

# **EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE**

Wednesday 17 December 2008

Session 3

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### EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE 31<sup>st</sup> 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 ALSO ATTENDED:

Alex Neil (Central Scotland) (SNP)

#### THE FOLLOWING GAVE EVIDENCE:

Lorraine Dilworth (ISEA Scotland)  
Fiona Hyslop (Cabinet Secretary for Education and Lifelong Learning)  
Michael Kellet (Scottish Government Schools Directorate)  
Iain Nisbet (Govan Law Centre)

#### CLERK TO THE COMMITTEE

Eugene Windsor

#### SENIOR ASSISTANT CLERK

Nick Hawthorne

#### LOCATION

Committee Room 1



## Scottish Parliament

### Education, Lifelong Learning and Culture Committee

*Wednesday 17 December 2008*

[THE CONVENER *opened the meeting at 10:00*]

#### Teacher Employment Working Group (Report)

**The Convener (Karen Whitefield):** Good morning. I open the 31<sup>st</sup> meeting in 2008 of the Education, Lifelong Learning and Culture Committee. Agenda item 1 is consideration of the report of the teacher employment working group. I am pleased to welcome Fiona Hyslop MSP, the Cabinet Secretary for Education and Lifelong Learning. She is joined by Michael Kellet, who is deputy director of the teachers division in the Scottish Government. I understand that the cabinet secretary wants to make a short opening statement.

**The Cabinet Secretary for Education and Lifelong Learning (Fiona Hyslop):** I do indeed.

Since the first General Teaching Council for Scotland survey of teachers leaving the induction scheme in 2005, it has been clear that there has been a consistent decline in the percentage of respondents gaining employment each year. For that reason, and because of long-standing concerns that I have held about the issue, I decided to establish the teacher employment working group last June to assess whether the teacher workforce planning process, which we inherited from the previous Administration, was fit for purpose.

The working group was asked to review the teacher workforce planning process, taking into account relevant policy developments; to examine whether improvements could be made to maximise the compatibility of student numbers and employment opportunities for teachers; to consider the impact of the teacher induction scheme; and to make recommendations for improvements to the process.

The group included all those with an interest in the agenda: the Association of Directors of Education in Scotland; the Educational Institute of Scotland; the Scottish Secondary Teachers Association; the Association of Headteachers and Deputies in Scotland; School Leaders Scotland; the teacher education universities; the General Teaching Council for Scotland; the Scottish Government; and the Convention of Scottish Local Authorities as the representative of local

authorities who are the responsible employers. The group reported at the end of October and, as the committee knows, I made a statement to Parliament on 30 October.

The working group concluded that the workforce planning system at a national level was fit for purpose. That is demonstrated by the fact that there are contrasting levels of teachers who claim jobseekers allowance throughout the country. In October, Scotland had 6.9 teachers for every 1,000 members of the teaching workforce in that position; there were 7.4 teachers per 1,000 in England, 10.1 in Wales and 16.4 in Northern Ireland. We recognise that there is significant room for improvement. As of 9.30 this morning, that 6.9 figure for Scotland was reduced to 5.6 teachers per 1,000 in November. That is at a time when the unemployment rate throughout the United Kingdom is rising dramatically.

The teacher employment working group made 12 recommendations and we are working hard to develop them with COSLA, ADES, the teacher education universities and other partners. I will not repeat the substance of each recommendation, but I thought that it would be useful to the committee if I were to give some indication of how we are progressing each recommendation.

Recommendation 1 underlines the importance of better alignment of national and local workforce planning. We should not underestimate how complex that task is. For example, we will issue advice shortly to the Scottish Further and Higher Education Funding Council on 2009 teacher training intakes. The four-year bachelor of education students who enter training next year will seek employment after the induction scheme in autumn 2014. The new BEd teachers who are seeking employment entered teacher training in 2003 on the basis of decisions that previous ministers took in December 2002. Recommendation 1 is difficult, but it is vital that we engage COSLA and ADES about it and that work will accelerate in the new year.

On recommendation 2, we are talking to the General Teaching Council for Scotland about longitudinal research into a cohort of probationers. We are also exploring with the GTCS how more reliable recurring information can be gathered annually. As the committee knows, only 44 per cent of this year's post-probationer cohort participated in the survey that the GTCS published last week and its report included a caveat in that regard.

Recommendations 3 and 12 refer to research that will be commissioned by the Scottish Government; the process of commissioning that research has begun.

Recommendations 4 and 5 refer to local authority practice around supply teachers. We have discussed that with ADES and written to directors of education to encourage them to take on board the recommendations.

On recommendation 6, we have had initial discussions with ADES and the Scottish Public Pensions Agency on early release schemes. Learning from good practice will be an important component, because some authorities have made more use than others of such schemes to refresh the profession.

Recommendation 7 states that we should revisit individual secondary subject workforce planning. We have done so for the current teacher workforce planning round and that modelling has shown, for example, a continuing high demand for teachers in a number of secondary subjects, particularly maths. We should not forget that the demographic profile of the profession is such that, even at a time when new teachers are seeking employment, we must plan for a time when demand for teachers will be high.

On recommendation 8, we have already increased the preference waiver for secondary probationary teachers who will begin their probationary year next August.

On recommendation 9, we have written to directors of education and deans of education to promote the development of distance learning initial teacher education courses. We may need to consider other providers such as the Open University, as they may be able to attract students who are unable to attend traditional ITE courses. The Open University already educates a small number of maths teachers.

Recommendations 10 and 11 are being implemented in the current information sessions for students.

I hope that that introduction has been of some assistance. I can confirm that we will continue to pursue the recommendations vigorously. I look forward to members' questions.

**The Convener:** I thank the cabinet secretary for that update. Members wish to cover a number of subject areas. We have all morning, although we also have another substantial item on our agenda. I would therefore be grateful if questions could be kept short and—equally important—if answers could be focused and could attempt to get to the heart of the issue.

**Fiona Hyslop:** Convener, it would be helpful if I knew your timescale for your next witnesses.

**The Convener:** I hope that we will finish absolutely no later than 11:15. I would prefer to finish at 11 o'clock, if we can manage it.

**Elizabeth Smith (Mid Scotland and Fife) (Con):** Good morning, cabinet secretary. I want to ask about recommendation 1, which is about the reconciliation of national and local workforce planning processes.

On 10 September, we took evidence from Frances Jack, who is a primary 2 teacher in Currie. She raised an interesting problem about the way in which different councils seek to employ probationers. She said:

"As I was in a different authority, I was not able to apply for any West Lothian posts until there were surplus vacancies. However, probationers in West Lothian could apply for the vacancies in any other council in Scotland. There seems a degree of unfairness, but if I could do it again, I would apply first to West Lothian Council because it gives preference to those whom it has trained. I am not saying that that is right or wrong, but it is the reality."—[*Official Report, Education, Lifelong Learning and Culture Committee*, 10 September 2008; c 1405.]

Is the fact that local authorities have slightly different procedures for taking on probationers central to the problem of not being able to match up local and national planning?

**Fiona Hyslop:** I do not think that that specific problem is central, although it is certainly relevant for the individuals concerned. Different local authorities have different practices when it comes to giving probationers experience and then employment. Some local authorities, such as West Lothian Council, make a point of trying to employ as many probationers as they have, post-probation. It is possible for individuals to apply elsewhere, but each local authority decides on its own practices.

If the issue that you raise is coming through as a substantive concern, we could certainly reflect on it. Local authorities will take on board the evidence that the committee has heard, and will consider what they can do.

Another issue that arises is the choices that people have in the first place. I think that we would all acknowledge that the induction scheme has great strengths. One of the strengths for individual student teachers is that they get to choose the local authority in which they want to work. Another recommendation from the working group is to make it a bit more obvious to students, when they choose where they want to go for their probationary year, which local authorities have a tradition of employing probationers post-probation and which do not. That may influence students' decisions on where to apply in the first place.

Several factors arise from your question, but I do not think that the issue is a core factor in the number planning that we have to do nationally. However, as you have heard in evidence, it is important to individuals.

**Elizabeth Smith:** For obvious reasons, different local authorities have different teacher numbers, but do you accept that the system is too rigid if certain councils can apply some kind of stop? It is not a free market, and it can be difficult for people who want to cross to a different local authority—even within the five choices that they have made.

**Fiona Hyslop:** From a local authority perspective, you are damned if you do and damned if you do not. A local authority will be criticised for not taking on probationers from its own area if it opens up the market for everybody else right at the beginning. It cuts both ways. Many individual, smaller things can be done that can help the system, and we have identified where improvements can be made with the workforce planning group. However, we will take the issue to the meeting that I will have with COSLA tomorrow at which there will be feedback on this session and on progress with the group. We will identify with COSLA whether there can be a common understanding of what local authorities might want to do.

Whether we should dictate an approach to take is an issue. There are benefits in encouraging local authorities to take on people who come to them post-probation. A free market might help the challenging areas of Edinburgh and Glasgow that we have previously identified, but it would mean that all the other local authorities would pick up the slack for those local authorities in whose areas people trained in the first place and want to go to.

**Elizabeth Smith:** Brian Cooklin, who gave evidence in the session that I mentioned, was also frustrated. As a headteacher, he sometimes feels constrained by local authority rules and regulations about whom he can and cannot interview. Sometimes all candidates are taken and sometimes they are not. Do you accept that that problem should at least be considered? I think that it imposes rigidities in the marketplace.

**Fiona Hyslop:** It can be considered, but I give a caution. You make the point that the Conservatives would like more flexibility for headteachers in respect of employment. The problem is that flexibility in individual schools could cause real and severe problems in trying to co-ordinate national workforce planning and in making recruitment decisions in 2009 for plans for 2014. The Government would have to liaise with each and every school to consider where workforce planning will be in 2014 for decisions that we are making now. The idea of having flexibility in local employment and in deciding which probationers to employ, how many there should be and where they should be might be good in itself, but it would not help national workforce planning. Obviously, the issue lies in ensuring that we get the numbers right nationally

and locally. For every benefit, there is a potential disbenefit. However, you are right. It is worth considering whether we can bring things closer together.

**Elizabeth Smith:** I am sure that we will debate Conservative party policies at another juncture. What I am getting at is whether you are concerned about having a national strategy at the same time as a historic concordat that involves local authorities being able to have the priorities that they want to have. Teacher employment is a difficult problem in that context. I am trying to get at some way that you can see of getting improvement in articulating decisions that are taken at national and local levels. If I have read the report's recommendations correctly, that is the central problem that people are trying to drive at.

**Fiona Hyslop:** We are trying to get intelligent and informed decision making. The problem, which was also a problem for the previous Administration, lies in getting information that is as accurate as possible for forecasting five years hence, which is quite tricky. Information and intelligence will allow flexible decision making, which is what you are asking for on a local, individual school basis, I think. Unless there is intelligent decision making and the required information, things will be more difficult. A better calibrated system on a national and local basis should allow more flexibility, even on an individual school basis, but we are not there yet. The previous Administration also had to deal with the problem.

We are criticised for having a decentralist agenda that involves local authorities making decisions, as they have done on teacher employment for the past umpteen years. All that I am saying is that decentralising decisions even further to individual schools without having a better calibrated information system could cause problems, not necessarily locally, but certainly nationally.

**Elizabeth Smith:** I accept that, but probationers send out messages when they submit applications. Do those messages not form part of the information process? My point is that those applications sometimes do not get far because of restrictions in local authorities that do not allow people to go for the jobs that they would like to go for. Is that not part of the issue?

**Fiona Hyslop:** We want to continue to pursue that matter. Recommendations have been produced, which we will pursue—indeed, I have said in evidence that we have already taken forward a good number of those recommendations—but that does not prevent us from considering other things as well. Many individual things can happen to improve the system. There is no big-bang solution; rather,

there should be intelligent decision making that allows local flexibility, is more responsive to individuals, and will get us to a better position.

**Elizabeth Smith:** So you are not really looking at a big-bang solution.

**Fiona Hyslop:** No, not at all.

10:15

**Elizabeth Smith:** I will change the focus to the class size policy in primaries 1 to 3. As you know, last week we took evidence from Mr Di Paola from the Convention of Scottish Local Authorities. I was a little surprised by his comments that the Government's class size policy in P1 to P3 had not been factored in to the overall projections for primary teacher employment. Can you explain that?

**Fiona Hyslop:** Page 4 of the concordat identifies that there are sufficient resources in the local government settlement to maintain teacher numbers at 53,000. Had we not made provision for that, it would have been possible for teacher pupil ratios and class sizes to be maintained across the country but with falling rolls we would have needed fewer teachers, so as teachers retired they would not have been replaced. We ensured that there were sufficient resources in the local government settlement to maintain teacher numbers. The figure never quite reached 53,000 in 2007, but it was at about that level.

Given that resources have been provided to local government to maintain employment levels at 53,000, teacher workforce planning is about how we ensure across the country that we plan for the supply to maintain that level, despite the fact that on average about 6,000 teachers retire each year. Over the four years of this parliamentary session, from 2007 to 2011, 50 per cent of teachers will leave the profession—mostly through retirement and some through maternity. Given that we are dealing with that level of change, the calibration to ensure that we get the planning right is crucial. Maintaining teacher levels at about 53,000 allows a planning exercise to take place locally and nationally to ensure that we can recruit the appropriate number of people from teacher training institutions. If we maintain teacher numbers at 53,000, falling school rolls will mean that we can make significant year-on-year progress on the class size reduction, which is what is agreed in the concordat.

**Elizabeth Smith:** But I think that I am correct in saying that, in the statistical model, there is an allowance of 8 per cent for what was called overstocking the population: in other words, an extra 8 per cent of teachers must be on the register, as it were, to cover illness, maternity leave or whatever. I think that another 8 per cent

may change in the light of the preference waiver scheme being increased from £6,000 to £8,000, so there are factors that must be taken into account in the statistical model. However, we have been told that there has not been any change in that statistical model to take account of a major Government policy on class sizes.

**Fiona Hyslop:** I do not recognise a figure of 8 per cent for the preference waiver scheme affecting the overall numbers; the scheme affects where teachers go, rather than how many there are.

**Elizabeth Smith:** Is it not the case that, because the Government has increased the preference waiver payment from £6,000 to £8,000, the statistical model is making a projection about the increase that that would provide?

**Fiona Hyslop:** Remember that the preference waiver is not for the post-probationer situation; it is for the induction scheme. The preference waiver scheme is a national pot that follows the probationer, so there is no additional cost. You are saying, "Hang on, the preference waiver is an additional cost because of what you have introduced." However, it is not—it is covered within the existing probationer funding scheme.

You are right about an extra 8 per cent being required to provide supply teachers. That is one of the requirements that the workforce planning group identified; it had not previously been widely known when planning was being done, but the same requirement would have applied when the previous Administration was maintaining teacher numbers or aspiring to get them to 53,000, so it is not a variable. You asked about the variable that the class size policy brings to the overall cohort of 53,000. The resources that we have put into the settlement mean that several thousand more teachers will be funded by the local government settlement than would otherwise have needed to be the case because of falling school rolls.

**Elizabeth Smith:** Was Mr Di Paola correct when he said that that was not factored into the statistical model?

**Fiona Hyslop:** The workforce planning system has to ensure that there are 53,000 teachers in the system. The planning exercise aims to get the balance right between primary and secondary. Given that there are falling school rolls, particularly in secondary, there might be a shift because fewer secondary teachers are required, so when secondary teachers retire there may be an increase in the number of primary teachers.

**Elizabeth Smith:** I can accept that, but let us get this absolutely clear. There is a statistical model for projections of the numbers who will come into the profession five years down the line. However, at the end of last week's session, I was



given the impression that certain factors within that model are being looked at because there is significant potential for the recruitment numbers to change. Am I correct in thinking that the class size projections per se are not part of the statistical model?

**Fiona Hyslop:** The 53,000 calculation factored in the need to achieve class size targets. Ensuring that teacher numbers are maintained at 53,000 allows the headroom to start reducing class sizes; otherwise, the numbers of teachers across Scotland would reduce markedly as school rolls fall. In that situation, local authorities would not replace teachers, because fewer teachers would be needed as pupil numbers fell.

**Elizabeth Smith:** But were the civil servants asked to consider a projection for each local authority of an increase in the number of teachers because of the class size policy?

**Fiona Hyslop:** Local authorities would not necessarily need an increased number of teachers to address the class size policy. Maintaining teacher numbers at pre-existing levels could be enough. We have seen that happening in different local authorities in the past year. By maintaining teacher numbers while school rolls fall, local authorities have been able to redeploy teachers as part of the policy of reducing class sizes. I admit that it is more of a challenge—we said this when the policy was introduced—in areas such as East Lothian, West Lothian and Perth and Kinross because school rolls are rising. However, the class size policy was factored into the 53,000 calculation.

**Elizabeth Smith:** Right. However, you do not predict that, because of the class size policy, there will be a considerable increase in the number of teachers employed.

**Fiona Hyslop:** We will maintain teacher numbers at a time when they would have been expected to reduce by several thousand. You are right that we need intelligence about the situation in individual local authorities. The more precise the information from individual authorities, the easier it is to make year-on-year predictions. However, if we had not maintained teacher numbers at 53,000, they could easily have reduced over the spending review period to 50,000 or 49,000 without necessarily affecting the teacher pupil ratio across Scotland.

**Elizabeth Smith:** But do you accept that the flagship national policy of reducing class sizes to no more than 18 in P1 to P3, which was promised to the electorate, is difficult to implement when it comes to teacher numbers?

**Fiona Hyslop:** Having several thousand more teachers in the system than are needed provides a resource to help support the policy. We provided

that resource by maintaining teacher numbers at 53,000.

**The Convener:** The committee heard from Joe Di Paola at last week's meeting that the numbers of teachers retiring were not as great as was originally anticipated. The teacher employment working group's recommendation 6 was specifically about that. Can you tell us a little bit more about what discussions you have had on reviewing the winding-down scheme and about the impact that you think it will have on encouraging teachers to consider taking early retirement?

**Fiona Hyslop:** I noted the evidence from COSLA—it was possibly anecdotal information—about people putting off retirement. We have heard anecdotal information about that. However, we have not had specific information about the number of teachers who are retiring and how that compares with the projections. Interestingly, the projections for this year were not out by much. Two years ago, it was modelled that 5,799 teachers, which is a fairly substantially number, would leave teaching between 2006 and 2007. We are therefore looking at a figure of about 6,000 retirements a year, which means that half of all teachers will leave the profession during the four years of this parliamentary session and that we will have to replace them. That is why we said that we need to have 20,000 teachers in training just to stand still.

The projection, then, was that 5,799 teachers would leave teaching between 2006 and 2007, but 5,622 actually left. That means that the projected figure was out by 177, or 3 per cent. That is not unreasonable for a projection, bearing in mind that people make retirement decisions as a result of family, income and other issues. By and large, the projections of how many would retire hit the target that we needed. We have asked local authorities to provide us with the information that we need on the actual experience of retirement this year—and, indeed, in previous years—compared with their projections. Indeed, we have asked the Scottish Public Pensions Agency to do likewise.

Teachers decide to retire in the summer, at Easter and at Christmas, so we will see an increase in the number of retirements over the next few weeks. There is anecdotal information that some teachers are delaying retirement because they face increasing bills, as many families do. If they choose to delay, it will have a knock-on effect. We do not have the information on that and we need to get it from local authorities to be able to do some modelling.

You asked about the winding-down arrangements. We have asked the SPPA to work with the directors of education on that and have set up a working group on it. Some local authorities seem to be able to manage winding

down more effectively than others, and sharing best practice on that would allow more teachers to get into employment. That will be criticised as part-time employment, but it is easier for a teacher who is already in a teaching job to get a full-time job when retirements start to come through. That is another of the actions that we are taking.

**The Convener:** Is there a resource issue for local authorities? A teacher's decision to retire a little earlier not only has resource and pension implications for the teacher but has a financial implication for the local authority. Perhaps some local authorities manage that better than others because they do not have as many teachers.

**Fiona Hyslop:** You might make that comment. Your question about the different experiences would be more appropriately directed at the COSLA official from whom you took evidence last week. I point out that 3,000 retired teachers will experience a cut in their pensions from April because of the recent decisions that were made about the pension scheme. Whether that will have an impact on individual teachers' decisions—such as whether they will want to do more supply work—is something to consider.

There is an issue about permanent supply pools: it is more difficult for retired teachers to take part in them because it can have an impact on their pensions. That means that there are more opportunities for post-probationers. As I said in my recent statement to the Parliament, we must be very conscious of age discrimination, but we are also aware that it is important for professionals to have experience in their post-probation year so that they keep close to the workplace. Therefore, there is an argument for ensuring that post-probationers have access to supply pools as part of the general training of the profession. That can be made more effective if local authorities share best practice.

**The Convener:** One of my colleagues will ask you about supply teachers, so I will return to the specifics of resources. Although I appreciate that local authorities have to find the money, ultimately the Scottish Government gives them the resources to deliver their services as they decide they want to. Are you confident that you are giving local authorities sufficient resources to allow them to ensure that teachers can retire if it is appropriate for them?

**Fiona Hyslop:** The resources are available for local authorities to maintain teacher numbers at 53,000. Teacher pensions are controlled and administered by Westminster, which is currently the subject of debate. The issue is that the cost of pensions, not only for teachers but for other local authority workers, is projected into planning for all local authorities. Local authority workers and

others such as the police are administered and controlled by the Scottish Government.

The planning issues should not have changed because of the current situation, but we all—national Government and local government—face pressures on our finances as a result of energy costs and other issues. Local government has not yet approached us to say that paying for pensions is a particular strain on its funding. Having said that, I will meet COSLA later today and tomorrow, so we might get more information on that then.

**The Convener:** I certainly wrote to you about that issue after being approached by North Lanarkshire Council. The council has a number of teachers who are nearing the end of their career and who might retire a little bit earlier if they had a financial incentive that made it worth their while to do so. However, the local authority would need to be resourced from the centre—some additional funding would be needed in the concordat settlement—to be able to offer such an incentive.

10:30

**Fiona Hyslop:** I remember the correspondence now. The suggestion is that councils need a pump-priming fund for early retirement. However, as you will remember, the cash-flow issue is that new teachers entering the profession are cheaper, because they are lower down the pay scales, so councils can make a saving by employing newer teachers.

I recognise that provision of such support is an issue—although it is not part of the original settlement that local authorities negotiated—and that an argument for that can be made. However, I should point out that South Lanarkshire Council embarked on an early retirement programme some years ago after realising what the demographics of its workforce were, so it will probably get first shout at getting a large number of younger teachers into the profession. I think that North Ayrshire Council also embarked on a similar programme.

**Aileen Campbell (South of Scotland) (SNP):** I want to move on to the issue of supply teachers. In evidence last week, Joe Di Paola told us that claims that retired teachers were being used for supply coverage instead of post-probationers were more or less anecdotal, as there were no hard figures to back them up. Will the Government monitor that situation closely to check whether there is such a trend?

**Fiona Hyslop:** Again, we need to improve on the previous situation by getting more intelligence on what is happening.

From their oral and written questions and from correspondence, it is evident that the experience

of members is that supply pools frequently call on retired teachers rather than post-probationers. There is general agreement that post-probationers in the supply pool should be given those opportunities—a unanimous report from all the different players and stakeholders identified that. That recommendation, and members' experience of what is happening, leads me to believe that we need to identify that as an issue. Local authorities and schools might find it easier or more convenient to employ a retired teacher who is known to them, but that prevents post-probationers in the supply pool from getting those opportunities.

We also need to recognise—this cuts to the heart of some of the angst that is felt—that many trainee teachers and post-probationers are older and have families. Such people are a welcome addition to the workforce, but their responsibilities make it more difficult for them to move. Although they might take some time to secure a permanent position to replace one of the 25,000 teachers who will leave the profession during the lifetime of this Parliament, waiting for that position could cause hardship if they have family responsibilities. Therefore, providing access to some security in the form of a permanent supply pool is better than continuing with the ad hoc arrangements that have been in place to date.

**Aileen Campbell:** The figures for 2007-08 show quite a marked increase in the number of post-probationers in supply posts. Do you want that figure to rise?

**Fiona Hyslop:** The ideal situation is to have as many teachers in permanent positions as is possible, but they cannot all be in permanent positions in August in any year. If we had 100 per cent of post-probationers in permanent employment in August, we would end up with extensive teacher shortages and pupils being sent home in November, December or January when people retire or leave the profession. We have cyclical recruitment, which is a challenge.

Discussions are on-going—no firm decisions have been taken, but this is worth thinking about and might even have been tried years ago—about whether the one-year initial teacher training postgrads should all be recruited in August. Rather than everyone come on to the market at the same time, perhaps they could be staggered so that half of the recruitment of trainee teachers took place in January. Having more people enter the market at different stages might add its own complexities, but it would allow us to ask, "Hang on a second, why do these one-year postgrads not have a job for six months?" However, such a change might just shift the problem of waiting for employment to an earlier point in the year than is the case just now. None of this is easy but, by dealing with each

individual step on the way, we might start to have an impact.

**Aileen Campbell:** If, as we are hearing anecdotally, retired teachers rather than post-probationers are being chosen for supply posts, will not more teachers taking early retirement have an impact that must be carefully considered?

**Fiona Hyslop:** For every action there is a reaction. Teachers taking early retirement packages, rather than using the winding-down scheme and working on for some time, may create more permanent jobs, but it will also increase the number of retired teachers who might want to join the supply pool, which will crowd out post-probationers. It might make sense to have an improvement in one area, but that can have a knock-on effect somewhere else. That is what I am referring to when I talk about calibration. We want to ensure that the process is tuned such that a particular action does not skew the system.

**Aileen Campbell:** We heard from Joe Di Paola at last week's meeting that you were taking legal advice about the potential for age discrimination—you mentioned that in your opening remarks. Is that still an on-going issue on which you are seeking advice?

**Fiona Hyslop:** Yes. It is obviously a delicate area. I think Duncan McNeil raised the question of age discrimination when I made the statement in the chamber, but I pointed out that we take the issue very seriously. Subsequently, the Equality and Human Rights Commissioner commented that any overt system that discriminated on an age basis would have difficulties with the European convention on human rights. We must therefore recognise that providing opportunities, whether in temporary posts or the supply pool, to keep post-probationers in the workplace or close to the profession is important for the individual professional development of the teachers and will make them better qualified to go into permanent employment later. The problem of age discrimination can therefore be addressed in different ways.

Having a permanent supply pool makes sense. For example, NHS Lothian moved to having a more permanent supply pool for nursing staff, which had a big impact. Having a supply pool provides greater certainty in planning terms for the employer, but it can also provide more certainty for those involved in it. However, it becomes more difficult for retired teachers on pensions to access a permanent supply pool if doing so has a negative impact on their pension. It might not be in their interest to do supply work, because there are strict pension rules about working.

We are liaising with the Scottish Public Pensions Agency on the issue of teachers' pensions.

However, it must liaise with the Treasury, which has ultimate control of teachers' pension provision. Similarly, the winding-down scheme, which was part of the McCrone agreement, could be established only with the specific agreement of the Treasury and we need its agreement to any developments of that scheme.

**Claire Baker (Mid Scotland and Fife) (Lab):** I have a couple of questions on primary school teachers. In October 2005, 61 per cent of post-probationers in primary schools were in permanent posts, but that figure has reduced to 30 per cent now. There is therefore a downward trend in the likelihood of post-probationers having permanent posts at primary school level. Are you worried by that trend? Do you feel that the working group's recommendations will do enough to address it? If not, do other measures need to be taken?

**Fiona Hyslop:** The working group's recommendations will have an impact on both primary and secondary across the piece. With the resources that are available to maintain teacher numbers at 53,000, there should not necessarily be the kind of trend that you described. We would anticipate some reduction in the numbers of post-probationers in permanent posts in secondary schools because falling school rolls are starting to impact more obviously in secondary, particularly in the west of Scotland, where population levels have reduced markedly. In contrast, there is a trend in the east of Scotland for the population to increase.

As I have said previously, I am concerned that the numbers of post-probationers in permanent positions in primary schools have reduced. However, we anticipate that 6,000 teachers will leave the profession, mostly through retirement, over the next year, which will create the space for post-probationers to be employed. In that regard, we must consider individual local authority responses on what is happening in their area, particularly for the primary level.

**Claire Baker:** I want to talk a bit more about the commitment to maintain teacher numbers at 53,000. Liz Smith asked about the class size pledge for primaries 1 to 3. Are primary teachers being specifically recruited? The types of student are not distinguished in the figure, and maintaining it at 53,000 could mean that the secondary sector will be overloaded. Are there any guarantees that primaries 1 to 3 are being targeted?

**Fiona Hyslop:** It is clear even from experience this year that local authorities have recruited into primary schools where there is headroom. A number of local authorities—Fife Council, South Lanarkshire Council and North Lanarkshire Council—have done that. The impact that we are now seeing of class size reductions to 25 should also be remembered. Last year was the first in which all local authorities by and large hit primary

1 class sizes of 25. They have been making decisions about what to do with P1 classes, and those children are now in P2. Many authorities—Dumfries and Galloway Council is a good example—want to keep P1 classes of 25 and progress them to P2. Again, local decisions are being taken where they can make an impact. Some authorities—West Lothian Council, for example—are targeting classes of 18 for areas of deprivation, which they want to focus on. For those who believe that local authorities should have discretion on how to implement national policies, authorities are taking different ways and routes to do that.

Even over the past year, the experience is that there is increasing use of primary teachers, although that is not necessarily resulting in permanent employment positions, which I think your question points to. I understand that temporary contracts have increased. A person might have a one-year temporary contract for full-time work, but that still puts them in the job market and they will be better placed when vacancies start to arise. That is what we are seeing.

That takes us back to recommendation 1 in the report. Our national workforce planning must be far more closely aligned with individual local authorities' workforce planning than it has been in previous years. Regardless of the class size reduction policy, getting workforce planning right when there has been a 50 per cent turnover of teachers in the space of four years would have been a challenge for any Government coming in; it would be a major challenge for any organisation.

I talked about the reduction in the number of teachers who are claiming jobseekers allowance, from 6.9 teachers for every 1,000 members of the teaching workforce to 5.6 for every 1,000. In total, 130 primary teachers and 145 secondary teachers are on jobseekers allowance.

**Claire Baker:** You say that 130 primary teachers are on jobseekers allowance. Are the others in teaching or in other employment? I am sorry; I ask that question because of my lack of knowledge of the matter.

**Fiona Hyslop:** They are not claiming—

**Claire Baker:** They are not claiming jobseekers allowance, but are that other 95 per cent all in teaching jobs? Do we know?

**Fiona Hyslop:** I am talking about the unemployment rates and the jobseekers allowance figures that have come out. All I am saying is that the trend is clearly that there has been a reduction in the number of teachers on jobseekers allowance at a time when, for obvious reasons, the national claimant count is increasing.

Let us consider the situation in Glasgow, for example, where, for whatever reason, teaching posts have been reduced by 170—a political decision was taken there recently—and another 70 people are leaving the profession and will not be replaced. If the local authority had maintained teacher numbers at the level that it was resourced to do, those 240 jobs in one local authority area alone would almost have cleared out the number of teacher job seekers in Scotland. That shows what can happen when even one local authority—especially a big local authority—decides to reduce teacher numbers. That also happened between 2006 and 2007 before any of the planning that we are discussing came into place—in Aberdeen, Edinburgh and Glasgow in particular, there were significant reductions in teacher numbers. Big local authorities, especially city authorities, can have a big impact on the numbers. If the number of primary teacher posts was maintained in Glasgow alone, jobs could have been provided for every primary school teacher on jobseekers allowance. That is unrealistic, because not all of those people will be in Glasgow, but perhaps it shows the scale of the challenge.

10:45

**Claire Baker:** Those examples point to the variability in the implementation of the class size pledge in primary schools, because different authorities are making different decisions for different reasons.

I seek clarity on the jobseekers allowance issue. The figures show that 5.6 per cent of teachers are on jobseekers allowance, so another 95 per cent or so are not, but we do not know that they are employed as teachers.

**Fiona Hyslop:** It is not a percentage figure.

**Claire Baker:** It is per thousand.

**Fiona Hyslop:** Yes, it is 5.6 per thousand.

Not everybody is eligible for jobseekers allowance because, as you will know, there are various rules about benefit eligibility. All that I am saying is that there is definitely a downward trend. As the year progresses, more vacancies arise and people go into jobs.

**Claire Baker:** Sorry, but in the responses that I have had from constituents who are post-probationers, many of them talk about moving abroad or looking for work in other areas. We cannot identify from that figure that the others, who are not among the 5.6 per cent per thousand on jobseekers allowance, are definitely in teaching jobs, can we?

**Fiona Hyslop:** It is not a percentage figure.

**Claire Baker:** Sorry, 5.6 out of a thousand. We can say that the others are in employment, but we cannot say that they are teachers.

**Fiona Hyslop:** Of course we cannot. However, I can give you the figures for England. When we were at 6.9 per thousand, England was at 7.4 per thousand, Wales was at 10.1 per thousand and Northern Ireland was at 6.4 per thousand. The figures released this morning show that the figure has decreased in all parts of the UK, but Scotland still has a lower rate of teachers on jobseekers allowance than any other part. However, we all know from the experience of our constituents that that does not mean that there are not challenges for individuals. We must ensure that the system is sophisticated enough to deal with the issue.

Getting back to the evidence session on the teacher employment working group recommendations, we have come a significant way over the last year towards identifying the challenges and we have put in place a series of initiatives to meet them, but there is not a big-bang solution. It is difficult when we are forecasting for five years hence. I remind members that the decisions about workforce planning for primary teachers who are currently post-probation were made in December 2002. It is difficult to forecast at the best of times and we are making decisions now for policies that will take effect in 2014. That is quite a challenge. The same happens in nursing and in other professions; all that we can do is ensure that our planning is as tight as possible. I would like to congratulate all those who took part in the workforce planning and are continuing to work on it to ensure that we can get the workforce as aligned as possible with need. The forecast will not be perfect, but we can certainly make it better than it has been in previous years.

**The Convener:** I remind everyone that time is moving on, so I ask for short questions and succinct and focused answers.

**Margaret Smith (Edinburgh West) (LD):** I apologise for being late, cabinet secretary.

You have given an example of the impact that a single local authority, albeit that it is Glasgow City Council, could potentially have on the availability of jobs. One issue on which we questioned COSLA last week was the possibility of a national staffing formula, which was the point of dissent within the working group. All the other points were agreed upon and there is a general consensus around them, but there were different opinions on that issue—the unions took the view that there was a case to be made for a national staffing formula. Given that we all know—and you have admitted it—that one local authority can have a big impact on the situation, can you outline your rationale for thinking that it is not acceptable to have a national staffing formula and that the

matter should continue to be dealt with by local authorities?

**Fiona Hyslop:** A reasonable case can be made either way and I understand the logic on both sides of the argument. However, strong regard has to be given to the fact that local authorities are the employers and they are responsible for the employment of teachers and for education policy in their local area. I also trust headteachers and they should have flexibility. I agree to that extent with Liz Smith; individual headteachers must have a degree of discretion and flexibility to provide the best staffing arrangements to meet the needs of their children.

North Lanarkshire Council, for example, has found lots of different creative ways—such as its staffing ratio and sports academies—to ensure that it has stimulating opportunities for young people. I understand what the unions want, and there is a case to be made for it, but a rigid national staffing arrangement that would satisfy them would prevent individual local authorities from having flexibility to react to local circumstances. We believe that education should not only address the needs of individual children, but reflect the communities in which they live, as well as the policy drivers and directions of the individual schools and local authorities. The danger of a national staffing structure is that it would prevent creativity and innovation in driving forward the quality of education provision.

That is the rationale for our policy and that is why it is appropriate that we allow local authorities discretion, but I go further: I have said to local authorities that, just as we have devolved power to them, the big challenge for them is to devolve more power to headteachers to identify needs as part of the local authority management team.

A case can be made for a national staffing arrangement, but it is not appropriate at this time. However, I understand why the unions take that position.

**Margaret Smith:** Last week, I picked up the sense that a centralised staffing arrangement was flatly unacceptable to some people, who felt almost on principle that staffing should be up to local authorities. However, I take a bit more comfort from your response, because it indicates that, for you, it is less about the principle that local authorities should make staffing decisions and more about the fact that you think that they and headteachers are better placed to use the flexibility to make the best possible decisions.

**Fiona Hyslop:** It would be possible to argue both points. A principle is involved, and it would run counter to our current relationship with local government to impose a centralised position on local authorities. However, the stronger argument

is the one that I have just given you: in practice, the flexibility that exists allows for the creativity and innovation that we need to drive up quality in education. It is easy to examine processes and numbers and consider the matter as a workforce planning issue that is about putting X per cent here and Y per cent there. However, education policy should be about improving the quality of education and it is sometimes worth keeping our eye on that driver rather than on what might be convenient from a management point of view.

**Margaret Smith:** What do you think of the degree of say that headteachers have throughout the country? Do some councils involve headteachers in planning more than others? Do you want that to be developed and will you monitor it? Do you consider it to be a way of improving the correlation between the numbers of post-probationers and jobs and of determining the right number of people to train?

**Fiona Hyslop:** There needs to be far more sharing of information not only at a micro level—individual schools—but at local authority level to improve the situation that we inherited. The workforce planning group said that the current system is fit for purpose. Indeed, the marginal difference between the number of retirements forecast and the number of teachers who retired shows that we have a system that is fit for purpose, as does the way in which those numbers feed into recruitment. However, the system can be improved, and greater intelligence and information are key factors in allowing us to do that.

You asked whether I will keep the matter under consideration. When I visited 11 councils and met council leaders, headteachers and directors of education over the summer, I was struck that there was a different culture in each authority. The extent to which headteachers felt that they were part of the leadership of the council varied from one area to another. I am taking forward an initiative to improve the leadership capacity in education generally. That is a challenge. We have headteachers with a tremendous amount of experience and, just as the Government has rightly decentralised much policy making and some decisions to local authorities, they have a challenge to decentralise some of that themselves. I will take a close interest in how that takes effect, but the message is getting across.

**Margaret Smith:** Do you accept that we have a system that is fit for purpose as long as people communicate exactly what they think they are going to do, but that the reality on the ground for local authorities is that they often have to react to specific circumstances and pressures, including financial pressures arising from their settlement, inflation, an involvement with Icelandic banks or whatever? Do you accept that, no matter how

robust the system is, local authorities will have to make decisions in a tight timescale, which is completely at variance with a workforce planning system that needs to forecast six years in advance?

**Fiona Hyslop:** Yes, and that is—

**Margaret Smith:** You are surely not going to make a case for both sides.

**Fiona Hyslop:** No. You will understand that that is the challenge that I face and that previous education ministers faced. That is why the intelligence is important. In the next few weeks, I will have to make decisions that will impact on the number of post-probationers in 2014, so we need a model and a common understanding of what we are trying to achieve. Therefore, the aim of maintaining teacher numbers at a certain level is one way of forecasting. If there are calibrations or movements either way, we will need to have information on that in sufficient time to make planning decisions. The situation is not new—it is exactly the same as previous Administrations faced. However, because there is a greater acceleration of those leaving the profession—as I said, 50 per cent of teachers have left in the space of four years—that perhaps presents more of a challenge to the present Administration than previous ones faced.

**Christina McKelvie (Central Scotland) (SNP):** I will move your attention on to the particular challenges in employing secondary teachers. Recommendation 8 of the teacher employment working group report was to increase the payment in the preference waiver scheme from £6,000 to £8,000. When I questioned Joe Di Paola last week on the impact of the scheme, he told us that the working group had not modelled it. Does the Scottish Government intend to model the effect of the increase in the preference waiver payment on filling vacancies?

**Fiona Hyslop:** Certainly, there is a large number of vacancies at present. Some members are obviously concerned because they have postbags full of letters from teachers who are seeking jobs but, even recently, Aberdeenshire Council said that it had 103 vacancies. I ask Michael Kellet to comment on the preference waiver scheme.

**Michael Kellet (Scottish Government Schools Directorate):** We will certainly keep an eye on the impact of increasing the payment from £6,000 to £8,000 on the cohort of probationers who are in their final year at university and who will be offered the increased payment as they go into the probation year next year. The figures on the scheme have been fairly steady—about 8 per cent of probationers have taken up the option of the preference waiver. We hope to increase that,

particularly among secondary teachers. We will keep a close eye on that to see whether increasing the payment to £8,000 has the impact that we want it to have.

**Christina McKelvie:** Last week, Joe Di Paola told us that there is anecdotal evidence to suggest that a higher level of probationers are retained and take up permanent employment when they have used the preference waiver scheme. Do you intend to establish more robustly whether there is better retention among probationers who take up the scheme?

**Fiona Hyslop:** One reflection that I have, after visiting many local authorities in the summer, is that councils such as Dumfries and Galloway Council, Argyll and Bute Council, Highland Council and Orkney Islands Council find that when teachers come to them, although the area might not have been their first choice for permanent employment post probation, the quality of life is fantastic and they end up satisfied, so the retention rates can be high. In itself, that shows that the initial incentive is an investment, as there is a saving further down the line because councils do not have to replace teachers.

However, there are big challenges. Orkney Islands Council told us about the challenge of finding employment for teachers' spouses or partners. It is a life-changing decision for someone to move from the city to a rural area. However, the people who have moved are great adverts to encourage others to do the same. We could explore that further. I have suggested to some of the more rural authorities that they should work collectively to promote rural areas for the experience that people can get and the quality of life for them and their families.

**Christina McKelvie:** I am looking at the clock, and taking up the convener's challenge of being concise in my questioning. Has there been a drop in the proportion of permanent posts in secondary schools? If so, does that indicate that some of the vacancies are oversubscribed?

11:00

**Fiona Hyslop:** It is important to remember that the response rate for the GTCS survey was only 44 per cent, and that it concerned only post-probationers. The working group is not just about post-probationers; it is about how we reconcile the whole teacher cohort. That is one of the challenges that we face. The GTCS figures seem to show that there was some movement in secondary, which we have to consider. It is about doing comparisons. We still have the figure of 54,000 for full-time, permanent posts, which was a bit higher previously.

The real issue here is that we must be careful about the figures that we use. The census that comes out in February or March will give a better snapshot. The information is taken in September but takes a while to be analysed. The figures were used by the previous Administration. Other figures tend to have issues such as double counting. The GTCS is a snapshot of a small proportion of one year's cohort. You have to consider the experience of secondary over the piece.

There are challenges, particularly for councils in the west of Scotland, where school rolls are falling more dramatically. Returning to the resource issue, which the convener raised, councils are starting to implement the cost floor rules and grant-aided expenditure. We should recognise that some councils face more challenges.

**Ken Macintosh (Eastwood) (Lab):** I am slightly concerned by your remarks about the nature of the problem that we are dealing with. You said that the trend might be improving. The GTCS survey suggests that in 2005, 94.7 per cent of post-probationers found a job in October. The following year, that fell to 92 per cent. The year after that, it fell to 87.8 per cent. This year, the figure was 79 per cent. Does that not reveal not only that there is a problem but that it is getting worse?

**Fiona Hyslop:** The figure of 79 per cent of teachers in employment is what we can reasonably expect. The figures that I gave the committee earlier on the jobseekers allowance show that the trend is such that that figure will increase. It has increased every year, and I am fairly confident that that will remain the case in April, when we expect the next GTCS survey. The situation is not new. It has happened consistently since 2005. The previous Administration faced a challenge in that it set the target of increasing teacher numbers to approximately 53,000, and it achieved a figure just a bit shy of that. It also had a situation in which a large number of teachers—up to 6,000—were starting to leave the profession.

I could make easy decisions now to ensure that we have as much employment as possible for probationers by cutting teacher training radically, but the danger would be that in four years' time we would have a teacher shortage, and any Administration that was in place would face a big challenge. We have a responsibility to plan ahead sensibly. What the previous Administration started to see in its last few years, and what we are seeing now, is that having to replace so many teachers puts a strain on the system. Unfortunately, that strain is felt by individuals, who do not automatically walk into permanent or even temporary employment—on supply lists—which is frustrating. However, we still have to ensure that we do not let down the pupils of Scotland by not providing properly for the numbers. I know that it is

frustrating and difficult, but that is the essence of where we are.

**Ken Macintosh:** The cabinet secretary said that the problem is not new, and that it has been consistent since 2005. I suggest that in 2005, one in 20 post-probationers could not find a job, and that that figure has risen consistently, so that now one in five cannot find a job. The problem is new and growing. If the cabinet secretary will not accept that there are too many teachers, is the problem that there are too few jobs for them to go to?

**Fiona Hyslop:** The funding for jobs allows us to maintain the number of teachers at 53,000, which is exactly the same figure as under the previous Administration.

On reducing the number of teaching posts, the figures for 2006-07 show that Aberdeen City Council planned and delivered a reduction of 66 teaching jobs, the City of Edinburgh Council delivered a reduction of 81, Glasgow City Council delivered a reduction of 26, and Perth and Kinross Council delivered a reduction of 75. That has a knock-on impact, because it affects post-probationers and others.

We are also seeing the impact of the induction scheme. We have to remember where we were when the induction scheme, which is an excellent opportunity, was introduced. It was not post-probationers who could not get jobs; it was people coming out of teacher training institutions. We know the horror stories about the experience in the early 2000s. The induction scheme was introduced to try to address the problem, and it has done so, but, given the volume that we are talking about, we might just have displaced the problems that were faced by students coming out of initial teacher training to their second year.

There is an expectation that if someone has been given a guaranteed position for a year, it will continue, but in which other profession or area of life does the Government guarantee someone a job? The issue is whether the Government should guarantee forever jobs for all teachers who are one, two or three years out of teacher training. In the first year after someone's initial teacher training, it is important that they get the experience, develop their skills and benefit from the mentoring and other support systems that are available in school, but there is a danger that the challenges that people faced in finding a position in their first year have just been displaced into their second.

**Ken Macintosh:** I agree that that is one of the dangers. No one is suggesting that there should be guaranteed jobs, but there is a big issue, and the cabinet secretary has responsibility for recruiting teachers and for funding local



authorities, so she has key controls. Two years ago, when the problem began to be identified, the minister at the time announced additional funds to address the problem. Last year, when the problem of post-probation employment grew, the cabinet secretary herself announced additional funds. The problem is much worse this year, so is the cabinet secretary about to announce additional funds to address it?

**Fiona Hyslop:** We provided additional funds to recruit 300 additional teachers on top of the number that we inherited. That involved an injection of £9 million into the system and was not for only one year; it has been maintained in the local government settlement.

The Administration has already injected 300 additional posts into the system. We had to do that to maintain the number of teachers at 53,000 because, as you might appreciate, under the previous Administration there was a drop-off, probably as a result of the reduction in the number of teaching jobs in the big authorities that I listed. In the year that we came into power, Aberdeen City Council lost 66 teaching posts, the City of Edinburgh Council lost 81, and Perth and Kinross Council lost 75. We addressed the problem by providing the initial £9 million to provide 300 jobs.

In the agreement with local government, local authorities recognise that there is funding for 53,000 teachers. Let us consider the key levers that you rightly say I have. Have I provided enough resources to maintain teacher numbers at 53,000? Yes, and that is recognised by local government. My other lever is the number of people going into teacher training. We are providing the system with enough teachers to maintain teacher numbers at 53,000. I point out that we are replacing 25,000 teachers just to stand still.

That shows that we are recruiting enough teachers and providing enough resources to maintain teacher numbers. The issue is whether local authorities deliver. As is shown by all the variables that the teacher workforce planning group and members have identified, the system is complex, but that does not mean that we cannot make improvements, which is what we are doing by taking forward the group's recommendations and pursuing other issues.

**Ken Macintosh:** Last year, the proportion of teachers in employment fell to 87.8 per cent and the minister announced an extra £9 million. Even though that money is still in the system, the problem is now worse, as the proportion of teachers in employment has fallen to 79 per cent. Given that the proportion of teachers in employment has fallen for three years in a row, and that in the previous two years the cabinet secretary announced additional money, what has

changed? Why did she announce additional money last year but not this year?

**Fiona Hyslop:** You are confusing the post-probationer situation with the general cohort. The £9 million that we provided for 300 jobs was not for only post-probationers; it was for the whole system. The resources that were put into the local authority spend to maintain 53,000 teachers also included a 2 per cent uplift to ensure that efficiency savings did not affect front-line services.

You asked why we did not put additional resources into the system, but we did. We put in resources to maintain teacher numbers at 53,000 despite falling school rolls, when otherwise the number would have reduced by 6,000 a year, primarily through retirement, but also through maternity leave. We also provided the 2 per cent uplift to ensure that efficiency savings did not have an impact. The £9 million extra that was provided for 300 jobs in 2007 has been rolled up and maintained in the local government settlement, and we provided an uplift from spring last year to maintain teacher numbers. We have taken that reasonable position to ensure that sufficient resources go into the system.

The challenge for me over the next three weeks is to decide how many people should go into initial teacher training, not only for the one-year postgraduate course but for the four-year BEd. Claire Baker made a point about the need to place more emphasis on early years and primary education. Last year, we decided to support the numbers on the BEd—which were previously not supported as much as they might have been—because the four-year course makes an important contribution to the equation. The previous Administration put greater emphasis on the one-year postgraduate course for primary teachers, for the understandable reason that it wanted year-on-year increases. We are trying to shift the balance so that there is more of a balance with the four-year BEd. Decisions have to be taken in the next three weeks, which is a big challenge.

**Ken Macintosh:** The £9 million to which the minister referred might be for permanent teacher posts—and, of course, it should be—but, if I am not mistaken, it was announced following the publication of the GTCS survey and the response to it in the Parliament.

**Fiona Hyslop:** No, it was not. I announced the £9 million in June 2007, but the GTCS survey did not come out until October, as it did this year.

**Ken Macintosh:** There has been continuing concern about teacher employment since the Parliament was founded. I and other members have raised questions since Peter Peacock was the Minister for Education and Young People. The

problem has been identified continually. Is the minister suggesting that that is not the case?

**Fiona Hyslop:** We came into power in May 2007 and announced the money before the summer recess, which was long before the GTCS survey on probationers for that year had come out. You asked me a specific question and I am giving you a specific answer. You said that we responded to the GTCS survey in 2007 with £9 million, but that is incorrect; we announced the £9 million for 300 additional teachers within a month or two of coming into power. The basis of your question is wrong.

**Ken Macintosh:** The basis of my question is not wrong, because it is that there is a continuing problem with post-probationary employment. A number of education ministers have announced a series of measures to address it, and I wonder what has changed this year. If there are decisions to be taken in the next couple of weeks, but no additional funding is to be announced and the Government is taking a partnership approach—the minister agreed that the problem requires solutions not only from her but from local authorities—will the minister agree to set up or recall the teacher employment working group on an on-going basis until the problem is resolved? We previously had a teacher induction scheme implementation group, but the teacher employment working group could be recalled now to oversee a realignment or recalibration—to use the minister's words—of teacher recruitment and teacher employment until we have addressed the problem of falling post-probationary employment.

**Fiona Hyslop:** The teacher employment working group was set up for a specific purpose with a specific remit and responded quickly and promptly with 12 recommendations that we took on board. You asked about continuing monitoring of the situation, which, as we know, is particularly acute for understandable reasons—that takes place. The teacher workforce planning group comprises representatives from the Scottish Government, COSLA, the Association of Directors of Education in Scotland, the GTCS, Her Majesty's Inspectorate of Education, the Scottish Further and Higher Education Funding Council, teacher unions and universities. That is the same representation as on the short-life working group that was set up specifically to consider whether the system that we inherited from the previous Administration was fit for purpose and to make some initial recommendations.

You are correct that the situation needs acute monitoring, and we will have that. The members of the group that I just identified will do exactly what you asked: they will continue to monitor the situation to ensure that we are aware of what is going on. We must ensure that the induction

scheme provides the quality of probationers that we need and the intelligent information that will allow for flexible decision making. Margaret Smith was right to point out that local authorities are making immediate decisions about things that are happening on a month-to-month or year-to-year basis, whereas our analysis and projections are for five years.

11:15

**Ken Macintosh:** The teacher workforce planning group will continue to exist, but there is a specific request for a new group to be set up to ensure that the problem that the GTCS survey has revealed relating to the employment of post-probationary teachers is resolved, so that we do not again have the situation of one in five post-probationary teachers finding themselves unemployed when they complete their probation in October.

**Fiona Hyslop:** I took action on the issue early and promptly. We have a report, on which the committee is taking evidence, with 12 recommendations. Our job is to drive forward those recommendations and to continue to identify opportunities to make differences: Liz Smith provided an example of how one local authority has done that. The fact that we have recommendations does not mean that we have finished dealing with the matter: there is a continuous process. The issue will receive the sharpest attention both from me and from the teacher workforce planning group, whose job and remit is to do exactly what you have outlined.

**Kenneth Gibson (Cunninghame North) (SNP):** I point out that, according to the information that the cabinet secretary has provided, the figure for the proportion of teachers who are unemployed is not 20 per cent but 0.65 per cent.

The teacher employment working group

“noted with concern that the increased media coverage on the issue may be having an adverse effect on the number of people applying for places on courses of initial teacher education.”

Is there any evidence of a reduction in the number of people applying to teacher education institutions in the current year? In particular, has the age profile of that cohort been affected? One would imagine that the impact on older people who may be looking to make a life change and who may worry about the risk of moving from employment into teacher training might be greater.

**Fiona Hyslop:** We are keeping the issue under close consideration. We must all be responsible when dealing with the situation. It is striking that, despite the fact that we have to recruit large numbers—as I said, we must refresh 50 per cent of the whole teaching profession during this

session—the quality of people who are applying to our institutions to become teachers has not diminished. It is important to focus not only on numbers but on quality. In its report on Scotland's school system, the Organisation for Economic Co-operation and Development was struck by the quality of teachers in the system and of the probationary scheme.

However, there are big challenges. You raise the important issue of the age profile of applicants. Although some teachers have had problems securing permanent employment as soon as they would like, there are real challenges for secondary teachers in maths, for example. People may have experience elsewhere that makes them suitable to come into the profession to teach maths, which is welcome. Obviously, that is a bigger challenge for people who are in their 30s and have family obligations. The last thing that we want is for people to be scared off by suggestions that they will not get a permanent job, as experience indicates that, by and large, they will do so by April or the summer. Michael Kellet may be able to give the committee more information on whether there have been any changes this year.

**Michael Kellet:** We have anecdotal evidence, from speaking to deans of faculties, that universities are experiencing some drop-off in recruitment this year. Recruitment is on-going, so they are not in a position to give us definitive evidence on the issue. I have no information on whether the age profile of applicants has changed, but we will liaise closely with deans to get better information and to share that with ministers and the committee, to see whether the suggestion is proving to be true.

**Fiona Hyslop:** The timeframe is such that, at this stage, we know about only the experience of those who applied this time last year, who started their studies for initial teacher training in the summer. Nothing from last summer's intake leads us to believe that there has been major variation.

As members know, pupils are filling in their forms and applying for study as we speak, so we will not know about this year's intake until some months hence. That illustrates the difficulty of our having to make decisions in the next few weeks to advise the Scottish Further and Higher Education Funding Council on the provision that it should make to deans of education. To return to Ken Macintosh's point, I want the teacher workforce planning group, which sits on a regular basis and is in charge of this area, to monitor behaviour for any changes.

**Kenneth Gibson:** Given that a lot of applications are being processed just now, I understand that it might be spring before you can give us a definitive answer, and one that takes gender into consideration.

Throughout my life, teacher numbers have been on a rollercoaster. As I have mentioned before in this committee, there were 59 children in my primary class when I started school—I will not tell you when that was. In my secondary school, there were no science teachers for the first and second year. The individuals who are concerned that there are too many teachers—although they did not express that concern from 2002 to 2005 when the teacher figures were being developed—are the same people who would be concerned if there were a chronic shortage of teachers. There are still shortages in specific subject areas. What is being done to address those?

**Fiona Hyslop:** One of the recommendations is for better forecasting for individual subjects to ensure that there is better reconciliation. There is variance, and maths is, as I said, the biggest challenge. We will have a better system this year than we have had in previous years for identifying the specific subjects to which we must recruit. My understanding is that we are examining some of the experience in England on forecasting for individual subjects to find out what lessons we can learn to help us to improve. Forecasting total numbers is challenging, never mind forecasting for individual subjects. Maths is causing particular concern.

Remote learning is increasingly important, given that teacher training institutions are not necessarily located where we need teachers to take up jobs, and people with families might not be able to move from more remote areas. Recent experience with using local universities has been interesting, but only a handful of students have been involved. We might need to consider how we provide more flexible routes into learning by, for example, employing more distance learning.

The situation with Gaelic teacher education at Aberdeen University is interesting. I took an early decision to improve teacher training opportunities at the Crichton campus in Dumfries, and also to do so in Aberdeen, to help to ensure that teachers are trained where they might be needed, and because teachers who study in areas such as Dumfries and Galloway might want to take up permanent employment there.

**Kenneth Gibson:** The convener mentioned retirement, and you pointed out that there were 177 fewer retirements than anticipated. You also mentioned that you expect about half the current workforce to retire over a four-year period. That means that about 10 or 15 per cent of teachers in any given school will retire in any given year, which must be quite disruptive to the pupils concerned. If pupils have a good rapport with a teacher who is very experienced, and that teacher retires at some point during the academic year, it must be quite disruptive for the school and for the

pupils in particular, who have rarely been mentioned today.

I know it sounds a bit radical, but are there any plans to consider whether retirement should take place at one fixed point in the year? It would surely not be beyond the realms of imagination to have a system in which those who were due to retire in December would retire at a fixed point in June. That might be a few months before or after a certain birthday, but it would allow schools to plan much more effectively than they can when retirements occur throughout the year. I realise that teachers leave the profession for a variety of reasons, but having a fixed point for retirement would help workforce planning, and it would help the pupils, who are ultimately what this is about—it is about providing an education for children, not providing jobs for teachers. What are your views on that? Could that suggestion be considered or discussed?

**Fiona Hyslop:** That would be quite a challenge. There are issues to do with employment, and local authorities have to consider age discrimination and other issues, but it would be an interesting challenge for us to reflect on. The situation is not easy. You suggest a simple solution that might help, but there might be added complications that would prevent the idea being taken forward. I am listening to what you are saying. I will reflect on your suggestion and discuss it with the teacher workforce planning group.

**The Convener:** That concludes our questions to the cabinet secretary. Thank you for your attendance. I am sure that we will return to the issue in the future.

11:24

*Meeting suspended.*

11:30

*On resuming—*

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

**The Convener:** I welcome Alex Neil, who has joined us for the second item on our agenda, which is stage 1 of the Education (Additional Support for Learning) (Scotland) Bill.

I also welcome Lorraine Dilworth, who is the advocacy manager with Independent Special Education Advice (Scotland), and Iain Nisbet, who is the head of the education law unit at the Govan Law Centre.

The witnesses will be aware that the bill allows for out-of-area placing requests to be made directly to local authorities. Are your organisations in favour of that? Is it a welcome change? Does the proposal strike the right balance?

**Iain Nisbet (Govan Law Centre):** The bill will do no more than put things back to how they were before the Education (Additional Support for Learning) (Scotland) Act 2004 came into effect. Under the old record of needs system, it was always assumed that an out-of-area placing request to the authority whose school someone sought to be placed in was competent. To revert to that position is only right and proper, as it gives the parents of pupils who have additional support needs the same rights as parents of pupils who do not.

**Lorraine Dilworth (ISEA Scotland):** I agree. Parents must have equality across the board, so they need to be able to make placing requests of other local authority areas.

**The Convener:** The bill proposes that, where a co-ordinated support plan is in place, a placing request appeal will be heard by the tribunal. Are you content with that suggestion?

**Lorraine Dilworth:** Yes, because we have been involved in cases in which there has been doubt about whether the tribunal has been competent to deal with the matter at hand.

In my consultation response, I said—as Jessica Burns, the president of the Additional Support Needs Tribunals for Scotland, said to the committee last week—that any such case involving a child who has additional support needs should go before the tribunal because the process by which it is decided whether a case is dealt with by the local authority's appeal committee, the sheriff court or the tribunal is complex. It would be much more streamlined and cost effective if parents simply went to the tribunal.

**Iain Nisbet:** I have concerns about using the CSP as the criterion for the decision about which appeals go to the tribunal and which go to the education appeal committees. The system is complex and is not well understood by anyone. In the Gordon case—which the committee has discussed at previous meetings and which has, I think, led to some amendments—the parent was wrongly advised about what was the best forum for the appeal. That wrong advice was given by the appeal committee, the tribunal and the authority: all those bodies had interpreted the law incorrectly and even now there is confusion. I dealt recently with a case in which the authority had initially indicated that there would be a CSP, but it changed its mind. The question was whether the appeal on the placing request would remain at the tribunal.

Confusion will remain under the proposed system and the proposed amendments would serve only to make the system much more complex. I read them on the train to Edinburgh today and I do not see the rationale behind the suggested dividing line. It would serve parents, pupils and authorities better if there were a simpler dividing line. Either we should move all additional support needs placing requests to the tribunal, or we should come up with a simpler dividing line. The Administrative Justice and Tribunals Council and the president of the additional support needs tribunal have suggested that it would be simpler if, for example, all placing requests for special schools were heard by the tribunal and other placing requests were heard by the appeal committee. That would be easy to administer and it uses a sensible criterion that is based on consideration of the likelihood of cases requiring the expertise of the tribunal.

**The Convener:** I am not asking you to second-guess the Government, and we will pursue this question with the minister, but can you think why the Government has drafted the amendments as it has rather than going for the much simpler approach that you are proposing, which appears to offer more transparency and be easier for parents to understand?

**Iain Nisbet:** There appears to be an idea that the tribunal should be focusing on CSP cases. Clearly, those who have drafted the bill have tried to ensure that all CSP cases in relation to which there are placing requests are heard by the tribunal. There seems to be an attempt to address the Gordon case's surprising outcomes, which were not what Parliament had in mind when the bill was drafted.

However, the proposals might end up causing problems that we do not have at the moment because they will increase the complexity of the process. That is particularly true of the proposals

that involve remitting forwards and backwards between sheriff courts, appeal committees and the tribunal. Under those proposals, a parent might be involved in a case that begins in one forum, switches to the tribunal and then switches back again. That would be unnecessary and would serve no-one's interests. That is probably why we have ended up with the muddled position that is being presented to us. It is an attempt to get back to the original intention of having a body that deals with CSP cases. However, as it is called the additional support needs tribunal, I can see no reason why a different and simpler dividing line could not be applied.

**Elizabeth Smith:** When the committee heard from stakeholder groups, we were told that there could be some difficulty if two local authorities were involved in the process. Do you share that concern?

**Lorraine Dilworth:** I do. One problem involves the fact that health boards span authority boundaries, which can cause difficulties, and the other involves cost implications. When a parent makes a placement request to a host authority—we have put this in writing many times—the authority will consider how much extra it will cost for the child to be placed. The financial memorandum details the costs of dispute resolution, mediation and review of a CSP, the cost of which is, I think, £800. I cannot imagine that any local authority will not look at that and say, "This is going to end up costing a minimum of £800 a year, plus staff time."

There is also an issue about the fact that taxpayers in one local authority area will be paying for the education of a child who comes from another area. I think that such children, and the parents who make the placement request, will be disadvantaged in making such requests to other local authority areas. It will be problematic. We have heard from parents who have been told by a potential host authority that it does not take placing requests from outwith its area, and from parents who have been told by their home authority that they cannot make a placing request to another authority. I foresee problems.

**Elizabeth Smith:** Local authorities have different special school provision and there might be transfers between Scotland and England. Will such issues exacerbate the problem?

**Lorraine Dilworth:** The approach that is taken in the bill to mediation and so on will exacerbate the problem, given the costs.

**Elizabeth Smith:** If a child's best interests would be served by their attending a private school rather than a local authority school—irrespective of whether the school is north or south

of the border—do you foresee difficult negotiations with the private sector?

**Lorraine Dilworth:** Are you talking about children with special needs?

**Elizabeth Smith:** If a child was referred to a private school that had a specialist dyslexia unit, for example, would there be problems? Such a situation would be unusual, but it might happen.

**Iain Nisbet:** The bill would not change the situation on placing requests to independent or grant-aided special schools, whether a school is in Scotland or England, Wales and Northern Ireland. Parents of pupils who have additional support needs are currently able to make placing requests to independent special schools, but the law does not allow such parents to make placing requests to mainstream independent schools, even if the school has a special unit, because of the way in which “special school” is defined. Such placing requests have never been an option for parents and I do not think that there are proposals to allow such an approach. The issue might be worth considering, although I do not know how common such a situation would be in the independent sector.

The process will remain relatively straightforward. A parent will make their placing request to the local authority that is responsible for their child’s school education, and that local authority will determine the issue.

**Elizabeth Smith:** Are you saying that you do not rule out giving the matter further consideration? Some independent schools have specialist teachers and extra resources, which could help to solve a child’s problems.

**Iain Nisbet:** I think that currently a parent would have to persuade their local authority that a placement in such a unit would be a good idea, and it would be open to the authority to make a placement to the unit. However, further amendment to the law would be required if parents were to be allowed to make direct placing requests, given rights of appeal and so on.

**Elizabeth Smith:** Mrs Dilworth rightly mentioned financial constraints on local authorities. Private-sector means to help children would be worth considering.

**Iain Nisbet:** Currently, if a child is placed in such a unit or in an independent special school, the local authority is obliged to meet the cost, so local authorities tend not to make such placements so that they save money. I am, however, speaking generally; there are particular specialist placements that are cheaper than similar provision in-house would be, where there would not be the required numbers of pupils with special needs.

**Elizabeth Smith:** Can we do more to the bill to ensure that we minimise problems that occur when two local authorities are involved? Should we consider other issues?

**Iain Nisbet:** I am concerned that section 5, which attempts to clarify which authority bears responsibility, will not do the job that it is trying to do. I hope that problems to do with cross-boundary disputes in which authorities argue about who should bear the cost, which Lorraine Dilworth mentioned, will be resolved to some extent by last week’s court decision by Lord Penrose in *East Renfrewshire Council v Glasgow City Council*. The ruling should put at least some problems to bed.

There is a difficulty with section 5 of the bill, which refers to the authority being responsible for the child’s school education and links it to whichever authority is the

“authority for the area to which the child or young person belongs”.

That concept of a child belonging to an authority comes from the Education (Scotland) Act 1980, and it depends on where the parent is resident. For children whose parents live in different local authority areas, a new confusing factor will be added by the bill because authorities will become involved that might hitherto have had no involvement with the child’s education. That probably needs to be reconsidered.

11:45

**The Convener:** Claire Baker had some questions about costs, which it might be best to pursue now.

**Claire Baker:** We have discussed the concern that a burden might be placed on certain authorities because of the types of schools in their areas. Concerns have also been expressed about the financial arrangements that will be made between two authorities. We asked the bill team about the matter, and they said that that will be dealt with under the code of practice to accompany the eventual legislation. Are you happy with that? You have just spoken about a need to reconsider section 5.

**Iain Nisbet:** The bill, with the clarification that is provided by the code of practice, spells out the current position fairly clearly. The home authority will need to bear the additional support needs costs of a child attending a school in a different authority. That is the decision that the court has come to. Section 23 of the Education (Scotland) Act 1980 act spells it out relatively clearly. There is probably no need for further legislative change in that respect, notwithstanding what I said about the need to clarify the provisions of section 5 of the bill.

The problem is probably one of practice. Where there is a prospect of additional costs, local authorities can be reticent about letting parents know that they have options in neighbouring local authority areas. In our casework, I have come across the problems to which Lorraine Dilworth referred. The host or receiving authorities can, for their part, be reticent about accepting placing requests from parents in other local authority areas, because they know that they might have a fight or an argument on their hands in trying to get the money from the other authority.

I do not know whether the code of practice is enough in itself. Section 23 of the 1980 act contains a dispute resolution mechanism for cases in which two authorities cannot agree how much money should be transferred between them. Such cases could go to the Scottish ministers to determine. Lorraine Dilworth and I are probably united in saying that we do not really mind what the arrangements behind the scenes are for two authorities arguing over who is paying what to whom, as long as that is not used as an excuse to delay or refuse placements that otherwise ought to be granted.

**Claire Baker:** Evidence that we have taken indicates that local authorities may refuse requests on the basis of cost. Could Lorraine Dilworth give us any examples? Is that a common complaint? Is that something that parents have to deal with?

**Lorraine Dilworth:** Placing requests that have been refused to parents who have approached us tend not to have been refused on the basis of cost alone. What is the wording, Iain?

**Iain Nisbet:** It is to do with the balance between cost and suitability.

**Lorraine Dilworth:** Yes—the grounds of “respective suitability” and “respective cost” are the argument that local authorities tend to use. The requests that we have been dealing with have been for independent and grant-aided special schools. In the case of a local authority school, the reasons are usually that there are no places, or the authority would have to employ another teacher, or are to do with the age, aptitude or ability of the child. When it comes to independent school places—for example for the Royal Blind school or Donaldson’s school for the deaf—authorities use the grounds of respective suitability and respective cost. Those two issues feature in the one reason that is given for refusal.

**Alex Neil (Central Scotland) (SNP):** The existing legislation refers to reasonable costs. In the case of *Boyd v South Lanarkshire Council*, which I know Iain Nisbet is familiar with, one of the council’s arguments was that it was beyond reasonable cost to locate the child or to agree to the application for a placement at a school south

of the border, as it was in that case. Is there a need for a clearer definition in legislation of what constitutes reasonable cost?

**Iain Nisbet:** The 2004 legislation says that the court or tribunal should have

“regard both to the respective suitability and to the respective cost”.

Only if it would be unreasonable to place the child in the school of the parents’ choice are they empowered to refuse the placing request.

There is a related issue in section 4 of the 2004 act, on the authority’s duty to

“make adequate and efficient provision for such additional support as is required by that child”.

However, that duty does not extend to anything that would involve

“unreasonable public expenditure being incurred.”

There are various points in the existing legislation where cost is brought in.

The code of practice already does a reasonably good job of explaining what is meant by “reasonable costs”. It also says that costs should not be the sole consideration, and that authorities should consider to what extent a resource or something else that carries a cost would benefit more than just the one child—it might be something that could have a wider benefit, and costs would be considered as part of a long-term view, too. Any initial cost should be considered if it might bring a benefit for a number of years. Given the wide variety of things that might involve costs, that is about as far as the code of practice could reasonably be expected to go.

**Alex Neil:** The code of practice has, at the moment, the status of guidelines. Is there a need to put it on a statutory footing?

**Iain Nisbet:** It is already on a statutory footing, to an extent. Not all Government guidance is mentioned in legislation. In this case, there is a requirement for tribunals, courts, authorities and appropriate agencies to “have regard to” the terms of the code. My experience has been that courts and tribunals accord it appropriate weighting.

**Lorraine Dilworth:** Yes—I have found that the tribunals pay a lot of attention to the code of practice. Officials have acknowledged that certain parts of the code of practice need to be rewritten, because they are so vague or are open to many different interpretations. I am not sure whether the code needs to be put on a statutory footing, but it certainly needs to be tightened up, with more explanation added to it.

**Alex Neil:** I return to the *Boyd v South Lanarkshire* case. One of the issues that arose in that case was the alleged disregarding of

elements of the code of practice by the council. That caused some of the problem, albeit not all of it. Are you saying that clearer definitions are required in parts of the code of practice?

**Iain Nisbet:** The code could certainly do with some redrafting. Parts of it perhaps do not go far enough, while other parts need to be redrafted because they are misleading with regard to some of the regulations. Overall, however, the code is a useful document, and I do not have any concerns that it is not being accorded appropriate weighting by tribunals and other decision-making bodies.

**Alex Neil:** I return again to the *Boyd v South Lanarkshire* case. And there are other cases like it. In that case, a sheriff court took a decision—on a legal point—not to award, or agree with, a placement. The child concerned still has five or six years of formal education to go. Would you agree that, in such cases, it would be appropriate to have the right to appeal to a tribunal, notwithstanding the decision that had been taken by a sheriff court? Should the bill make it possible to ask the tribunal to revisit decisions in such cases?

**Iain Nisbet:** It is certainly open for parents to make a fresh placing request at any time. The legislation states that, in relation to appeals of placing requests, a 12-month gap must be left, so in cases such as the one Alex Neil describes, in which the child still has five or six years of their education to go, it would be open for parents—

**Alex Neil:** You would need a CSP.

**Iain Nisbet:** To make a fresh placing request.

On who would decide the appeal, Alex Neil is right that it would go to the tribunal only if there was a CSP, unless Parliament were minded to change the criteria, as we have been discussing. The case that he mentioned involved a special school. If Parliament were to adopt the proposal by the president of ASNTS that all special schools cases be determined by the tribunal, that case and others like it would be determined in that forum.

**Christina McKelvie:** I turn your attention to who has responsibility for reviewing a CSP. The bill proposes that the host authority will take responsibility for reviewing the CSP and that the review should happen

“as soon as practicable after the date of transfer.”

Are there any difficulties in sharing information and co-ordinating provision between local authorities, especially in cases in which there is an out-of-area placing request?

**Iain Nisbet:** When there is an out-of-area placing request, the home authority—the authority in which the family lives—no longer has any, or at least has very little, involvement in the child's

education. In such cases the provision of education tends to be relatively straightforward. That is probably a better system than the old record of needs system, in which one authority was responsible for things that happened at school, another authority was responsible for the educational psychology input and so on. That could sometimes get a bit difficult. When there is an out-of-area placing request, the authority in whose area the school is will take control. That is probably a good system and a better way of dealing with the situation.

When an authority has bought a place in a school in another authority's area, or has reciprocal arrangements with another authority—as sometimes happens between neighbouring authorities—it is up to those authorities to ensure that whatever arrangements they agree to in respect of that external support work well. My experience is that when authorities have come to such arrangements themselves they tend to have fairly good arrangements. I do not have particular concerns about how sharing of information or co-ordination between authorities works in such circumstances.

**Christina McKelvie:** Does ISEA have any different experiences?

**Lorraine Dilworth:** I have a case in which a family has moved from one of the islands to a mainland town. The CSP was completed to the parents' satisfaction on the island and was very detailed. The receiving authority has, in the parents' opinion, ignored the CSP and is in the process of reviewing it—as is an authority's right because the child has come in. As I have said to the parents, the process will take a long time because none of the professionals knows the child and they need to get to know them. In the interim, the child is not receiving what is currently in the CSP. We have suggested to the authority and to the school that they should contact the professionals on the island who have worked with the child, but a barrier has gone up and they have said, “No. We'll do our own assessment.” In that case, there are particular problems.

**Christina McKelvie:** Do you think that the bill will address such problems?

**Lorraine Dilworth:** Time limits need to be placed in respect of by when reviews of CSPs should be done. It would be helpful to the children and the parents if the local authorities worked within such timescales.

**Christina McKelvie:** Yes—the bill currently just says “as soon as practicable”.

**Lorraine Dilworth:** Yes. The matter can be referred to the tribunal if authorities do not meet the timescales. A number of references that were made to the tribunal within the first and second



year were about local authorities not complying with the current timescales. It is black and white.

**Christina McKelvie:** Timescales are set for other provisions in the bill and that is something that you would welcome for this provision.

The issues that you have just described are quite different from those that the Govan Law Centre outlined, which says that it has not come across any particular problems. You have given an excellent anecdotal example of such problems. Will the provisions of the bill have a positive or a negative impact?

12:00

**Lorraine Dilworth:** I do not quite understand the question. Could you repeat it?

**Christina McKelvie:** The responsibility for reviewing CSPs will be with the host authority: that will address the anecdotal example that you gave. However, the Govan Law Centre remains to be convinced on that point. What would be the impact of the specific provision that is proposed?

**Lorraine Dilworth:** It is a difficult issue, because the bill will set up a two-tier system. If a local authority places a child in another authority's school, the home authority is still responsible for everything. However, if the parent makes a placing request to the host authority, everything changes. We will be setting up another tiered system for parents. Either host authorities that accept placing requests from other authorities should take over all responsibility for the CSPs of the children concerned, or home authorities should remain responsible. When legislating in this area, we keep setting up different tiers for parents, which is confusing. All cases should be dealt with in one way—they should not be split up, as is the case at present.

**Iain Nisbet:** I do not see that as a problem. In practice, where there is a transfer of responsibility, authorities are reviewing CSPs. I am generally in favour of the proposed amendment, which provides a safeguard by obliging authorities to do what they are probably doing in most cases.

**Christina McKelvie:** Lorraine Dilworth gave the example of a family that obtained a CSP that was to its satisfaction. A huge amount of time, effort, money and commitment must have gone into getting to that stage. Parents are sometimes not absolutely happy with CSPs, so there has to be compromise. If the provision addresses the issue that has been identified, it is to be welcomed. It will be good if host authorities retain responsibility for reviewing CSPs. However, if people move to another authority area—as in Lorraine Dilworth's example—and must go through the whole process again, the needs of the child are not being

addressed in the best possible way. I do not understand why, if an extremely detailed CSP already exists, an authority would go to the expense of putting the same amount of work into another CSP, which may not be to the full satisfaction of the child's parents.

**Lorraine Dilworth:** The quality of CSPs in the 32 local authorities in Scotland is variable. Some authorities produce excellent CSPs, but others produce one-liners. Why should people seek a CSP when what they get is a one-liner? We have seen that happen.

**Iain Nisbet:** That is certainly true.

**Aileen Campbell:** You touched on mediation and dispute resolution when speaking about section 23 of the 1980 act. In its written evidence, ISEA notes that about 75 per cent of parents are unaware of the fact that they can request mediation and that 80 per cent have no or poor information on their right to request dispute resolution. What do you see as the reasons for those high figures?

**Lorraine Dilworth:** The information comes from responses to a questionnaire that we sent to the 150 parents with whom we had dealt most recently. There is a lack of information. Some local authorities provide access to the 2004 act, their policy and so on through their website, but in other cases that information is not there.

Parents inform us—we have also seen it—that local authorities are still sending letters that do not give them the right of appeal or information about how they can access mediation and dispute resolution. Iain Nisbet may agree with me on that. Parents are struggling to find out how they can access dispute resolution, which is quite a complex issue. Our questionnaire showed that there is a lack of information for parents. They are happy to go to meetings, but they do not know that they have the right to get papers, agendas and reports. How can someone play a full part in discussions with professionals about their child's education if they do not have the necessary information?

**Iain Nisbet:** I echo some of the points that Lorraine Dilworth made, which reflect our experience. We run an education law helpline that is funded by the Scottish Government and receives about 600 calls a year. If the course of action that we are recommending is dispute resolution, it is unusual for the parent concerned to have heard of that—it comes as news to most people. My impression is that mediation has a rather higher profile than dispute resolution. Part of the problem is that all but one of the dispute resolutions that the Scottish ministers have received have related to the failure to provide additional support. When the ground for dispute

resolution is a decision, there is a trigger that obliges authorities to bring the procedure to parents' attention, but when the issue is not a specific decision but failure to provide support, there is no trigger—nothing obliges authorities to let parents know that they have the right to dispute resolution. That may be the reason for the lack of knowledge that has been identified.

We are undertaking a training process for a number of advocacy groups in Scotland. One of the points that we are trying to promote to them is that dispute resolution is available and, in my view, works well. We want more advocacy groups and parent groups to be aware of it and to know how to make use of it.

**Lorraine Dilworth:** We have flagged up the fact that, under current legislation, parents must write to the local authority to request dispute resolution—the local authority is the gatekeeper on the issue. We find that an increasing number of local authorities are writing back to parents to tell them that dispute resolution is not available. In such cases, we have to seek a section 70 order. Even when we write requesting dispute resolution on parents' behalf, authorities do not pass cases on.

**Aileen Campbell:** That is concerning. You said that some local authorities are good, whereas others provide CSPs that are one-liners. I do not want you to name and shame particular authorities, but have you noticed a trend? Are there clear patterns that indicate where more best practice should be shared?

**Lorraine Dilworth:** There certainly are. Some local authorities have very good practice; unfortunately, quite a few do not.

**Aileen Campbell:** Is there enough sharing of good practice?

**Lorraine Dilworth:** We provide feedback to Scottish Government officials on a regular basis.

**Aileen Campbell:** Presumably, many of the parents who know how to ask for mediation or dispute resolution are more confident than others. Many parents who are lacking in confidence may need extra help to enable them to access those procedures. In an informal discussion, we heard about the situation of Gypsy Traveller children. Is there a definite need to do more to help those children's families, given that they travel a lot and pass through many different local authority areas?

**Lorraine Dilworth:** We have identified a need in that area. Armed forces children are also on the move and spend only short periods in local authority areas. Your suggestion that some families are more able than others is interesting. The majority of the 150 families that took part in our survey had an income of £25,000 or more.

The survey showed that those families were able to access our service, because we do not advertise. We are concerned about where the support is for low-income families. Families with an income of £25,000 and above require our assistance to attend meetings with them and so on. We have dealt with parents who are solicitors, but because they are so emotionally involved in their child's case, they need someone to come in and support them.

**Aileen Campbell:** Are those problems best addressed in the bill or in the code of practice?

**Lorraine Dilworth:** A lot of work must be done to get the information out to parents. Parents are hard to find, because they come to us only when they are at crisis point because the child has been excluded and so on. I do not know whether Iain Nisbet finds that, but it is certainly the case for our service. Enquire is working on producing information, but the issue is getting it out to parents. The more that parents know about their rights and their children's rights, the more CSPs we will see.

**Iain Nisbet:** Section 30 of the 2004 act said that for the first two years of implementation local authorities should pay particular attention to children and young people who had a record of needs. Local authorities were given a two-year period to ensure that all those children were being provided for and that consideration was given to a CSP. It is now time to do the same for the groups of children that Her Majesty's Inspectorate of Education's report states are not being well catered for by the act. We would include in that bracket the families to which you have referred: looked after and accommodated children; young carers; and children and young people with mental health issues. Those three groups are identified by HMIE as being examples of groups for which local authorities are not catering well. The bill should state that we have had our two years when we have looked after children who had a record of needs and paid them particular attention and that we should now do the same for the groups that are being left behind.

**Aileen Campbell:** I am perhaps going back to the same issue again rather than asking you another question, but when you refer to local authorities being good at getting information out there, what are they doing? You mentioned that they have provided the opportunity to access information online, but are they doing more than that? Not everyone has access to information online.

**Lorraine Dilworth:** They also send leaflets and so on out to parents and the professionals are also providing parents with information.

Some parents who are teachers who have come to us did not know about the 2004 act. Even though they are teachers and have a child with additional support needs, they did not know what their rights are. They are teachers working in mainstream schools.

In local authorities where there is good practice the parents have received leaflets, they know how to access the authority's website and the information is easily accessible. However, for one local authority, which I will not name and shame, you could not even find the name of the director of education on its website.

**Margaret Smith:** Although you have a problem with some elements of the bill, it is coming through to us that, for the most part, most of the people from whom we have heard—formally or informally—are content with the general direction of the bill and with what is in it. However, they feel that it does not go far enough and that this is a missed opportunity to look at a matter that, although we all agree with it in principle as set down by the Parliament, and it is something that we all want to happen, has in reality not been happening.

When the committee took evidence from the bill team, we asked about issues such as definitions, the timetable, the rights of parents to receive information and all sorts of matters. The response was often that those issues would be covered in the code of practice or in secondary legislation. I am quite uneasy about that, because we have reached the position that we are in despite having had primary legislation, secondary legislation, a code of practice and a historic concordat with local government, which one would think would mean that local government would do what the Government wants it to do on such issues. I am not making a party-political point. It is a fact that a lot of things have been in place, but it seems from what you are telling us that the system is in a pretty critical condition and is not delivering what the Parliament wanted it to deliver. Are you content that such issues should simply be covered in codes of practice, or should we put much more in the bill to ensure that people know what the law requires them to do?

12:15

**Iain Nisbet:** It is probably a little harsh to say that the state and operation of the bill are critical. I would not go that far. I will be fair to local authorities, which I do not like to do too often. I am always conscious that, in my work, I see only complaints or cases in which things are going wrong—it will be the same for Lorraine Dilworth. People rarely phone us to tell us what a good job their school is doing, but we know that there are

plenty of examples of schools doing good jobs. That is an important point.

The legislation has taken a step forward from where it stood when we had the record of needs system. Things have improved overall. That said, things undoubtedly need to be done with the code of practice and subordinate legislation, and I agree that more needs to be put in the bill. If that is not done, Parliament will have missed the opportunity to address issues.

The point of the HMIE implementation review was to revisit the legislation. The bill does not cover serious and important recommendations that have been made, and I am concerned that subordinate legislation and the code of practice are not capable of addressing those recommendations.

**Margaret Smith:** Would you give us examples of what you mean?

**Iain Nisbet:** The five proposals made by the consortium of organisations in the joint response to the committee's call for evidence address the matter. As a group of organisations that work throughout Scotland with many thousands of families that the bill will affect, we tried to identify issues that HMIE picked up, or that arose as a result of court cases that required legislative responses. I have already mentioned the three groups that the bill needs to cater for. The definition of additional support needs to be reconsidered and transition questions, for example, need to be considered.

**Lorraine Dilworth:** I agree with much of what Iain Nisbet says. We deal with parents who are at crisis point. There is good practice out there, but we do not hear from a huge number of parents in the middle, such as Gypsy Travellers, who do not know their rights or who to turn to. We are especially concerned about looked-after children, a very low number of whom have co-ordinated support plans, because social workers are their guardians—and they work for local authorities. Something needs to be done about that.

When the 2004 act was being drafted, we made a number of recommendations and expressed concerns in written and oral evidence to Parliament. I am sorry to say that, over the past couple of years we have ticked off things that we said would happen as they happened. Some of the bill must be changed. It does not go far enough in tackling what is happening at the grass-roots level. We want the legislation to be successful. I am sure that every MSP who passed the 2004 act wanted to help the most disadvantaged children in our society. However, my organisation has done road shows throughout Scotland and spoken to parents in every local authority area, and it knows that the legislation is

not, unfortunately, delivering on the ground. We need to make changes in order to deliver on the ground.

**Margaret Smith:** I would like to ask about timescales. We heard from the president of the ASNTS that the tribunal had the ability and the resources to take on a fundamental role in monitoring whether its decisions had been implemented by local authorities within set timescales. It concerns me that, if parents are not happy about something, they are expected to deal with it themselves. A tribunal may have considered the issue and made recommendations, but if the tribunal has no powers to monitor the implementation of the recommendations, or to impose sanctions if they are not implemented, it will again be up to the parents to resolve the issue. Could we improve the situation by giving the tribunal more involvement, or by giving it the power to impose sanctions or take other measures?

**Lorraine Dilworth:** ISEA has dealt with quite a few tribunal cases. When the local authority has not implemented the tribunal's decision, parents have sometimes had to find a lawyer and threaten to go to court to get the decision implemented.

I spent three days on one particular case, relating to the contents of a CSP. We rewrote it, the tribunal accepted it, and the local authority eventually accepted it. That child must now have one of the best CSPs in Scotland. However, the local authority has not implemented one thing within that CSP, and six months have now passed. We have had to resort to a section 70 complaint.

In another case, the local authority was told that it had four weeks in which to issue the CSP. Two months later, the local authority had not done it.

I therefore agree that the tribunal needs monitoring powers to ensure that its decisions are being carried out. If the tribunal does not have those powers, it will need some mechanism by which it can fine a local authority. Parents should not have to pay out of their own pockets or go through even more stress while trying to get a tribunal decision implemented.

**Iain Nisbet:** I would sound a note of caution on giving the tribunal monitoring powers. Unless you were also going down the route of giving the tribunal powers to attach financial penalties or something along those lines, I would be concerned about giving the tribunal a monitoring power. If the tribunal could call the matter back in, without there being any definite end point, it could disadvantage parents because it might prevent them from taking legal action—a judicial review action for the implementation of the statutory duty—because the court would say, “You can’t come to us just now, because there’s another remedy available to you.”

Giving the tribunal a monitoring power could mean that the legal option for parents would be delayed. If there were going to be some mechanism, I think that it would have to be at the level of a power to impose financial penalties. I am not sure how realistic that would be.

Issues certainly arise when a child has a CSP and it is not being put in place. There are remedies, but as Lorraine says, it then goes back to the parents to take the initiative.

**Margaret Smith:** Is there any way in which the tribunal could take the case to court? Could it be up to the tribunal, rather than the parent, to make the decision? I am not suggesting that that would happen in many cases; if the tribunal had the power, minds might be more focused on what should have been done—perhaps much sooner—on the back of the tribunal's original decision.

**Iain Nisbet:** You would have to discuss with the tribunal how comfortable it would be with that idea. It might compromise the tribunal's independence if it were seen to be acting directly on behalf of one party in a dispute—even after the dispute had been resolved.

**Margaret Smith:** I was taking advantage of the free legal advice while you are here.

**Iain Nisbet:** All our legal advice is free.

The issue needs to be considered, but remedies are available. I would be uncomfortable with giving the tribunal powers unless they were substantial.

**Margaret Smith:** Lorraine Dilworth mentioned section 70 requests. The bill team mentioned that measure to us as well. The committee is keen to get an idea of what going down that route means for parents. Is it successful? What stress levels are involved? Is it realistic for most parents to say that the final option is to go to court?

**Iain Nisbet:** I will defer to Lorraine Dilworth on that, because she probably has much more experience of it than I have.

**Lorraine Dilworth:** A section 70 request involves writing to the Government to say which part of the legislation the authority has failed on. How can most parents do that? When I worked on such cases many years ago, solicitors used to draft the letters, but ISEA does it now. We have lodged about five, I think. Such cases take time, so the stress levels for parents are sky high, as in the one that I mentioned on the CSP. It takes months to get to and go through the tribunal. Then we have to leave it for a couple of months before writing to the authority to say that it has not implemented the tribunal's decision, after which we have to write to the Government to say that we are making a section 70 request. The Government then writes to the local authority, which then writes back and then a decision is taken. I think that we

started to lodge the requests in May. None of the five cases has concluded yet.

**Margaret Smith:** Is that the first time that you have used the procedure? We are trying to get a sense of whether it is successful for parents.

**Lorraine Dilworth:** We have not had any success yet.

**Margaret Smith:** You have not had any experience of a successful conclusion to a section 70 request.

**Lorraine Dilworth:** Not so far.

**Iain Nisbet:** Because the Govan Law Centre is a firm of solicitors, we would tend to take court action on the non-implementation of a CSP or something similar. Obviously, that has its own issues, such as whether legal aid is available depending on the parents' income. However, if the case is urgent, the process can be expedited, and the Court of Session is pretty good at prioritising cases that involve children with disabilities. The court approach can be effective. It is a big stick to use, and the issues are how comfortable parents are with the process and the financial implications of going to court if legal aid is not available.

**Claire Baker:** We explored with the bill team and witnesses from the Additional Support Needs Tribunals for Scotland the provision to allow a tribunal to review its own decision. The president of the ASNTS said that the provision would be useful if a decision required further clarity, and the bill team said that the subordinate legislation containing the details would have to be consulted on. When we took evidence from stakeholders in a round-table session, they expressed caution about the idea of a tribunal being able to review its own decisions. What are the witnesses' views on the issue?

12:30

**Iain Nisbet:** It is a power that tribunals generally have. There is certainly an administrative use to it in cases in which there is an error that has not been picked up and on which both parties can agree. However, I have real concern about allowing parties to come back to the tribunal with new evidence or to request clarification of the detail of the tribunal's decision in light of new information.

Given the nature of the decisions that the tribunal takes, it is not like an employment tribunal, which considers whether a decision was fair at a fixed point in time. The additional support needs tribunal's decisions are, quite rightly, to do with a child's stage of development and needs at the time of the hearing. There will always be new evidence. Therefore, I am concerned that it will be much easier for an authority to say, "An

assessment that was carried out by our educational psychologist in the week after the tribunal has provided new information that the tribunal must consider." There is the potential to undermine the security of a decision that is in favour of a parent.

I am not against a review power as such, but I would be very concerned if parties were allowed to revisit the content of the decision on the basis of new information.

**Claire Baker:** The bill team said that the detail of what could be reviewed would be dealt with in subordinate legislation. Is that the right approach? Will we be able to return to the issue at that stage?

**Iain Nisbet:** The issue is for subordinate legislation, which is where the rules of the tribunal are to be found. This committee, or another committee, will deal with the subordinate legislation. I have expressed my concerns about the power, as we did during the consultation. We remain concerned.

**Lorraine Dilworth:** I share those concerns. We find that many more local authorities are employing advocates to represent them at tribunals, along with their in-house solicitors and senior officials. We would be concerned if the tribunal had the power to review its decision on a point of law, because the parents whom I accompany to tribunals are not legally qualified—although I am learning quickly. A parent might be able to get legal aid for advice and assistance from a solicitor, but the solicitor would not attend the tribunal and could only view the decision. If an authority asks the tribunal to review a decision on a point of law, it will be represented by its advocate and senior solicitor, who can easily pick up on points of law, whereas the parent will be represented by me or Iain Nisbet—to whom I mean no disrespect.

Inequality of arms is a human rights issue and is increasingly a problem. I can understand why local authorities use advocates and senior solicitors to contest, for example, requests for a placement at Daldorch House school, which would cost an authority more than £100,000—although inequality of arms remains an issue in such cases. However, this week a local authority employed an advocate to contest a parent's reference on the contents of a CSP. We were asking only for what the child was receiving, but the authority was represented by an advocate, senior officials and a senior solicitor.

The tribunal tries to be user friendly, but authorities are coming in heavy handed. That needs to be stopped. The officials who made the decision have all the information. Why cannot they represent the authority? Why do they need senior counsel? The approach is damaging the tribunal's

ethos; the tribunal is no longer user friendly. I am often asked, "Mrs Dilworth, will you sum up your legal arguments?" I reply, "I'm not a lawyer, so it won't be a legal argument." However, the authorities are represented by people who can make the legal arguments.

**Claire Baker:** Why are some authorities taking such a heavy-handed approach?

**Lorraine Dilworth:** They want to win at all costs. As I said, authorities used to bring in senior counsel when the issue was a placing request, but now they are doing so to contest the contents of CSPs.

We got the tribunal to overturn a local authority decision not to open a CSP for a child, but the authority lodged its appeal with the Court of Session this week. I do not think that the parents who are involved qualify for legal aid, so they might not be able to defend the case in the Court of Session, whereas the local authority is using public money to take the case to that court.

**Claire Baker:** Will you tell us which council is involved?

**Lorraine Dilworth:** I do not know whether I am allowed to do that.

**Iain Nisbet:** The name is lodged in court.

**Lorraine Dilworth:** It is the City of Edinburgh Council.

**Claire Baker:** That information is helpful.

I understand that the equivalent tribunal in England has the power to review its decisions. Do you know or have experience of how the system operates there?

**Lorraine Dilworth:** We have a sister organisation in England, which has said nothing negative about the system, but I urge caution, because the English process does not last as long as our tribunals in Scotland—it works differently.

**Claire Baker:** That answer is helpful. Thank you.

**Ken Macintosh:** I will continue that line of questioning. What are your suggestions for reducing the use of the adversarial approach at tribunals?

**Lorraine Dilworth:** My solution is that the people who have made the decisions should be present to support them.

**Ken Macintosh:** Last week, the president of the tribunals gave evidence that, in most cases, the representatives were education officials. She did not say that no advocates were present; she said that they—or, more commonly, solicitors—were present occasionally. Usually, education officials are the representatives, but you think that a

definite trend exists. Should we ban lawyers from tribunals? Could that be done? Could the role of lawyers be restricted at tribunals?

**Lorraine Dilworth:** The code of practice said that parents and local authorities would be discouraged from bringing solicitors and advocates. That part of the code is obviously not working. I think that I have attended more tribunals in Scotland than anybody else and I see a trend of authorities using solicitors and advocates more than officials. I believe that as officials make the decision, they should come and state their case. That would make the playing field more level.

Parents need support. As Iain Nisbet said, he is providing training to get more advocacy groups up and running. If many more advocacy groups were up and running, we could even do away with Iain Nisbet's services for representing parents. However, we need a level playing field.

**Iain Nisbet:** I cannot speak with much authority on the issue, as I am a solicitor who appears at the additional support needs tribunal, so I have been only in situations in which both sides were legally represented. As Lorraine Dilworth said, we would like enough advocacy organisations throughout the country to be skilled and experienced so that we do not need to attend tribunals and can concentrate on the education law issues that require solicitors, such as appeals, sheriff court actions and discrimination cases. That is the direction in which we are moving. We are trying to do ourselves out of a job. Other than in exceptional cases, neither side should be legally represented. That is the appropriate way for tribunals to work.

**Ken Macintosh:** If the code of practice discourages legal representation, can the tribunal do more to discourage local authorities from bringing lawyers?

**Lorraine Dilworth:** I understand from conversations with Jessica Burns that she has no powers to do that.

**Ken Macintosh:** Ms Burns suggested last week that the tribunal could have not a power to grant legal aid, but a budget to appoint to families legal representation on a point of law.

**Lorraine Dilworth:** I disagree with that. That would create a two-tier system among parents. For example, if Argyll and Bute Council did not bring a solicitor, parents in that area would have to argue against the official and all their witnesses, whereas parents would obtain a solicitor in Edinburgh. Parents might move area to ensure that they have a solicitor if they must go to a tribunal.

Let us get back to the original idea, which is that the system should be user friendly and allow

parents to speak up. Parents have great difficulty at times. In two separate cases in which my colleague and I are involved, we cannot get teachers to appear as witnesses for the parents, and we now have to get citations for them. Health boards are not releasing records, and we have to apply for citations so that we can get the parents the records that they need to support their case at tribunal. Parents are expected to know how to apply to tribunal for citations.

**Ken Macintosh:** The committee has heard a lot of evidence, including at our stakeholder meeting, suggesting exactly that—that we put more support into advocacy and into mediation and dispute resolution before a case gets to tribunal. Can anything be done in the bill to support that work? I know that, for example, ISEA has recently received funding, but is it a case of funding advocacy support groups and services such as yours to a greater extent, or is there something that we can put into legislation?

**Lorraine Dilworth:** The code of practice and the 2004 act both refer to advocacy, but it would be useful if we made it a given right in the bill that parents and young people could have advocacy representation and could be given the information on how to access the service, if they wished to do so.

**Iain Nisbet:** That is the approach that is taken to mental health advocacy. There is a right to those services and an obligation on health boards to fund them, so a model already exists. It is principally an issue of funding and, to an extent, of experience and expertise, which we are trying to address through the training that is being funded by the Scottish Government. Ultimately, groups cannot spare members of staff indefinitely to do the work when there is no funding base for it. That issue needs to be addressed in some way.

**Ken Macintosh:** Are you saying that, to square that circle, we could include in the bill a right to advocacy for parents? Would that not increase the adversarial process? If the right depends on a funded service and the funding does not exist, is it a meaningless right?

**Iain Nisbet:** There is already a right to advocacy; people are entitled to be represented at meetings and at tribunal. What is being described is a model similar to that in the mental health processes, in which there is not only the right to the service but an obligation on health boards to fund it. That is one model. The other would be to put in the funding centrally so that the Government knew that it was there.

**Ken Macintosh:** We are looking at the bill, rather than the funding, but thank you.

**Iain Nisbet:** In the mental health model, there are provisions in the legislation. If you wanted to follow that route, it would require legislation.

**The Convener:** Thank you for that suggestion, Mr Nisbet.

**Kenneth Gibson:** You have spoken about some provisions that you would like to be added to the bill. Are there any issues that would be better progressed through subordinate legislation, the code of practice or the implementation of policy?

**Iain Nisbet:** Yes. We have already discussed the tribunal rules. Those rules are governed by subordinate legislation, which is the appropriate way to address any changes. When the president of the ASNTS gave evidence, there were questions about issues such as the length of time that some tribunals take and how the documentation is handled. Those issues will all be addressed through the rules in subordinate legislation. On the tribunals' jurisdiction, powers are already available in delegated legislation to add to the cases that they can handle.

Similarly, the dispute resolution process is governed by subordinate legislation, so the changes to that would appropriately be effected by amendments to regulations. We talked earlier about issues on which the legislation already says what we want it to say but there is a question of getting authorities to comply with their duties or a question of ensuring that more parents are aware of their rights under the existing legislation. Those are issues for the code of practice and for policy.

12:45

**Kenneth Gibson:** Access is important. It is also important that we tighten up the code of practice to ensure that the legislation is implemented effectively. We have talked about tribunals and the fact that, on occasion, their decisions can be ignored. Would it be appropriate to give tribunals more teeth and to allow them to give financial penalties?

**Iain Nisbet:** I do not know how realistic that suggestion is. As a concept, I am quite attracted to it, because I feel that some kind of punishment is merited on occasions. However, to be realistic, it is unusual for tribunals to have enforcement powers. At present, matters such as a failure to comply with a CSP can be dealt with by dispute resolution or through a section 70 order. We need to consider those processes and ensure that they can deliver the outcome that parents are looking for—swiftly.

**Kenneth Gibson:** We have talked about heavy-handed representation—for example, local authorities employing advocates—and whether neither side should be allowed a solicitor. Is there

a happy medium whereby only a certain element of legal representation should be allowed? No one wants the sort of escalation that we have heard about or a sledgehammer approach being taken, such as in the case in which the City of Edinburgh Council employed advocates. Do you think that, although legal representation should be allowed, there should be a limit to it?

**Iain Nisbet:** It would probably be difficult to introduce such a restriction. Given human rights legislation, I am not sure that we could tell an authority or a parent that they were not entitled to be represented legally. The best that we can do is to encourage and support non-legal representation. For example, in social security appeal tribunals, people are entitled to legal representation, but they are much better off being represented by a welfare rights officer, because those officers know what they are talking about.

**Lorraine Dilworth:** The conveners of the tribunals are legal people—they are lawyers. Why is there a need for either side to have legal representation? It is the job of the tribunal members to interpret the legislation and to apply it to the individual child's case. Why are we employing conveners who are lawyers if matters are being taken out of their hands because of a heavy-handed approach by local authorities?

**Kenneth Gibson:** You talked about the interminable process and the five cases that were presented in May and have still not been resolved. What can be done to expedite matters to ensure that the process is not dragged out in that way? You talked about the impact on parents and children. The approach that you described is almost a way of countering the spirit of the legislation.

**Lorraine Dilworth:** In fairness to the officials, there was a hiccup with the cases that I lodged in May, because of people leaving and so on. Parents need cases to be turned around quickly. I do not know whether this is possible, but if a time limit was set on the turnaround of section 70 cases, parents would know when the decision would be made. If they had a date to look forward to, that would certainly help.

**Kenneth Gibson:** So you would like such time limits to be in the bill.

**Lorraine Dilworth:** Yes.

**Kenneth Gibson:** If your proposals were incorporated in the bill, how many parents and children a year do you think would benefit?

**Lorraine Dilworth:** An awful lot—that is about the only answer I can give.

When the 2004 act was going through Parliament, evidence was given about the number of children who should have CSPs, but we are well

short of that number. The legislation must be changed so that more children can get CSPs. It must also be changed in the interests of the children who are classified as having additional support needs but who do not require CSPs, as those children often seem to be left out. They do not get review meetings and no work is done around transition. Those children need to be looked after, and the legislation must be changed to ensure that that happens.

The issue of the cut-off at 18 must also be addressed—I think that Jessica Burns talked about that. The problem usually arises with children who are at independent or grant-aided schools, to whom the local authority says, "Your CSP doesn't apply after your 18<sup>th</sup> birthday, and, by the way, that's the day you're leaving school." If a so-called normal 18-year-old's birthday is in November, they will be allowed to stay on until June, so why should a child with a disability have to leave?

**Iain Nisbet:** If the changes that we suggest—even just the five changes that are suggested by the consortium—are incorporated in legislation, many thousands of pupils will benefit. As it stands, the bill will be of primary benefit only to those children who are the subject of cross-boundary placing requests.

**Kenneth Gibson:** So you are saying that there must be a fundamental change, and that the consortium's five suggestions must be implemented if we are to avoid the need to revisit the issue in four or five years.

**Iain Nisbet:** Yes.

**Margaret Smith:** You have told us that thousands of pupils would be assisted if we were to take forward the five points that you have suggested. Those proposals have cost implications. Have you done any work on the financial consequences for local authorities and others of the incorporation of those changes?

**Iain Nisbet:** The five changes that we are proposing do not place any onerous new obligations on local authorities; they do no more than ensure that education authorities comply with duties that they are already supposed to be complying with. For example, we are suggesting that the legislation should put a particular emphasis on putting in place a mechanism to ensure that children who are looked after and accommodated, who are young carers, or who have mental health problems are prevented from slipping through the net, which can happen at the moment. However, local authorities already have a duty to prevent that from happening. Councils are being funded on the basis of the duties that are placed on them by the 2004 act. That ought to



mean that they are already providing for those children.

**Lorraine Dilworth:** In my submission, I suggested that the financial memorandum should reflect the numbers that were given when the 2004 act was going through Parliament, rather than the number of children who currently have CSPs.

**Margaret Smith:** You talked about children who have special needs and require special support but who do not have CSPs. Could you give us some examples of the children you are talking about? You could write to us with the information, so that we do not prolong this session.

**Lorraine Dilworth:** We can do that.

**The Convener:** Thank you for your attendance and for your written submissions. The committee will reflect on the points that you have raised.

I wish everyone a happy Christmas. I hope you all have a very healthy new year.

*Meeting closed at 12:55.*



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