

# **ENTERPRISE AND LIFELONG LEARNING COMMITTEE**

Wednesday 20 September 2000  
*(Morning)*

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2000.

Applications for reproduction should be made in writing to the Copyright Unit,  
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ  
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate  
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The  
Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now  
trading as The Stationery Office Ltd, which is responsible for printing and publishing  
Scottish Parliamentary Corporate Body publications.

---

# CONTENTS

Wednesday 20 September 2000

Col.

SCOTTISH QUALIFICATIONS AUTHORITY .....	1077
---	------

---

## ENTERPRISE AND LIFELONG LEARNING COMMITTEE 20<sup>th</sup> Meeting 2000, Session 1

### CONVENER

Mr John Swinney (North Tayside) (SNP)

### DEPUTY CONVENER

\*Miss Annabel Goldie (West of Scotland) (Con)

### COMMITTEE MEMBERS

\*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

\*Nick Johnston (Mid Scotland and Fife) (Con)

\*Marilyn Livingstone (Kirkcaldy) (Lab)

George Lyon (Argyll and Bute) (LD)

Ms Margo MacDonald (Lothians) (SNP)

\*Mr Duncan McNeil (Greenock and Inverclyde) (Lab)

\*Dr Elaine Murray (Dumfries) (Lab)

\*Elaine Thomson (Aberdeen North) (Lab)

\*Allan Wilson (Cunninghame North) (Lab)

\*attended

### THE FOLLOWING MEMBER ALSO ATTENDED:

Cathy Peattie (Falkirk East) (Lab)

### WITNESSES

Alistair Aitken (Scottish Executive Enterprise and Lifelong Learning Department)

Mike Foulis (Scottish Executive Enterprise and Lifelong Learning Department)

David Stewart (Scottish Executive Enterprise and Lifelong Learning Department)

### CLERK TO THE COMMITTEE

Simon Watkins

### SENIOR ASSISTANT CLERK

David McLaren

### ASSISTANT CLERK

Linda Orton

### LOCATION

Committee Room 1



## Scottish Parliament

### Enterprise and Lifelong Learning Committee

Wednesday 20 September 2000

(Morning)

[THE DEPUTY CONVENER *opened the meeting at 09:32*]

**The Deputy Convener (Miss Annabel Goldie):** Ladies and gentlemen, good morning and welcome to the 20<sup>th</sup> meeting this year of the Enterprise and Lifelong Learning Committee. I am Annabel Goldie, the deputy convener. I have been asked to convene the meeting this morning because one of our apologies is from John Swinney. I do not know whether it is so much a case of his having other fish to fry as that he is frying the other fish, but he has other distractions in his life. I have apologies also from Margo MacDonald and George Lyon. Committee members may be interested to know that George's daughter was in a road accident and, although injured, is all right. Our thoughts will be with George today.

Later, we will be joined by Cathy Peattie as reporter to the Education, Culture and Sport Committee. She is currently sitting in that committee, but she is expected to join us at around 10 o'clock.

### Scottish Qualifications Authority

**The Deputy Convener:** The purpose of this meeting is to consider our inquiry into the governance of the Scottish Qualifications Authority. In taking evidence from our three witnesses, whom I shall introduce in a moment, I hope that we can keep a clear eye on our committee remit, because that will be necessary to ensure that we do not stray into other territory. Committee members should be mindful of that.

We have before us some new documents that have been submitted at short notice, which I appreciate none of you has had the opportunity to look at. They are notes of a meeting between the enterprise and lifelong learning department and the SQA liaison group on 10 August 1999. Subject to the agreement of the committee, I suggest that rather than try to deal with these documents this morning, members should read them before the next meeting and we will deal with them then. I suggest that we recall our witnesses to our next meeting to answer any points that arise out of this late documentation. Does the committee agree?

*Members indicated agreement.*

**Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP):** I agree with that suggestion, but I am puzzled why we did not receive these documents before, since it was clear from other documents that we received that they would be germane to our inquiry.

**The Deputy Convener:** I note your point. Our witnesses may have some clarification to offer. The important feature is that we have the information. My concern is that we have time to digest it, then raise the matter properly with the witnesses as agreed by the committee.

Our three witnesses are from the enterprise and lifelong learning department. We have before us Mike Foulis, the head of economic development, advice and employment issues group; Alistair Aitken, the head of qualifications and skills division; and David Stewart, a familiar face to us, who is the former head of qualifications and skills division and held Mr Aitken's position. On behalf of the committee I welcome you to our meeting this morning. I suggest that you each make a short statement of your position to give some background to the committee, following which we will proceed to questioning by members.

Mindful of our scheduled programme, and given that we have never before had to examine witnesses over two and a half to three hours, we should key in a comfort break around 11 o'clock so that people do not become distracted or think it necessary to fly the coop in the interests of bladder.

Without further ado, I invite Mr Foulis to address the committee.

**Mike Foulis (Scottish Executive Enterprise and Lifelong Learning Department):** Thank you, Miss Goldie. We are happy to be here, as we do not get out often. We are happy also to talk about sponsorship, which is a subject of great interest to us. I look after the bit of the enterprise and lifelong learning department that falls between enterprise and lifelong learning. From December, that has included the division that Alistair Aitken heads, which is responsible for sponsoring SQA and policy on vocational qualifications. David Stewart was responsible for a slightly larger division that did that job and others.

If it would be helpful, I will pick up the point about the minutes of the meetings of the liaison group, which we sent you yesterday. We are sorry that we did not get them to you earlier. It takes a bit of time—more than you would think—to assemble and assess the relevance of all these materials. Looking back, perhaps we spent time that we did not need to, trying to work out what was to do with sponsorship and what was not, so as not to give you stuff that was irrelevant to your

inquiry. However, we have discussed that matter with the clerks and we will leave it to them to sort out.

I wish to make a couple of points about the construction of the minutes that should be borne in mind. Each minute does not incorporate the corrections agreed at the following meeting, so they have to be read as a set, which might cause confusion. If it would be helpful, we could produce a set that incorporates agreed changes, but what we have given you is the minutes as they were on the files. Some of them have a number of typos, particularly the first minute. That is just the way they were. We can tidy them up if members would find that helpful. Also, you have to look through the minutes to find instances where there are discussions about what we would think of as sponsorship matters. Most of the content of the minutes is about policy development and may be of more relevance to the Education, Culture and Sport Committee inquiry, although you will have to judge that.

**Allan Wilson (Cunninghame North) (Lab):** May I ask an obvious question that arises from that? Does that mean that the minute of 10 May is not an approved minute?

**Mike Foulis:** That is a good question.

**Alistair Aitken (Scottish Executive Enterprise and Lifelong Learning Department):** Yes, it is not an approved minute, because there has not been a meeting since.

**The Deputy Convener:** Are you finished?

**Mike Foulis:** Yes.

**The Deputy Convener:** Who is to speak next?

**David Stewart (Scottish Executive Enterprise and Lifelong Learning Department):** We had not intended to add anything at this stage.

**The Deputy Convener:** Mr Aitken, do you have anything to say?

**Alistair Aitken:** It might help if I explain my role in the governance of the SQA. As Mike Foulis said, I have worked within his group since December, as part of the reorganisation. I head what is now known as the qualifications and skills strategy division, which covers a range of functions such as sponsorship of the SQA, vocational qualifications policy and other matters including national training organisations, skills policy, investors in people, national training awards and trade union learning. It covers a range of functions in the lifelong learning agenda.

I formerly worked in David Stewart's division as head of a branch responsible for the sponsorship of the SQA. I can go back to the time prior to the SQA, because I headed the branch responsible for SCOTVEC, as it was at that time. There is a

consistency through there in the vocational side.

**The Deputy Convener:** I will set the ball rolling by asking one or two general questions.

As I said at the outset, our remit is governance. I will clear some debris out of the road before we have a wee look at the rubble. The statutory creature that begat the SQA was the Education (Scotland) Act 1996—which, obviously, was pre devolution. The principal minister was then the Secretary of State for Scotland. According to your written evidence, which is one of the documents that you have submitted to the committee, practical considerations had to be taken into account post devolution. There was a deemed allocation of ministerial responsibility between two ministers, by implication therefore operating two departments. Has there been cross-departmental discussion about SQA governance?

**David Stewart:** It was agreed post devolution that Mr McLeish would lead on the sponsorship of the SQA and that both ministers—Mr McLeish and Mr Galbraith—would share responsibility for higher still. Any submissions to ministers on higher still went to both ministers jointly and any on governance of the SQA went to Mr McLeish, but also to Mr Galbraith given his clear interest in SQA activities. Mr McLeish leads on SQA governance, but Mr Galbraith is consulted.

**The Deputy Convener:** We are anxious to establish the *modus operandi* of the two departments post devolution. Are you saying that there is some working relationship to ensure a cross-transmission of information?

**David Stewart:** Yes. If a topic were of relevance to more than one division in the Executive, it would be discussed between divisions before a submission went to ministers.

**The Deputy Convener:** Thank you, on behalf of the committee, for the helpful documentation that you have made available. With regard to that documentation, can you clarify what you consider to be your advisory obligations to your minister in respect of governance?

**Mike Foulis:** We operate a governance system, which is set out in some detail in the guide that I sent to the clerk. It has 214 pages. Our job is to ensure that all the steps in the governance system are operated and that the powers and duties that ministers have under the Education (Scotland) Act 1996 are properly operated.

In the appointments process, for example, we operate the procedure for running appointments and ministers take the final decisions. This is pre devolution, but the minister would take the decision on the accounts direction. Ministers take decisions on the corporate plan and so on. The process of governance throws up a series of

decisions that are required as we go through the year. That is where we have our main interaction with ministers.

**The Deputy Convener:** That is helpful.

In its inquiry, the committee will certainly want to clarify the systems that exist to identify any difficulties that might arise with the operation of the SQA and the point at which you, as advisers to the minister, might be obliged to alert him to those difficulties. Is that part of your remit?

09:45

**Mike Foulis:** Yes. There are a variety of systems at different levels. At one level, we review performance against the formal targets and performance measures that are set out in the corporate plan and the annual business plans. That gives certain information about how the body is operating. From informal contacts with the body, we also pick up information that we report to the minister if it causes concern or is of interest.

**Nick Johnston (Mid Scotland and Fife) (Con):** The acoustics in this room are absolutely dreadful. It might be a product of my advanced age, but I am having great difficulty hearing the responses.

**The Deputy Convener:** Gentlemen, can you bring the microphones a little closer to you and raise them to your mouths? Mr Aitken, your microphone is still a bit squint. Can you aim it towards your mouth? I am glad that you do not play for Scotland. We will see what happens.

I am grateful to you for expanding that point, Mr Foulis. I know that colleagues will have more specific questions on those aspects. If, in pursuit of section 9 of the Education (Scotland) Act 1996, the minister had given the SQA a specific or general direction that had not been complied with, how would the existing machinery let you know that? Furthermore, what would be your advice on non-compliance to the minister?

**Mike Foulis:** That is a hypothetical question, as no such direction has yet been given. However, any direction would contain a mechanism to establish whether it has been carried out. Although it might be patently obvious that some directions had been carried out, that might not be the case for others, and those directions would need to be accompanied by a mechanism for gathering the necessary information to find out whether they had been carried out.

The power of direction also includes a duty on the SQA to comply. We should bear in mind the fact that the use of a direction is a pretty dramatic step and is not normal in the course of relations with a sponsored body.

**The Deputy Convener:** Is a direction justifiable

for a pretty dramatic incident?

**Mike Foulis:** Yes, if it is possible to frame a direction that will have a positive effect.

**David Stewart:** A direction would probably be used only when the body did not wish to rectify the situation and was not working to that end. If the body was working to resolve a problem and reporting that it was doing so, a direction might not be necessary. The power of direction is the nuclear option in a case where a non-departmental public body is not carrying out an action that ministers could legitimately ask it to carry out. It is a backstop provision that is rarely, if ever, used for an NDPB.

**The Deputy Convener:** Although I accept that, section 9 of the act has presumably been devised to cover the backstop, nuclear option situation to which you have alluded.

**David Stewart:** Yes indeed.

**The Deputy Convener:** The committee would find it helpful to understand the advice that is available to a minister in the event of their having to issue a direction. What advice on non-compliance would you give? The committee is very anxious to clarify the lines of communication, accountability and responsibility.

**David Stewart:** If a direction had been issued, the extent to which it had been complied with would feature as the first item at any future meetings with the body. If there were any suggestion that the direction was not being complied with, it would be a matter about which we would want to inform ministers very promptly.

**The Deputy Convener:** Does your obligation stop at giving information? I thought that Mr Foulis said that it extended to giving advice.

**David Stewart:** Our obligation to ministers is to give information and advice.

**The Deputy Convener:** I am still not clear about the advice that you would give.

**Mike Foulis:** It is difficult to give a full answer to the question, because—crucially—the action would depend on the nature of the direction that had been issued. Obviously, one would want to include with a direction action to ensure that the information necessary to form a judgment on whether the direction had been complied with was obtained from the body. That might be obvious and simple if the action you wanted the body to take was public and manifest, but if it were more complicated, more difficult and less open, you would have to require from the body the necessary information that would allow you to form a judgment.

**The Deputy Convener:** What happens if you cannot get the information? Suppose you are at an

impasse—your minister is tearing his hair out, not sleeping at night and begging you on bended knees to tell him what to do—what do you tell your minister to do?

**Mike Foulis:** The body is under an obligation to give us information that we reasonably require of it, so if the action is capable of being measured it is difficult to imagine circumstances in which it would not be possible to obtain information on whether the action had been carried out.

**The Deputy Convener:** So, apart from holding the minister's hand, patting him on the head and saying, "We have done our best to get the information, but it is all very sad", there is nothing more that you can advise the minister to do? Can the minister sack the chairman or members of the board?

**Alistair Aitken:** The minister can sack the board members whom he appointed, which is the majority of them.

**The Deputy Convener:** So that would be an option in an extreme case.

**Alistair Aitken:** That is a possibility.

**Mike Foulis:** However, under schedule 2 of the act, the power to remove members from the board is subject to various constraints. There has to be a reason to do it.

**The Deputy Convener:** Theoretically, that is advice that would be available to you to give the minister.

**Mike Foulis:** At the end of the day, yes, although the appearance of such powers in the act is perhaps misleading in a sense. As David Stewart said, such powers exist so that they do not have to be used and so that the relationship with the body can be conducted not on the basis of threatening legal action, but of getting it to co-operate. The art of sponsorship is in getting the body to believe that it wants to do what you want it to do; it is about building a relationship, having a clear understanding of the respective roles, good communication and respect for each other's positions.

As with any relationship between people, institutions or organisations, you try to build the relationship on the basis that you will not resort to legal violence. In the case of the board members, therefore, you would not leap first to the exercise of the statutory power to remove members for the reasons set out in schedule 2; your first course of action would be to say to the board members that the minister has lost confidence in them and to ask them to resign.

**The Deputy Convener:** I am grateful, Mr Foulis. We all acknowledge that in an ideal world you would want to proceed without invoking sanctions,

but the committee must consider what, if governance reaches an impasse, the ultimate remedies available to the minister are and what advice would be proffered by his civil servants. You have covered that for us, and I am happy now to invite further questions.

**Allan Wilson:** Before we move on to general questions, I have a question about structure. We have received about 14 pages of written evidence and a further eight pages of annexes to that evidence. A lot of matters have arisen under "Directions", in paragraphs 18 to 22 of the evidence document. Will we address the other parts of the written evidence? I would also like to address the questions that arise in connection with the general background and statutory position of the SQA.

**The Deputy Convener:** I hear what you say, Mr Wilson; I am certainly anxious not to inhibit committee members' desire to interrogate as freely as they wish on the aspects that they think are significant. As we have found when taking evidence from witnesses previously, what is revealed by evidence largely determines the questions then asked by the committee. Subject to the views of the committee, I want to let this inquiry run as freely as possible. If members feel that a matter has not been dealt with adequately, or if they still have residual concerns, they should ask questions. I would like to deal with matters in that rather more fluid fashion. Do members agree?

*Members indicated agreement.*

**Dr Elaine Murray (Dumfries) (Lab):** It has been said that section 9 of the Education (Scotland) Act 1996, on the power of direction, is exceptional and exists not to be used. Certainly, the letter from the minister indicates that no directions were given by ministers this year. It is expected that any direction would be included in the annual report. Although the 1998-99 report includes a reference to a request from the Secretary of State for Scotland, there is no indication that a direction was ever used. Has any minister ever issued a direction to the SQA since its inception? Has that power ever been used? In what circumstances would advisers advise a minister to use his exceptional power of direction?

**Mike Foulis:** The answer to the first question is no: the power of direction has never been used. My colleagues and I could come up with only one example of a power of direction ever having been used—within living memory, as it were. The power of direction for the SQA is a pretty standard-issue power. Lots of our NDPBs have a similar power in their founding statutes.

It may be useful for me to describe the one instance that we can remember. The Conservative Government ordered Caledonian MacBrayne to



sell the vessel that was to be used for the Campbeltown-Ballycastle route. The circumstances surrounding the use of the power on that occasion provide quite an interesting comparison with the situation that we are now considering. First, there was an object, which was difficult to miss, as there was no doubt about the existence of the ship. Secondly, only two facts had to be established, and they were easy to establish: first, that CalMac owned the ship; secondly, that it did not want to sell it. The Government could direct an alternative course of action—selling the vessel—which it was within CalMac's capacity to bring about and which would advance the interests that the Government wanted to advance.

It is hard to speculate on the use of the section 9 power in this case without getting into a debate on what people think went wrong and why. I have my hunches but, until the inquiry report comes out, anything we say would be based on incomplete information. However, none of the three elements of the CalMac case seems to have been present at any point in the SQA case.

**Dr Murray:** Under what circumstances would you advise a minister that they should invoke that power? Who would alert you to the possibility that the power should be invoked?

**Mike Foulis:** One would have to have in mind a proposed action that the body refused to take, that it was capable of taking and that, if taken, would produce a material advantage. Otherwise, there would be nothing for one to fasten on to; there would be no point in telling the body to do something that it said it wanted to do anyway. Moreover, one would not proceed if the body were not capable of doing what one wanted it to do or if that action would make things worse.

**Dr Murray:** If it were detected that the body was not fulfilling its functions, the minister would be advised to use his power of direction.

10:00

**Mike Foulis:** If the body were not fulfilling its functions and—this is crucial—if it were refusing to do so even though it was capable of doing so and was told to do so, we would advise ministers to use their power of direction. I leave out the final condition of the action that was directed having some positive effect, as there would obviously be a positive effect if the body fulfilled its functions. We would need to identify something on which we could bite.

**The Deputy Convener:** Under section 9, direction may be either general or specific. The problem could be broad or narrow; there is no limit to the difficulty that section 9 could embrace.

**Mike Foulis:** Yes, but whatever the size of the problem, there would still have to be something to fasten on to that the body was refusing to do and was capable of doing and that it was worth directing it to do. It is perhaps slightly misleading to look at the bald words on the pages of the act. Our understanding is that legitimate expectations may have arisen as to how the power of direction would be used, on the part of the party against whom it might be used and others. We also feel that the courts would be likely to construe the power narrowly, both in terms of the circumstances in which it could be used and the scope of the power when it was exercised. Part of the reason for that is that an exercise of the power of direction would be seen in the context of the statutory framework as an extraordinary intervention into the affairs of the body, which the statute set up as one that should not be subject to routine intervention.

That is the background to the power, but in the practical world of sponsorship in which my colleagues—principally David Stewart and Alistair Aitken—and I live, the use of the power hardly ever arises because it is possible to achieve one's ends through agreement. The bodies know that the power exists—it is the big stick that allows one to speak softly and be heard.

I understand that you will take evidence from Professor Sizer. When I set up the Scottish Office end of the Scottish Higher Education Funding Council, Professor Sizer became my chief executive there. He may be able to throw a different light on the matter. I think that he would have thought it pretty extraordinary if I had threatened to use the power of direction against him.

**Dr Murray:** If you perceived that a non-departmental public body was not acting effectively, would that be a ground for a minister to use his power of direction?

**Mike Foulis:** If it were a question of the effective use of public resources and the efficiency with which the body discharged its functions, the answer would be probably not. One's first recourse in such a situation would be through the framework of strategic control that one exercises over the body.

In extreme cases, one would bring forward the policy, financial and management review, as we have done in this case. Such a review is sometimes called the quinquennial review and takes place, as the name suggests, at least every five years. That review is a useful mechanism. It allows fundamental questions to be asked—more fundamental than would be raised by your instance—such as whether the body is needed at all and, if so, what form it would take. If it is decided that the body is needed, a detailed

consideration of the management processes and so on can be undertaken.

**Dr Murray:** That is what is being done at the moment.

**Mike Foulis:** Yes. However, that would be towards the upper end of the scale. The body might be invited to undertake its own management review and consultants might be sent in. When the new chief executive of Scottish Enterprise turned up, he instituted a thorough review to address the concerns that you mentioned. There are a variety of ways of tackling the problem of an underperforming NDPB, but the use of the power of direction would not be particularly apt.

**Allan Wilson:** I want to continue the theme of direction in relation to sponsorship or governance. We say governance and you say sponsorship. Are they the same thing?

**Mike Foulis:** Yes—he said carefully. Sponsorship is our end of the process. We sponsor the body. This may be a little too fancily semantic, but governance could be a wider term, which could take in the body's view as well as the activity. Sponsorship is an activity.

**Allan Wilson:** When paragraph 4 of section 3 of your written evidence talks about sponsorship, is that the definition that is being used?

**Mike Foulis:** Yes.

**Allan Wilson:** You have made it clear that the minister's power of direction is not unfettered. I am interested in the Caledonian MacBrayne analogy. Is the power of direction a power of the sponsoring minister alone or is it available only if the sponsoring minister is not satisfied that all reasonable steps have been taken? In the case of the SQA, would the power of direction be available only if the SQA were to disagree on the actions sought by the minister?

**Mike Foulis:** The Scotland Act 1998 converted references to the Secretary of State for Scotland into references to—in most cases—the Scottish ministers. I believe that the doctrine is that the Scottish ministers exercise their powers collectively. That is slightly different from the doctrine on the position of the secretary of state. In UK Parliament legislation, one hardly ever sees a reference to a specific secretary of state—it is one office with many holders—but the secretary of state who exercises the powers does so in his or her own capacity. The Scottish ministers exercise their powers collectively.

**The Deputy Convener:** Is that a practice that has evolved?

**Mike Foulis:** No, I think that that was the intention of the Scotland Act 1998.

**The Deputy Convener:** Is it a statutory

direction?

**Mike Foulis:** It means that the exercise of any of those powers by a Scottish minister is done on behalf of the Scottish ministers. There are a few instances where the First Minister has a specific power, but they are rare. The power is, as I was saying, hedged in by the normal conventions that surround administrative law—reasonableness and so on.

Also worth mentioning is the fact that, unlike the situation with some other bodies, the power in this case includes a requirement to consult the board. That is not always the case. Consultation is a simple word, but we believe that it means that one has to set out the proposition—probably in writing—sufficiently clearly that the body that one is sending it to can understand what is wanted; one has to allow that body a reasonable time to think about the proposition and to respond; one has to consider the response, without having made up one's mind beforehand; and then one has to reach a reasonable decision in the light of that response. One cannot just phone the body and say: "I will issue you with a direction, and you will have 30 seconds to provide me with a response." Does that answer your question?

**Allan Wilson:** Yes, it certainly clarifies things for me. Would there have been a requirement to consult in the only other instance of the use of the power of direction—the case of Caledonian MacBrayne?

**Mike Foulis:** I am sorry, I cannot answer that question. However, as it is a question of fact, we could get an answer for you.

It might be worth making the point that the Further and Higher Education (Scotland) Act 1992 provides for a power of direction for the Scottish ministers over the Scottish Higher Education Funding Council. However, that is hedged in with a series of different restrictions, which were included to deal with concerns over political interference in academic freedom—for instance, to deal with ministers directing the funding council not to fund a department that was producing critical material. Depending on the circumstances, on the body and on the nature of the body's business, we may find that ministers' powers are constrained in certain ways. If there is an analogy with the SQA, it is that there is a widespread desire to avoid political interference in the business of setting exams and marking the results. Part of the reason for having a non-departmental public body—which is set up by statute, is independent and has its independence defined and constrained by legislation—is that, since 1 January 1965, the business of setting and marking exams in this country has been conducted outwith the direct sphere of political interference.

**Fergus Ewing:** We have received a large bundle of documents, including the Education (Scotland) Act 1996, the corporate plan of the SQA, its mission statement, its annual report for last year, and a 46-page document from the Office of the Commissioner for Public Appointments. I spent a pleasant weekend going through all of them. What puzzled me was that, although we have a lot of documents that deal with the present structure and system, we have little information that deals with what has happened over the past year. Do you accept that our task in looking only at the governance issues is to identify what went wrong and how it can be put right? We have to know whether what happened was due to human error, a systems failure or a mixture of the two.

**Mike Foulis:** There is indeed a lot of information to read. As an enthusiast in such matters, I am slightly disappointed that the clerk has not circulated the 214-page NDPB guide, which I recommend to Mr Ewing. It contains a lot of fascinating—and relevant—material. He may wish to ask the clerk for it. The minutes of meetings, which we circulated yesterday, contain a lot of material on what happened between August last year and May this year.

It will be difficult to get far with an investigation into the relationship between governance and the events that took place until we have good, soundly based information on what really happened. I have seen some information, but my knowledge is partial. I have suspicions and thoughts on the matter, but that does not take me very far. How you relate the structure of governance, and the way that we operated it, to what happened will depend on the evidence of what really happened. It may be difficult to come to firm conclusions before that evidence is available.

**The Deputy Convener:** For the information of members, the clerk has just informed me that he received the NDPB guide too late to circulate it. It will be made available to us all before the next meeting.

10:15

**Fergus Ewing:** Thank you, convener. I look forward to receiving that document. However, it is not the lack of that document that concerns me; it is the lack of documents explaining what actually happened—not the structure, not the legal framework, but the facts.

I shall ask a fairly simple question. In his ministerial statement, Sam Galbraith gave an undertaking to the Parliament that all necessary documents would be made available for the inquiries that are being conducted, of which this is the first one.

**The Deputy Convener:** I am informed that the

voluminous documents that the education department is making available will be forthcoming on Friday. They will be circulated to members of the Education, Culture and Sport Committee and, at the same time, will be copied to members of this committee.

**Fergus Ewing:** I am grateful for that information, although I was aware of that. My question is whether all relevant and necessary documents—to use the wording of Mr Galbraith—have been submitted to this committee for the purposes of our inquiry.

**Mike Foulis:** We believe so. We have attempted to find what is relevant.

**Fergus Ewing:** Is the decision of which documents are relevant and necessary made by the minister?

**Mike Foulis:** Ultimately, ministers are accountable to the Parliament and our responsibility is channelled through them. It is therefore a matter for ministers to decide.

**The Deputy Convener:** In fairness to the witness, Mr Ewing, it may be necessary to be a little more specific. If you have in mind documents that you feel should be within the province of the committee, it would be only fair to Mr Foulis and his colleagues for you to indicate what you consider those documents to be.

**Fergus Ewing:** Yes, I was going to get to that, convener. Thank you.

It is difficult for us to know what documents are relevant, as we have not seen them. Normally, the rule in the code, in relation to information that is made public and information that is not made public, contains various caveats. A series of those caveats involve advice and information that is given to ministers in due course by the civil servants. It seems to me that, to get at the facts of what happened, it would be relevant for the purposes of both inquiries to have free access to those documents. It will be necessary for internal documents that would normally be kept secret to be made public. Will the provisions of the code be waived, so that a completely open and thorough inquiry can take place, which is what all members want?

**The Deputy Convener:** Before Mr Foulis answers, I must refer to the remit of this committee. I understand the point that you are trying to make, Mr Ewing, but I do not think that it is reasonable to expect the department to engage in a universal, unlimited fishing expedition to try to rake out anything in the filing cabinets that might be relevant. If there are specific areas of concern to this committee, it would only be fair to indicate to the department what those areas of concern are and what sort of documents we are talking about.

Do you anticipate telephone message sheets, memorandums, minutes of informal meetings and notes taken at meetings? If those are the kinds of documents to which you allude, it would be helpful to state what they are. It is then for the witnesses to say whether such documents exist and whether they are exempt by reason of containing ministerial advice.

**Fergus Ewing:** I have described some of the documents already—they would contain advice or information from civil servants to ministers. I refer also to internal memorandums, which would give us rather more detail about what happened at, for example, liaison group meetings between the SQA and the Executive, which appear to have been conducted on a quarterly basis. They would also give us detail about the sole meeting that Mr McLeish had with the SQA on 6 March. There are no papers before the committee now that give a detailed description of what was discussed at that meeting; there is merely a reference to what was discussed. I would like to return later to discussion of the meeting on 6 March.

For the purposes of both inquiries, it will be necessary to have not only a minute of a meeting—minutes, as we know, often conceal more than they reveal—but the internal memorandums that I imagine exist. Those would specify exactly what was said at the meeting on 10 May between the liaison committee and the Scottish Executive about, for example, the failure of information technology. That was one of the matters that were discussed, according to Mr McLeish's letter of 6 March.

**The Deputy Convener:** Mr Ewing, can you be a little more specific? The witnesses need to know exactly what point you are putting to them and what question you wish them to answer.

**Fergus Ewing:** You ask me to be more specific, but I have seen none of the documents, so it is rather difficult for me to be specific. The gentlemen who are here have seen many of the documents. Such documents as I have in mind would include the following: letters and other documentation that passed between the SQA and the Executive; and documents that passed between civil servants and ministers, which contain advice or information that was given or received.

That is the kernel of my point and I wish to clarify why I think that those documents are relevant. The question that is at the root of both inquiries is: to what extent is it prudent or sensible for ministers to rely on assurances that are given by chief executives of non-departmental public bodies? If we are to provide a careful and sound judgment on that question, we must put ourselves in the shoes of Mr McLeish and Mr Galbraith, so that we can gauge whether it was prudent to rely on the assurances that were offered—as far as we

understand them from Mr Galbraith's statement—or whether other courses of action should have been taken.

The convener has asked me to outline which documents I think are relevant—I hope that I have done that in omnibus form.

**The Deputy Convener:** Can we give the witnesses an opportunity to comment on that?

**Fergus Ewing:** Certainly.

**Mike Foulis:** I hope that I can answer the question helpfully. My understanding is that our ministers wish to make a full disclosure of relevant information to the two committees, within the terms of the code that is being advanced. The material that we have presented in the form of our minutes is material that we have not hitherto made public. I refer not only to the specific instances that we are dealing with, but to minutes of our internal meetings in general. A precedent is therefore being established.

Those minutes constitute the true record of the meetings. I doubt that there will be a voluminous raft of other documents produced that tell a different story about the meeting—that would be a waste of effort. We concentrate on producing a record as efficiently as we can. It is principally a record of what was agreed, which can guide action that is undertaken by the two bodies.

As the convener said, a voluminous wodge of information is due on Friday. Once that has been digested, it will be easier to gauge whether it answers the questions or whether more information is needed.

**Fergus Ewing:** Would it be in order for Mike Foulis to confirm whether the normal rules in the code of conduct—which has been in power since last summer, I believe—in relation to freedom of information are to be disapplied? That would allow free flow of information that would normally be kept under wraps, including advice that was given by civil servants to ministers.

**Mike Foulis:** My understanding is that the Executive wishes to maintain the integrity of the principal provisions of the code. The most salient element of the code relates to advice. It says that we must—using a quaint phrase—maintain

“the frankness and candour of internal discussion”.

**Fergus Ewing:** I understand that that is the justification for the rule. I am talking hypothetically because I have not seen the documents, but let us assume that a civil servant has advised a minister that it would be rash or risky to rely on information that was received from a non-departmental public body. If such advice or warnings had been issued by civil servants to ministers, we would all agree that that would be highly relevant to the course of

action that a minister should take, should the minister act on warnings from civil servants.

In the case of the exams fiasco inquiry, we need to know whether the civil servants gave warnings to ministers and, if so, what they were and when they were given. We cannot get to the bottom of what went wrong unless the normal rules are disapplied and we have access to the advice—I am sure it was excellent and informed—that was given by you to your minister, and by your counterparts to Mr Galbraith.

**Mike Foulis:** It is difficult for me to go beyond the position of the Executive on its code. My colleagues are considering ways in which to make the maximum amount of information available—for instance, by extracting relevant facts from surrounding advice—so that both committees are in the best position to understand what happened.

**The Deputy Convener:** I accept that the area that is being covered by Mr Ewing's line of questioning is somewhat sensitive. Mr Ewing, we have our witnesses here this morning and we are able to pose to them specific oral questions for answer or comment. We have available to us information that we can examine before our next meeting. We expect to be deluged with information that will be released to the Education, Culture and Sport Committee and which will be copied to us. Given all that, does Fergus Ewing accept that it would be more appropriate to consider his concerns when the committee has digested all that information? If Mr Ewing thinks that there is an inadequacy in the provision of documentation, that might be an area of questioning that he will want to revisit at our next meeting.

**Fergus Ewing:** That is a reasonable suggestion, and I am quite happy to accede to it.

**The Deputy Convener:** For the purposes of our meeting this morning, if Mr Ewing has specific areas of concern that are based on the documentation that has been submitted to the committee, I suggest that he deal with them by direct questions that are concerned specifically with those items.

**Fergus Ewing:** I am happy to do that. I wanted to raise those issues as preliminary matters.

I have one further point to raise as a preliminary matter. We know that Deloitte and Touche is carrying out a further independent inquiry, which is to be completed and reported on by 31 October. Will that inquiry be provided with any information to which MSPs will not have access?

**Mike Foulis:** I am sorry. I do not know the answer to that question.

**Fergus Ewing:** Could you obtain an answer?

**Mike Foulis:** Yes.

**Fergus Ewing:** Perhaps I can return to substantive issues later, convener.

**The Deputy Convener:** Certainly, Mr Ewing.

**Mr Duncan McNeil (Greenock and Inverclyde)**

**(Lab):** It seems a long time ago, but we were on the theme of powers of direction. You have confirmed that you have never advised the minister to issue a direction to the SQA. Are you saying that the power of direction is designed to resolve disputes, rather than to be used every other day? Would that power of direction be appropriate if the SQA had agreed that there was a problem and had submitted a plan of action to deal with it? A power of direction would not be appropriate in that case, would it?

**Mike Foulis:** Duncan McNeil is right. That power has never been used. I draw a veil over the question whether ministers have been advised not to use it—that is the position that we must maintain.

It would be extraordinary to use that power in a situation in which there was no dispute with a non-departmental public body over what had to be done. In such a circumstance, the resort would be to give the NDPB a direction to try harder, which would be pretty pointless. We would have to know what action we wanted the body to take and that it would not take such action unless we asked it to. The action would have to make the situation better—not worse.

**The Deputy Convener:** I am so sorry—I was liaising with Allan Wilson about a matter of some confusion.

**Mr McNeil:** I wanted merely to clarify that section for myself.

**Nick Johnston:** I also want to delve into the mists of time. I have two questions, and I am afraid that I will have to ask for the witnesses' indulgence, as I will plunge them once more into the mists of the theoretical.

If you judged that a minister should be advised that guidance should be issued, at what point would you decide which minister should issue that guidance? Is it within your remit to issue advice only to the Minister for Enterprise and Lifelong Learning? If that is so, who would issue guidance to the Minister for Children and Education?

You referred to the exercise of strategic control, which is a nice phrase and one that I will remember. At what point in the loop does the board of the SQA come in?

10:30

**Mike Foulis:** The direction would be issued by the Scottish ministers, who have that power. Depending on the problem, we would direct the

advice either to Mr McLeish and copy it to all relevant ministers or to both Mr McLeish and Mr Galbraith. However, that amounts to the same thing in the end. A minister would not take action unless he knew that he had the support of his colleagues.

On the question of where the board comes in, the Education (Scotland) Act 1996 places responsibilities on the board in relation to the SQA. A curious feature of NDPB legislation, which sometimes surprises people, is that the board is the body, in legal terms. The body is not the staff, the building and so on—it is the board. The board is responsible for discharging all the SQA's functions and for overseeing the management of the organisation, to ensure that it is heading in the right direction. It is also responsible for holding to account the management of the organisation for that organisation's performance.

**Nick Johnston:** Is there a direct link between your department and the board of the SQA? Do meetings take place between your department and the board, or do they take place only between the chief executive of the SQA and your department?

**Mike Foulis:** The usual pattern is for contact between a department and an NDPB board to take place through the NDPB's chairman, who represents the board and speaks on its behalf. That is what happened in the case of the SQA.

**The Deputy Convener:** I would like clarification on that point. The "Management Statement and Financial Memorandum"—a fairly early document, which was issued in April 1997 and finalised in March 1998—says that officials of the department can, when in consultation with the SQA, attend board meetings for specific items when departmental input is required.

However, when we move to the written evidence statement that was issued by the department, we see in section 15 on page 10 that the position has moved on. Section 15 states:

"In line with Scottish Executive policy departmental officials . . . do not attend meetings of SQA Board; Finance, Planning and General Purposes Committee; or Audit Committee."

It would be helpful to the Enterprise and Lifelong Learning Committee if you clarified whether that is the current situation. How can we be sure about the ability of the department to be in close touch with the board? From those two documents, I am not clear what mechanism exists to ensure that there is regular contact between the department and the SQA.

**Mike Foulis:** We reserve the right to attend, but our policy is that, to leave the board under no illusion about the nature of its responsibilities, we do not sit in on board meetings. The board arrives at decisions—those decisions are the board's

decisions, and the board is responsible for them. That also avoids confusion about who is responsible. For example, would the presence of an assessor—if you like—from the department imply complicit assent in relation to a decision that the department subsequently objected to?

We know what goes on in board meetings because we get all the papers at the same time as board members get them. We have the option of intervening or commenting in the light of those papers. We also see the papers—although I will be corrected if I am wrong—of the other committees, such as the audit committee, which we are especially interested in, and the accreditation committee.

**The Deputy Convener:** Those meetings are quarterly, however. As you stated earlier, the minute is only the minute and has to be approved at the next quarterly meeting, so at any time the accuracy of information could be six months in arrears.

**Mike Foulis:** We see the board papers, which come up in advance. We also have quarterly liaison meetings at which every issue that is relevant to the current business of the SQA and the department comes up.

**The Deputy Convener:** Can you also have ad hoc meetings?

**Mike Foulis:** Yes.

**The Deputy Convener:** Have there been any ad hoc meetings?

**Mike Foulis:** Yes—I will invite Alistair Aitken to talk about that.

**Alistair Aitken:** Since the SQA was established, there have been quite a number of ad hoc meetings. In the past year, there have been ad hoc meetings on governance issues such as the staff pay and grading system. The authority has been required to harmonise its pay and grading structure, because the two previous bodies had completely different structures. Those structures are quite complicated and are linked into local authority pay systems. Since its establishment, the SQA has been working to bring the structures together. A number of meetings have been held to talk through how that could be done.

We have had a number of meetings about copyright. It is quite complicated to establish who owns the copyright of much of the material that comes out of the SQA. Some material is provided by the department and some is provided by the higher still development unit. The Scottish Consultative Council on the Curriculum is also involved, so there is an issue about who owns the final copyright.

**The Deputy Convener:** Are minutes taken of

those meetings?

**Alistair Aitken:** There is usually a brief note—particularly on pay and grading or on any issues that have to be taken forward. There is a pay policy unit within the Executive that we must work with.

**The Deputy Convener:** Would it be possible to make that information available to the committee?

**Alistair Aitken:** We will have a look at that.

**Mike Foulis:** We will consult our authorities, as the saying goes.

**Elaine Thomson (Aberdeen North) (Lab):** When we were talking about the power of direction, you made it quite clear that the power has never been used and that it would be unusual to use it. I was out of the room for a moment, but I think that you described the power as the “nuclear option”.

Some people might suggest that what happened this year was pretty grim. The fact that events went nastily wrong and the power of direction was still not used suggests that you were not aware that there was a reason for using it. I think that you said that earlier. Are the monitoring systems and liaison between your department and the SQA adequate to identify problems? There were major problems this year, but you did not seem to be able to identify them to take any action.

What are the normal forms of communication between the department and the SQA? Is the liaison group one of them? The liaison group has met on various occasions and you have given us the minutes. Do those meetings represent a normal year's business, or do they represent a normal year that changed so that more frequent meetings were needed when it was realised that there was a problem?

**Mike Foulis:** I think that you are right—the implication that members should draw from what I have said is that it is difficult to see how the section 9 power was apt for the particular circumstances that arose during the summer. It is also difficult to give a categorical answer without having better information about what happened.

**The Deputy Convener:** Were those liaison meetings or ad hoc meetings?

**Mike Foulis:** They were ad hoc meetings about the emerging problems.

**The Deputy Convener:** Will details of those meetings, as well as details of the meetings to which Mr Aitken referred, be made available?

**Mike Foulis:** That information will be included in the volume of material that is coming to the committees on Friday. It is of more interest in connection with what happened with the exam diet

this year than is most of the material now before you.

It is hard to say whether the arrangement is adequate until we get to the bottom of what went wrong. Most of our contacts are with the top of the organisation—with the board, the chief executives and the directors. If the problems manifested themselves much deeper in the organisation, we would not routinely encounter them. However, at this stage we are all just guessing.

**The Deputy Convener:** On governance and the minister's responsibility under the act, is it the case that the mechanism for the transmission of information is somewhat inadequate? Under the current machinery, it seems to be difficult for you to discharge your obligations to the minister if you are genuinely unaware of circumstance lurking underneath the stratum with which you deal.

**Mike Foulis:** The results of the Deloitte & Touche inquiry will have a bearing on whether that was the case.

**The Deputy Convener:** Would you consider it inappropriate to express an opinion about the existing mechanism?

**Mike Foulis:** It is difficult to do so on the basis of incomplete knowledge.

It may help the committee to know that the SQA had ISO 9001 accreditation. The Scottish Vocational Education Council, but not the Scottish Examination Board, had had Investors in People status, and the combined organisation was working for IIP accreditation. Also, the SQA was implementing the European Foundation for Quality Management excellence model, and it conducted customer, stakeholder and staff surveys. The chairman and chief executive went round schools meeting pupils and teachers. Therefore, if we had asked the SQA whether it had the right systems in place and was doing everything that an organisation should do to ensure that it is well managed, the answer that we would receive was that it was doing all those splendid things that we wanted it to do.

**Allan Wilson:** I will develop the theme that Nick Johnston started, on the relationship between the non-departmental public body—in this case, the SQA—and the sponsor department.

As I understand it, that relationship is defined in the “Management Statement and Financial Memorandum”. The first thing that struck me was that it was finalised in March 1998 and therefore takes no account of developments in relationships since then. Is that the only documentation that defines the relationship between the SQA and the department?

**Mike Foulis:** There is also the Education (Scotland) Act 1996, which is not overtaken by the

document. However, it is the current management statement and financial memorandum. We would have examined it after devolution, but the essential parameters—the act—remained the same. The change in this context was the substitution of the secretary of state by the Scottish ministers.

10:45

**Alistair Aitken:** One of the notes of the liaison group refers to the need to update the management statement. The intention was to update it on the formation of the Scottish Parliament. We were about to think about that when the two departments were split and that prompted us to wait until everything had settled down. Nevertheless, the document's description of the provisions of the act is still accurate.

**Allan Wilson:** Two questions arise from the section of your submission that relates to the document. Paragraph 4 says that

"The Board is also required to ensure that SQA provides Ministers with advice relating to SQA's functions"

and their discharge. Does that mean that the board has a duty to notify ministers of problems that it thinks cannot be resolved internally?

**Alistair Aitken:** The board, through the chairman, would provide advice to ministers where necessary. The chairman is appointed by the Scottish ministers and part of his role would be to report to ministers on any matters that he considered necessary.

**Allan Wilson:** That is what I was trying to get at. Paragraph 5 of that section of your submission says that

"the SQA Chairman is responsible to Ministers for the overall direction and management of SQA".

Can that be interpreted literally?

**Mike Foulis:** Yes, it can.

**Alistair Aitken:** Yes.

**Mr McNeil:** You have described informal connections and communications with the SQA—ad hoc meetings, memorandums and so on—that took place while the crisis was developing, and we have spoken about powers of direction. Did the SQA ever decline to take any advice that you offered through the various lines of communication? If the SQA declined to accept advice, in what circumstances did that take place?

**Mike Foulis:** I am not aware of any occasions on which the SQA refused to take a course of action. The material that the committee will receive on Friday will give some indication of that. To the best of my knowledge, the answer is no.

**Mr McNeil:** Did the SQA accept and act upon

any advice that you offered?

**Mike Foulis:** I believe that that is substantially the case.

**Dr Murray:** I have had a quick scan of the notes of the meetings that you provided for us. I want to ask about an issue that arose in November 1999. If we are looking at the ways in which information is communicated to ministers, the point might prove useful. The section on exam appeals says that a member of the Executive

"asked what she could tell Ministers regarding the errors in the Standard Grade exam appeals"

last year, which had affected 750 pupils in 260 schools. She goes on to explain some of the background detail.

A member of the SQA advised that the error had been due to a computer problem that would not happen again because the SQA was transferring to a new system. The member of the Executive

"explained that she wanted to tell Ministers that the SQA was checking procedures"

and the SQA representative said that the organisation

"was looking for complete accuracy on certification."

That problem happened last year. What was the procedure after that? What information was transmitted to the minister in that case? If it was pointed out last year that there might be problems with the computer system and certification, who was responsible for asking the SQA whether the situation was under control? What checks and balances were in place after the situation had been outlined by the member of the Executive who advised ministers?

**The Deputy Convener:** Before Mr Stewart answers—and it is appropriate that Dr Murray's questions are answered—I repeat my earlier remarks that the committee does not wish to extend its examination of these documents until all members have had a chance to consider their content. Although I am prepared to accept that Dr Murray's question is properly posed, I ask other members to withhold their interrogation on these documents until the next committee meeting.

**David Stewart:** I presume that my colleague Eleanor Emberson reported on that matter as suggested in that paragraph of the minutes. As the issue of standard grade was a matter for the division that she headed, she would have wished to report in the terms outlined in that paragraph. In the light of the assurances that we received, that particular part of the discussion was not repeated at the next meeting.

**Dr Murray:** So there would be no reference back in those circumstances.



If the SQA told members of the Executive that matters were in hand and gave an assurance that it was coping, would that be an end to the matter? Is there no mechanism to allow the Executive to check whether the SQA's information is accurate?

**David Stewart:** As I chaired that meeting, I recall the discussion, and the minute accurately reflects both the discussion and the SQA's specific assurances to the department on that issue. In any normal relationship between an NDPB and the department, we would not go in and check underneath that kind of mechanism.

**Dr Murray:** So if you had an assurance from the SQA, you would accept that.

**David Stewart:** We would ask the questions that are reflected in that paragraph.

**Mike Foulis:** Your question seems to suggest that we might have been somehow inhibited in progressing the matter. We were free to raise any issue at any time; however, to do so, we would need some information as a basis for raising the issue.

**Nick Johnston:** Although I take the convener's ruling on the minutes of these meetings, it seems appropriate to mention that they contain an awful lot of anonyms, some of which I do not understand.

**The Deputy Convener:** A lot of what, Mr Johnston?

**Nick Johnston:** Abbreviations. Is it possible for the department to provide a glossary of those terms, so that when we consider the minutes we know what an NWI, an APB or an XYZ is?

**The Deputy Convener:** Would that be possible before our next meeting?

**Mike Foulis:** Yes.

**Alistair Aitken:** We considered providing such a glossary for the evidence paper, but at that stage we had not got into the detail of the minutes.

**The Deputy Convener:** I think that a glossary would be immensely helpful for those of us who are a bit dull on jargon. Your co-operation to that end would be much appreciated.

We seem to have made very positive progress this morning. The last question I have noted is from Fergus Ewing. If Mr Ewing is induced towards brevity—and I utter these words more by way of a prayer than in any expectation of achievement—it might be possible to conclude proceedings at about 11 o'clock. However, I do not want to do so without giving our three witnesses the opportunity to make any concluding remarks or observations.

**Fergus Ewing:** I am sure that you can always

inspire me to prayer, convener.

On page 12 of your submission, the third paragraph—headed "Ministerial meetings"—states that it is the SQA's practice to have an annual meeting with the Minister for Enterprise and Lifelong Learning, Mr McLeish. Is that right?

**Mike Foulis:** Yes, in the sense that there has been only one such meeting.

**Fergus Ewing:** So Mr McLeish has met the SQA only once over the year?

**Mike Foulis:** I think that he has attended a series of other engagements.

**Fergus Ewing:** That paragraph states that at the meeting that took place on 6 March between Mr McLeish, Mr Miller the chairman and Mr Tuck, the then chief executive, a number of matters were discussed, including information technology. Would I be right in thinking that those matters would be to do with IT problems?

**Mike Foulis:** I cannot remember.

**Alistair Aitken:** Not necessarily problems. If I remember correctly, the discussion was about how the IT system would be put in place.

**Fergus Ewing:** Dr Murray has already referred to IT problems and I guess that it is no secret that various IT problems were publicised last autumn. They were to do with the differing computer systems that colleges and the SQA had, for example.

**The Deputy Convener:** Mr Ewing, we are dealing with very substantive matters that are entirely within the domain of the SQA. I would not expect the witnesses to be able to comment unless such knowledge is within the ambit of their departmental operation.

**Mike Foulis:** Thank you, convener.

**Alistair Aitken:** The IT matter that was considered at that meeting was a look at future IT developments such as online learning and assessment.

**Mike Foulis:** In the minutes of the meetings that we gave you, there is a reference to plans to develop an online assessment bank. That would cost an estimated £10 million, not £100 million, as the minutes say. That mistake was corrected at the next meeting.

**Fergus Ewing:** I want to move on to deal with the power of direction.

**The Deputy Convener:** Is it a point that we have not covered? We have dealt with that subject extensively.

**Fergus Ewing:** It certainly is. In his ministerial statement to Parliament, Mr Galbraith said:

"In March, I was concerned by reports that I received from schools and colleges that told me of problems with electronic transfer of information to the SQA. At my request, a senior member of the Scottish Executive's information technology directorate met the SQA, reviewed the situation and made recommendations."—[*Official Report*, 6 September 2000; Vol 8, c 21.]

Are you able to say whether the reports that were received from schools and colleges and which were referred to Mr Galbraith were received before March?

**Mike Foulis:** I think that the time to which he was referring was towards the end of March and that our chap went in in April.

**Fergus Ewing:** I would be grateful if you could check that and let me know.

As Dr Murray said, it was clear in November that there were IT problems. In March, the Minister for Children and Education was aware of IT problems, particularly in relation to transfer of information to the SQA. Those problems have been well publicised since then. If a senior member of the Scottish Executive's information directorate reviewed the situation, surely it would have been possible then to make a decision with a view to making a direction under section 9. In other words, to send somebody—

**The Deputy Convener:** I am sorry, but I must intervene. Mr Ewing, I think that you are asking witnesses from the department of enterprise and lifelong learning questions on matters that are not directly within the province of that department. They might be within the province of the department of education, or the IT department. It is unfair to ask these witnesses to comment on matters that are outwith their knowledge and their competence.

**Fergus Ewing:** I agree that it is difficult to set a dividing line between this inquiry and the other. Perhaps that illustrates the problem. Who would be the appropriate minister? Which would be the appropriate department to make a direction? Is there confusion about the fact that responsibility for the SQA is shared by two ministers? Would one minister be expected to issue a direction if it were appropriate for a direction to be made under section 9? If so, which minister?

**Mike Foulis:** I do not think that confusion arises from that fact. One of the things that we have tried to do in the Scottish Executive since devolution is to avoid the Whitehall departmentalitis. A great effort was put into encouraging corporate, collective behaviour. That manifests itself in the fact that, for instance, the way we go about seeking decisions from ministers in different departments is more informal than it is in Whitehall.

In Whitehall, one minister would write to another,

who would have a certain amount of time to comment on the letter. Then either the Cabinet Office would sum up the exchange or an agreement would be reached. That does not happen here. Instead, we put the advice to the relevant ministers at the same time, having done the necessary liaison with their officials and squared everything. I do not think that any confusion arises from that source. If I may tiptoe on to the territory that the convener was warning me off, I think that the report by our IT expert will be included in the evidence that the committee will receive at the end of the week. It will then be easier for you to ask the sort of questions that you are asking.

11:00

**Fergus Ewing:** I look forward to seeing that. Your answer is that the decision about whether to use the power of direction under section 9 would be taken jointly, rather than by one department or another.

**Mike Foulis:** It would be a collective decision. It would have to identify a course of action that could have done some good and that the body had refused to take, even though it had the authority to take it.

**The Deputy Convener:** You explained previously that a decision made by one minister would, in fact, be made on behalf of all his ministerial colleagues. To avoid confusion, is that what you mean when you talk about collective decision making? Mr Ewing is asking whether notice or direction under section 9 would ever be given by one minister on the advice of his civil servants. In this situation, where there is split departmental responsibility—which some might see as anomalous—would such notice be given only on the say-so of both ministers?

**Mike Foulis:** It is inconceivable that we would so arrange things that one minister would take such a step without the knowledge and consent of his relevant colleagues. The way in which we work is designed to prevent that sort of situation arising.

**Fergus Ewing:** I wanted to move on to general questions about the power of direction. However, that may take a little while. Earlier you mentioned our having a break, convener; perhaps we should take that now.

**The Deputy Convener:** I was hoping that we might be spared the necessity of a break. I do not want to curtail your right to interrogate the witnesses, but again I would suggest the need for brevity. Would you care to proceed?

**Fergus Ewing:** On page 6 of your written submission, you set out your view of the power of direction under section 9. On reading section 9, I

understood it to give the Government fairly unfettered power to intervene in a non-departmental public body and to require that body to do as it is told. That seems to me to be the ordinary reading of the powers that are available to ministers under section 9. Do you regard that layman's interpretation as fair?

**Mike Foulis:** In answer to a question from Dr Murray, I said that we do not regard the power of direction as unfettered. Given the structure of the 1998 act, read as a whole, the party against whom the power might be used and other parties might legitimately regard it as an extraordinary intervention in the affairs of a body set up by statute with the specific intention that it should be free of such intervention. The courts would be likely to take a restrictive view both of the circumstances in which it would be reasonable to use the power and of the way in which it ought to be exercised—in other words, of the specific act that the body was being directed to perform.

Any use of the power would be subject to judicial review on the grounds of reasonableness, among other things. In framing the power, there would need to be the coincidence of something that the body could be directed to do, something that it was refusing to do, something that it was capable of doing, if directed, and something that, if done, would serve a useful purpose. That is a restatement of what I said before.

**The Deputy Convener:** In fairness, Mr Ewing, we have covered that area extensively and I would ask you to direct your questions towards those aspects of section 9 that have not previously been covered.

**Fergus Ewing:** Reference has been made to a judicial review, but I find it utterly implausible that a non-departmental body would sue the Scottish Executive because the Executive told it what to do. The submission refers—

**The Deputy Convener:** Mr Ewing, what is your question?

**Fergus Ewing:** Do you agree that the possibility of a judicial review, in the event that the Government stepped in to tell a non-departmental body what to do, is very remote indeed?

**Mike Foulis:** In considering the use of a power such as that, one must take into account the possibility of judicial review. That is what I said—that it was possible that it would be subject to judicial review. Being generally cautious, we tend to advise our ministers to be safe and to stay within the likely ambit of the powers.

**Fergus Ewing:** I am trying to establish a simple point. The Government has a power of last resort, but it is an absolute power none the less. Section 9 of the Education (Scotland) Act 1996 states that the Executive may give the SQA

“directions of a general or specific character with regard to the discharge of its functions and it shall be the duty of SQA to comply with such directions.”

You did not really answer the question that I asked a moment ago. Do you agree that the possibility of a quango challenging a Government that decided to use that power of last resort is so remote that it could almost be dismissed? No quango would take on a Government if the Government told the quango what to do.

**Mike Foulis:** I did not say that I thought that a judicial challenge would be likely. I simply said that any action of ministers is open to judicial challenge. One should not construct one's actions on the basis of getting away with it because no one is likely to complain; ministers must construct their actions in order to remain properly *intra vires*.

**The Deputy Convener:** We have been joined by Cathy Peattie from the Education, Culture and Sport Committee. Do you have any questions that you would like to put to the witnesses?

**Cathy Peattie (Falkirk East) (Lab):** No.

**The Deputy Convener:** Do the witnesses have any concluding remarks?

**Mike Foulis:** We have probably said enough. Thank you for giving us the opportunity to speak to the committee.

**The Deputy Convener:** I hope that your taciturnity is not born out of exhaustion, but reflects the significant contribution that you have made to our work this morning. Thank you for attending the committee.

The next meeting of the Enterprise and Lifelong Learning Committee will be held on Tuesday 26 September at 2 pm. I ask members to note the change in date.

**Allan Wilson:** In the event that some issues arise from the minutes and other documentation, will Mr Foulis and his colleagues be available to come back to the committee?

**The Deputy Convener:** They have agreed to attend the next meeting, should further issues arise.

*Meeting closed at 11:08.*



Members who would like a printed copy of the Official Report to be forwarded to them should give notice at the Document Supply Centre.

Members who would like a copy of the bound volume should also give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the bound volume should mark them clearly in the daily edition, and send it to the Official Report, Parliamentary Headquarters, George IV Bridge, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

**Friday 29 September 2000**

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

#### PRICES AND SUBSCRIPTION RATES

##### DAILY EDITIONS

*Single copies: £5*

*Meetings of the Parliament annual subscriptions: £500*

BOUND VOLUMES OF DEBATES are issued periodically during the session.

*Single copies: £70*

Standing orders will be accepted at the Document Supply Centre.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

*Single copies: £3.75*

*Special issue price: £5*

*Annual subscriptions: £150.00*

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

*Single copies: £3.75*

*Annual subscriptions: £150.00*

Published in Edinburgh by The Stationery Office Limited and available from:

**The Stationery Office Bookshop**  
71 Lothian Road  
Edinburgh EH3 9AZ  
0131 228 4181 Fax 0131 622 7017

**The Stationery Office Bookshops at:**  
123 Kingsway, London WC2B 6PQ  
Tel 020 7242 6393 Fax 020 7242 6394  
68-69 Bull Street, Birmingham B4 6AD  
Tel 0121 236 9696 Fax 0121 236 9699  
33 Wine Street, Bristol BS1 2BQ  
Tel 01179 264306 Fax 01179 294515  
9-21 Princess Street, Manchester M60 8AS  
Tel 0161 834 7201 Fax 0161 833 0634  
16 Arthur Street, Belfast BT1 4GD  
Tel 028 9023 8451 Fax 028 9023 5401  
The Stationery Office Oriol Bookshop,  
18-19 High Street, Cardiff CF12BZ  
Tel 029 2039 5548 Fax 029 2038 4347

**The Stationery Office Scottish Parliament Documentation**  
Helpline may be able to assist with additional information  
on publications of or about the Scottish Parliament,  
their availability and cost:

**Telephone orders and inquiries**  
**0870 606 5566**

**Fax orders**  
**0870 606 5588**

**The Scottish Parliament Shop**  
George IV Bridge  
EH99 1SP  
Telephone orders 0131 348 5412

[sp.info@scottish.parliament.uk](mailto:sp.info@scottish.parliament.uk)

[www.scottish.parliament.uk](http://www.scottish.parliament.uk)

**Accredited Agents**  
(see Yellow Pages)

and through good booksellers