

Kate Higgins: We should keep things in perspective. There is also the issue of choice. Just as not every child who is not disabled would choose to go on a ski trip, not every child who is disabled would choose to go on one. If a child wants to go on such a trip but is denied access to it because the school or education provider concerned has not anticipated the situation and refuses to ensure that the trip is accessible, that school or education provider will be open to challenge under the Special Educational Needs and Disability Act 2001 and the accessibility strategies.

Some people may feel that a levelling is taking place that will disadvantage other children. However, there are operators that organise ski trips and other winter sports activities for people with disabilities. We need to ensure that there is provision that benefits all children. By the same token, it would not be right for a school to offer a trip that was suitable only for children with disabilities; children without disabilities and their parents would be up in arms about that. We welcome the fact that legislation is now in place to redress the balance somewhat.

I would like to comment on the point that Mr McAveety made about the strategy being available only in writing. The Deputy Minister for Education and Young People, and Sam Baker, who is in charge of the bill, said that addressing that issue would be very complex. However, we suggest that the Scottish Local Government (Elections) Bill may offer a way round the issue. Capability Scotland campaigned successfully for an amendment to the provisions in the bill relating to pilot schemes. That amendment, which allows local authorities to pilot the provision of materials in accessible formats, was couched in language that was not complex. The form of words contained in the Scottish Local Government (Elections) Bill may be helpful.

The Convener: That is a helpful suggestion, which we will consider. Thank you for your evidence.

Our next set of witnesses is from the Disability Rights Commission. I welcome to the committee Adam Gaines and Heather Fiskin, along with Catherine Cherrie and Margaret Reynolds, who will act as lip speakers in this evidence-taking session. I ask Adam Gaines to make some introductory remarks, after which we will proceed to questions.

Adam Gaines (Disability Rights Commission): I will try to keep my remarks brief.

I thank the convener and the committee for providing us with the opportunity to give oral evidence this afternoon on what we regard as a welcome and vital bill. We welcome the fact that the bill is being taken through with such vigour.

The bill will underpin the anti-discrimination duties in the Special Educational Needs and Disability Act 2001, which takes effect from September this year. That act is important because it seeks to end discrimination against disabled people in education. The most important aspect of the Education (Disability Strategies and Pupils' Records) (Scotland) Bill is that it will lead to the development of strategies throughout Scotland to increase access to education for disabled pupils and play an important part in ensuring that those students have an education that is equal to that of their non-disabled peers.

15:45

The Special Educational Needs and Disability Act 2001 introduced a planning duty in England and Wales that is similar to the duty that is proposed in the Education (Disability Strategies and Pupils' Records) (Scotland) Bill. It is important that pupils in Scotland are put on an equal footing with their peers south of the border. Indeed, the provisions in the bill go slightly further than those in England and Wales. We should also note the many instances of good practice in the field throughout Scotland.

Before I comment on the detail of the bill, I will highlight a few examples of the impact that the bill is likely to have on people's lives. First, we support inclusive education for all. The best education for disabled pupils is the education that best suits their needs, meets their expectations and affords them social inclusion on a personal level. That applies equally to education in mainstream and special schools. The bill can help to achieve more inclusive education in Scotland by providing strategies for disabled pupils, over time, to gain further physical access to schools and access to the curriculum, and hence to better opportunities.

At the moment, some disabled pupils have no choice but to attend a special school facility some distance from home and either board there or travel long distances each day. That allows them less time with their families or social groups and fewer opportunities to form friendships or associations in their neighbourhoods. Alternatively, they may be striving to succeed in a mainstream setting where they are perceived as either extra work or unable to participate alongside their peers in all activities, because the curriculum or the school buildings are not fully accessible.

Another positive aspect of the bill is that benefits will not just be restricted to pupils. Planning and implementing strategies on access will also benefit staff, parents and possibly community education students who use the facilities. That will assist education providers in meeting their other duties under parts II and III of the Disability Discrimination Act 1995.

I have highlighted the positive aspects of the bill, and now would like to comment on a few of the details. Three areas in particular could benefit from being extended and clarified: the provision of auxiliary services; the scope of the expectations on responsible bodies; and the mechanisms for review. As we indicated in our written evidence, the clarification and extension of those areas would strengthen the bill.

The Convener: I ask members who wish to ask questions to indicate that to me.

Mr McAveety: We have received written submissions and we have heard from the Deputy Minister for Education and Young People. You strongly recommend a tribunal system, which I wish to tease out a bit further. You say that you

"would strongly support a single, independent and specific avenue for complaint, appeal, redress and remedy across the range of education provision"

and

"the early establishment of an Educational Tribunal System for Scotland."

Why do you feel so strongly about that? How does that fit in with other views that we have read or heard about finding a halfway measure?

Adam Gaines: The issue is about ensuring that students and parents are able to seek review of certain decisions. The difficulty is that there are different provisions in different pieces of legislation. For example, there is provision for access to the sheriff court under part IV of the Disability Discrimination Act 1995. There are different provisions under the Special Educational Needs and Disability Act 2001 framework, under which there is access to appeal committees and potentially also to sheriff courts or ministers.

Our view is that it would be helpful for parents, disabled students, education authorities and others if those review processes could be brought together administratively in a straightforward form such as a tribunal. At the moment, people have to ask themselves which route they need to take in certain cases. That is not to say that there are no routes. Given our experience of working on the Disability Discrimination Act 1995, we thought that a single tribunal might be a way forward when it came to certain cases in the field of employment tribunals.

Mr Monteith: Could you expand on your concern about sections 1(2) and 2(1) with regard to the provision of auxiliaries? You mentioned the problem that the special educational records might say that certain auxiliary help is required but that there is no right to such help.

Heather Fiskin (Disability Rights Commission): The bill does not say that auxiliary services are covered. The spirit of the bill is that it will improve education for all disabled people. If you do not specifically include support workers for those who need them, you are not improving education. That would create different types of access for people with different disabilities.

For example, loop systems are very welcome but we feel that support workers have to be included. Although they are provided for under the record of needs, there is no entitlement to them. Obviously, we do not know what the outcome of the review of the record of needs will be. There might be something in that to address the problem. However, we believe strongly that there should be an entitlement to a support worker where that is required by a particular disabled person.

Adam Gaines: The bill is welcome because it sets out the requirement to develop strategies. It would be helpful if those strategies included one to consider auxiliary aids and if there was consideration of auxiliary services elsewhere. It would be helpful if the strategy could be more encompassing. It would be easier for everyone concerned to know how developments will be implemented over time.

The Convener: As there are no further questions, I thank the witnesses for their evidence.

Adam Gaines: Thank you.

The Convener: I welcome the representatives from Children in Scotland and ask Susan Grant to introduce her colleagues because I cannot quite see their names from here.

Susan Grant (Children in Scotland): At the far end of the table is Neil Todd from the Royal National Institute for the Blind Scotland. Kay Tisdall is the director of policy and research for Children in Scotland. I am senior policy and

research officer for Children in Scotland. Martin Vallely is part of our team but he is with the City of Edinburgh Council education department.

The Convener: Would you like to make introductory remarks, or do you wish to proceed straight to questions?

Susan Grant: Kay Tisdall will make introductory remarks.

Kay Tisdall (Children in Scotland): We promise to make the remarks short; I know that the committee is pressed for time.

I echo what I have heard others say: we strongly welcome the bill as an essential complement to the Special Educational Needs and Disability Act 2001. As the committee will note from our written evidence, we think that there is a real opportunity to ensure that the bill delivers on its intentions.

We want to emphasise three points. First, it is essential that the bill fits in with education and other children's legislation. More could be said about how it might fit in with the existing educational planning framework. Secondly, we think that the bill should strengthen monitoring. On implementation, there are possibilities to explore within the educational planning framework. Thirdly, I emphasise dissemination, for which there are stronger requirements in the Standards in Scotland's Schools etc Act 2000. There are examples of such requirements in primary legislation and we think that they should be in the bill as well. It is essential that children and parents are involved in and know about the strategies.

We hope that there will be improvements to the bill and that further commitments will be made on guidance and regulations to address some of those issues.

Jackie Baillie: Monitoring is a recurring theme for the Executive. How would you strengthen monitoring in the bill?

Martin Vallely (Children in Scotland): In planning for education and schools, it is critical that we consider the issues that matter most and that we place the provisions within that framework. The bill needs to make it clear that monitoring is expected not just of local authorities, but of schools in their development plan processes. Monitoring must be more strongly integrated in the requirements for service improvement planning for local authorities than the draft regulations imply will be the case. It would then be the focus of HMIE inspections of schools and education authorities. By integrating the provisions of the bill more closely with that, more effective monitoring would be implicit in the planning carried out in schools and local authorities.

Neil Todd (Children in Scotland): It is important to consider the role of the inspectorate in relation to the bill. The current wording of the section that refers to HMIE is vague. We discussed earlier whether the Executive could request to see the plans that have been drawn up. We would like the provisions to be strengthened so that there is more of an expectation that the Executive will see plans regularly and then pass them to the inspectorate. That would probably be for guidance, as Martin Vallely said. There are lots of opportunities for highlighting good practice and doing comparative studies, which would give momentum to the new planning requirement.

The Standards in Scotland's Schools etc Act 2000, which highlighted educational priorities and inclusion, seemed to dovetail beautifully. There are plenty of reasons to examine monitoring. We believe that it is weak at the moment. If the inspectorate's role was stronger and was clarified in the bill, that would strengthen the bill significantly and would answer a lot of the questions that parents raise about the enforcement process. If things are not working satisfactorily, the inspectorate deals with them, but the bill does not say that clearly at the moment.

Martin Vallely: I would like to make a supplementary observation: it is important that the exercise is not just a paper one and that it does not just go through the formal planning processes in the Scottish Executive education department. It is important that the Executive takes the matter seriously. For example, the public-private partnerships that are being considered will become part of the criteria according to which local authorities' business cases are assessed.

Susan Grant: Monitoring is another tool, as is good practice. Such tools help the Scottish Executive to identify gaps in need and in services, so that we can move forward to improve the lives of children with disabilities.

16:00

Jackie Baillie: There are obvious enforcement issues at school level, but there are separate issues for parents and young people, such as the lack of a system of redress. The Executive witnesses spoke about the possibility of appeals being made to the Executive. They also referred to section 70 of the 1980 act, which gives a right of appeal to a sheriff. Are those mechanisms sufficient? If not, what system of redress would you recommend?

Kay Tisdall: It has been widely acknowledged by those who assess children's needs that the present system is not sufficient. Few appeals are made to the secretary of state, let alone to the sheriff court. Until the situation is fully resolved through consideration of the SEN framework, we do not have a definite recommendation to make,

although we believe that more might be made of local authority complaints procedures—Martin Vallely may want to address that point. At least those procedures are a little closer to children and young people.

Martin Vallely: It is important that all the readily available mechanisms are involved, including community planning, the role of elected members and authorities' complaints procedures, where we expect good practice. Every reasonable step should be taken to resolve matters as close to the ground as possible.

Jackie Baillie: I have two supplementary questions. Would such mechanisms require to be spelled out in the bill? Would they apply to independent schools?

Kay Tisdall: To be honest, I would like a legal opinion on whether the mechanisms should be spelled out in the bill but, in the meantime, I would like an assurance that they would be recognised. Education is ready for that approach.

On your second question, my understanding is that a local authority complaints procedure would not apply to independent schools.

Neil Todd: Martin Vallely represents the City of Edinburgh Council and brings a particularly interesting perspective to the discussion. Earlier, he made a point about the importance to the community of local accountability. A central part of that approach is for authorities to ensure effective dissemination of summaries of local council plans in all formats and in community languages. Full copies of the plans should be made available to those who want them. Kay Tisdall addressed at the beginning of our evidence the key point about dissemination of information. At present, the bill makes no reference to effective dissemination of the plan, although that is important for accountability to the community.

On appeals, we are in a state of flux in relation to the Education, Culture and Sport Committee's report on its inquiry into special educational needs and are waiting to see what emerges. It has been suggested that a tribunal should be established to consider all appeals that relate to special educational needs and pupils with disabilities. In the not-too-distant future, there may be a proposal to pull together the disparate pieces of legislation. It would be terrific if we could establish one appeal system to deal with all issues, but I am not sure that such a proposal could fit into the bill.

Ian Jenkins: One of the first recommendations in your submission is that the title of the bill should be changed. I do not know whether you heard the minister's evidence that the Executive is using a particular phrase in the bill to restore the rights that were taken away by the Data Protection Act 1998. Were you satisfied with that explanation?

Neil Todd: I was interested in the minister's explanation, which was that the Executive had to use the term "educational records". The term originated in the Westminster Parliament, where there is little understanding among most MPs, if not those from Scotland, of the use in Scotland of the phrase "record of needs". Because the bill's title refers to education disabilities, the immediate assumption is that the reference to pupils' records in the title is to records of needs, which it is not.

The ambiguity is unhelpful. I think that parents would assume that the bill refers to the record of needs, particularly as we know that that issue has been discussed and that there could be legislation soon on it. The ambiguity is unwelcome. The bill's title should be changed by using a word such as "information". Educational records could still be referred to in the text of the bill to cover the legal point. If the bill's title were changed in that way, at least the title would not be a misleading description of the bill, as it currently is.

Another important point is that perhaps a third of the bill is about accessible information. There is much reference to information in the bill, so the use of the term "information" in the bill's title would cover both that aspect and what is required for the Data Protection Act 1998.

Irene McGugan: I want to ask a bit more about the section in your written submission on how the accessibility strategy could connect to other planning requirements. What is the minimum that needs to be done to provide cohesion? Why do you think that the Executive did not attempt to provide such cohesion, given that schools' improvement plans, for example, must have regard to equal opportunities and that we are now all signed up to integrated services? Why do you think that no attempt was made to integrate the accessibility strategy with other requirements?

Kay Tisdall: I understand that that is partially because the independent schools are being included, which we welcome. However, the policy memorandum says that the Executive "could" associate the accessibility strategy with school planning. We think that that should be expressed much more strongly for statutory schooling, to link accessibility strategies explicitly with the national priorities. Schools must produce annual statements and school development plans for their local authorities in any case, to consider equal opportunities issues. We suggest that, for statutory schooling, accessibility strategies should become part of that process. That would be a good way to go forward.

We have debated children's services plans, which are important and also deal with inclusive aspects. Therefore, we suggest that, for the sake of Scotland's children, we should consider how accessibility strategies can link effectively with

other services.

Martin Vallely, who is engaged in cohesive planning, might want to come in.

Martin Vallely: The minimum requirement would be for the accessibility strategy to be considered alongside school development plans and the overall approach of the local authority. The bill says that accessibility strategies "could" be integrated. It would be more reasonable for the bill to say that accessibility strategies "normally would" be integrated or—even better—that they "should" be integrated.

Mr McAveety: What is the position of local authorities on those issues and how can we maximise the effectiveness of accessibility strategies, if the bill is passed? The evidence suggests that, because of resources, practices or structures, accessibility strategies are uneven.

Martin Vallely: Somebody from a local authority would mention resources, as it is an issue. Nonetheless, the question is how we best use and direct resources, regardless of the scale that is available. The key issue is that there is fatigue in education because there has been initiative after initiative and plan upon plan. The more we can integrate the accessibility strategy into one approach, the more likely it is to have an impact on people's perception of the relationships between different elements and their ability to give due weight to the implementation of the strategy, instead of fulfilling endless planning requirements.

Susan Grant: We feel that, for the bill and the Special Educational Needs and Disability Act 2001 to move forward meaningfully, it is important that awareness and training are part of implementation. That should be considered for in-service training, but should also be picked up during initial training for teachers and auxiliary staff. Without that, it will be difficult to shift attitudes, so that people think about how we can make schools more accessible, not only in relation to the physical aspects, but in relation to the curriculum and information. We feel that it is important that those elements be given equal emphasis. That could be achieved through training and by thinking about how to link that to training on equal opportunities and under the Race Relations (Amendment) Act 2000.

Kay Tisdall: On a practical note, providing such training would be one of the best protections for any school or local authority against a case being brought under the Special Educational Needs and Disability Act 2001. It is one of the ways for them to show that they have tried to make reasonable adjustments.

The Convener: I thank you for your evidence. We will now hear evidence from the Convention of Scottish Local Authorities.

I welcome the witnesses from COSLA. Councillor Helen Law is the COSLA education spokesperson, Lynn Townsend is the special educational needs manager for West Dunbartonshire Council and Maggi Allan is the executive director of education resources for South Lanarkshire Council.

Would Helen Law like to make some introductory comments?

Councillor Helen Law (Convention of Scottish Local Authorities): We have given the committee a written submission and I know that members have had a long day, so I will be brief.

We draw attention to the funding consequences of the bill for councils. I know that £9 million has been announced, but that would be insufficient to make a big impact on councils. Funding is needed not only for access to buildings, but for access to the curriculum and extra-curricular activities. Although councils are committed to dealing with special needs and have, in the main, a good record of dealing with young people with special needs, there is still concern.

I also mention briefly the implications for councils of going into partnership with private and voluntary sector organisations. The impact could be particularly drastic on rural communities.

On the requirement to draw up written accessibility strategies, we are concerned that the new planning requirement should dovetail with other planning issues. The policy memorandum that accompanies the bill indicates that there will be flexibility, which we welcome.

I will end there, but I draw members' attention to our written submission.

The Convener: Thank you. You said that £9 million was not enough. Have you received any indications of the figure that you would require? Have you done an analysis?

Councillor Law: I will ask Maggi Allan to answer that. She has done some calculations based on the situation in her authority.

16:15

Maggi Allan (South Lanarkshire Council): I am not in a position to speculate on the national figure, but to prepare for this meeting we looked at the figures for our primary schools. We have 124 primary schools, of which 40 would require a lift. We know how much it costs to put a lift into a primary school, so the total cost would be £3.2 million. We calculate that we will get something like £600,000 through GAE from the £9 million that has been allocated for 2003-04. The financial memorandum gives no indication whether that income will recur or whether it is a one-off

payment.

Other schools would require amendments—ramps or new toilets, for example. The cost for that would be around £5 million. Installing induction loop systems or individual microlink systems for children would cost between £500,000 and £1 million. Considering only those ballpark figures, I can already account for the £9 million in one council's primary school sector.

The Executive's PPP initiatives mean that councils will have the opportunity to review provision and to promote inclusion. In the secondary schools in my authority, that is the means by which we hope to meet the requirements made of us by this bill and the Disability Discrimination Act 1995.

I know from talking to other directors of education that we are not unique. When our PPP consultants considered our 21 secondary schools, they identified two of them and said, "It really doesn't matter what you do, you will never make these schools truly accessible for disabled youngsters." The schools are built on a slope, include several buildings and have lots of stairways—to take account of only the physical environment. We welcome the fact that the bill considers not only physical accessibility but educational accessibility in the round.

The Convener: Your area covers my constituency, which has large rural areas. You may not have this information to hand, but perhaps you could come back to us with it. Given that the bill places an emphasis on extra-curricular activities, what are the transport implications of ensuring that children with disabilities can take part in such activities on an equal basis with their peers?

Maggi Allan: Again, all of us welcome the bill's proposition that young people with disabilities should have access to extra-curricular activities. From experience, we know that all too often those children, unlike other children, go home at the end of the school day and do not have the opportunity to socialise with their peers.

You are right to suggest that the implications could be extensive. Depending on the extent of their disability, many young people may well need a helper so that they can access the curriculum or social activities. That would involve additional auxiliary support; so, in addition to transport costs, which will be above the norm because they are specialised, we would have to consider the cost of having helpers. We have not done costings for that.

Obviously, there are individual cases of local authority support for young people's extra-curricular activity—I was telling my colleagues this morning that a young person in our authority takes part in a skating activity with her class—but that clearly incurs a cost.

Michael Russell (South of Scotland) (SNP): Are you aware of any member authorities being consulted on the estimate for the £9 million that has been provided?

Maggi Allan: I am sorry—I cannot answer that question.

Michael Russell: So you are not aware that there has been any consultation.

Maggi Allan: No.

Michael Russell: Was Fife Council consulted?

Councillor Law: No.

Michael Russell: So the figure of £9 million is not based on a survey of likely need.

Councillor Law: That said, all local authorities have submitted a summary of the state of their school buildings. Although I do not have any details about the survey, it was a fairly recent exercise.

Michael Russell: Yes, but it did not centre on this specific issue. Have authorities been asked how much it would cost to do the job?

Councillor Law: I am not aware that they have been asked that. There might have been an inquiry about our property, but I am not aware of that either.

Michael Russell: Maggi, are you also unaware of any consultation?

Maggi Allan: Yes.

Michael Russell: Generally, we all support the bill. However, if it becomes law—as is likely to happen—and the funding falls far short of what you require, how will that affect South Lanarkshire Council?

Maggi Allan: We have a programme that allows parents to say whether they want their youngsters who are coming out of pre-school education to be mainstreamed. As a result, we already know what the likely costs will be, and have tried to meet some of them from our existing mainstream budget and our inclusion fund. We receive about £800,000 in the excellence fund for the inclusion programme. However, once the bill is passed and placed alongside the requirement to mainstream education in the Standards in Scotland's Schools etc Act 2000, we will have quite a different ball game. At the moment, we can say to parents that although we might not be able to meet all of a child's needs in a local school, there might be a school six or 10 miles down the road at which those needs can be met. However, if a parent were truly insistent and held the new legislation up in front of us, the authority would face difficulties.

Mr McAveety: In your assessment of primary and secondary schools' needs, do you have a scale of improvement strategies that ranges from a moderate to a maximum level and that contains a set of cost options? For example, you say that the Executive's figure of £9 million is nowhere near the right figure. Do you have an optimum figure that you could accept? Have you carried out any costings in that respect?

Maggi Allan: Not really. While preparing for this meeting, we carried out costings. Those costings were for primary schools that are not on one level and which therefore require lifts, primary schools that require ramps and toilets, and primary schools that need some minor improvements, because they are new and are therefore disability-friendly. We also carried out costings for making primary schools accessible to hearing-impaired children.

Mr McAveety: In any of your capital programmes over the past few years, have you drawn up any strategies, based on the bill's principles, for adapting schools or have you had other priorities to deal with?

Maggi Allan: Although, like other authorities, we have been developing such provision, we have generally done so on a needs basis. When parents have said that they want their youngster to go to the local school, we have tried to accommodate that as far as possible and have made the necessary physical adaptations.

Councillor Law: In some areas, schools are very close together. People have been able to access schools fairly close to where they live, although the school might not be the catchment school for their area.

Mr Monteith: I want to pick up a small point about the costs that the convener was exploring. Insurance liabilities might have to be met for people who operate any lifts that must be installed. There might also be additional costs relating to the operation of lifts. I take it that you have priced only the capital costs of installing lifts, but there could also be running costs.

Maggi Allan: That is correct. The figures that we have cited refer to the cost of installing a lift in a building, not to the lift's running costs.

Mr Monteith: Would it be possible for South Lanarkshire Council to gauge the costs of items such as insurance for schools that currently operate lifts and to extrapolate from those costs a global sum?

Maggi Allan: We could attempt to do that.

Ian Jenkins: What human resources—such as staff training and auxiliaries—would be needed to back up the provisions of the bill?

Lynn Townsend (West Dunbartonshire Council): There are two main issues. Training is a big issue, as training and changing attitudes go hand in hand. In my experience, most teachers are very keen to welcome into their schools children who have disabilities or special needs, but they are also very apprehensive if they have not been in that position before or if they lack specific training and experience. It is very important for us to be able to offer training. Such training, in particular specialised training, can be problematic and costly. We need to be able to reach down to classroom teachers in preparation for children moving into a school. At the moment we do that on an individual, needs-led basis. If we know that a child who has special education needs will be going to a school, we can raise awareness in that school and conduct specific training with specific members of staff. However, doing that throughout an authority would be problematic.

The second issue is that of access to specialist staff. Good inclusion of children and their success in school often depends on there being at least access to a teacher who is a specialist in autism, visual impairment or hearing impairment, for example. Some of our successes with inclusion are attributable mostly to the availability of a specialist teacher who can offer both consultation to mainstream staff and direct input to the young person concerned and, possibly, their parents. There are difficulties not only with funding such a service, but with the availability and recruitment of trained staff.

Ian Jenkins: My next question ties in with what Lynn Townsend just said, although it is not really in the mainstream of what we are discussing. How would you react to the suggestion that some adjustment should be made to maximum class numbers if youngsters with special educational needs are to be integrated into mainstream classes? Does a formula exist that could be used to adjust expectations of class sizes?

Lynn Townsend: We have not to date considered that option, but I know that class sizes can be an issue. School boards have told us that, although they welcome the inclusion of children who have a range of special needs, they have concerns about the amount of time that an individual child might require from a teacher and about the impact that that might have on the other children and young people in the class. Adjusting class sizes is an option that we might need to consider alongside having additional adults in the classroom. We provide SEN auxiliary support for a range of children, which means having a second adult in the classroom. However, that person is not usually a second teacher.

Jackie Baillie: I want to ask about three areas. First, I want to return to finance, so that I can be

absolutely clear about the situation. I understand that the £9 million that has been referred to will be made available in local government revenue grants in 2003-04. However, that needs to be set against an increasing inclusion fund within the excellence fund, which will rise to £19.5 million in 2003-04 from £14.3 million this year. The amount of money that is available is increasing. We are talking not about just £9 million, but about the additional sum of almost £5.2 million between the current financial year and 2003-04, with an indication that more funding may be expected in future years.

If we factor in the public-private partnership considerations—to which you referred in a South Lanarkshire context—that presents us with a slightly different picture. Notwithstanding any anticipated further dialogue between COSLA and the Executive, do those considerations start to present councils with the necessary finances?

16:30

Maggi Allan: Those funds will certainly help. I was not aware of the significant increase in the inclusion fund within the excellence fund, to which you referred. South Lanarkshire Council currently receives £800,000 from that fund. My quick calculation is that our allocation would probably increase to £1.1 million. With the addition of the £600,000, we are looking at about £1.7 million a year to attack the problem. I am assuming that the £9 million is recurring funding. If that is the case, we could make the commitment to move towards the implementation and the development of accessibility strategies. In return for that, we would want flexibility in the time scale. Local authorities will obviously be at different stages. The ease or difficulty with which they can implement the strategy will depend on the size, age and condition of their properties. We would welcome an indication from the Executive about the period within which authorities would be expected to implement the bill.

Councillor Law: Lynn Townsend will add to that.

Lynn Townsend: It is important to bear it in mind that inclusion funding covers a wide range of projects and initiatives; it does not focus only on children who have disabilities. We are working hard to include children who have social, emotional and behavioural difficulties and who would not normally be considered in the disability category. Much of the inclusion funding might be directed toward that.

Jackie Baillie: That is helpful. I will move away from finances completely.

I am keen to explore whether local authorities and schools can play a more proactive role. Section 3(5) of the bill leaves the onus on parents to request copies of the accessibility strategy. The strategy is over 100 pages long when the appendices are included, so I do not suggest that it should be sent out to people. However, I am conscious that the bill's impact will depend on the extent to which local authorities and schools proactively promote the bill's provisions. Will it cause too much difficulty to send a summary of the strategy to parents, as is already done for a number of strategy documents?

Councillor Law: In our written evidence, we suggested that the strategy could be published every three years as part of the children's services plan. I see no difficulty in publishing a summary, but I doubt that a full strategy could be sent out every year.

Jackie Baillie: Several organisations highlighted the fact that the bill seems to lack provisions for dealing with complaints or for any system of redress. I acknowledge that, despite the best efforts of schools and local authorities, there will be parents who will not be satisfied. Is there a need to spell out a clear and simple system of redress?

Councillor Law: There is a need for a system of redress, but local authorities would not favour a tribunal system. Perhaps a better way forward would be for redress to be sought through HMIE.

Jackie Baillie: Should parents be given the right to approach HMIE?

Maggi Allan: It might be advantageous to approach the matter using aspects of previous legislation. While giving evidence earlier the minister said that, ultimately, the opportunity would exist to apply for a default order under section 70 of the Education (Scotland) Act 1980. It is clear that that would happen only at an extreme stage. For example, at the moment any challenge to the record of needs is automatically sent to HMIE. The inspectorate carries out an investigation on behalf of the First Minister—originally, the legislation stated that the inspection would be on behalf of the Secretary of State for Scotland—and authorities abide by whatever ruling HMIE makes.

Similarly, if section 70 of the Education (Scotland) Act 1980 were applied, the appeal would be made to the First Minister. Perhaps we should consider current approaches rather than introduce a new system. That is how our thinking is shaping up

Mr McAveety: Do local authorities provide documents in appropriate formats in relation to their other their responsibilities? Would it be complex or difficult to meet the requirements of the bill?

Maggi Allan: We tend to provide documents in other languages, rather than in other formats. Like most authorities, we are developing our website, so information is available there. We do not provide information on tape. We occasionally provide large-print material, but that is generally on request.

Mr McAveety: Given the numbers that are involved, will the burden be excessive?

Maggi Allan: The burden will probably not be excessive, but it will depend on demand. I presume that material could be put on tape or drafted in Braille.

Mr McAveety: The submissions that we received contained different views about appeals. Some organisations expressed strong views about the frustration that individuals and families feel about the process in education directorates, on the enforcement of families' rights and the appropriateness of concerns, given the understandable powerplay between an institution such as a council or other body and an individual. How do local authorities achieve that balance?

Maggi Allan: We try not to deal confrontationally with parents. Many of us are conscious that, all too often for parents who have youngsters who have special educational needs, their entire life tends to be a struggle and a battle with the health services or, unfortunately, with local authorities. Increasingly, we try to ensure that that is not the case.

Difficulties can arise when different views are held about the provision that should be made. If authorities come into conflict with parents, it generally concerns that distinction. The parent prefers one type of provision and the local authority professionals—and often health professionals—might recommend another. In such instances, we try to resolve the matter without confrontation.

It has been suggested that a mediation service should be brought into play. Some authorities, including South Lanarkshire Council, have mediation services for housing, which deal with difficult housing cases. That might be an option, but we have not explored it in depth. I am not sure whether any other authority has done that.

Lynn Townsend: A few authorities are piloting mediation. That would be a useful step in the process, but I agree that, for the most part, we try hard to work and remain in dialogue with parents. Sometimes, the situation can be difficult from the local authority perspective, because we might feel that we have engaged with parents, tried hard, met many of their needs and not had a struggle. However, parents describe the process as a fight and a struggle. Sometimes, it is a matter of different perspectives.

Mr McAveety: Do you feel more comfortable with exploring an option that involves mediation and arbitration, rather than one that involves a tribunal?

Maggi Allan: Yes—such an option would be a bit less formal.

Ian Jenkins: Should funding for the provisions in the bill and other SEN provisions be treated differently from other funding? How do you react to ring-fenced money and grant-aided expenditure? Some people are making a case for a special way of treating that funding, because the size of its allocation significantly impacts on authorities and might not be determined relative to population size, for example.

Councillor Law: Local authorities generally do not welcome the ring-fencing of funding; they seek funding that is adequate to carry out all their tasks, but they also want flexibility in the funding arrangements so that they can address local issues and needs, which vary between areas. My response to the question is therefore that there should simply be adequate funding for councils to do the tasks that are expected of them.

Ian Jenkins: I will not get into a debate about that.

The Convener: I thank the witnesses for their evidence.

Councillor Law: I alluded at the start of the meeting to the bill's implications for rural areas and, if possible, I would like to ask Maggi Allan to elaborate on that, because no member has raised the matter.

The Convener: You may do so as long as it is to do with rural areas in the broadest sense.

Maggi Allan: It is more to do with pre-school provision.

The Convener: Including that in constituencies such as mine? [*Laughter.*]

Maggi Allan: Not at all, convener. We listened to what the minister said and to the questions that the committee put to him in respect of pre-school provision and the bill's potential implications for partner organisations. It is my understanding that, under the Disability Discrimination Act 1995, if a local authority contracts with a partner to provide a service on behalf of the authority, it is still the local authority that is ultimately accountable, and legal redress could be taken against it. That has potential implications for our early-years provision partners.

That might have an impact on rural provision. We try to develop partnerships because of their impact on the local economy—they provide employment. It is worth considering what the bill's impact on partner organisations will be. That might

well be something that the new Scottish Commission for the Regulation of Care will want to consider. I am not sure whether it would be a requirement of registration that provision must comply with the 1995 act.

The Convener: I think that that is worthy of further consideration, and I will take the matter up in my letter to the Deputy Minister for Education and Young People for further clarification. We will come back to you prior to stage 2 to consider the issue in more detail. Thank you for your evidence.

Subordinate Legislation

The Convener: We move to item 4, on subordinate legislation, which could be very interesting.

Michael Russell: Is not Ian Jenkins a member of the Subordinate Legislation Committee?

The Convener: He knows how bad these statutory instruments are.

Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001 (SSI 2001/476)

Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (SSI 2001/477)

Children's Hearings (Legal Representation) (Scotland) Rules 2001 (SSI 2001/478)

The Convener: I propose that we discuss all three Scottish statutory instruments together. The Subordinate Legislation Committee's report draws particular attention to the second of the Scottish statutory instruments that is before us, but it also refers to the first and the third. I understand that the Subordinate Legislation Committee has expressed concern about the SSIs since their introduction, and that it has been trying to secure changes since then.

From my information, the Executive has said that, although it acknowledges that there are some problems, no further action is proposed. The SSIs follow on from other subordinate legislation that we have considered. We indicated previously our concerns about legislation coming before us that is clearly not drafted as it should be. I ask the folks from the Executive who are present why the Executive has determined to take no action in relation to the points that were made by the Subordinate Legislation Committee, which are numerous.

Boyd McAdam (Scottish Executive Education Department): Good afternoon. I will introduce my colleagues. They are Gordon Watt, who works with me in the young people and looked-after children division of the education department, and Linda Sneddon from the solicitor's office.

The various points that were raised by the Subordinate Legislation Committee received a response from the Executive. However, apart from the comments on the commencement order and the incorrect reference in the rules to one of the regulations, we felt that the points were adequately covered by the Interpretation Act 1978.

Although some of the drafting is unfortunate or incorrect, it is not a fundamental fault in the regulations.

16:45

The Convener: I draw your attention to paragraph 42 of the Subordinate Legislation Committee report in relation to the European convention on human rights. The committee made the point that because of

"the failure to provide for an appeal against a decision to terminate an appointment to a panel, the Regulations may conflict with Article 6 of the ECHR and thus raise devolution issues."

What are your views on that?

Boyd McAdam: I do not have a copy of the report to hand, but I am aware of the issue.

The regulations on safeguarders and curators ad litem were intended to re-enact, under the 1995 act, the provisions that operated in the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 1984. We transferred the arrangements under the old regulations to the new ones. The intention was to make as few changes as possible. We do not have the details on why the previous regulations adopted a different approach, so I cannot explain that. As I understand it, the view that an appointment should be terminated is extremely rare; the appointments of individuals are for periods of three years and it is open to safeguarders and curators ad litem to choose to accept a case.

Many of the panel members involved carry out their duties in addition to their normal employment and there is less risk of serious consequences in relation to their appointment being terminated. We acknowledge that there might be an issue, but in focusing on getting the regulations introduced with minimum change, we did not address that matter.

We are awaiting research on the operation of the safeguarder scheme under the 1995 act, which we expect within a few weeks. We will then examine in much more detail the way in which the system of safeguarders is operating and there will be read-across to the way in which the curators system operates. That will include consideration of the appointment process, the qualifications that are required and so on.

The Convener: I accept that there might not be many people who have their appointments terminated, but failure to have a procedure for appeal would bring us into conflict with the ECHR. It would embarrass the Parliament and the Education, Culture and Sport Committee if we allowed the instrument to come into force, knowing that there is no appeal mechanism and that we are in breach of the ECHR.

Boyd McAdam: There exists the option of judicial review against the decision. In relation to safeguarders, the local authority in consultation with the sheriff principal and the chairman of the children's panel must take the decision. There are built in safeguards and mechanisms.

The Convener: I do not accept that it is appropriate for a parliamentary committee to rely on judicial review in relation to positions that have no appeal against termination of employment, particularly given that we have adopted the European convention on human rights into Scots law. I understand that that was not an issue prior to devolution, but we are living in a new political situation in which the ECHR applies. I find it remarkable that the Executive would seek to introduce a statutory instrument that might not comply with the ECHR.

Boyd McAdam: Another point is that the appointment of the panel does not result in employment. Being a member of a panel allows one to be approached to undertake a specific piece of work, but as I understand it a contractual employment relationship is not involved.

The Convener: Is there an appeal process to deal with the termination of whatever that contractual agreement is?

Boyd McAdam: There is no appeal process.

Michael Russell: I can scarcely believe what I am hearing. I will repeat two words that you used. You accepted that the drafting was "unfortunate" and "incorrect".

Boyd McAdam: I said that about some of the minor errors.

Michael Russell: No, you said that the drafting was unfortunate and incorrect, but that it did not produce fundamental flaws. You are asking the Education, Culture and Sport Committee to rubber-stamp drafting that is unfortunate and incorrect and—in one respect—contrary to the ECHR. Although on seven occasions in a three-page document the Subordinate Legislation Committee has said that the regulations create problems, we are meant to rubber-stamp them.

The regulations have simply been sent through again after a little tidying up of the pre-devolution regulations as a result of the Regulation of Care (Scotland) Act 2001. The regulations need to be re-examined, because things have changed substantially since 1995. If that is to be done, it should be done in a careful, thorough, painstaking and legally correct manner, rather than in a manner that produces drafting that is—in your words—unfortunate and incorrect.

Boyd McAdam: I used the words unfortunate

and incorrect about the typographical errors and so on. I must rely on advice about whether the regulations that are presented are compatible with the ECHR. When the regulations were being prepared and laid, that issue was not brought to my attention. My understanding is that the provisions are compatible with the ECHR.

Michael Russell: I will ask you a fair question. Have you seen the Subordinate Legislation Committee report?

Boyd McAdam: No, we saw only the *Official Report* of the proceedings. I have not seen the Subordinate Legislation Committee's report.

Michael Russell: I will ask a simple question about your activities. Ministers have brought us a piece of subordinate legislation. I, along with other members of the Education, Culture and Sport Committee, have never seen a report like the report of the Subordinate Legislation Committee. We are not experts in the field. As the convener indicated, this is not the first time that we have seen drafting that we find to be defective.

In those circumstances, is there a procedure that ministers can take to withdraw the regulations—to take them away, to draft them in a form that the Subordinate Legislation Committee and others like and to bring them back to us—or is it a take-it-or-leave-it option? As a civil servant, you will know the answer to that.

Boyd McAdam: Making the changes that I think the committee would wish to be undertaken—to provide an appeal mechanism—would require consultation with the individual local authorities concerned about the procedures that would be required. That would take time. The regulations were regarded as an adjunct to the rules that were intended to introduce the option of legal representation for children to protect their rights within the hearings, following the court judgment last August. Our aim—and ministers' aim—is to ensure that those arrangements are put in place as soon as is practical.

I think that if we took the regulations away we would have to adjust the commencement order and amend the existing regulations. I am sorry, I will have to seek procedural advice from my colleague.

Linda Sneddon (Office of the Solicitor to the Scottish Executive): As the commencement orders come into force today, the only option would be to withdraw the regulations, which would leave no regulations in place until new regulations could be implemented. Until now, we have been working under the regulations under the Children Act 1975. From midnight tonight, those regulations will have no effect and the new regulations will come into force. Withdrawal of the new regulations would leave no regulations, because the repeal of section 103 of the 1975 act and the commencement of section 101 of the Children (Scotland) Act 1995 would automatically mean that the previous regulations would have no force.

If we withdrew the regulation at this stage, we would have no regulations relating to safeguarders or the curators ad litem. It is possible to amend regulations subsequently. An amendment can come before the Parliament in the usual way and can be made when the regulations are in place.

Michael Russell: However, as members cannot amend subordinate legislation, that amendment would have to come from the Executive. The Executive would have to acknowledge its error before lodging an amendment. Is that correct?

Boyd McAdam: Yes. I should stress that the—

The Convener: The information that I have says that SSI 2001/478 is required to come into force because of a breach of the European convention on human rights that was brought to light in the courts, but you are asking us to support another SSI that might also breach the ECHR and require us to implement another SSI in a few months' time when it, too, is challenged in court.

Michael Russell: It is a mad, mad, mad, mad world.

The Convener: Basically, yes.

Boyd McAdam: We are faced with a judgment of the Court of Session that says that the absence of a system to enable legal representation to be considered for children in hearings in certain circumstances is a breach of the ECHR. SSI 2001/478 is intended to remedy that breach. Whether the regulations for curators and safeguarders represent a breach of the ECHR has not been established by the court. My advice is that they do not. We present the regulations as complementing the rules to respond to the Court of Session judgment that identified a specific breach.

Ian Jenkins: I was going to say that when the Subordinate Legislation Committee has been faced with pieces of subordinate legislation that we think might be problematic, we have passed them to the lead committee with a note that draws its attention to the defective drafting—which has sometimes been acknowledged by the Executive—with an understanding that the regulations will be changed swiftly. Occasionally, the instruments have been withdrawn and amended before the commencement order has put them in place.

The Subordinate Legislation Committee recognised that the matter that we were discussing is a problem. We have said that we are not unsympathetic to the Executive's difficulties, but we raised the issues to allow the Executive to

state its position. I do not think that we should bash ahead and pass a defective instrument without the Executive giving us a genuine undertaking to rectify the problem quickly. If there is an undesirable gap, we can pass the instrument only on the understanding that it will be filled quickly.

The regulation contains issues about the kind of representation children get. It does not say that any member of the panel must be a qualified solicitor. It also says that members of the panel can be paid only when they are asked to represent a child and that there would be no fee for solicitors other than that.

The regulation is a mess that seems to be twirling around inside itself and not getting anywhere.

The Convener: Before you answer that point, I would like to ask a procedural question. There is a time scale for parliamentary consideration of SSIs of 40 days from the date on which the order is laid. If we have until 10 February to consider this regulation, make the appropriate representations to Parliament and go through the due process, why have you decided to implement the regulation on 23 January? You seem to be saying, "If you don't do this the way we say, you will be left with a big vacuum." Why did the regulations commence before our report to Parliament?

Linda Sneddon: According to the standing orders of the Parliament, we must lay such instruments for 21 days. That is the time that we are told. The Parliament has 40 days to consider such instruments. I do not know why there is a difference between the times.

The Convener: We must draw Parliament's attention to that. To say that amendments cannot be made to the regulations because that would leave us with nothing is to hold a gun to members' heads. We have a certain period of time to consider instruments.

17:00

Jackie Baillie: I regret the timetable. The clerks and the Executive must reflect on whether the timetable is suitable for the consideration of such issues. I am disinclined to take the view that an excuse for producing flawed legislation is that we would otherwise be left with nothing. I want to explore the extent to which the regulations are flawed.

There are errors in the regulations other than those connected to the ECHR. It is human nature for errors to creep in, but why did the Executive not use the opportunity that was afforded to it to correct them? It does not seem that that has been done. Given the basic principle that legislation should be accurate, opportunities to make corrections should be seized upon.

I want to explore whether the regulations breach the ECHR. At present, the termination of a panel member's appointment can be taken to judicial review, but the court cannot reappoint the person; it can simply examine the process by which the decision not to reappoint was made. Is that correct?

Linda Sneddon: The ECHR issue is not related to reappointment; it is related to whether panel members have a right to judicial review if they are struck off during their three-year appointment. A decision on reappointment is taken after the three years, but there is no right to reappointment.

Jackie Baillie: Forgive me; I was loose with my words. If a person's appointment is terminated during the three-year period, a judicial review cannot reinstate that person, but can examine only the process of termination.

Linda Sneddon: The matter is fairly open. In general, the courts inform the local authority that the procedures were not appropriate. The court can explain the outcome of the review to the local authority. In a judicial review, the person can ask the court to decide on their appointment and the court can decide that the termination was illegal. If the court holds that the local authority's decision was not exercised correctly, the decision falls and the appointment would not be terminated.

Jackie Baillie: I was reflecting on the dim and distant past of the Housing (Scotland) Act 2001, in which a judicial review does not reinstate a flawed decision, but merely exposes it as flawed. In that case, the judicial review has no power to rectify the decision.

Linda Sneddon: I am sorry, I do not know the provisions of the Housing (Scotland) Act 2001, but in this case, if the court decides that the decision is incorrect, it can hold it to be incorrect. Generally, the court tells the local authority that its procedures are wrong and that it should use the correct procedures.

Jackie Baillie: Is there a requirement on the local authority to listen?

Linda Sneddon: Yes. If someone takes the case to judicial review, the chances are that if the local authority still does not follow the correct procedures, the person will go back to court. I hope that no local authority would act in that way. However, the authority is not obliged to come to a different decision after a judicial review.

Jackie Baillie: I want to hammer this point.

Linda Sneddon: The party to the judicial review can ask the court to give a specific order. It is up to the court whether it grants the order. A judicial

review can do more than simply send the matter back to the authority.

The Convener: It may be helpful to explain that this committee has already had to take through a second piece of legislation because of ineffective drafting. That might explain why we are reluctant to accept drafting that is not as it should be and are wary of anything going forward that may mean that the legislation comes back to the committee six months from now. As I understand the procedure, we can lodge motions with the chamber desk this week and they would be debated by this committee next week. That would give the Executive a week to produce alternative proposals. That may be a useful way forward, to find out whether the Executive is prepared to listen to the views of the Subordinate Legislation Committee and the Education, Culture and Sport Committee on these matters.

Linda Sneddon: It is difficult. We were told informally about some of the points raised by the Subordinate Legislation Committee. We have not seen the report that it has given to this committee. We responded to the Subordinate Legislation Committee's points. We disagree with it on some of the points that it raises; we do not think that some of the issues are a problem. We think that what we have done is correct. We admit that there are typographical errors in the instrument. There is obviously a difference of opinion between the legal advisers to the committee and the Executive.

The Executive's point of view on the ECHR takes into account the decision in the Starrs v Ruxton case. We do not think that there is an ECHR issue. The matter can be reconsidered, but there is the potential for a difference of opinion. We have not seen the formal report that came to this committee: we have seen only the *Official Report* of last week's Subordinate Legislation Committee.

The Convener: There is always potential for a difference of opinion. We have had to take through a second bill because of a difference of opinion that proved to be correct. The first bill had to be amended because the information about the drafting was not correct.

Michael Russell: This is a very important point. Attached to the Subordinate Legislation Committee's report is appendix D, which contains the response from the civil service about regulation 7(3)(a). It makes no mention of the ECHR. It repeats the argument that we heard earlier—that

"decisions to terminate are taken in very rare cases ... Most panel members carry out their duties in addition to their normal employment and there is less risk of there being any serious consequences on their appointment being terminated."

That response, which Linda Sneddon just mentioned, does not mention the ECHR issue that we have raised today. That response is signed by Linda Sneddon.

The Convener: The Subordinate Legislation Committee has drawn several issues other than the ECHR issue to our attention. Even if we accept that the ECHR issue would have to be subject to a judicial review and a challenge in the courts—despite the fact that we think it should be dealt with at the beginning—other issues that were drawn to our attention have still not been dealt with.

Michael Russell: This is important. We have just been told that there is a disagreement with what the Subordinate Legislation Committee said and that the information was provided to that committee. We have the document, signed by Linda Sneddon, that was provided to the Subordinate Legislation Committee. It does not mention that matter. I find that extremely difficult to take.

Linda Sneddon: On regulation 7(3)(a), in relation to which we had the *Official Report* of the meeting of the Subordinate Legislation Committee, the committee asked about the functions of the membership, the action subject to judicial review and whether it may have serious consequences. We were answering those questions. I appreciate that our response does not go into as full an explanation as the committee required. The case law was not considered. I take the point.

Mr McAveety: Can you help me out on when this process started? Are you seriously saying today that there is no opportunity to address many of the concerns that have been flagged up? That would leave us in the position that the committee would approve legislation that you may feel is not likely to be challenged, but could possibly be challenged. We are legislators and we do not want to be criticised for passing flawed legislation, which has nothing to do with us until it comes back to us. We are sensitive to that on this committee.

When we receive a report from the Subordinate Legislation Committee, which is probably more extensive than its reports for any other piece of legislation, that sets the alarm bells ringing. The uncertainty and lack of clarity of some of the contributions means that I am less reassured than I was before. If we agree with what the convener is saying about coming back to debate the motions next week, does that put the procedure in jeopardy? The interests of young people should be paramount for every one of us, but equally we do not want to address one concern about the ECHR and leave ourselves open to a challenge on another. It just seems to be a daft side of the seesaw.

Boyd McAdam: The judgment was delivered on 7 August, last summer. The Executive had to consider carefully what was in the judgment and how it could be effected. Discussions were held with local authorities and members of children's panels as to what scheme might be appropriate.

The initial scheme gave rise to concerns about vires. Local authorities expressed those concerns. The scheme was revisited and ministers approved the principle of the scheme and, on 13 November, it went out to consultation with local authorities, chairmen of children's panels and a range of other interested parties, including safeguarders and the Law Society.

In the light of that consultation, the concerns expressed about vires in relation to payment of fees no longer remained. The detailed regulations were drawn up for presentation to Parliament on 21 December. At that point, the 21-day rule applied. That rule does not count when Parliament is sitting.

In order to give effect to the safeguarders and curators regulations, we needed to commence section 101 of the Children (Scotland) Act 1995 because that had not been commenced. That commencement order raised concerns in the Subordinate Legislation Committee, which felt that we needed to clarify that the old regulations terminated when the new regulations came into force.

As a result of the Subordinate Legislation Committee's concerns, a new commencement order has been made, clarifying that the old regulations fall. The switch therefore takes place at midnight tonight.

Mr McAveety: I am trying to comprehend that.

That is not the point. I was asking if there was any stage between August and now at which those concerns could have been modified or addressed. I understand the time scale we are working in and that the shutters are coming down. Why did nobody go away and sort it out?

Boyd McAdam: Those concerns only emerged from the Subordinate Legislation Committee two weeks ago. By that time, the regulations had been made and laid before Parliament. Those concerns were not expressed to us during the consultation. They were new points.

The Convener: What was the rationale behind laying the commencement order before Parliament on 21 December? Why could it not have waited until the week after the recess?

Boyd McAdam: Ministers are very anxious to put in place a system that protects children during hearings and provides publicly funded legal representatives at hearings when that is necessary. In order to achieve that, the panel members have to be trained on the principles of the scheme. The local authorities have to ensure that they have adequate legally qualified safeguarders and curators on their panels. They also need to set that process in train. Until the Executive's intention was set out in the regulations, that process was not starting properly. The regulations were brought into effect as soon as practicable to make sure that it did. The reason that a date of 23 February was set was to ensure that training of panel members could be undertaken so that the system could become operative, subject to Parliament's approval.

The Convener: I want to make something very clear so that there is no ground for misinterpretation. The committee does not want to do anything that would jeopardise the rights and responsibilities of young people or their rights to legal representation. If anybody should indicate that by scrutinising the regulations before us, we are trying to do that, I say that we are not.

We are trying to make sure that the process is not open to legal challenge or any other process. I think that there is sufficient concern among the committee members to suggest that we should lay down motions for debate at next week's meeting and allow the minister to come back for further discussion and debate. The committee can then decide how it wishes to proceed.

I do not believe that that will stop things happening tonight. The instruments will still come into force, because a commencement order will be in place until the motions lodged by the committee have been debated by Parliament. If sense prevails, if we are able to move forward together constructively and if the Executive indicates to us how it intends to address the concerns raised by both the Subordinate Legislation Committee and the Education, Culture and Sport Committee, perhaps an accommodation can be found next week. If not, we will proceed with the motions and the instruments will not be accepted.

17:15

Michael Russell: I associate myself entirely with your remarks, convener. One of the issues that should be addressed next week is the time scale for these orders. I regard it as either incompetence or brinkmanship to put us in this position. That is quite unacceptable.

Ian Jenkins: With many of the instruments that come before the Subordinate Legislation Committee, opinions are divided on the issue of vires. Although sometimes members of the committee and its legal advisers believe that there is doubt about an instrument, we are assured by the Executive that it is aware of our questions but thinks on balance that it is in the right. In this case,

the issue may not be as black and white as it seems. For that reason, I support the convener's suggestion that we invite someone to appear before the committee to give us the necessary assurances, so that the legislation can proceed as smoothly as possible.

Jackie Baillie: I support entirely what the convener has suggested. Is the minister aware of the detail of the issue that has been brought before us today?

Boyd McAdam: Not of the detail.

Jackie Baillie: I suggest that you make the minister aware of that detail.

Boyd McAdam: I shall certainly do that.

Michael Russell: I suspect that the minister would appreciate that.

Mr Monteith: I am surprised that Mr McAdam and his colleagues have not had sight of the report by the Subordinate Legislation Committee. Is that normal practice? Is the minister also unaware of the committee's report? It would have been helpful if Mr McAdam and the minister had been on the circulation list.

The Convener: I find it remarkable that they are not.

Ian Jenkins: What we have before us is an excerpt from the advice that the Subordinate Legislation Committee received.

Michael Russell: No, it is the conclusions of the committee.

Mr Monteith: Those were e-mailed to us.

Ian Jenkins: I stand corrected. I thought that the procedure was for a report to be made and a letter to be sent.

The Convener: We have received an extract from the Subordinate Legislation Committee's report, which is dated 21 January.

17:18

Meeting adjourned.

17:19

On resuming—

National Performance Indicators

The Convener: We move to agenda item 5, on national performance indicators. I have not received any comments about those, but I am sure that members have comments to make. Those should be brief.

Michael Russell: I shall make my comments brief as I suspect that we can do little about the matter. I have considerable reservations. The package is a slight tweaking of "How good is our school?" There is little difference. Those of us who know and have regularly read "How good is our school?" have the impression that the indicators confirm what is in that document.

The exercise is unnecessarily bureaucratic—it is absolutely mired in bureaucracy. Teachers need support and help in assessing their work with their pupils, but they get so much jargon and twaddle—I must use those words, although I normally would not—that they are frightened by them. I see Jackie Baillie responding to the word "twaddle".

I will give examples, one of which particularly sticks out. National priority 3 concerns inclusion and equality. The document states:

"*Outcome: every pupil benefits equally from education*".

That is impossible. Education must help every pupil to benefit and there must be ways to ensure that every pupil benefits, but the statement is nonsense. That outcome cannot be achieved from the performance measures or anything else. We must help those who are not achieving. Teachers despair about many of the other recommendations in the same way that they despair about constant assessment and constant interruptions to their teaching to answer questions from civil servants and administrators.

The tables are an example of bureaucracy gone mad. Nothing can be done about that because nothing that we say will make the slightest difference to the Executive's determination to carry on with its approach, which is driven by civil servants and inspectors.

However, I will continue to oppose bureaucratic interference in education. We should help teachers to teach, provide the context in which young people can learn and ensure that schools perform their function—the committee might discover that during its inquiry into the purposes of education. The measures may help to support those objectives. Reading through the papers is like wading through cold porridge, but if one does

wade through them, one will eventually probably get something out of them.

One tends to despair. It is no wonder that many teachers are alienated and many young people find the whole process impossible.

I have had my say and I suspect that nothing will happen. I wonder about the indicators.

The Convener: It would be useful for the committee if the Executive indicated what is new in the information and what has been requested elsewhere. Are the papers simply a collation of information that has already been required? Is there substantial new information in them that has been requested?

Jackie Baillie: I was going to make only one point, but I shall rise to the challenge and make more. Throughout the document, there are references to breakdowns by gender and ethnicity where possible. The committee should stress to the Executive that there should be automatic breakdowns by gender, ethnicity, disability and other categories. Unless that is done, one cannot hope to influence future educational provision. There should be less dubiety and more commitment.

The second point is that I agree with what the convener said, but I also agree in part—do not die of shock, Mike—with what Mike Russell said. There are issues about the fact that you can measure equality of input and try to ensure that there is equality of outcome, but that is difficult to measure. All education is focused on the input that people receive. The reality is that some children need more assistance. That raises the debate about targeting those who are most disadvantaged, which is something that will arise through—[*Interruption.*] Dearie me, is that your press release already, Mike?

Michael Russell: No, it is a timer.

Jackie Baillie: There are serious points. While there is a desire to help teachers to teach, the reality is that there is a desire for parents to understand what is going on and for them to have measures of quality. It is about getting the balance right, rather than simply throwing away the package and saying, "We can't change it." Parents should have a mechanism by which to form a view of how good their school is and how well the education system is operating. More balanced comments are required.

Michael Russell: Surprisingly, I agree with some of Jackie Baillie's comments. Of course parents must have a mechanism, but the problem is that if you were to give this package to anybody in the street—which is the perfect solution—and ask them what it meant, 99.9 per cent would be incredulous that this was the way in which we were trying to measure things, because it makes no sense at all at times. I did not say that we could not change the package; I said that the Executive will not change it.

The Convener: Are there any other comments?

Ian Jenkins: I find myself in a difficult position, since I have inveighed often against target setting and league tables where targets are plucked out of the air. At least this package takes us forward, in the sense that we are not looking only at examination results as a judge of schools. The package is logical in that it ties in with the national priorities that have been identified, all of which are full of merit. It will give us statistics that will allow us to form a bigger and better picture of schools than we have had before.

I return to what Mike Russell said. There is hope in the fact that Mike Russell, Jackie Baillie and I have a great degree of common ground. In tweaking things and in our further discussions, we might do well to look again at the document.

The Convener: One other point that we should make in our response to the Executive is that there is a need to continually review and evaluate what is happening. In the light of our inquiry and the Executive's inquiry into national priorities and the future of education, there may be a need ahead of the three-year target to determine whether we have the appropriate mechanism for judging and measuring education. Perhaps some of the things that come out of the discussions that we are all having over the coming six months will provide a better way to do things. There may be a need to highlight that what we have is not set in stone, and that there is a need to continue to examine the issue and perhaps produce alternatives if the debate that we engage in shows us something positive for the future.

Ian Jenkins: I wonder who draws up the statistics. Like Mike Russell, I do not want there to be much impact on teachers in the classroom if it can be helped. If, as has been suggested, quite a lot of material is already held by local authorities or school administrations, I hope that people in the classroom do not have to do the same work again and reinvent the wheel and the statistics.

The Convener: If there are no further comments, I will close this meeting.

Michael Russell: Will those comments be passed on to the Deputy Minister for Education and Young People for a response?

The Convener: I will provide a written response to the minister. He will also get a copy of the *Official Report*, which reflects members' comments in more detail than I will be able to do in a letter of only one page.

Michael Russell: Convener, will you be lodging the motions that we need to discuss on the subordinate legislation?

The Convener: No. The deputy convener will lodge the motion, because I will have to convene the meeting.

Michael Russell: Excellent.

Mr McAveety: I have nothing to lose but my chains.

Michael Russell: Absolutely.

The Convener: As I understand it, we will lodge fairly simple motions, and they will be the same for each instrument, for example, "The Education, Culture and Sport Committee recommends that nothing be done," followed by the name of the statutory instrument. We will lodge them tomorrow.

Michael Russell: Is the meeting now finished?

The Convener: Yes, the meeting is finished.

Meeting closed at 17:29.

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