EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

Wednesday 3 December 2008

Session 3

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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE
29th Meeting 2008, Session 3

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

COMMITTEE MEMBERS

*Claire Baker (Mid Scotland and Fife) (Lab)
*Aileen Campbell (South of Scotland) (SNP)
*Ken Macintosh (Eastwood) (Lab)
*Christina McKelvie (Central Scotland) (SNP)
*Elizabeth Smith (Mid Scotland and Fife) (Con)
*Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Ted Brocklebank (Mid Scotland and Fife) (Con)
Bill Kidd (Glasgow) (SNP)
Hugh O'Donnell (Central Scotland) (LD)
Cathy Peattie (Falkirk East) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Susan Gilroy (Scottish Government Schools Directorate)
Fiona Hyslop (Cabinet Secretary for Enterprise and Lifelong Learning)
Robin McKendrick (Scottish Government Schools Directorate)
Louisa Walls (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Nick Hawthorne

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 3 December 2008

[THE CONVENER *opened the meeting at 10:01*]

Decision on Taking Business in Private

The Convener (Karen Whitefield): Good morning, and welcome to the 29th meeting in 2008 of the Education, Lifelong Learning and Culture Committee. I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the meeting.

Under agenda item 1, we must decide whether to take in private item 7, which concerns our consideration of witnesses for scrutiny of the Education (Additional Support for Learning) (Scotland) Bill. Do members agree to take item 7 in private?

Members *indicated agreement*.

Subordinate Legislation

Fundable Bodies (Scotland) Order 2008 (Draft)

The Convener: Under agenda item 2, we have an opportunity to take oral evidence on the draft Fundable Bodies (Scotland) Order 2008. I am pleased to welcome Fiona Hyslop, the Cabinet Secretary for Education and Lifelong Learning, to the committee. She is joined by Andrew Scott, the director of lifelong learning; George Reid, the head of further education strategy and college-specific issues, and the school-college review team; and Stephen O'Connor, policy officer in the higher education and learning support division.

Thank you for joining us. I understand that the cabinet secretary wishes to make some opening remarks.

The Cabinet Secretary for Education and Lifelong Learning (Fiona Hyslop): I do not, but I am happy to move the motions following the raising of any concerns by the committee.

The Convener: In that case, do members have any questions?

As there appear to be no questions from members, I think that this will be one of the cabinet secretary's easiest visits to the committee. It is difficult to know what clarification the committee might seek in relation to some technical name changes.

Fiona Hyslop: I am pleased to have the opportunity to move motion S3M-2832. The draft order is to be made in exercise of the powers that are conferred by section 7(1) of the Further and Higher Education (Scotland) Act 2005. The changes that are made by it have, as required by the 2005 act, been approved or proposed by the Scottish Further and Higher Education Funding Council.

The funding council may fund only those institutions that are listed in schedule 2 of the Further and Higher Education (Scotland) Act 2005. The purpose of the order is to reflect two institution name changes and to allow the Scottish funding council to continue funding the institutions under their new names.

The name changes involve the Central College of Commerce changing its name to Central College Glasgow, and Napier University changing its name to Edinburgh Napier University. Including Glasgow and Edinburgh in the respective names builds on the international recognition of the institutions and of the cities concerned, as well as the international recognition of Scotland. The location of an institution is an important factor in

student choice, alongside the courses that it offers and its reputation.

Central College of Commerce wishes to make its name change on 1 January 2009. Napier University wishes to make its change on 25 January 2009 to coincide with the 250th birthday celebrations for Robert Burns and the beginning of our homecoming Scotland celebrations. The order also amends an error in the 2005 act in the name of Glasgow College of Nautical Studies.

I move,

That the Education, Lifelong Learning and Culture Committee recommends that the draft Fundable Bodies (Scotland) Order 2008 be approved.

The Convener: We have up to 90 minutes to debate the motion, but it is unlikely that there will be any rush to take part in such a debate. Therefore, we will move straight to the question.

Motion agreed to.

Protection of Charities Assets (Exemption) and the Charity Test (Specified Bodies) (Scotland) Amendment Order 2008 (Draft)

The Convener: For agenda item 4, we have the same witnesses before us. Do members have any questions for the cabinet secretary?

Kenneth Gibson (Cunninghame North) (SNP): I see Ken Macintosh's finger wiggling.

The Convener: The deputy convener is suggesting that there might be a question for the cabinet secretary, but I am not quite so sure.

There being no questions, we move to item 5. I ask the cabinet secretary to move the motion in her name.

Fiona Hyslop: I am pleased to have the opportunity to move motion S3M-2833. The draft order is to be made in exercise of the powers that are conferred by section 7(5), section 19(8) and section 19(9) of the Charities and Trustee Investment (Scotland) Act 2005. The act makes provision in respect of the assets of any body that is removed from the Scottish charity register, and enables the Office of the Scottish Charity Regulator to apply to the Court of Session to approve a scheme for the transfer to a specified charity of such assets. Section 19(8) of the 2005 act allows Scottish ministers to exempt named bodies, by order, from that provision so as to protect public money that has been invested in those bodies and to help ensure that they can continue to perform their function if they lose their charitable status.

All incorporated colleges and higher education institutions are charities and are exempted by the Protection of Charities Assets (Exemption) (Scotland) Order 2006 (SSI 2006/220). The draft order reflects the changes that are being made to the names of Napier University and the Central College of Commerce, which I outlined earlier. The draft order also corrects minor errors in the entries for Glasgow College of Nautical Studies and the Adam Smith College, Fife.

As the committee is aware, the Charity Test (Specified Bodies) (Scotland) Order 2008 (SSI 2008/268) exempts the further education bodies that are listed in the schedule from the independence requirement of the charity test. The draft order that is before the committee makes the necessary change to the schedule to the existing order to reflect the name change for the Central College of Commerce.

I move,

That the Education, Lifelong Learning and Culture Committee recommends that the draft Protection of Charities Assets (Exemption) and the Charity Test (Specified Bodies) (Scotland) Amendment Order 2008 be approved.

Motion agreed to.

The Convener: That concludes our consideration of subordinate legislation. I thank the minister and her officials for their attendance.

10:08

Meeting suspended.

10:10

On resuming—

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

The Convener: The sixth—and most substantive—agenda item is consideration of the Education (Additional Support for Learning) (Scotland) Bill at stage 1. We will take evidence from Scottish Government officials and I welcome to the meeting Robin McKendrick, head of the support for learning branch and bill team leader; Susan Gilroy, policy officer in the support for learning branch and bill team official; Louisa Walls, principal legal officer, branch 4 of solicitors development, education and local authorities division; and Joanne Briggs, economic adviser in the analytical services unit—schools. I understand that Mr McKendrick wishes to make a brief opening statement.

Robin McKendrick (Scottish Government Schools Directorate): Thank you, convener. It might be helpful if I provide a short explanation of why it was necessary to amend the existing legislation and what the bill seeks to achieve.

First, the bill alters neither the ethos nor the fundamental building blocks of the Education (Additional Support for Learning) (Scotland) Act 2004, which is aimed at a broad group of children and young people with additional support needs. Instead, it aims to clarify operational aspects of the 2004 act and, as members would expect, covers issues that can be addressed only by primary legislation rather than by secondary legislation, in guidance or through implementation of the act's provisions.

As I am sure members have gathered, the bill focuses on placing requests and the powers of the additional support needs tribunal. In keeping with that, the first main thrust of the proposals is to provide parents of children with additional support needs, including those with co-ordinated support plans, with the same rights as others to make out-of-area placing requests for their children. That clarification of the original policy intention is required as a result of Lord Macphail's recent ruling in the Court of Session. The amendment relates only to parental placing requests, not to situations in which the child is placed in a school outwith the home authority as a result of placing arrangements that are agreed between two authorities. Those quite separate arrangements are already covered in legislation and are not in any way affected by Lord Macphail's ruling.

The bill's second main thrust is to clarify the jurisdiction of the additional support needs tribunal to allow it to consider any placing request in which a CSP is involved or is under consideration before final determination by an education appeal committee or, indeed, the sheriff. We are seeking to make the amendment as a result of Lady Dorrian's ruling in the Court of Session, which questioned the timing of referrals to the tribunal.

The bill also seeks to increase parental rights of access to the tribunal with regard to failures by the education authority. As voluntary organisations and indeed the president of the tribunal made clear to us, in some cases, local authorities did not respond to parents as required under the code of practice; however, parents had no rights to refer such matters to the tribunal, and the bill seeks to amend that situation.

The bill seeks to give the tribunal the ability for the first time to review its decisions in keeping with the guidance that is issued by the Administrative Justice and Tribunals Council on such issues. At the moment, if someone wants to challenge a tribunal ruling, the only option is to go to the Court of Session.

The bill seeks to allow for parental access to mediation and dispute resolution from the host authority following a successful out-of-area placing request.

Through its amendment of section 29(3) of the 2004 act, the bill clarifies that when arrangements are entered into between two authorities in respect of the school education of a child or young person, it will always be

"the authority for the area to which the child or young person belongs",

which is known as the home authority, that is the responsible authority in such circumstances.

10:15

We will use the "Supporting Children's Learning" code of practice that supports the 2004 act as a vehicle to place that act in the context of the growing policy agenda around children and young people—namely, getting it right for every child, the early years strategy that is due to be published shortly and, of course, curriculum for excellence. That is the role of the code of practice, not of the amending bill.

It is our intention that the redrafted code will develop the definition of the term "significant", which is used when determining whether a child or young person requires a co-ordinated support plan, and will clarify the process of placing requests for the people involved, including parents. The code is scheduled to be amended in due course, subject to the Parliament's agreeing to pass the bill. As the 2004 act requires, any

changes to the code will be fully consulted on, as will any secondary legislation that is required.

As the committee may know, we have consulted extensively on the proposed changes. A public consultation on the draft bill was conducted between 9 May and 19 June 2008. Slightly fewer than 4,500 copies of the consultation document, which included a copy of the draft bill, were circulated among a wide range of stakeholders, including all local authority education and social work departments; health boards; all Scottish schools, colleges and universities; community councils; and relevant voluntary organisations and parental bodies. In addition, the document was publicised in Children in Scotland's "Moving Forward" newsletter, which is circulated to 10,000 professionals, and nine consultation events, which were held throughout Scotland, were attended by approximately 450 professionals and parents.

The consultation document posed questions in a genuine and open manner and sought respondents' views on all the questions. The consultation events generated discussion on a number of topics, and I am pleased to note that a number of respondents acknowledged our intention to consult openly. I am pleased, too, to report that the vast majority of the 165 consultation responses that were received from a wide range of consultees, including 23 of the 32 Scottish local authorities, were broadly supportive of the proposed amendments.

Various other issues were raised during the consultation process. Indeed, the consultation document sought comments on any issue that affected the implementation of the 2004 act. Although those issues are regarded as relevant, it is considered to be more appropriate to address them in secondary legislation or, as I have explained, by amending the code of practice that supports the 2004 act. I have said that we intend to consult on any changes that we propose to make to the code.

We are progressing a range of activities on which further action was identified as being required in Her Majesty's Inspectorate of Education's report of late 2007 on education authorities' implementation of the 2004 act. I would be happy to update the committee on those issues if they arise during today's considerations. If they do not, I could provide an update in writing to the committee clerk.

As I have said, the bill focuses on two issues: placing requests and the additional support needs tribunal. It is extremely important to stress that the bill does not seek to change the fundamental aspects of the 2004 act. I hope that members have found that short explanation helpful.

The Convener: Thank you very much for those comments.

You highlighted the Government's commitment to consult in this area. Will you give the committee an indication of the main themes of the consultation responses? How has the Government responded to the concerns that were raised?

Robin McKendrick: As I said in my short introduction, the vast majority of comments were favourable. The consultation paper contained a proposal to introduce a legal penalty for those who break a restricted reporting order that the tribunal has issued. A number of respondents, including Scotland's Commissioner for Children and Young People, thought that that was not the right course of action. It would plug a lacuna in the legislation, but the policy intention is not to penalise parents who are speaking on behalf of their children. In our response to the consultation, we indicated that we had decided to drop the proposal.

The vast majority of comments focused on the 13 questions that we asked. For example, we asked whether it was right that interauthority placing requests should be available to children with additional support needs, as they are to all other children; that was the original intention under the Education (Additional Support for Learning) (Scotland) Act 2004. About 77 per cent of respondents were in favour of the proposal, and it was a similar story with each of the questions that we asked.

As I indicated, comments were made on the use of the term "significant" and the challenges that we face in that regard. We were questioned about the number of co-ordinated support plans that are in place, as the HMIE report on the implementation of the 2004 act indicated that the number of plans introduced by authorities is below the identified target. Issues were raised regarding the implementation of transition to post-school arrangements. Youngsters with additional support needs, especially those with co-ordinated support plans, should get transitional support when they leave school—not just from schools, but from appropriate agencies such as further and higher education institutions, Careers Scotland and voluntary organisations that are involved with the post-school agenda.

Although a number of the issues that have been raised are relevant, we do not believe that it is appropriate to address them in primary legislation. We will seek in the code of practice to develop understanding of the term "significant". The matter has been taken to the Court of Session and the inner house—not just the outer house—has ruled on the definition of the term. From their lordships' ruling, which builds on what already appears in the code of practice, we can develop a better understanding of the issue.

The allied health professions have done a lot of work with education authorities to develop co-ordinated support plans. The City of Edinburgh Council has worked with Queen Margaret University on a circle approach, which is aimed at breaking down the barriers that sometimes exist between the language that is used by allied health professionals, on the one hand, and educationists, on the other. The Royal College of Speech and Language Therapists and the College of Occupational Therapists have signed off that approach, and we are looking to build an understanding of it.

I could go on for most of today about what we are doing in relation to the 2004 act. Suffice it to say that we have a way of addressing the vast majority of comments, although not all of them, as there are some with which we do not agree. Our aim is to benefit children—recognising the important role of education authorities and the good work that they are doing, on the whole, to implement the 2004 act—by improving implementation of the act, where we can.

The Convener: Organisations that represent parents and children and young people with additional support needs seem to be happy with what is proposed, with some caveats. Their concerns relate to what the bill does not include. You mentioned the definition of the term "significant". Parents organisations have considerable concerns that that definition—or sometimes the lack of it—impedes their ability to access the protection that the legislation should offer. There are also some concerns about the number of co-ordinated support plans that are in place around the country, not in any one specific area.

Robin McKendrick: As I said, the Court of Session has ruled on the definition and we believe that we can develop understanding of it. I have asked—perhaps in an offhand moment—whether, if there was not an issue with the term "significant", there would be an issue with the term "complex" or with how many non-complex factors make up multiple factors. There will always be something that there can be an argument about. The challenge is to broaden the understanding of the term and to develop an understanding that we are not talking about the old record of needs system or special educational needs in another guise. The 2004 act is a much broader concept and framework than that.

The system in Scotland is different from that in England, where a statement is the passport to services and money. In Scotland, being recognised as having additional support needs is the passport to services. The co-ordinated support plan exists because we recognise that, when there is significant input by health professionals and allied health professionals such as speech and language therapists, educational psychologists and perhaps social workers, that needs to be co-ordinated. The parent needs a key worker—a key part of the co-ordinated support plan—to help them to make sense of the myriad services that are involved in supporting a child.

That is one reason why a co-ordinated support plan is important. It also gives parents certain rights. If parents request that an authority prepare a co-ordinated support plan, they have an undeniable right to go to an additional support needs tribunal.

We acknowledge that not all parents know what their rights are under the 2004 act. We tried a pilot communication campaign in Dundee—with the support of Dundee City Council, our communications people and an outside agency—to raise awareness of the legislation. We asked parents to contact schools and to phone the advice line. The campaign was not a resounding success, which reflects the fact that the life of a family with a child with additional support needs—especially severe needs—is largely event driven. If an event does not happen during a campaign, the family may look to come back to it later.

The Scottish Government funds the national advice line, which is called Enquire. Susan Gilroy and I will meet representatives of Enquire next week, and although we are satisfied with the work that it does in providing advice to those who phone, we think that more could be done to seek out parents and engage actively with them. It is not enough to send information leaflets to all general practitioner surgeries and early years centres; it is important to ensure that the leaflets are received and put on display. We acknowledge and do not underestimate the challenge of getting the message over to parents.

When the HMIE report was published in November 2007, the Minister for Children and Early Years Adam Ingram wrote to all chief executives and directors of education to say that he was glad that the report recognised that good things were happening—good intervention in early years and interagency co-operation. However, the situation was not as good for transition, and the minister's frank description of what was happening on co-ordinated support plans was that the number was just not good enough.

We have taken action to support the plans, and we recently secured agreement to form a short-term working group involving different local authorities, some of which have a reasonable number of co-ordinated support plans on their patch and some of which are at the other end of the scale. We want to discuss the challenges, what goes right and wrong, and what some authorities do that others do not, so that we can

learn the lessons. We intend to discuss the output from that group with Learning and Teaching Scotland to see what it can do with those lessons to consider continuing professional development and to publicise good advice and co-ordinated support plan exemplars.

10:30

One reason why we have not yet published an example of a good co-ordinated support plan is that people would say that, if something was not in the example, it could not possibly be in a CSP. In the code of practice, we published a list of those who could have additional support needs, including looked-after children and young carers, but people then said that, if someone was not on that list, they did not have additional support needs. That is the problem with publishing a list or an example. However, I believe that we can get round that.

We are determined to ensure that every child who requests a co-ordinated support plan has their request considered seriously by the education authority, and if the conditions are met, a plan should be put in place. The plan gives them rights, including the right to an annual review, and it also gives the parents rights. That is not to say that parents of children who do not have co-ordinated support plans do not have any rights. They have important rights to access mediation and dispute resolution and a right to appeal to Scottish ministers under section 70 of the Education (Scotland) Act 1980.

As I said, the Scottish Parliament recognised all that in 2004, when it passed the bill. We now need to see where we can strengthen the system.

The Convener: Thank you. When you talked about the complexity of the system, you pointed out that parents have the right to go to the tribunal. I do not want to stray into that issue because one of my colleagues will cover it, but a number of voluntary organisations to which I have spoken believe that far too many parents have to go to the tribunal to access a co-ordinated support plan, rather than their being able to engage with local authorities at an earlier stage. I hope that the short-term working group that you mentioned will address that. Is there a timetable for the group? How will you ensure that its recommendations are quickly disseminated to all 32 local authorities?

Susan Gilroy (Scottish Government Schools Directorate): The first meeting of the group is scheduled to take place on 19 January. In the letters that we sent out to local authorities, we said that we envisage that the working group will meet over two or three months. LTS is a member of the working group, and we hope to work with it to take forward the group's findings as soon as possible after the group concludes its work.

The Convener: Can you supply the committee with a full list of members of the working group?

Susan Gilroy: Absolutely—that is no problem.

The Convener: That would be great. Thank you.

Margaret Smith (Edinburgh West) (LD): Good morning, everybody. I have some questions about out-of-area placing requests. As has already been said, our general feeling is that the bill commands support. Many of the concerns that we have touched on are to do with things that are not in the bill. That said, why has the issue of out-of-area placing requests been handled in the way that it has? Instead of simply creating a duty and providing that out-of-area placing requests are allowed, the bill includes a number of components that alter definitions and responsibilities. The approach seems quite complex.

Will you talk us through how the process will work for parents who want to make an out-of-area placing request? Is the process different for those who have a CSP, those who are in the process of getting a CSP, and those who do not have a CSP?

Robin McKendrick: I will answer your final questions first. The process of making an out-of-area placing request should be the same for every child, regardless of whether they have additional support needs and a co-ordinated support plan.

When we look closely at the process of accepting a placing request and not just at the right to make a placing request, we ask what components make the system work. One element is a co-ordinated support plan. Regardless of whether a placing request has been made, when a child transfers from one authority to another, who has responsibility for the co-ordinated support plan is always an issue. That is because the responsibility lies originally with the home authority, although the child is educated in another authority's area, perhaps many miles from the home authority. We are taking the opportunity to tidy the system, so the bill says that when a child transfers as the result of a parental placing request, the responsibility for the plan will transfer with them to the new authority.

The original code of practice recognised that mediation and dispute resolution could be accessed only through the home authority but said that it was reasonable for a host authority to extend access to those two avenues to a parent. We subsequently found that we should not have said that so, in amending the 2004 act, we are taking the opportunity to tidy the situation.

Louisa Walls (Scottish Government Legal Directorate): I will address Margaret Smith's first question. The changes to out-of-area placing requests are necessary because of a recent decision of the inner house of the Court of Session in the case of WD v Glasgow City Council. That decision cast doubt on the original intention in the 2004 act to allow all children—including those with additional support needs—to make out-of-area placing requests, so the Scottish Government felt that it was necessary to clarify the position in the bill.

Section 1 deals with the changes that are necessary because of that decision. It permits the parents of children who have additional support needs, including those with a CSP, to make an out-of-area placing request. Parents make such a request directly to an authority other than that in whose area they live. Following on from that, a change was necessary to give parents the right to take a decision to refuse such a request to the additional support needs tribunal.

The other changes are necessary to give the host authority—the out-of-area authority that accepts a placing request—duties in relation to the CSP, so that the system works logically, as was always intended. Section 1 gives the host authority the duty to review a CSP that is transferred.

It was felt necessary to give parents and young people the right to access mediation and the alternative forms of dispute resolution that are available under the 2004 act in the host authority's area. The cost of those services will not be recoverable from the home authority, because they will always relate to a dispute with the host authority. The bill allows for that.

The out-of-area placing request changes simply ensure that the logic of the 2004 act follows through for out-of-area placing requests.

Robin McKendrick: No bill—far less an amendment bill—is easy to understand. Complexities are involved, but we will have the opportunity to explain the position clearly and concisely in the revised code of practice. I make it clear that we will provide information to parents to ensure that they are clear about their rights. We will discuss with Enquire the issuing of one of its leaflets. I do not know whether members are aware that Enquire has published 16 excellent leaflets for parents and young people that explain simply what the 2004 act is about and what their rights are. It is certainly our intention and, I am sure, Enquire's intention, to publish a leaflet on the bill.

What happens between authorities when they deal with placing requests has been commented on. As Louisa Walls mentioned, section 23 of the Education (Scotland) Act 1980 is the convention; it is the legislative opportunity by which authorities can claim money back from one another. However, we wanted to be sure about the issue so that we could clearly explain things to people.

I will give an example of what would happen, if I may. If 10 pupils move from schools in East Lothian to schools in Edinburgh, the next time that the school census data are used to calculate the local government settlement—the allocations will be in 2011 and 2012—those pupils will appear in Edinburgh's pupil count. As a result, Edinburgh will get a slightly larger share of those grant-aided expenditure lines and East Lothian will get a slightly smaller share, all other things being equal. Moreover, the additionality for children with additional support needs—it is recognised that something additional is required—can be claimed back under section 23 of the 1980 act.

Lest anybody is concerned that that approach is a parents charter to visit placing requests on local authorities that have no power but to accept them, schedule 2 to the 2004 act specifically lists a number of grounds on which an education authority can refuse a placing request for a pupil, whether that is an out-of-area request or a request for a place within the same area. I do not want to go into details, but the schedule says that an authority could refuse a placing request if, for example, the school would require an extra teacher, or if unreasonable costs or anything else out of the ordinary were involved. We are simply saying that a parent has the right to make a placing request to their home authority or to another authority, and we are trying to clarify some of the supporting reasons for that.

Margaret Smith: I would like to progress through the process that involves parents going to a tribunal with a placing request and the tribunal deciding that that request should be accepted. As far as I understand it, there does not appear to be any power at the moment to state commencement dates, and it does not appear that there will be on-going scrutiny of whether such decisions have been acted on. Obviously, such issues have been raised with us and with you; it is telling that they have also been raised in the submission from the additional support needs tribunals for Scotland. There is frustration with how the system works at the moment, and it is clear that you do not intend to deal with that in the bill. Do you intend the code of practice to deal with it?

Robin McKendrick: The president of the additional support needs tribunals for Scotland and one or two others have raised the issue of a tribunal being able to specify dates by which its decisions should be acted on, but on specific—

Margaret Smith: The issues of delays and the power to state commencement dates were raised with us in the joint submission that we received, to

which a number of key organisations have signed up, such as Govan Law Centre, Enable Scotland, Capability Scotland and the Royal National Institute of the Blind. Although they are few in number, they are significant players in the sector.

10:45

Robin McKendrick: Yes. We work closely with Govan Law Centre and a number of the other agencies that you mentioned on supporting implementation. You are right to say that the 2004 act does not specify that any decision of the tribunal should be acted on by an authority within a specified period of time. That was considered when the original bill was being drafted. I think I am right in saying that the thinking at the time was that an authority would be under a duty to deal with quite complex issues and to put arrangements in place, which might take some time, and that it was difficult to specify how that might apply in a rural authority, as opposed to a city authority.

Equally, when an education authority fails to take the action that is specified by the tribunal, although the legislation does not permit people to go back to the tribunal to complain about the issue, there is certainly the opportunity to complain through dispute resolution—although that might not be so relevant in such cases—or under section 70 of the Education (Scotland) Act 1980, or by seeking from Scottish ministers an order under section 27 of the 2004 act. If the tribunal has said that something should happen, but it has not happened, would a further decision of the tribunal make it happen, or would it be better to bring the matter to the Scottish ministers, which can be done under section 70 of the 1980 act, as a failure of an authority to make provision for the additional support needs of a child? We have not addressed the point in the bill as it stands. We would want to hear more about the issue before we considered it further.

Margaret Smith: How many parents have found it necessary to take the route that you have just suggested of going to Scottish ministers under section 70 of the 1980 act? Given everything that we have heard about parents' views about tribunals and the complexity of the situation, and given what you have said, quite rightly, about the types of families that we are talking about, who have incredibly difficult lives, surely we should be making things as easy as possible for them. Most of us find that our work with such families is an increasing part of our case load. So many families seem to be put through the mill to get the services that they need for their children. Would it not be reasonable to have a catch-all timescale whereby if, by x months—let us say six months, which is a long time in a child's life—something had not happened, the issue would come back to the tribunal? That would create a default position and it would be up to the tribunal to keep an on-going watch on whether its decisions were being implemented. If they were not being implemented, the onus would no longer be on the parents to take forward the matter; it would be for the tribunal to ensure that its decisions were acted on.

Robin McKendrick: We would want to give that further consideration. Perhaps the minister can give you a view on that when he comes back, if that is acceptable.

Margaret Smith: Thank you.

Elizabeth Smith (Mid Scotland and Fife) (Con): In the evidence that we took last week informally from many stakeholder groups and in some of the evidence that councils have submitted, the overriding concern is to ensure that the educational needs of the child are in balance with the needs that have a social dimension to them. If we are doing our jobs properly, that ought to be the outcome. Are there specific parts of the bill that you think will enhance that by taking a more holistic approach, or do you think the code of practice could be improved to address that?

Robin McKendrick: By strengthening parents' rights, the holistic approach is supported. The changes proposed in the bill either clarify or strengthen the 2004 act. In doing so, I believe that they will support the broader objectives that you have outlined.

Now that we have a couple of years of experience, we can put down in words what we mean by additional support for learning, and we can perhaps describe the outcomes somewhat more clearly than we could back in 2004-05. However, it is the implementation that will be important. In light of the concordat, we have to co-operate with local authorities to ensure that not only this piece of legislation but broader children's legislation can meet objectives and do what it says on the tin—improve life chances and opportunities for our children in line with the aims of the curriculum for excellence, the early years strategy and the getting it right for every child agenda. The bill is part of that agenda. It is important that we get the message across to professionals—health professionals, social services professionals and education professionals—that the child has to be at the centre of what we do. We want a joined-up approach to the support and the services that are offered to the child and the family.

Elizabeth Smith: In the evidence that you took before making the proposals in the bill, were there any tensions among stakeholder groups? Did they feel that not enough information was being shared about individual children?

Robin McKendrick: There were no specific tensions, but some issues remain to be resolved. I do not know whether this will answer your question; please correct me if I go off down the wrong track. There can be a tension between, on the one hand, social services, who say, "We've got getting it right for every child, which is the most important game in town," and, on the other hand, education professionals who say, "Wait a minute. We've got the additional support for learning legislation, and that's the most important game in town." The truth is that neither is more important than the other.

We are aware of that possible tension for our colleagues who are working with the getting it right for every child agenda. Tensions exist all over society, but the tension here is important because implementation will affect individual children.

At a recent conference on inclusion, run by the Association of Headteachers and Deputes in Scotland at Our Dynamic Earth in Edinburgh, we took the opportunity of publishing a leaflet. If you like, it was a starter for 10 that sought to tease out some of the issues in "Getting it right for every child", in the Education (Additional Support for Learning) Act 2004, in the curriculum for excellence and in the early years strategy. We wanted to explain where the interfaces are—where they all join up. The different ideas are not contradictory. People ask how a co-ordinated support plan can link with a single plan. Understanding how a modular plan can exist does not require an understanding of rocket science, but explanation is required from the centre to practitioners.

We attend meetings of the association of support for learning officers. The association comprises quality improvement officers, so they are fairly senior players in education authorities. The issues between "Getting it right for every child" and the 2004 act come up repeatedly. We are trying to explain the issues to professionals and, importantly, to parents, so that they can make sense of them.

Elizabeth Smith: Are you confident that the proposals in the bill will make the lines of responsibility clear?

Robin McKendrick: The code of practice can help to explain not the lines, but the symmetry between them; where the policies join up and interface; and the holistic approach. As I said earlier, the code of practice is the place to put the legislation on additional support for learning in context with the getting it right for every child agenda, the early years strategy, the curriculum for excellence, and health initiatives as well.

Elizabeth Smith: Are you in the business of disseminating best practice? In the code of practice, you obviously use examples that have worked very well. What are the timescales for putting everything together?

Robin McKendrick: The timescales depend very much on the progress of the bill. As I am sure you realise, the code of practice contains exemplars in which we set out the situation for a child in position A, B C and so on. The LTS inclusive education website has some good examples of the situation three years down the line and, just over a year ago, we ran a seminar on building best practice and understanding. Equally, we seek to ensure that any professional who is struggling with an issue knows where to go to get good advice. The Enquire service gives education professionals, including teaching staff, access to best practice information, as does LTS, through its glow programme.

Christina McKelvie (Central Scotland) (SNP): I will pick up on some of the issues that my colleague Elizabeth Smith explored. We heard interesting evidence last week from stakeholders on taking a holistic approach to looked-after young people who are being accommodated away from home and Traveller children, and the social work engagement in all of that.

The issue with Traveller children is the inconsistent approach that is taken to co-ordinated support plans as they move from school to school or authority to authority. The issue with looked-after children who are accommodated away from home is the conflict of interest that arises if the corporate parent goes to the tribunal to support the young person against the authority that is itself the corporate parent. Do you know what I mean?

Robin McKendrick: Yes.

Christina McKelvie: Another issue that arose in last week's evidence relates to impacts on the children's hearings system. We heard that educational and support needs are sometimes put on the back burner as a result of behavioural issues or other social issues in the family circle taking precedence.

Robin McKendrick: I go back to "Getting it right for every child", which set out the holistic approach that should be taken by the children's hearings system. There are signs that the educational needs of the child have been overlooked. The message in the 2004 act was that those needs should never be overlooked and that they can be accommodated, no matter the situation in which the child finds him or herself.

For example, in drafting the bill, we made it absolutely clear that the co-ordinated support plan should reflect the fact that a child at school A is taken into residential care because of behavioural issues. The first, rudimentary change to the CSP should be that the child's nominated school is no

longer the local school. The educational objectives need also to be considered if we are to address the issues that cause a child's offending behaviour. Unless education is considered, any plan that the children's hearings system comes up with for a child will not be as full as it might be. I think and hope that we are addressing the issue through the getting it right for every child agenda.

I turn to the issue of Traveller children and the different approaches that they may face. We have funded and continue to fund the Scottish Traveller education programme—indeed, my branch has responsibility for working with STEP. We have done quite a lot in that regard. In the last wee while, we funded STEP to develop a rapid initial assessment tool that could be used when a Traveller child first arrived at a school. We wanted the teacher to have a tool with which they could rapidly assess the child beside their classroom peers. We are continuing to work with STEP.

Service children also move from school to school. We discussed the matter with the Ministry of Defence and hope to hold a short seminar—through the good offices of the Convention of Scottish Local Authorities—with the Scottish Government, the MOD and education authorities that have service bases in their locality. In that way, we can start to discuss the issues for children who face interrupted learning.

The 2004 act considers such issues in a holistic way, and further attempts are being made to address such matters through developments to do with the personal support that is available to children. We have no pat answers to give the committee, but we are aware of the issues, which are on the agenda, and we are trying to develop good practice in that regard.

11:00

It is fair to say that in the context of the 2004 act the interests of looked-after children concern the minister more than almost anything else does. There is not a complete lack of co-ordinated support plans for looked-after and accommodated children, but the number of plans is low, which is simply not good enough, as the minister said when he wrote to chief executives and directors of education.

As recently as last week we met the Equality and Human Rights Commission, which signalled its intention to consider the provisions for looked-after children, as is the commission's right under the Equality Act 2006. The commission acknowledged that the situation in Scotland is different from the situation in England and Wales, because we have the 2004 act. The commission is interested in considering the matter and we are interested in working with it.

We can ensure that our colleagues who have responsibility for that policy area write to the clerk to give an indication of the range of activity in which they have been involved—members will forgive me if my memory is a bit patchy on that. A range of developmental material was published recently on the position of looked-after children in relation to peer support, socialisation, access to education, transition arrangements and so on. There has also been recent work on the corporate parent. There are issues to do with how the corporate parent caters for looked-after children through co-ordinated support plans—although such issues are not necessarily for the bill.

HMIE also considers the issue. The more it highlights the plight of children who are looked after and accommodated, the better. It is not that children are not being properly looked after; it is about ensuring that a child's right to a co-ordinated support plan is properly acknowledged, if a plan is appropriate for the child.

It is important to stress that we are not saying—nor does the 2004 act say—that every child who is looked after or accommodated, every young carer and every child in circumstances A, B, C or D has additional support needs and should have a co-ordinated support plan. The 2004 act sets up a broad framework in which what is important is the needs of the individual child.

I hope that my response addresses some of the points that members made. We will ensure that colleagues send the clerk an update on action that has been taken.

Christina McKelvie: That would be helpful.

Claire Baker (Mid Scotland and Fife) (Lab): My questions are about changes to the tribunal system. First, will you give us the rationale for changes in the approach to transfers between education appeal committees and the tribunal or sheriffs and say what you hope to achieve by making the changes? Can you give examples of situations that parents have found themselves in?

Robin McKendrick: I can tell you about the case that led to Lady Dorrian's ruling. The parent made a placing request, which was refused, and was advised that they had a right of appeal to an education appeal committee, and that ultimately the case could go to a sheriff. Two weeks later, the authority told the parent, "We've changed our mind. We're going to prepare a co-ordinated support plan for your child, and you can take the case to the tribunal." Off the parent went to the tribunal. However, as the 2004 act stands, a person can go to the tribunal only if the placing request is refused after the authority has indicated that a co-ordinated support plan is being prepared.

In that case, the placing request was made before the CSP. If it had been the other way

round, the matter would have gone to the tribunal. Because it was how I described it, it should have gone to a sheriff, but it went to the tribunal, which ruled on it. That ruling was appealed and the case went to the Court of Session. Lady Dorrian said that the case should never have gone to the tribunal. Our counsel argued that, although the 2004 act did not specifically say so, when a CSP was on the agenda and there was a placing request, it should go to the tribunal—it was like the elephant in the corner, and everybody knew it. As Lady Dorrian said, if the Scottish Parliament intended that to be the case, it should have said so in the legislation. The fact is that the legislation does not say that.

In the bill, we are trying to make it clear that if, at any time, a co-ordinated support plan pops its head above the parapet before the sheriff court has made a final determination on a placing request, the matter should go to the additional support needs tribunal. The co-ordinated support plan is arguably as important as the placing request and will play an important part in provision for the child. The school is the setting for that provision, not simply something separate from it; it is plugged into the provision that would be made for the child under a co-ordinated support plan, so it is important.

It has been suggested that parents could make a vexatious request for a co-ordinated support plan just because they did not want to go to a sheriff and the case could start pinging and ponging between the sheriff and the additional support needs tribunal. We think that the bill will prevent that ping-pong and ensure that the child's interests are paramount.

If a case about whether a co-ordinated support plan should be opened and in which a placing request had been made was referred to a tribunal—even erroneously—and the tribunal ultimately said that the authority was right that no co-ordinated support plan should be prepared, that tribunal would be left deciding a placing request for a child with additional support needs. Technically, it should not do that, because the request should go to an education appeal committee and a sheriff. However, in those circumstances, if the tribunal with its expert hat on believed that the request was well intentioned and if, although the co-ordinated support plan had not been agreed to, it was close but no coconut, the tribunal would have the power to decide on the placing request. If the claim was vexatious—if it was clear to everybody that there never had been any likelihood of a co-ordinated support plan being prepared and that the request was just a chance to get to a tribunal rather than a sheriff—the tribunal would have the power to transfer it back.

I sympathise with your difficulty in trying to make sense of the bill. We tried to address that in the explanatory note, but the code of practice will have to make it absolutely clear to everybody what the issue is. We talked before about the placing request leaflet that we were going to ask Enquire—the Scottish advice service for additional support for learning—to produce for parents to clarify the matter. The code of practice will have to address what happens when parents request a co-ordinated support plan. There will be guidance to try to clarify this highly technical issue for professionals and parents.

Claire Baker: That is helpful. My other question is on the new ground for referral to the tribunal, when the timescale has been breached. In such cases, the appeal will be heard only by the convener of the tribunal. Although the stakeholders with whom we met supported the new ground, they sounded some notes of caution on the idea of the convener hearing cases alone. Why was that decision made and what will its benefits be?

Robin McKendrick: Speed. An individual hearing a case alone can make a decision far more quickly than if we had to try to get a date for the three tribunal members to get together. Such a case would be an expedited reference and we therefore thought that the convener could meet alone. Basically, the facts would be such that it would not take three people to decide whether the timescale had been breached—it would have been breached or it would not. The case would be black and white; there would be no in-between and no judgment to be made. That is why we felt that a convener sitting alone would be the best and quickest way to proceed. We could have said any tribunal member, but we think that the convener has the necessary legal standing to make the determination on his or her own.

Claire Baker: The bill also proposes that the tribunal can review its own decisions. You commented on that previously, but can you say more about the kind of issues that might be dealt with, who would do the review and how it relates to appeals to the Court of Session?

Robin McKendrick: As I said previously, the Administrative Justice and Tribunals Council publishes guidelines for tribunals, which state that there should be a review when the issue is a point of law, but it also gives other examples. The bill states that the tribunal can review decisions, but we will have to specify what the tribunal can review when we revise and amend the tribunal rules and procedures in secondary legislation. When we do so, we will consult the Administrative Justice and Tribunals Council, as we are required to do.

We have not yet made a decision on when reviews should take place. We discussed the issue at the consultation seminars. Some people said there should be reviews only on points of law and others said that there should be reviews when there has been an error and the tribunal may have reached the wrong decision. With administrative errors, the tribunal can already conduct a review under the tribunal rules and procedures. As with most things in life, it is fair to say that there were a variety of views on the best course of action.

We will reach a decision only after we have consulted and people have been able to see the whites of our eyes when we say, "That is what we are proposing. What do you think about it?" No doubt we will come before the committee at some point in the future to discuss the revised rules and procedures so that we can hear what you think about them.

Claire Baker: That is helpful. The issue was raised in our discussion with stakeholders. There was caution about the tribunal reviewing its own decisions, so I am sure that those stakeholders will take part in the consultation.

Robin McKendrick: It is not uncommon for tribunals to be able to review their own decisions. The only other way to review a tribunal decision at the moment is to go to the Court of Session. If the person concerned does not get legal aid, that is not easy.

Kenneth Gibson: I was about to touch on that issue. Neither parents nor children currently have rights to assistance to secure legal representation to take their case forward. What plans do you have to redress the balance?

Robin McKendrick: The plan is that there should not be a balance to redress. The issue is that education authorities have recently begun to show up with fairly senior legal representation, while on the other side is the parent and ISEA or Govan Law Centre. I remember that a senior solicitor from London who spoke at a Central Law Training workshop just after the Education (Additional Support for Learning) (Scotland) Act 2004 had come into force was aghast that a piece of legislation referred to ethos, level playing fields and ensuring that the parent is comfortable at a tribunal, but that is what the tribunal rules state.

We must consider what people are saying about the tribunal. If education authorities and senior speech and language therapists are saying that they would not wish to repeat the experience, and if ISEA is telling us that parents are saying that they do not want to go through the situation again, something needs to be done about the tribunal.

There is a limit to what we can do in the bill. We can do something about the tribunal procedures, but we have not yet started to draft the secondary legislation that will flow from the bill. When we discussed the tribunal at the consultation events, we had to hold people back and say that we were not discussing the tribunal rules and procedures. We will consult on those. Everyone is aware of the issue about the tribunal, and there is an expectation that we will address it.

11:15

We have talked to the Govan Law Centre and ISEA, which are the principal proponents of parents at the tribunal, about how we can make the process simpler for all concerned, not just parents. For example, we have discussed having an agreed bundle of documents rather than a big bundle here and a big bundle there, because the current situation means that, when people go to the tribunal, the facts of the case have not been agreed, because one bundle says one thing is happening and the other bundle says something else. The Govan Law Centre and ISEA will speak for themselves, but, believe me, we think that they see the logic in doing something about that and either having an agreed bundle or extending the current period of 30 days between someone receiving the bundle and their having to respond to it. A longer period would allow people to reflect more on what is being said.

Another issue that the committee might wish to raise with the president of the tribunal—ultimately, she can issue directions about how the tribunal operates—is the practice of party A asking party B direct questions. That is certainly not how the legislation envisaged the tribunal would operate. Rather, the view was that tribunal members would have a clear understanding of the agreed grounds between the parties and would seek to identify what was required to make a decision on the referral. That would make the education authority's Queen's counsel redundant, because the tribunal would ask the professionals about X and the parents about Y.

It would not be the best approach to seek to equalise the situation by having solicitors on both sides; instead, we should try to neutralise the situation to make the tribunal work as the rules and procedures envisaged it would. We will return to the issue of the tribunal's operation when we consider the secondary legislation on the tribunal rules and procedures.

Kenneth Gibson: I imagine that, for many parents, the tribunal process is onerous and they would not want to go through it unless they absolutely had to. What support is provided to parents and children before they get to that stage? Clearly, parents have to go up against what they might see as the power of the council and its resources. There is concern that, although parents have rights, they do not have access to resources

such as mediation and advocacy before the tribunal stage. How do we ensure that, when parents must go to the tribunal, the balance that you talked about when you referred to strengthening parents' rights becomes a reality?

Robin McKendrick: We stress in the code of practice and all our guidelines that, although the Education (Additional Support for Learning) (Scotland) Act 2004 puts in place an appeals route for parents, we hope and expect that issues will be resolved at the lowest level possible. We believe that the best place to try to resolve issues is in school with the teacher or headteacher. However, we realise that not every issue can be resolved at that level.

I draw the committee's attention to the fact that, recently, the Government announced that it had stepped in to safeguard the advocacy service for parents with children with additional support needs by providing funding to ISEA. Its principal funding sources had dried up, it was in the process of closing its office in Dalkeith and it was no longer able to support parents. Although people know that ISEA represents parents at the additional support needs tribunal, that is just the tip of the iceberg—it provides support and advocacy to parents on a much broader basis. Given that, and although we recognised that most local authorities were doing an excellent job in meeting the needs of children with additional support needs and were providing adequate support to parents, we stepped in to fund ISEA, at least to the end of this financial year.

In the meantime, we recognised that there was a need to re-examine advocacy services in and around the Education (Additional Support for Learning) (Scotland) Act 2004. To that end, we commissioned the Govan Law Centre to undertake some developmental work. It has contacted a number of volunteer advocacy organisations, including the National Autistic Society, and is running a suite of development courses for them to build knowledge about the 2004 act and the skills that are necessary to advocate on behalf of families and children under it, and to gain the necessary experience by going along to tribunals to see how they operate. We have asked the Govan Law Centre to reply to us by the end of January, at which time we will take a decision about whether we should take further steps to provide advocacy services for parents under the legislation.

As the minister said, the funding that has been announced today will allow such services to develop support and provision. In the longer term, we are considering carefully how we can further improve advocacy support to parents, although the decision about what advocacy service will be provided has not been finalised.

We met ISEA last week to discuss how things are going. Since funding was provided to it on 27 October, it has taken 94 calls, taken on 19 new cases and made six referrals to the additional support needs tribunal, one of which was upheld. Importantly, as other stakeholders have said to the committee, the one appeal that the tribunal upheld overturned an education authority's decision—which was based on Lord Wheatley's decision—not to prepare a co-ordinated support plan. The provision of co-ordinated support plans and support services from social services were called into question, at least by some, as a result of Lord Wheatley's decision.

You will hear many people say of ISEA, "All they're interested in is going to the tribunal. They don't seek to resolve the issue with authorities and advocate on parents' behalf." However, it was clear in the grant offer to ISEA that we expect it to provide an advocacy service to any parent who approaches it and to seek to resolve issues with education authorities before the matter goes to a tribunal or dispute resolution. Of the 19 new cases that ISEA has taken on, there have been only six referrals, which means that it is involved in 13 cases that are not getting the same attention as the six that are going to the tribunal.

I hope that we are getting it right there, but equally, as the minister said, many education authorities are doing the right thing by their parents. For example, although I will not name them, several education authorities have service level agreements with the Parent to Parent service, which provides advocacy services for children and parents under the 2004 act. We spoke to that service, and although it is true that no one has taken a case to the additional support needs tribunal, it confirmed that if a case existed, it would take it to the tribunal on behalf of the parent. However, it has managed to resolve all the issues that have arisen without the need to go to the tribunal. I am not saying that that is right or wrong—it just happens to be the right outcome for those parents in those cases.

We still have some way to travel, not just on advocacy but on ensuring that parents know what their rights are. When they know their rights, they can make a decision about whether they want to do something about a situation.

An encouraging number of cases have been resolved through mediation. I am sure that the Govan Law Centre would say—although I do not want to put words into its mouth—that it is a fan of independent adjudication, and not just because of the process itself, but because sometimes the fact that a parent has lodged a complaint with an authority means that the authority re-examines the issue and comes to an arrangement with the parent about making provision for their child,

which avoids the need for an independent adjudicator to make a recommendation.

A lot of work is going on below the surface. Education authorities are doing the right thing in supporting parents and ensuring that information is available and that decision-making processes are open and transparent. Unfortunately, a few authorities are not doing as well as others, which gives rise to problems—cases go to the Court of Session and there is fallout from that. On the whole, however, we can tell a positive story about advocacy. We will never do everything that children in Scotland want from advocacy services, but I believe that we are doing quite a lot.

Kenneth Gibson: You are doing something, but it is a concern that, given its caseload, ISEA has funding only until the end of this financial year. I hope that when the report is published in January, the Scottish Government will seek to put advocacy services on a much sounder footing, because they are required in the long term.

Robin McKendrick: I hope that the Minister for Children and Early Years might be in a position to say something further on that when he appears before the committee in January.

Kenneth Gibson: Many local authorities act in the spirit of the 2004 act, but it is a concern when others do not. The problem is about rights and duties. There is an issue around trying to ensure that measures are carried out because there is a duty to do so rather than through the enforcement of rights. Parents have responsibilities, but they sometimes feel that the spirit of the 2004 act is not being followed, which is why we are in the current situation.

Robin McKendrick: I am a parent myself—my child is disabled, and I had to tell the school workforce what her rights were under the 2004 act. I recognise that I am in a fairly unique position, and that not all parents know how to address the issues. I am sure committee members agree that there is no silver bullet—the issue is about ensuring the availability of information and access. Authorities are under a duty to publicise information for parents, but not all 32 local authorities are doing so in the best way, and some are perhaps not doing it at all.

It is a simple point, but the issue is to ensure that when the Scottish Government becomes aware that something is not happening, we bring it to the attention of the district HMIE inspector. They are the people who review authorities, and they can bring the issue to the attention of the appropriate senior people in the authority who do not know that X has happened or that Y has not happened, or that a decision has been taken in a certain way.

Kenneth Gibson: In its submission, Afasic Scotland states:

> "While Section 11A of the ASL Act gives both parents and children the right to support/advocacy there is no duty on anyone to provide or fund such a service … A right which carries no matching responsibility is meaningless."

The issue is about delivery on the ground. Everyone wants those parents who are least able to make their case for financial or other reasons to be able to fulfil their duty to their child and have access to those support mechanisms.

11:30

Robin McKendrick: I am sorry, I did not catch who said that.

Kenneth Gibson: Afasic Scotland.

Robin McKendrick: As I have said, we are taking certain steps. We have taken action to fund ISEA, because its service would not have been available if we had not done so. Comic Relief and the Big Lottery Fund withdrew funding and the Scottish Government stepped in. The Minister for Children and Early Years will probably be able to update you on that when he appears before the committee towards the end of January.

In addition, we fund Govan Law Centre to provide advice and advocacy services on additional support for learning. It is no benefit to parents who are not in their areas, but several authorities have taken action to provide advocacy services through Parent to Parent and other organisations, such as the children in the Highlands information point in Inverness. We are addressing the issue.

Aileen Campbell (South of Scotland) (SNP): Before I start on my line of questions, I will ask you about something that was brought up in an informal session. It was suggested that local authorities often pursue legal routes because they are a bit frightened that some of the issues that are raised might be a slight on them and they are a bit risk averse. Do you accept that view?

Robin McKendrick: I do not know how to answer that. Are local authorities in Scotland risk averse? The benefit of the 2004 act is that others are there to help the decision makers in the education authority to come to the right decision about provision for a child or young person. Although the old-fashioned view is that education authorities and professionals working in them are risk averse, the vast majority are not.

We are funding the University of Aberdeen over a number of years to look at inclusive practice in initial teacher education, so that when the next cohort of young teachers goes into the profession, they might be more aware than many who are already in the profession of children's needs for

and rights to additional support for learning. In fact, the First Minister has been involved with the deans of initial teacher education faculties in Scottish universities, and the cabinet secretary recently spoke at the launch of an HMIE report on dyslexia to draw attention to the fact that the deans are working on an inclusive approach that will be integrated into initial teacher education programmes. There will be an announcement to that effect in April next year. That is another indication of the work that is being done in support of the inclusive ethos of the 2004 act.

Aileen Campbell: In your opening remarks, you said that you foresee changes to the code of practice and subordinate legislation. What changes to subordinate legislation might arise from the bill?

Robin McKendrick: We will certainly need to address the co-ordinated support plan regulations because we will need to specify certain issues. Susan Gilroy can say a little bit more about that. I am not trying to teach my granny to suck eggs here, but primary legislation has a certain function, and secondary legislation is more detailed, so it will give the detail stipulated by the bill.

Specifically, the bill will require the co-ordinated support plan regulations and the tribunal rules and procedures to be amended to clarify, for example, what is meant by the tribunal reviewing its own decision. The regulations will specify what the circumstances would be for that. It is not proper for an act to reflect that; it needs to be reflected in secondary legislation.

We have had two and a half years of working with the code of practice. At the risk of being put up against a wall and shot, I say that we recognise that there are areas where it might be improved, for example in the language that is used. We did not have two and a half years of experience when we wrote the code of practice. We can make it better than it is, not only by explaining parents' rights and the duties on education authorities but by making it clear what the procedures are for placing requests, and what happens when someone requests a co-ordinated support plan and makes a placing request at the same time. That process has been introduced as a result of the legislation. There are issues that go from primary legislation to secondary legislation and through to the code of practice. I cannot predict what else stakeholders will say when we discuss with them the tribunal rules and procedures, and whether they will say, "You should be changing this. You should be changing that." There will be a consultation on that.

None of this can be consulted on until after you have passed the bill at stage 3. We need to wait until then before we can publish anything relating to secondary legislation or the code of practice. After stage 3, when we know what the bill says before it goes to royal assent, we can publish secondary legislation. As I have said, it is our intention that the secondary legislation will relate to the CSP regulations and the tribunal rules and procedures. There is also the code of practice. It is required by statute—in the 2004 act—that we consult on that. That is all part of the work that we will do in secondary legislation. I am not dictating the timetable for the bill, but I think that we will be in a position in the early autumn to consult on the secondary legislation. Hopefully, the legislation, having passed the consultation phase and parliamentary scrutiny, will commence towards the end of 2009. The secondary legislation represents a related but separate process. Does that help?

Aileen Campbell: Yes, that was a very full answer. It covered many of the supplementary questions that I wanted to ask.

We heard a lot from the stakeholders about the code of practice. We felt that it could be strengthened regarding the transition from pre-school to primary school and the period that goes beyond school education. Are those issues that you will be considering when you revise the code of practice?

Robin McKendrick: We will be re-emphasising what the code of practice already says. We will give symmetry to the early years strategy and will reflect that in the code of practice.

On the transition to post-school, we recognise that more needs to be done to spread the message. During the consultation, a few people lamented the passing of the future needs assessment as if it were the only lighthouse—the only planning mechanism for children and young people moving on to post-school life. We had to explain to them that the 2004 act put that on a completely different level. No longer will there be one planning meeting in the last year of the child's education. Planning should start as early as second or third year and should be concluded before the young person or child enters the final year of their school experience. There is a link between additional support for learning and the children and young people on whom the more choices, more chances strategy is focused. With colleagues who are involved in that initiative, we will interview this Friday for a development officer position that will be funded by the schools and lifelong learning directorates. The officer will work not only with schools but with stakeholders in further and higher education, Careers Scotland and other agencies that are involved in transitions. They will be based in LTS and will try to build up exemplars of good practice in transitions to post-school provision.

According to the HMIE report, too often no planning has taken place when children leave

school. The 2004 act includes provisions relating to additional support needs. More choices, more chances is a policy agenda that the Government is pursuing. Hopefully, the development officer will bring the two issues together, to ensure that there is effective planning for children who require that to support them into their post-school lives. In the code of practice, we talk about appropriate agencies rather than other local authorities, because all areas—not just education—are under a duty to be involved, as partners, in transition planning for children and young people before they leave school. Housing and social services may have a role to play in a young person's life when they leave school or home. The development officer's job is to build capacity and understanding and to identify examples of good practice across Scotland.

Aileen Campbell: Many people think that the code of practice does not possess enough teeth and that it would be preferable to use legislation to bring about the changes that they regard as necessary. What is your response to that view? How can you assure people that changes to the code of practice will be sufficient to ensure that problems do not arise to the extent that they have in the past?

Robin McKendrick: When the inner house of the Court of Session considers referrals on a matter relating to the 2004 act, it refers to the code of practice. The act makes clear that authorities are required to "have regard to" the code. That does not mean that they are stuck with what the code says—they can make alternative provision—but they cannot ignore it; successive rulings of both the inner house and the outer house of the Court of Session have made that absolutely clear. If any education authority or stakeholder is in doubt, I suggest that they look at what their lordships have said regarding the code of practice.

Ken Macintosh (Eastwood) (Lab): Issues that were flagged up in the consultation include the contrast between the expected uptake of CSPs when the Education (Additional Support for Learning) (Scotland) Bill was passed in 2004 and the actual number of plans. There are just under 2,000 CSPs, but there were expected to be 12,000, 13,000 or 14,000. Is that a concern for the Government? If so, do you expect the bill to address it?

The Convener: I remind you that questions to officials should not relate to policy. Your question might be better put to the minister, although I think that Mr McKendrick has already answered it at various points today when responding to other questions.

11:45

Ken Macintosh: In general, are you able to give us a steer on your attitude to amendments to address more fundamental concerns to do with the operation of the 2004 act—for example, the concern that the process is too legalistic or confrontational despite the best intentions of the act?

Robin McKendrick: We will consider each proposed amendment individually and judge it on its merits.

Ken Macintosh: Many people have flagged up a concern about the funding for additional support for learning and the transfer of any costs between local authorities. There is nothing about that in the bill. Did I hear you say that the issue will be addressed in the code of practice?

Robin McKendrick: Sorry?

Ken Macintosh: The transfer of resources for additional support for learning between local authorities is an issue of great concern. There is currently a lack of clarity about who is responsible for which costs. Do you intend to address that issue?

Robin McKendrick: As I have said, we will clarify section 29(3), which makes it clear that, when arrangements are entered into by two local authorities—for example, East Lothian Council and City of Edinburgh Council—

Ken Macintosh: Sorry, but where will you clarify that?

Robin McKendrick: We are clarifying it in the bill.

Ken Macintosh: The bill will clarify—

Robin McKendrick: As I said, the amendment to section 29(3) clarifies that, when arrangements are entered into by two authorities—East Lothian Council and City of Edinburgh Council, for example, with East Lothian being the home authority and Edinburgh being the host authority—in respect of the school education of a child, the home authority to which the young person belongs will always be responsible. However, if a parent in East Lothian asks that their child attend a school in Edinburgh—not an independent school but a school that is run by the Edinburgh education authority—it is up to City of Edinburgh Council to decide whether it accepts that placing request. Schedule 2 to the 2004 act specifies the reasons why City of Edinburgh Council could refuse such a placing request.

If the council grants that placing request and one pupil transfers from East Lothian to Edinburgh, as I explained when I talked about 10 pupils, the child will be captured in the school census data as attending a school in Edinburgh and, when the

school census data are used to calculate the local government settlement, City of Edinburgh Council will have plus one and East Lothian Council will have minus one, so City of Edinburgh Council will be funded for that place. In terms of any additionality that comes with the individual child, City of Edinburgh Council could claim back from East Lothian Council under section 23(4) the portion that is additional to the schooling of the child.

We believe that that is already clear in the legislation. However, given the comments that have been made by education authorities regarding the matter and the questions that we have been asked by principal psychologists at some of the consultation meetings, there seems to be a misunderstanding of the process. We could describe ourselves as anoraks because we know the details of it. However, when we clarify the situation regarding arrangements that are made between authorities in clarifying section 29(3), we need to clarify the situation regarding the arrangements between authorities when a parent makes a placing request outwith an authority. We can certainly clarify that in the code of practice when we publish that. The committee will see the code of practice, and there will be 40 days to consult on it—it will be an affirmative rather than a negative instrument. There will be a full discussion about it.

Ken Macintosh: I will come on to the code of practice in a second, but have there been any occasions on which the Executive has been asked to adjudicate on a dispute between authorities about costs and an authority has not abided by the Executive's decision?

Robin McKendrick: There is a case involving two authorities in which the Scottish ministers' decision is being considered at the Court of Session. I do not believe that it would be appropriate for me to comment further on that at this stage, other than to say that a number of cases involving the same two authorities have been referred to us. We want to meet those authorities early in January to discuss the issue with them.

Ken Macintosh: I will put it another way. Has the Executive made any successful adjudications in cases in which there has been a dispute between local authorities?

Robin McKendrick: I am not aware of any adjudication by the Executive that predates those that are being considered at the Court of Session, but I could certainly look into that and write to the clerk, if that would be helpful.

Ken Macintosh: You mentioned a mechanism by which such disputes can be resolved, but the mechanism has been tested and so far it has been found wanting, in that it has not been used successfully, as far as I am aware.

Robin McKendrick: Any mechanism involves rights. If we come down on the side of one party, the other has a right to go to the Court of Session. As I understand the situation, that is what has happened.

Ken Macintosh: So an authority can go to court—that is fine.

How will the provisions on out-of-authority transfers be interpreted? Some local authorities have suggested that if a parent appeals to a host authority to accept an out-of-authority transfer, the home authority's responsibility for costs will be bypassed. They have flagged up that they are worried that, in such a case, they will have no say in a decision on whether a child is accepted into another authority's school but will be liable for the costs.

Robin McKendrick: All parents have that right. What is being suggested—it has been suggested in the responses to the consultation—is that, out of all the parents of children in Scottish schools, those who have children with additional support needs should not have the same rights as other parents to make a request to another authority to place their child in a particular school.

The costs that can be claimed back relate to the proportion of additionality, but that will take us into the section 23 argument again. Any child who is accepted into the school of another authority—this is true of all children who are the subject of placing requests between authorities, not just those with additional support needs—will, in time, be identified as a pupil, whether primary or secondary, in the lines of that other authority. To return to the example that I gave earlier, rather than appearing in East Lothian's count, the child from East Lothian will appear in Edinburgh's count for the following three years, even if they go back to East Lothian. That is the roundabout in that respect.

I do not think that the proposals put an exporting authority at a disadvantage, nor do I think that they put an importing authority at a disadvantage. As I have said, schedule 2 to the 2004 act gives the host authority the ability to refuse a placing request. At the moment, if a parent wants to make a placing request to an independent school such as a grant-aided school that is outwith the authority area or to an independent school such as New Struan or Daldorch House school, which are schools for pupils with autism, they go through their home authority. That is because, in those cases, the home authority pays.

When the placing request is merely for a school, whether it be a special school or a mainstream school with good provision for autism, it will go to the host authority. In that case, the home authority does not pay for the school education. Indeed, it

can be argued that it benefits from the situation; even though the child has moved to another authority, it still receives money for him or her because the funding predates the move. That said, the host authority will in time catch up and get the funding.

Given that some people who have commented at consultation events or who have written on behalf of national bodies seem to have misunderstood the existing arrangements, it is incumbent on us to address the issue and provide all concerned parties with a more adequate explanation of the different circumstances and funding arrangements that apply both to placing requests and to what happens when a child is placed as a result of an arrangement by a local authority.

Ken Macintosh: As you have said, some local authorities have suggested that the existing mechanism for independent special schools be used. Have you considered that?

Robin McKendrick: Yes. The point was made in the consultation responses. However, we believe that such a move would put young people with additional support needs and their parents on a different playing field. That was not the intention behind the 2004 act or indeed the original bill, both of which sought to ensure that those parents and children would have the same rights in making placing requests for local authority schools in particular as every other parent or child who wanted to make such a request. That is only fair and equitable.

On the other hand, if a parent wants to send a child to an independent school, the decision has to go to the home education authority because it is responsible for funding places at, say, New Struan, Daldorch House, Corseford school, Stanmore House school, Donaldson's school, the Royal Blind school and so on.

Ken Macintosh: I whole-heartedly agree that children with special needs should be treated exactly the same and have exactly the same rights as other pupils. However, my concern, which was raised in last week's informal evidence session and has been expressed in other evidence, is that the issue of resources remains unspoken in far too many decisions. Although local authorities are not allowed to take resources into account, we suspect that, in practice, they form part of their decision. Indeed, authorities have openly argued that, as their provision has to meet the needs of all the children in the area, decisions will be based on the number of children with additional support needs that they have planned for. If those children go elsewhere, that affects not only their planning but provision for everyone.

However, as I say, the real concern—and the unspoken barrier—that lies hidden in many of the decisions that affect children with additional support needs is cost. I am not saying that the Government is ignoring the issue, but we could do far more to get it out in the open. Making it absolutely clear who was responsible for costs in every case would help parents to assert their rights and, indeed, help local authorities to assert those rights by making them responsible for their own duties. Do you agree that such clarification is desirable, if not necessary?

Robin McKendrick: I always agree that it is helpful to clarify areas of doubt.

Ken Macintosh: If as a result, say, of an influx of 10 children with additional support needs from East Lothian to Edinburgh, the City of Edinburgh Council felt that it needed to employ an additional child psychologist, how would the cost be recouped?

Robin McKendrick: That is provided for under section 23 of the Education (Scotland) Act 1980, which has been around for nearly 30 years. The City of Edinburgh Council could claim back the additionality if it had to employ an additional educational psychologist specifically to meet the needs of those children. One might argue, however, that if the 10 children who were moving into Edinburgh from East Lothian needed an educational psychologist, East Lothian would be able to find the money as it would not need that position itself.

12:00

Given that it is covered by section 23 of the 1980 act, the ability of a child with what were formerly known as special needs but are now called additional support needs or, indeed, with a co-ordinated support plan to make a placing request is not a new concept. If clarity is required, however, it might be better for us to reflect on the matter when we put together the code of practice than to respond to individual points this morning.

Ken Macintosh: I am very concerned about the effect on children applying to independent special schools. If the bill means that a greater number of children will transfer into and out of authorities, greater clarity will be required. I am certainly not reassured to hear that the legislation currently governing the situation has never been used successfully.

You said earlier that "significant" will be defined in the code of practice. Will you be able to provide us with some idea of the thinking behind the definition or perhaps even the wording that you will use? The same might apply to other issues addressed in the code.

Robin McKendrick: Obviously, it would not be proper for us to publish the revised code of practice before the bill reached stage 3. [*Interruption.*] Louisa Walls has helpfully reminded me of the decision by the inner house of the Court of Session on the meaning of "significant". I referred to it earlier, and we think that it succinctly sums up the position. Indeed, I might even say that it risks resembling plain English and being easy to understand. If it is possible—and I do not know whether it is—we will certainly look for some opportunity to run the reworded section past the committee. I have no objection to being as open as possible with the committee about our intentions, but I do not want to break parliamentary protocol by publishing part of a code of practice if it should not be published before we have gone through a certain stage in the bill's consideration.

Ken Macintosh: Perhaps you can report back to the committee on that matter. We might even ask the Minister for Children and Early Years whether he will give us advance sight of the Government's thinking on this issue. At last week's informal evidence session, the committee was interested to hear that most local authorities were already using and were quite comfortable with a practical, working definition of "significant" that had evolved over time. I am not sure that that definition is the same as that set out in the inner court decision but, again, it would be helpful to have advance sight of the Government's thinking on the issue.

The same applies to other issues in the code of practice. Unlike the bill and other primary legislation, the code cannot be amended by the committee, so we need to be reassured that it will address contentious issues. I am not suggesting that you are fobbing us off, but the fact is that such issues are sometimes taken out of legislation and addressed in a code. We do not think that issues such as the definition of "significant" should necessarily be covered in primary legislation, but it is quite important that contentious issues, including guidance on interauthority cost transfers, be brought to us at an early stage. That would be welcome.

Kenneth Gibson suggested that we could place a duty on local authorities to reinforce parents' rights. I might again be straying into the territory of ministers rather than of officials in saying this, but Children in Scotland and Afasic Scotland suggested a couple of amendments. Children in Scotland said that the Government should

"Strengthen the duty to provide information about the *ASL Act* by requiring governmental agencies to actively promote easily understood … age appropriate, genuinely accessible information to all eligible pupils and their mothers/fathers/carers",

and that it should

"Couple the existing *right* to 'advocacy' and 'support' in the ASL Act with a new *duty* on government to support independent support/advocacy."

Are you still considering such approaches? Given that they are not provided for in the bill, have you ruled them out? I will not repeat the arguments for them, which Kenneth Gibson made well.

Robin McKendrick: Authorities have a duty to publish information. The 2004 act clearly sets out what must be published—indeed, regulations amended it to provide that local authorities must publish details of health boards and other contacts.

Children in Scotland is best placed to know the situation, because we fund it to run the Enquire advice and information service. As I said, we are keen for Enquire to develop its performance on taking the message of the 2004 act to professionals and parents. Enquire must ensure that it has an aggressive and not a passive marketing policy, so that rather than being just a one-stop shop it offers sustained support. I will not comment further on that.

I am sure that Children in Scotland would love us to resume funding for it to provide advocacy services. We provided it with such funding a couple of years ago, but the approach was not successful. We made it clear that we were providing short-term, pump-priming funding. The charity asked for additional support, which the Government at the time provided, again making it clear that other sources of funding would be required. However, Children in Scotland singularly failed to attract support, even from the local authorities with which it was working.

Parent to Parent and other organisations have managed to put in place service level agreements with local authorities to provide advocacy support to parents and young people. Those organisations have done that independently and without Government funding. It is unfortunate that there is not blanket provision throughout Scotland, but I hope that by the time the minister gives evidence to the committee in a few weeks' time we will have had a letter from ISEA that explains the situation and we will be able to inform the committee of the Government's plans in that regard and advise you on plans to roll out an advocacy service throughout Scotland.

Ken Macintosh: To be fair to Children in Scotland and groups that support its position, I should say that I do not think that it was asking for money for itself; it was making the point that local authorities would be far more likely to support advocacy services if a statutory duty were placed on them in that regard.

The argument was forcefully made that we do not want to divert resources from additional support for learning into fighting legal battles in the tribunal or other hearings at which QCs and solicitors are employed at a cost of thousands of pounds. Children in Scotland thought that placing more emphasis on support, advocacy and information up front would be the best way of ensuring equality of representation and preventing tribunals from becoming ever-more complicated, bureaucratic and legalistic.

Robin McKendrick: You will hear no argument from us about diverting money to a specific advocacy service or supporting the development of good practice—providing information early to parents and sharing information. I am sure that Children in Scotland brought to the committee's attention the work that it did for North Ayrshire Council. Several messages emerge from that, but one of the strongest is that early communication and discussion with parents are key to a lasting partnership. The earlier discussion takes place, the better it is and the deeper will be the roots that sustain a child throughout their school life.

Ken Macintosh: Children in Scotland was very critical of the idea of relying on good practice; the whole point of the legislation was to create a statutory duty.

The joint submission from Govan Law Centre, which was much quoted earlier, made a series of practical suggestions. Have you had the chance to consider them?

Robin McKendrick: Not in detail.

Ken Macintosh: I will not go through the suggestions individually but, in principle—I return to my first question—do you object to such amendments, which would extend the bill's limited scope?

Robin McKendrick: As I said, I have not examined Govan Law Centre's proposals in detail, so I honestly cannot comment.

Ken Macintosh: I can describe the proposals briefly. One is to remove the word "educational" from references to additional support needs, so that it is clear that not just additional support needs in an educational context are being referred to. One suggestion is about transition arrangements. One proposal is to extend to all parents and not just those who are applying for a co-ordinated support plan the right to demand and receive an assessment. Other issues are also raised. I suggest that the proposed amendments are designed to address more fundamental concerns about the operation of the 2004 act.

Robin McKendrick: It is obvious that I will have to look at the submission. Does Govan Law Centre mean removing education from the act, so that it is just the additional support for learning (Scotland) act and not an education act?

Ken Macintosh: I am sorry—I do not want to spring the suggestions on you.

The Convener: I remind you, Mr Gibson, that in relation to amendments—

Kenneth Gibson: Mr Macintosh.

The Convener: I am sorry, Mr Gibson.

I remind Mr Macintosh that the decision on the admissibility of amendments rests with the convener. Whether amendments are admissible is not a matter for Government officials or the Government; the decision rests with me. At the appropriate time, the Government can say whether it supports the amendments, if they are considered admissible. I appreciate that you are attempting to raise issues and to assess the Government's support, but the purpose of today's session is to scrutinise the bill as introduced. Any questions about policy changes should be addressed to the minister.

Ken Macintosh: I say with respect to Mr McKendrick that I am certainly not asking his permission for amendments. The question is more whether the Government has considered such proposals. I am still not entirely sure why the bill is relatively narrowly drafted. I am trying to get a feel for that and for what battle we might have in broadening the bill's scope.

I thank Mr McKendrick.

The Convener: That concludes our extensive questioning of Mr McKendrick. I thank him and the other witnesses for their attendance.

On the committee's behalf, I say thank you to Andrew Proudfoot, who is one of the committee's clerks. He has worked with the committee for more than a year, but he is moving on to support the Justice Committee. I am sure that our loss will be its gain and I wish him well in his work with that committee.

Members: Hear, hear.

12:14

Meeting continued in private until 12:25.

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