

# EAST AYRSHIRE COUNCIL

## EDUCATION COMMITTEE : 1 FEBRUARY 2005

### DRAFT GUIDANCE ON LOCAL AUTHORITY ACCOUNTABILITY IN RELATION TO THE ANTISOCIAL BEHAVIOUR ACT 2004

#### Report by the Executive Director of Educational and Social Services

#### 1. PURPOSE

- 1.1 To advise members of the draft response submitted to the Scottish Executive in terms of draft guidance issued in relation to Local Authority accountability as part of the Anti-Social Behaviour Act 2004.

#### 2. BACKGROUND

- 2.1 The Scottish Executive issued draft guidance in relation to aspects of service delivery by Social Work and Education Services regarding children who are the subject of Supervision Orders through the Children's Hearing System continued within the Anti-Social Behaviour legislation. The legislation applies to all children subject to a Supervision Order. The closing date for the submission of evidence was 3 December 2004.
- 2.2 The Scottish Executive has proposed that the Children's Panel should be given the opportunity to challenge the failure of Local Authorities to implement the decisions of a Children's Hearing through recourse to the Sheriff by way of a review process. The guidance indicated that Panel members should only seek this remedy where the failure to implement a recommendation is significant in its impact upon the child, for example where a social worker is not allocated to a case or where a Secure Order is not implemented. In respect of education the requirement relates to the failure of the Authority to provide adequate and efficient education for a child.
- 2.3 The guidance establishes a process whereby a Panel can ask the Reporter to the Children's Panel to refer the matter to the Sheriff Court for resolution. A Sheriff can then review the failure to deliver the service and require the Local Authority to implement the condition. If the Authority continues in its failure to deliver then the Authority can be considered by the Sheriff to be in contempt of Court.
- 2.4 In respect of education where the Authority, in the view of the Panel, fails to provide adequate and efficient education then the Panel has two sources of remedy. It can either follow the route noted above or it can refer the matter to the appropriate Minister within the Executive for resolution utilising existing education legislation and guidance.
- 2.5 Appendix 1 details the response that was submitted to the Scottish Executive following consultation with education, social work and legal services staff within the council. In broad terms there was concern that the resources are not yet in place to deliver on the expectations of children's hearings although it is acknowledged that there has been significant investment in services. This investment will however, take time in relation to the creation of additional

resources, particularly staff who have to undergo professional training. It was also felt that the process was a very lengthy one and it is likely that resources will be provided to meet young people's needs before the process can be exhausted. In this respect it was the view that the Reporter should be given some discretion in referring matters to the Sheriff as a resolution could be achieved without such recourse.

- 2.6** In educational terms there was concern that the guidance issued was at odds, on occasion, with guidance issued through SEED (Scottish Executive Education Department) and the guidance needed to be reviewed in light of SEED Circulars. There was also concern that parents currently have a process open to them to challenge the decisions of the local authority and that this is the route that should be used rather than creating an additional route which appears to be quite lengthy in process and could potentially delay the resolution of a problem. As with social work it was the view that the Reporter should be given greater discretion in relation to cases of concern and that it should be possible to reach a solution in problematic cases without referral to the sheriff.

### **3. FINANCIAL AND PERSONNEL IMPLICATIONS**

- 3.1** There are no financial or personnel implications at this time as the guidance has only been issued in draft form.

### **4. LEGAL/POLICY IMPLICATIONS** Nil.

### **5. RECOMMENDATIONS**

- 5.1** It is recommended that Members:

- (i) note the response sent in terms of the draft guidance;
- (ii) note that this report was considered by the Social Work Committee on 27 January 2005;
- (iii) request a further report from the Executive Director of Educational and Social Services when the final guidance is issued; and
- (iv) otherwise note the contents of the report.

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Executive Director of Educational and Social Services

BE/JK  
23 December 2004  
Enc (1)

**LIST OF BACKGROUND PAPERS** Nil

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**EAST AYRSHIRE COUNCIL: DEPARTMENT OF EDUCATION**

**ANTI SOCIAL BEHAVIOUR ETC (SCOTLAND) ACT 2004**

**CONSULTATION ON DRAFT GUIDANCE ON LOCAL AUTHORITY  
ACCOUNTABILITY**

Comments on the Consultation on Anti-Social Behaviour, Local Authority Accountability.

Para 14. It is inevitable that children on supervision orders will be prioritised ahead of other children if the Executive gives effect to the proposals in this guidance. It is clear that there will be the potential for specific penalties where supervision orders, or aspects of them, are not given effect to and that these penalties will not apply where children are not on supervision. Potentially therefore this could have the effect of the no order principal also meaning no service where there is a constraint on resources. The potential exists for the number of supervision orders to increase as Panel members will know that they have some control over the local authority in relation to the allocation of resources if they make a supervision requirement.

Para 19. To suggest that resources should not be taken into account by the Reporter fails to recognise that the availability of resources, or at least the lack of them, is a significant determinant of whether or not an order can be implemented. As a number of resources are those which would be purchased by an authority, rather than directly provided, then the Court may find that cases are being brought to its attention where the resource is simply not available, for example a secure placement or a residential or foster care placement. Indeed in naming a specific resource Panel members may put a service at risk of breaching its registration with the Care Commission if the decision were implemented. If the local authority is, as it should and is implied by paragraph 52, to be given an opportunity to be heard by the Sheriff Principal it is entirely inappropriate for this paragraph to state that the Sheriff Principal may make an order upon receipt of the order. This part of the guidance appears to be contrary to paragraph 52 and the legislation itself does not refer to an order being made by the Sheriff Principal "on receipt".

It is acknowledged that there has been additional investment in resources, including social work training, but that has not necessarily put additional resources on the ground at this point in time and the executive requires to take into account the lead in time for some of its initiatives to take effect at a local level. Enactment of the legislation should therefore be either phased or delayed to reflect this lead in time.

Para 25 We agree with the care plan setting out what interventions are required and more importantly, being realistic about what can be provided, and when. However this contradicts the guidance to Reporters about ignoring resource availability when taking actions to the Sheriff for failure to implement an order. If the department cannot access a resource then it cannot make it available. The Reporter should at least be required to make himself aware of the steps an authority has taken to obtain a resource and if reasonable steps are being taken then the Reporter should have the discretion to decide not to proceed to the Sheriff.

Para 27 As a minimum standard the contact requirements are onerous and will have implications for the other work of children and family teams, particularly in relation to the allocation of cases where there is not a supervision requirement. The Annex B refers to national standards for criminal justice but fails to mention that this is a service which is 100% funded by the Executive and that to some degree funding follows workload. It is worth noting however that the national budget is not set with overall workload of agencies in mind but rather that the budget is divided on the basis of workload across the criminal justice partnerships. Failure to deliver criminal justice services and sanctions applied as a result are therefore taking place within a different framework from the implementation of supervision orders for the children's hearing where the budget is not set by the executive and subject to a process of annual reporting and negotiation in terms of additional funding following additional work.

Para 28 The time standard set here exceeds the level on which services are currently audited by Audit Scotland, this being set at 15 days.

Para 35 The guidance in this paragraph is far too prescriptive and denies the issue of professional judgement on the part of agency staff in determining the level of input/support that a child will require. It also fails to recognise that many of the support services, or clinical services, in other agencies are also facing staff shortages or resource shortfall. For example child and adolescent mental health services face difficulties in recruiting and retaining medical staff and to prescribe the level of service that should be provided by this agency ignores the fact that this is an agency which consistently fails to deliver reports to the Children's Hearing system to the standard already set within time intervals. This is also a service that is not commissioned by the local authority but is funded directly by the Executive and therefore to hold the local authority accountable for the failure to deliver is not reasonable. Can we presume therefore that it will be the Chief Executive of Health who will be called to account by the Sheriff for a failure to deliver a service rather than a senior manager from the local authority.

Para 37 It is not clear who is to write these reports. It may be too onerous of task to expect lay chairs to provide such detailed report. If it is to be the reporter then it may prejudice the independence of the panel.

Para 38 Where a Panel makes a decision which is not contained within the care plan the Local Authority, or another agency where the service is not directly provided or purchased by the local authority, should be given the right to ask for a review of the decision. This review should be heard by a differently constituted Panel and within a time frame which allows the local authority to maintain its requirements under the proposed standards.

Para 39 Children's Hearings should be required to take into account what works for a child when considering whether or not a service has been implemented. To continue to implement a condition of an order when it is not working, and presumably therefore not in the interests of the child, does not seem to be in the best interests of the child and loses sight of the purpose of intervention.

Para 40 The guidance at this point will be open to interpretation by individual panel members and the Reporter should be given discretion in relation to the implementation of the panel decision, as noted in Para 25 above.

Para 58-61 The section on resources is interesting and it is acknowledged that the Executive has increased the resources available to children's services. As noted at Para 27 above, the comparison with Criminal Justice services is not valid as Criminal Justice services are funded on a 100% basis by the Executive. There are also areas of children's services where the rate of inflation has increased significantly above the rate of funding , for example residential school placements and secure care, which have skewed the additional spend made available to children's services. The requirement to register services with the Care Commission and to meet national standards has meant that investment has been required to maintain the level of service rather than necessarily an increase in the amount of resources. This has happened at a time when SCRA has acknowledged in its annual reports that there has been a significant increase in demand through the numbers of children being referred. Services have not increased in quantity to match this increase and therefore departments are already operating in a deficit situation where they are having to prioritise work and the implementation of this legislation will ensure further prioritisation which will see children subject to voluntary measures of care at a disadvantage in terms of allocation to a social worker or allocation to specific resources. This is at odds with the "no order" principle.

## **COMMENTS ON PAGES 13 - 16**

### **INTRODUCTION**

The content, tone and direction of this section is more than disappointing. It is quite simply ill-conceived and unacceptable. It is singularly unfortunate that in a 16 page document this section commands 3 pages or approximately 20%. The fact that it is the only section headed "Failure to ....." suggests that it has been written from a perspective that originates outside the Antisocial Behaviour Act.

The picture that it paints is unjustifiably negative. The legal remedy that is being sought is out of all proportion to the problem that is being addressed. There is a real danger that a disproportionate emphasis will therefore be given to this issue.

### **GENERAL POINTS**

The thrust of the document raises a bigger and important truth. The needs of the group of young people who will be subject to this Act are complex. Multi-disciplinary co-operation is essential, and will require all agencies to work in partnership. This document, with its emphasis on a particular role for the Children's Hearing cuts completely across the concept of effective partnership working.

Neither does the document take adequate account of the realities of work in this area. The central issue is not about education authoritys' failure to provide, rather the main and significant issue is the difficulties the young people and/or their parents can face in trying to cooperate with the authority when provision is made. It is these issues that should be the principal focus of attention.

### **DETAILED COMMENTS**

Para 62 The first sentence is wrong. The duty of an education authority is stated under the Education (Scotland) Act 1980 and is to make effective provision for their area. The duty referred to in para 62 is actually legally that of the parent. (Hence children educated at home for whom the authority has restricted responsibilities and indeed there are children in private education). The last sentence of para 62 does not make sense. It may indeed be true that services have been offered that have not been taken up. However the sentence appears to imply this might be related to exclusions from several schools or a move between foster carers. A different school is an educational service; is it being implied that such a provision is unacceptable? If not, it is uncertain what the implication is in any meaningful terms. In any event a move between schools would not prevent an authority from making effective provision.

Para 63 The first sentence is both not accepted nor is it acceptable. This rest of this paragraph requires to be much more explicit on what is meant by “not otherwise have provided an education service”. The use of such a loose phraseology opens the possibility for any amount of misinformation or misjudgement in the context of a panel hearing.

Para 64 This section reflects a complete lack of understanding of Education law and practice. For a child who has been enrolled at a school it is simply not possible for them to disappear off the roll in the way that it is being suggested. If they are excluded / removed from register, another school placement must be given with accompanying formal procedures protecting the rights of child and parents. Multiple exclusions do not mean in legal terms that this child has “disappeared”. It may mean the parent / carer is condoning truancy and the circumstances on how this is handled are quite clear. In summary, this whole paragraph, including the circumstances for a section 70 referral, are almost completely wrong.

Para 65 It is ironic that this channel is being opened to Scottish Ministers for this group of young people when no other group of children, schools or even education authorities have such an equivalent legal route. It must not be forgotten that an “absence of education” in this case results as a direct consequence of the young person’s difficulties in the provision that is being made. They will have been excluded as a result of their own or their parents’ actions. For such an exclusion, if they believe there has been an injustice, there is a statutory appeals process.

If there is a problem would it not be much more effective in all circumstances if the Reporter’s first port of call was to the Authority itself, rather than the Ministers. Such a course will produce immediate action. Referral to the Ministers, as a process will last longer than any exclusion.

Para 68 This section is also wrong. The authority with responsibility is not necessarily the one in whose area the child was last a pupil. Rather, it is the area where the parents are resident, or it is the authority with responsibility under the 1951 regulations. It is suggested that the author of the document should read SEED Circular 4/96 for guidance on this matter.

Para 69 Refer back to paragraph 65.

Para 70 No comment.

Para 71 This entire paragraph is superfluous. Reference should be made simply to the conditions of the SEED Circular on Exclusion issued in 2003.

Para 72 See comments above.

Para 73 A Children's Hearing is not competent in practical terms to decide or determine on issues such as "appropriateness" or "adequacy" of provision particularly for children with additional support needs. These are highly technical issues requiring a lot of professional expertise and knowledge. How will the hearing make this judgement? This, in conjunction with the requirement of the Reporter to comply with the hearing's request for a referral, is positively dangerous since it is taking the hearing into an area of operation for which it is neither equipped nor trained.

Para 74 The introduction of an element pragmatism here is welcome. The last sentence is the key and it is suggested that the concept contained here should be expanded considerably to form the main bulk of the guidance on this matter.

Para 75 Surely, it is essential for the Reporter to have a detailed discussion with the Authority before a referral to the Scottish Ministers is even contemplated.

Para 76 The practicalities here are worth considering. There are very few exclusions beyond 10 days and none beyond 30 days in this Authority. The time intervals for Children's Hearings are set well outside such a window. So, unless there has been a permanent exclusion (and these are extremely rare) it is unlikely that the measures described in the paragraph could ever be put meaningfully into operation.

Para 77 The only experience this Authority has had of a referral to Scottish Ministers was in relation to two Record of Needs Appeals. On those occasions, it took the Scottish Ministers approximately two years to make a determination. This paragraph therefore begs a lot of questions on how this procedure will operate.

Para 78 This section appears to cut completely across the Education (Additional Support for Learning) (Scotland) Act which has well-developed (if equally controversial) measures for resolving matters on additional support needs. It should be noted here that by the definitions in the ASL Act nearly all children appearing before a Hearing will have additional support needs, and will therefore also be subject to this wider legislation. Similarly they may also have rights under the Disability Discrimination Act. National guidance should address these complexities of the law.

## CONCLUSION

Unfortunately, from the educational point of view the guidance is unacceptable. It does not reflect education law, SEED Guidance or take account of existing good practice or the current state of service delivery. In places the document is wrong or confusing. Some of the value-laden statements in the document require to be amended.

Most importantly implementation of this guidance, as written, could substantially jeopardise the strong and positive local partnerships which are essential to serving the needs of our children.