EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

AGENDA

30th Meeting, 2009 (Session 3)

Wednesday 11 November 2009

The Committee will meet at 10.00 am in Committee Room 1.

1. **School class sizes:** The Committee will take evidence from—

   Fiona Hyslop MSP, Cabinet Secretary for Education and Lifelong Learning, and Michael Kellet, Deputy Director, Teachers Division, Scottish Government.

2. **Subordinate legislation:** The Committee will consider the following negative instrument—


3. **Proposed Children's Hearings (Scotland) Bill - appointment of adviser:** The Committee will consider a draft remit and person-specification for the post of adviser in connection with its likely consideration of the proposed Children's Hearings (Scotland) Bill.

4. **Draft Budget Scrutiny 2010-11 (in private):** The Committee will consider a draft report to the Finance Committee on the Scottish Government's Draft Budget 2010-11.

Eugene Windsor
Clerk to the Education, Lifelong Learning and Culture Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 0131 348 5204
Email: eugene.windsor@scottish.parliament.uk
The papers for this meeting are as follows—

**Agenda item 1**

Paper by the clerk  
ELLC/S3/09/30/1

SPICE briefing  
ELLC/S3/09/30/2

**Agenda item 2**

Paper by the Clerk  
ELLC/S3/09/30/3

**Agenda item 3**

Paper by the clerk  
ELLC/S3/09/30/4

**Agenda item 4**

Draft report  
ELLC/S3/09/30/5 (P)
Class sizes

Introduction

1. This paper introduces members to the evidence session with the Cabinet Secretary on issues relating to class sizes.¹

2. The Cabinet Secretary will be accompanied by Michael Kellet, Deputy Director, Teachers Division.

Background

Petition PE1046

3. In 2007-08, the Committee considered petition PE1046, which argued for reductions in class sizes. The Committee took evidence from the Cabinet Secretary and from stakeholder organisations.

4. Following its evidence sessions, the Committee agreed to close the petition. It also agreed, however, to schedule future evidence sessions to consider broader issues relating to class sizes. Further information relating to the Committee’s consideration of petition PE1046 can be found at Annexe A.

Recent developments

5. The Cabinet Secretary wrote to the Committee on 22 September 2009 updating members on the Scottish Government’s progress in relation to class sizes in primary one classes and announcing a review of the current arrangements governing class sizes across all school years. The relevant section of this letter is attached at Annexe B.

6. Members may wish to note that the Teacher and Pupil Census is due to be published shortly.

Action

7. The Committee is invited to take evidence from the Cabinet Secretary for Education and Lifelong Learning.

Emma Berry
Assistant Clerk
Education, Lifelong Learning and Culture

¹ SPICe produced a briefing on class sizes on 16 April 2008. Available at— http://www.scottish.parliament.uk/business/research/briefings-08/SB08-18.pdf
Education, Lifelong Learning and Culture

Summary of consideration of petition PE1046

15 March 2007
Petition by Ronnie Smith (General Secretary) on behalf of the Educational Institute of Scotland, calling on the Scottish Parliament to support significant reductions in class sizes in Scottish publicly funded schools during the lifetime of the next Scottish Parliament.

23 October 2007
Petition considered by the Public Petitions Committee and referred to the Education, Lifelong Learning and Culture for further consideration.

21 November 2007
The Committee considered the petition and agreed to take evidence from a range of stakeholders, including the petitioners; COSLA; Directors of Education; Scottish Council for Research in Education (SCRE); Headteachers’ organisations and the Cabinet Secretary for Education and Lifelong Learning.

The Committee also agreed to take evidence on the petition from the Cabinet Secretary in advance of the consideration of the petition.

19 December 2007
The Committee took evidence from the Cabinet Secretary.

21 May 2008
The Committee took evidence from the Educational Institute of Scotland and the SCRE Centre.

28 May 2008
The Committee took evidence from the Association of Directors of Education in Scotland, the Headteachers’ Association of Scotland and the Association of Headteachers and Deputes in Scotland.

18 June 2008
The Committee took evidence from COSLA.

25 June 2008
The Committee took evidence from the Cabinet Secretary.

2 September 2008
The Committee agreed to close its consideration of the petition. The Committee also agreed, however, that it would schedule evidence sessions to consider broader issues relating to class sizes in the future.

Further information can be found on the Committee’s closed petitions page—http://www.scottish.parliament.uk/s3/committees/ellc/PetitionsArchive.htm
EXTRACT FROM LETTER FROM THE CABINET SECRETARY FOR EDUCATION AND LIFELONG LEARNING TO THE CONVENER, DATED 22 SEPTEMBER 2009

Some local authorities have encountered difficulties in meeting the previous administration's commitment to reduce P1 classes to a maximum of 25 due to the statutory maximum remaining at 30. As I have indicated in Parliament before, I have been considering whether the balance between parental choice and class size reduction is right. I have concluded that it is not and that to assist local authorities to reduce class sizes, I intend to introduce regulations that will limit P1 classes to a maximum of 25. Consultation on these regulations will take place shortly with the intention of having the regulations in place for the start of the autumn term in 2010.

In parallel with the work entailed in preparing these regulations, I propose to initiate a Review of the current unsatisfactory arrangements governing class sizes across all school years. There are currently a mixture of class size control mechanisms, including regulations, circulars and teachers terms and conditions of employment which make rational management of class size very difficult. I would like to see more consistency and coherence of approach. Details of the review will be announced shortly.
Introduction
This paper gives an overview of policy and trends affecting primary class sizes. It sets out the current maxima and plans to change this before setting out national trends in class sizes, pupil numbers, teacher numbers and local authority expenditure.

Key points
- Classes have been becoming steadily smaller over the last ten years – particularly in P1 where the proportion of pupils in classes of 18 or fewer has risen from 7% in 1997 to 13% in 2008.

- The Scottish Government has proposed legislation to cap P1 classes at 25. Currently, 3% of P1 pupils are in classes of over 25, taught by a single teacher.

- Between 1999 and 2007, the number of primary pupils fell by around 15% and the number of primary teachers increased by 38%. This increase was particularly marked between 2003 and 2006. Although the money spent on primary teachers’ salaries increased, this was in the context of increases in local government spending overall, with the effect that the proportion of local authority spend on primary teachers actually reduced from 9.13% in 1999/00 to 7.97% in 2008/09.

- Between 2010 and 2018, primary pupil numbers are expected to rise by about 6% before starting to decline again.

- In 2008, the number of primary teachers employed fell by 1.5% compared with the previous year (from 23,540 to 23,171).

- The Scottish Government’s revenue grant to local government for 2010-11, is set to increase by 6.8% in cash terms compared with 2009-10.
Setting the maximum
Different class size maxima are found in policy, regulations and the SNCT teachers’ conditions of service as set out in the table below.

Table 1: Class size maxima

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<thead>
<tr>
<th></th>
<th>Regulation</th>
<th>SNCT</th>
<th>Current Policy</th>
<th>Previous Policy</th>
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<td>30</td>
<td>30</td>
<td>18</td>
<td>25</td>
</tr>
<tr>
<td>P2</td>
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<td>30</td>
<td>18</td>
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<tr>
<td>P4</td>
<td>-</td>
<td>33</td>
<td>-</td>
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<td>-</td>
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<td>-</td>
<td>33</td>
<td>-</td>
<td>20 maths and English</td>
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<td>-</td>
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<td>20 maths and English</td>
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<td>30</td>
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<tr>
<td>Practical</td>
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<td>20</td>
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</tr>
</tbody>
</table>

The Education (Lower Primary Class Sizes) (Scotland) Regulations 1999 require a maximum of 30 pupils in P1 to P3. This was phased in over three years – with the maximum applying in 1999 for P1, 2000 for P2 and 2001 for P3. However, the regulations allow for exceptions in cases where pupils join a class:

- following a successful placing request appeal in relation to P1, where the placing request was made outside the normal placing round (i.e. decision made after 30th April)
- because their family has moved into the area during the school year, and no other school is within reasonable distance of their home
- who receive some of their education at a special school or special needs unit within the same school or who have a record of needs.

The previous Scottish Executive had a policy to reduce class size to 25 pupils in P1 and to 20 in S1 and S2 English and Maths. Guidance was issued as Circular 1/2007, which applied the same principles of ‘excepted pupils’ as the regulations.

Class sizes and placing requests
As outlined above, children can be placed in classes that are ‘full’ when this is a result of a successful placing request appeal. This issue went to judicial review in 2008. The sheriff in the original case had set out his reasoning as follows:

“There is no doubt that placing A and J in the P1 class at would bring the total number of children in the class to 26, of whom 4 would have been placed by virtue of appeal committee or shrieval decisions. Equally, however, the plain
implication of the Schedule of excepted pupils, which appears in both the 1999 Regulations and the 2007 Circular, is that these four pupils would not count towards class size limits during the 2008-09 school session. On moving into P2 in August 2009, the applicable class size limit would be 30, as per the 1999 Regulations.”

Lord Woolman confirmed that this was the correct approach, saying:

“Parliament has expressly determined that class sizes are not affected by pupils placed by sheriffs or appeal committees. It follows that it is not a legal requirement for an authority to appoint an additional teacher. The legislation expressly allows for that contingency.

The regulations themselves are not engaged here, because the class size would not reach the statutory maximum even with the twins. Further, as the excepted pupils’ provisions were translated into the authority’s policy adopted in accordance with Circular 2007/1, the sheriff was also entitled to hold that it was not bound to appoint an additional teacher in order to comply with that policy.”

Legislation and review
The Cabinet Secretary for Education and Lifelong Learning announced on 23 September 2009 that the Scottish Government would introduce legislation to set the maximum class size in P1 at 25. In a speech to the Scottish Learning Festival she said:

“To support local authorities to continue to reduce class sizes, I am pleased to announce today that it is my intention to make regulations to set a maximum class size of 25 for P1 from August 2010. Reinforcing 25 in this way is a significant milestone on the way to our target of 18. The last administration did not provide local authorities legal support to ensure the benefits of smaller class sizes were not compromised by placing requests. We will consult on these draft regulations shortly.

I can also announce to the Festival today a Review of the current unsatisfactory arrangements governing class sizes across all school years. There are a mixture of class size control mechanisms, including regulations, circulars and teachers terms and conditions of employment which make rational management of class size very difficult. I would like to see more consistency and coherence of approach and the class size review will help determine what new arrangements and possible legislation may be needed in the longer term.”
National trends in class sizes
The legislation proposed will cap P1 classes at 25 pupils. In 2008, 2,898 P1 pupils were in classes of over 25, out of a total of 52,106. However, over a thousand (1,192) of these are in classes taught by more than one teacher. The current regulations state that:

“no lower primary class at a school shall contain more than 30 pupils while an ordinary teaching session is conducted by a single qualified teacher.”

Not counting those pupils taught by two teachers, there are 1,706 P1 pupils currently in classes of over 25. This represents 3% of the year group.

Table 2 below shows that over the last ten years the proportion of pupils in P1-3 in classes of 18 or fewer has increased from 7% to 13%, and the proportion in classes of more than 25 has dropped from 53% to 23%. There has been less change in upper primary. The proportion of upper primary pupils in classes of more than 30 fell from 20% in 1997 to 15% in 2006. It has since increased to 17% in 2008.

Table 2: Proportion of pupils in classes of different sizes, 1997 – 2008

<table>
<thead>
<tr>
<th></th>
<th>P1 to P3 pupils</th>
<th>P4 to P7 pupils</th>
<th></th>
<th></th>
<th></th>
<th></th>
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<tr>
<td></td>
<td>18 or fewer</td>
<td>19 to 25</td>
<td>more than 25</td>
<td>25 or fewer</td>
<td>26 to 30</td>
<td>more than 30</td>
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<td>1997</td>
<td>7</td>
<td>40</td>
<td>53</td>
<td>45</td>
<td>35</td>
<td>20</td>
</tr>
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<td>1998</td>
<td>8</td>
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<td>50</td>
<td>45</td>
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<td>20</td>
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<td>2001</td>
<td>10</td>
<td>49</td>
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<td>2003</td>
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<td>41</td>
<td>48</td>
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<td>2004</td>
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<td>49</td>
<td>41</td>
<td>48</td>
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<td>2005</td>
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<td>2006</td>
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<td>2007</td>
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<td>60</td>
<td>28</td>
<td>50</td>
<td>34</td>
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<td>2008</td>
<td>13</td>
<td>63</td>
<td>23</td>
<td>51</td>
<td>33</td>
<td>17</td>
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</tbody>
</table>

Source: Scottish Government, Pupils in Scotland 2008, Table 2.21
Chart 1: Proportion of P1-3 pupils in classes of different sizes. 1997 - 2008

Source: Scottish Government, Pupils in Scotland 2008, Table 2.21

Chart 2: Proportion of P4-7 pupils in classes of different sizes, 1997 - 2008

Source: Scottish Government, Pupils in Scotland 2008, Table 2.21
Local variation in class size trends
There is considerable variation between different local authorities. Whereas the national average is 13% of P1-3 pupils in classes of 18 or fewer, this varies from 66.6% in the Western Isles to 3.9% in Dundee. Table 3 shows the proportion of pupils in small classes in lower primary (i.e. 18 or fewer in P1-P3). It shows the proportions since 2004 and the change between 2004 and 2008. Authorities are ranked according to the amount of progress made between 2004 and 2008 and all figures which are above the Scottish average in each column are shaded.

Table 3: Proportion of P1-3 Pupils in Classes of 18 or Fewer, 2004 -08

<table>
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<tr>
<th>Authority</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>change 2004 to 2008</th>
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<td>7.5</td>
<td>7</td>
<td>7.5</td>
<td>10</td>
<td>24.8</td>
<td>17.3</td>
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<tr>
<td>Scottish Borders</td>
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<td>11.5</td>
<td>12.9</td>
<td>17.7</td>
<td>24.4</td>
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<td>12.4</td>
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<td>West Dunbartonshire</td>
<td>9.4</td>
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<td>5.1</td>
<td>14.8</td>
<td>18.5</td>
<td>9.1</td>
</tr>
<tr>
<td>Argyll and Bute</td>
<td>25.1</td>
<td>30.3</td>
<td>29.9</td>
<td>37.6</td>
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<td>16</td>
<td>6.7</td>
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<td>6.9</td>
<td>9.4</td>
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<td>Eileanan Siar</td>
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</table>

source: Pupil census 2008 Table 6.8
It is clear that very rural authorities have the smallest classes. However, the local authorities that have made the most progress in reducing their class sizes over the last four years are not all rural. The progress made by West Lothian between 2007 and 2008 is particularly notable – from 10% to 24.8%. The next greatest increase is Scottish Borders, which increased its proportion of pupils in small classes from 17.7% to 24.8% in one year. The authorities with the highest proportions of pupils in small classes remain those very rural authorities which have always had small class sizes – such as Shetland (53%), Western Isles (66.6%) and Orkney (43%).

Chart 3 shows the percentage point change from 2007 to 2008 in the proportion of pupils in classes of 18 or fewer. Most progress has been made by West Lothian and least by Inverclyde.
Chart 3: Progress in class size reductions, 2007-08.

Percentage point change from 2007 to 2008 in the proportion of P1-3 pupils in classes of 18 or fewer pupils. Based on Pupil Census table 6.8.
Primary teacher numbers and population trends

Chart 4 below shows the fluctuations in primary school teacher numbers since 1991 and chart 5 shows the trend in the number of primary school pupils. Pupil numbers have been falling since 1997. Instead of following this same trend, teacher numbers fell until 1997. They then fluctuated for a few years before rising steeply between 2003 and 2007 reaching a high point of 23,540. In 2008 they dropped below this, but are still higher than in 2005.

Chart 4: Primary teachers employed, 1991 – 2008


Chart 5 below shows that the number of primary school pupils has been declining, but will start to rise again after next year. In the longer term, numbers are expected to fall again after 2018.

Chart 5: Trend in number of primary pupils, 1996 – 2024

Between 1996 and 2009, pupil numbers fell by 17%. Between 2010 and 2018, the number of primary pupils is expected to rise by 6% before starting to decline again.

Table 4. Trend in number of primary pupils, 1996 – 2024

<table>
<thead>
<tr>
<th>actual</th>
<th>predicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>441,727</td>
</tr>
<tr>
<td>1997</td>
<td>440,594</td>
</tr>
<tr>
<td>1998</td>
<td>436,979</td>
</tr>
<tr>
<td>1999</td>
<td>431,414</td>
</tr>
<tr>
<td>2000</td>
<td>425,221</td>
</tr>
<tr>
<td>2001</td>
<td>420,521</td>
</tr>
<tr>
<td>2002</td>
<td>413,713</td>
</tr>
<tr>
<td>2003</td>
<td>406,015</td>
</tr>
<tr>
<td>2004</td>
<td>398,100</td>
</tr>
<tr>
<td>2005</td>
<td>390,260</td>
</tr>
<tr>
<td>2006</td>
<td>382,783</td>
</tr>
<tr>
<td>2007</td>
<td>375,946</td>
</tr>
<tr>
<td>2008</td>
<td>370,839</td>
</tr>
<tr>
<td>2009</td>
<td>368,500</td>
</tr>
<tr>
<td>2010</td>
<td>367,200</td>
</tr>
<tr>
<td>2011</td>
<td>368,700</td>
</tr>
<tr>
<td>2012</td>
<td>371,800</td>
</tr>
<tr>
<td>2013</td>
<td>376,400</td>
</tr>
<tr>
<td>2014</td>
<td>381,600</td>
</tr>
<tr>
<td>2015</td>
<td>385,300</td>
</tr>
<tr>
<td>2016</td>
<td>387,800</td>
</tr>
<tr>
<td>2017</td>
<td>389,300</td>
</tr>
<tr>
<td><strong>2018</strong></td>
<td><strong>389,600</strong></td>
</tr>
<tr>
<td>2019</td>
<td>389,000</td>
</tr>
<tr>
<td>2020</td>
<td>388,000</td>
</tr>
<tr>
<td>2021</td>
<td>386,600</td>
</tr>
<tr>
<td>2022</td>
<td>384,900</td>
</tr>
<tr>
<td>2023</td>
<td>383,100</td>
</tr>
<tr>
<td>2024</td>
<td>381,300</td>
</tr>
</tbody>
</table>

Local authority resources
The table below shows local authority estimated spend on primary teacher salaries as a proportion of their total revenue spend. This shows that although spend on primary teachers has increased, it has not increased as fast as local authority expenditure as a whole. Generally therefore, over the last ten years, a reducing proportion of local authority money is spent on primary teachers.

Table 5: Spend on primary teachers as a proportion of total spend, 1999 – 2008, £000’s

<table>
<thead>
<tr>
<th></th>
<th>total spend</th>
<th>primary teachers</th>
<th>proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999/00</td>
<td>£6,997,921</td>
<td>£638,596</td>
<td>9.13%</td>
</tr>
<tr>
<td>2000/01</td>
<td>£7,175,467</td>
<td>£659,659</td>
<td>9.19%</td>
</tr>
<tr>
<td>2001/02</td>
<td>£7,665,954</td>
<td>£692,876</td>
<td>9.04%</td>
</tr>
<tr>
<td>2002/03</td>
<td>£8,345,896</td>
<td>£749,483</td>
<td>8.98%</td>
</tr>
<tr>
<td>2003/04</td>
<td>£9,202,263</td>
<td>£801,254</td>
<td>8.71%</td>
</tr>
<tr>
<td>2004/05</td>
<td>£9,687,678</td>
<td>£873,831</td>
<td>9.02%</td>
</tr>
<tr>
<td>2005/06</td>
<td>£10,245,603</td>
<td>£921,105</td>
<td>8.99%</td>
</tr>
<tr>
<td>2006/07</td>
<td>£10,598,131</td>
<td>£926,926</td>
<td>8.75%</td>
</tr>
<tr>
<td>2007/08</td>
<td>£11,032,171</td>
<td>£948,874</td>
<td>8.60%</td>
</tr>
<tr>
<td>2008/09</td>
<td>£12,298,126</td>
<td>£979,869</td>
<td>7.97%</td>
</tr>
</tbody>
</table>

Source: CIPFA Budget estimates

The charts below illustrate the growth in spend and the reduction in the proportion of total expenditure this represents. It should be noted that during this period, the number of pupils in primary was falling.

Class size reductions have been possible in the ‘gap’ between falling school rolls and rising local authority spend. The achievements to date in reducing class sizes do not appear to have required local authorities to increase the proportion of their spend on teacher salaries.

Although the local government grant is set to increase in 2010/11 according to the draft budget, there is the expectation of pressures on budgets over the next spending review period. A report from the CPPR suggested that there may be real term cuts to the Scottish budget as a whole of 8.5% over the period 2009-10 to 2013/14².

² Centre for Public Policy and the Regions, The Scottish Government’s Budget, Growth Prospects and Budget Options. Available at: http://www.cppr.ac.uk/centres/cppr/analysisofthescottisheconomy/
Chart 6: Spend on primary teacher salaries as a proportion of total local authority spend, £000's

(source: CIPFA estimates)

Chart 7: Spend on primary teacher salaries (£000's, cash terms)

(source: CIPFA estimates)
Trend in primary teacher training places
Chart 4, above, showed the increase in the number of primary teachers employed between 2003 and 2007. There has also been an increase in the numbers of teachers being trained – particularly through PGDE. Teacher training places have been rising for the last ten years, but after revising the intake targets last summer, there are fewer places available this autumn than last. Most of the increase has been in PGDE places, but since 2007, BEd places have also been rising.

A further reduction in teacher training places has been indicated in the draft budget 2010/11. [Table 4.30 teachers line reduced from £31.8m to £22.1m between 09/10 and 10/11]

Chart 8: Trend in ITE intake for primary BEd and PGDE, 1999-2009

Source: SFC Circulars.
Trend in employment of newly qualified primary teachers

The chart below plots the results of the surveys taken in October and the follow up in the spring the following year. The original and follow up surveys are shaded differently to distinguish them.

In April 2007, 40% of the 2006 primary teacher probationers had permanent contracts compared with 30% of the following year’s cohort in May 2008. The total number of primary teachers employed also dropped from 23,540 in September 2007 to 23,171 in September 2008. The number of primary pupils dropped from 375,946 in September 2007 to 370,839 in September 2008.

Chart 9: employment of newly qualified primary school teachers, 2007 - 2009

Source: GTCS surveys
http://www.gtcs.org.uk/Research_/publishedresearch_/TeacherInductionSchemeResearch/research_teacher_induction_scheme.aspx

Camilla Kidner
SPICe
21 October 2009

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.
Introduction


2. Copies of the SSI, explanatory notes and Executive Note are provided to members in hard copy only.


Background

3. The order was laid on 5 October 2009 and the lead committee must report by 23 November 2009. The Education, Lifelong Learning and Culture Committee was designated the lead committee.

4. This instrument is made in exercise of powers conferred in the Protection of Vulnerable Groups (Scotland) Act 2007.

5. The instrument is subject to the negative procedure and a procedural note on this is attached at Annex A.

Policy objectives

6. The Protection of Vulnerable Groups (Scotland) Act provides that the Scottish Ministers may make provision consequential to provisions made in the Safeguarding Vulnerable Groups Act 2006. Through these statutes, the UK is in the process of implementing corresponding lists of individuals who are disqualified from working with children or vulnerable groups.

Issues the Committee may wish to consider

7. The Committee will note that the instrument breaches the 21 day rule. Correspondence from the lead official to the Presiding Officer and from the Minister for Children and Early Years to the Convener in relation to this is included with the instrument documents.

8. The reason given for the breach is to prevent a loophole opening between the UK and Scotland relating to the current disclosure and disqualification arrangements. The lead official states that:

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“It is necessary for this Order to come into force at the same time as England and Wales Commencement Order (and before the expiry of the 21 day period) as the effect of the Order is to preserve current disclosure and barring arrangements and, without it, a significant loophole in the protection of vulnerable groups in Scotland would open up on 12 October 2009”.

9. The Subordinate Legislation Committee (SLC) considered the instrument at its meeting on 3 November 2009. The extract from the SLC’s report is attached in Annexe B.

Action

10. The Committee is invited to consider whether it has anything to report to the Parliament.

Emma Berry
Assistant Clerk
Education, Lifelong Learning and Culture Committee
Procedural note

Standing Orders
1. The procedures for dealing with Scottish Statutory Instruments (SSIs) are covered by Chapter 10 of Standing Orders. SSIs are laid by being lodged with the chamber clerks and are published in the Business Bulletin. They are referred to the Subordinate Legislation Committee, the appropriate subject committee (the ‘lead committee’) and, where relevant, any other committee.

SSIs subject to annulment: ‘negative instruments’
2. Where an SSI is subject to annulment, it comes into force on a specified date and then remains in force unless it is annulled by the Parliament. Any MSP may by motion propose to the lead committee that the committee recommends that nothing further is to be done under the instrument. Such motions are lodged with the chamber clerks.

3. The lead committee debates such a motion for no more than 90 minutes.

4. The lead committee reports to the Parliament, setting out its recommendations. If it recommends annulment, the Bureau will propose to the Parliament a motion that nothing further is to be done under the instrument.

5. All the above must take place within 40 days of the instrument being laid, excluding recesses of more than 4 days.
EXTRACT FROM THE SUBORDINATE LEGISLATION COMMITTEE’S 44TH REPORT 2009


2. The questions by the Committee (in the Appendix) largely related to the same issue, namely the nature of the ‘modifications’ which the Order makes to other primary legislation.

3. The Committee also noted the correspondence between the Scottish Government and the Presiding Officer on the reasons given for this instrument breaching the 21 day rule.

Question 1

4. This Order has been prepared on the basis that it is subject to negative procedure. The Committee noted that under section 100(4) of the 2007 Act an order under section 87(1) must be laid before the Scottish Parliament in draft. That is however the position ‘only if the order contains provisions which add to, replace or omit any part of the text of this or any other Act’. This Order is made under provisions in the 2007 Act, including section 87(1).

5. The Committee considered whether Articles 3 and 4, which are headed, respectively, ‘Modification of the Police Act 1997’ and ‘Modification of the Protection of Children (Scotland) Act 2003’ might be seen as making textual amendments to those Act, and whether therefore the instrument should actually have been subject to affirmative procedure. It considered whether the provisions might appear to be making textual amendments by means of inserting additional text in those Acts. This raised the issue of whether the instrument might be considered ultra vires as a result of procedural impropriety.

6. The response sets out the Government’s case why textual amendments are not being made here. It draws on the manner in which the articles concerned have been drafted, with it being stated at the beginning of each article that the provision is made (only) ‘for the purpose of this Order’ and that the legislation has effect ‘as if it had been modified’. The Government asserts therefore that the provisions concerned have not been drafted so as to ‘add to, replace or omit any part of the text of an Act’. It is stated that in relation to articles 3 and 4 the provisions ‘gloss’ the meaning of the affected Acts specifically for the purpose of this Order.

7. The reply also contrasts the different approach taken in the drafting of articles 3 and 4, with that taken in 5. The latter concerns amendments which are made
there to regulations. The response observes that the terminology used is different and states that it is plain that textual amendments are being made.

8. The Committee is not wholly convinced by the drafting devices used, and considers that the phrase ‘for the purposes of this Order’ seems to be somewhat circular and of uncertain meaning. It considers that the drafting approach within articles 3 and 4 is less than satisfactory, although not such that it would be appropriate to report this instrument on vires grounds.

**Question 2**

9. The question concerned the meaning attached to the phrases ‘For the purpose of this Order’ and ‘has effect as if it had been modified’. The reply emphasises the intention to make transitory provision. It refers to what is said in that regard in the Explanatory Note to the Order. The response assists the view that the ‘modifications’ to the 1997 and 2003 Acts, by virtue of articles 3 and 4, are to have effect ‘as if modified’ for a transitory period. However the Committee notes that section 100(4) which provides for the use of affirmative procedure, does not distinguish between provisions which are of a temporary nature or a transitory period. It simply states that if the provisions add to, replace or omit part of the text of an Act then affirmative procedure is to be used.

**Question 3**

10. The Committee asked what considerations had been taken into account by the Government in relation to presenting the changes made to the 1997 and 2003 Acts in the form taken at articles 3 and 4, rather than as straightforward textual amendments.

11. In its response, the Government states that no permanent changes are being effected by this instrument, in relation to the primary legislation ‘modified’ under articles 3 and 4. It states that the provisions introduced are transitory since they will have effect only until provisions in the Protection of Vulnerable Groups (Scotland) Act 2007 come into force. The response emphasises that there was no intent to make textual amendments, as these were neither necessary nor appropriate due to the transitory nature of the provision.

**Question 4**

12. Article 2 indicates that the Order, (as a whole) is to have effect until the commencement for all purposes of a specified provision within the 2007 Act. The Committee was not clear about the intended interaction between article 2 and those provisions in the Order which suggested that they were of a permanent nature, in particular article 6 which provides for the revocation of SSI 2009/4. The reply confirms that the whole Order is indeed intended to have only temporary effect until the relevant provisions of the 2007 Act come into force in order then to make a permanent change which takes account of the Safeguarding Vulnerable Groups Act 2006. It is stated that the intention of article 2 is that the legislation in respect of which articles 3, 4 and 5 makes ‘amendments’ or ‘modifications’ will be so amended or modified only as set out in the Order until the 2007 Act comes into force.

13. The Committee, while noting these remarks, considers that the drafting of article 2 might have been made clearer, having regard in particular to article
6. which as noted above provides for the revocation of another instrument. The Committee noted that since revocation might be seen as being 'final' the indication that the whole Order is of temporary effect appears to be inconsistent with the terms of article 6 and the revocation made thereunder.

14. In relation to the response provided by the Scottish Government in respect of questions 1 to 3, all concerned essentially with the same issue and related to the nature of the 'modifications' which the Order makes to other primary legislation, the Committee draws this instrument to the attention of the lead committee and the Parliament on the basis that the form or meaning of articles 3 and 4, which provide for modification of the Police Act 1997, and the Protection of Children (Scotland) Act 2003, could have been made clearer. Where the question of whether an instrument makes a textual amendment is determinative of the Parliamentary procedure which applies the Committee considers that the form of modification adopted should be absolutely clear.

15. The Committee draws this instrument to the attention of the lead committee and the Parliament on the basis that it considers that the intended effect of article 2, which provides for the Order being of temporary effect could have been made clearer, as there appears to be a fundamental inconsistency with the proposition that the entire Order is temporary in its legal effect, and article 6 which provides for the revocation of the instrument which is referred to therein and which is assumed to be intended to be permanent.

16. In relation to the breach of the 21 day rule, the Committee reports to the Parliament that, for its interest, it finds the Government's explanation satisfactory in relation to the failure to comply with article 10(2) of the Scotland Act (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SSI 1999/1096).
APPENDIX


On 9th October the Scottish Government was asked:

1. On what basis it considers that articles 3 and 4 do not, actually, make textual amendments in relation to the Police Act 1997 and the Protection of Children (Scotland) Act 2003 (such that this instrument should not therefore be subject to affirmative procedure in terms of section 100 (4) of the 2007 Act).

2. What meaning it considers attaches to the phrases ‘For the purpose of this Order’ and ‘has effect as if it had been modified by inserting’ which are used in articles 3 and 4 with reference to the inserted text which then follows.

3. Why it has elected to deliver a permanent change to the legal effect of sections 113C(3) of the Police Act 1997 and section 17(1) of the Protection of Children (Scotland) Act 2003 other than in the form of a straightforward textual amendment, and to indicate what considerations were taken into account in that regard.

4. With reference to article 2 of this instrument, which suggests that the whole Order is of temporary effect, the Scottish Government is asked to explain what is considered to be the effect of that article on the operation of articles 4, 5 and 6.

The Scottish Government responds as follows:

1. The Government considers that articles 3 and 4 do not make any textual amendment in relation to the Police Act 1997 and to the Protection of Children (Scotland) Act 2003. The drafting makes it clear that the provision is made only for the purpose of this Order and that the legislation has effect as if it had been modified. The drafting is clearly not intended to be make actual textual amendments to the Police Act 1997 and the Protection of Children (Scotland) Act 2003. Section 100(4) of the Protection of Vulnerable Groups Act 2007 ("the PVG Act") provides that the draft affirmative procedure is the appropriate parliamentary procedure where the instrument adds to, replaces or omits any part of the text of an Act. The approach adopted in the drafting of this Order does not do any of the above, but glosses the meaning of the affected Acts specifically for the purposes of the Order.

The drafting of these articles should be contrasted with article 5 where a textual amendment is made to the affected Regulations. The words used by the drafter in article 5 to bring about a textual amendment can be contrasted with those used in articles 3 and 4 to gloss the meaning of the affected Acts for the purposes of the Order.

2. The Government considers that ‘For the purpose of this Order’ means that the gloss to be applied to the affected provisions of the Police Act 1997
and of the Protection of Children (Scotland) Act 2003 is only for the purpose of this Order. Section 87(1) of the PVG Act provides that Ministers may make such provision as they consider appropriate in consequence of or for giving full effect to any provision made by virtue of the Safeguarding Vulnerable Groups Act 2006 ("the SVG Act").

The Explanatory Note makes clear that the purpose of the Order is to make transitory provision in consequence of the Safeguarding Vulnerable Groups Act (Commencement No. 6, Transitional Provisions and Savings) Order 2009 (S.I. 2009/2611) ("the England and Wales Commencement Order"). The England and Wales Commencement Order commences certain provisions of the SVG Act to allow the new vetting and barring system to commence operation in England and Wales. The provisions of the Police Act 1997 and the Protection of Children (Scotland) Act 2003 are therefore to have effect 'as if they had been modified' for a transitory period.

3. This Order does not deliver a permanent change to the legal effect of section 113C(3) of the Police Act 1997 and section 17(1) of the Protection of Children (Scotland) Act 2003. The provisions introduced are transitory as they will have effect only until provisions in the PVG Act come into force. It is due to the transitory nature of the provision that the Government considers that it was neither necessary nor appropriate to effect an actual textual amendment.

4. The Government notes the comment that article 2 suggests that the whole Order is of temporary effect. The Government confirms that the Order is intended to have only temporary effect until the relevant provisions of the Protection of Vulnerable Groups (Scotland) Act 2007 come into force in order to make a permanent legislative provision to deal with the SVG Act. It is considered that the effect of article 2 on the operation of articles 4, 5 and 6 is that the Police Act 1997, the Protection of Children (Scotland) Act 2003 and the Police Act 1997 (Criminal Records) (Scotland) Regulations will only have effect as if they had been modified as set out in this Order until the Protection of Vulnerable Groups (Scotland) Act 2007 comes into force. That is the clear intention of article 2.

As a final comment, it is should be mentioned that the Executive Note sets out the detailed information concerning the new systems which are being introduced in England and Wales and in Scotland to protect vulnerable groups. These new systems are being implemented in different stages in the two jurisdictions, making complicated transitory provisions necessary to ensure that vulnerable groups continue to be fully protected in the implementation stages. This Order will prevent a loophole from emerging which would otherwise occur with effect from 12 October 2009 when the relevant provisions of the SVG Act came into force in England and Wales. Without this Order, a person included on either the children’s or adults’ barred list under the SVG Act would not have that fact included on a Scottish enhanced disclosure and, in respect of inclusion on the SVG Act children's barred list, would not be barred from taking up a child care position in Scotland. Without this Order, an individual determined to be unsuitable to
work with vulnerable groups in England and Wales could legally and undetected enter the Scottish vulnerable groups' workforce.
Proposed Children’s Hearings (Scotland) Bill

Introduction

1. At its meeting on 4 November 2009, the Committee agreed its forward work programme up until June 2010.

2. Part of that work programme included agreeing an initial draft approach to the Committee’s anticipated scrutiny of the proposed Children’s Hearings (Scotland) Bill.

3. The Committee indicated that it may wish to seek to appoint an adviser to assist it with its anticipated scrutiny of the proposed Bill.

Proposed Children’s Hearings (Scotland) Bill

4. The Scottish Government has announced that it intends to bring forward a Children’s Hearings (Scotland) Bill to reform the current children’s hearings system in Scotland.

5. A draft bill was published in June 2009. Following consultation and feedback on the draft, the Scottish Government published an overview and table which set out—

“[…] the changes to the draft Bill (published in June 2009) that the Government intends to make; what those changes are designed to achieve and the concerns they are intended to address; those issues on which we are still considering how best we can move things forward; and those issues on which we propose no change at present.”

6. The Cabinet Secretary for Education and Lifelong Learning wrote to the Convener on 26 August 2009 to inform the Committee that the introduction of the proposed bill was likely to be early in 2010.

7. Once the bill has been introduced it is expected that the Committee will be designated as the lead committee at Stage 1 by the Parliamentary Bureau.

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1 Scottish Government (2009). Draft Children’s Hearings (Scotland) Bill. Available at: http://www.scotland.gov.uk/Topics/People/Young-People/c-h-bill/DraftBill
2 http://www.scotland.gov.uk/Topics/People/Young-People/c-h-bill/ResposneOverview
3 http://www.scotland.gov.uk/Topics/People/Young-People/c-h-bill/ResponseTable
4 http://www.scotland.gov.uk/Topics/People/Young-People/c-h-bill
Action

8. The Committee is asked to agree whether it wishes to seek to appoint an adviser to assist with its likely scrutiny of the Children’s Hearings (Scotland) Bill.

9. Should the Committee agree to seek to appoint an adviser it is invited to begin the standard adviser appointment selection process immediately. A summary for the procedure for appointing an adviser is attached at Annexe A.

10. A draft adviser remit and person specification is attached at Annexe B. The Committee is asked to agree its adviser specification.

Nick Hawthorne
Senior Assistant Clerk
Education, Lifelong Learning and Culture Committee
The main stages in the advisers’ appointment process are as follows:

**Stage 1:** A remit and person specification is approved by the Committee.

**Stage 2:** A paper is put to the Parliamentary Bureau seeking approval to appoint an adviser

**Stages 3 and 4:** If the Bureau approves the Committee’s request, the position is publicised and candidates are identified

**Stage 5:** The Committee decides on a candidate or, where there is more than one acceptable candidate, a ranked order of preference

**Stage 6:** Once an identified candidate has accepted the offer of the position, a contract is awarded.
Committee adviser:
Education, Lifelong Learning and Culture Committee

Proposed Children’s Hearings (Scotland) Bill scrutiny

Specification for appointment

Remit

The Education, Lifelong Learning and Culture Committee is expected to be the lead committee for Stage 1 and, if the bill passes Stage 1, Stage 2 scrutiny of the proposed Children’s Hearings (Scotland) Bill. The Bill is a proposed piece of Scottish Government legislation which will seek to reform the current children’s hearings system in Scotland. The Bill is expected to be introduced in Parliament in early 2010.

Adviser’s duties

The role of the adviser will be to assist the Committee in all aspects of its scrutiny of the Bill. In particular, the adviser will be expected to provide expert advice on the selection of witnesses and areas of questioning and to contribute to the Committee’s report to Parliament at Stage 1. The adviser will be expected to attend evidence-taking sessions where possible, any informal briefings/meetings held to assist scrutiny of the bill and all meetings held to consider a draft report.

Person specification

Skills/abilities
The individual should have excellent analytical skills as well as strong written and oral communication skills. The individual should also be able to work to tight deadlines.

Experience
The individual should preferably have direct experience of both the children’s hearing system itself and the legal framework within which it operates. Ideally, the Committee would wish to appoint an individual with both academic and practical experience in this area.

Knowledge
The individual should have expert knowledge of the children’s hearings system in Scotland, including all legal aspects of the system. The individual should also have detailed knowledge of the political environment of both central and local government in Scotland and the policy landscape surrounding the children’s hearing system. Finally, the individual should have detailed knowledge of the relevant other agencies/organisations that are involved in the children’s hearings system in Scotland.
Conditions of appointment

As an expert in the field (and given the size of the remit) the adviser might well have had an involvement with the main agencies involved in providing services. Any such interests would be declared, in the interests of transparency and accountability.

Time commitment

It is envisaged that the adviser will spend the equivalent of 15 days supporting the Committee. An indicative division of time is as follows:

- 2 days to advise on terms of reference/witness identification
- 4 days to attend meetings of the Committee
- 2 days to attend informal briefings/other relevant meetings
- 4 days to prepare areas of questioning
- 2 days to analyse evidence/assist with drafting report
- 1 day to advise on drafting any amendments which members bring forward if the bill progresses to Stage 2.