



Northern Ireland  
Assembly

Committee for Education

# OFFICIAL REPORT (Hansard)

Education Bill: Briefing from the Department  
of Education

9 January 2013



**The Chairperson:** Not in relation to the Bill, but we probably will see it at some stage. CCEA is listed among the issues that we need to look at. On this particular issue, we should get that clarification in writing because it may be of help.

I will quickly try to summarise the issues. The Catholic teaching certificate was raised earlier, and you passed a note to the Committee stating that the Bill does not affect anything in relation to —

**Mr Stewart:** If Jonathan Craig forgives me, I disagree with him. I have to clarify that the Bill does not affect this in any way. Where it is lawful at present for the certificate to be required for a post, it will continue to be lawful for it to be a requirement in the future. In future, as today, that decision will be one for the board of governors of the relevant school.

**The Chairperson:** So, were ESA to be established now, how would the live issue that Barry raised — agreement between or amalgamation of two schools — be resolved fairly and equitably?

**Mr Stewart:** I will give a slightly longer answer to that than you were expecting. The first point to make is that I do not think it would be affected by the Bill or by the establishment of ESA.

If I may digress for a second, there is a very live example that Barry and Rev Herron gave of the need to deal with a controlled school and a Catholic maintained school, and I say "Catholic maintained" very deliberately. Sometimes, and I am guilty of it myself, we use the word "maintained" as a euphemism for a Catholic school, but maintained is a management type. As we know, there are three Protestant maintained schools, which are owned by the Church of Ireland, so I talk about a Catholic maintained school very deliberately. If there is a perceived need and an acceptance in a local community to bring together a controlled school and a Catholic maintained school, it can be done today under the current legislation. As I often say to people when I am asked, the legislation is perhaps not the friend that we would like it to be in this situation, but it is not the barrier that some people fear that it is. The question is: what sort of school would the new school be? In law, you cannot have a hybrid. It cannot be half controlled and half maintained; it must be one or the other. It would be possible for the new school to be either. The maintained model is much more likely.

At the risk of putting words into their mouths, I think that the Catholic trustees would have difficulty in buying into the concept of the new school being a Catholic school. There would also be a practical difficulty for them in that if it were a controlled school, the religious education within it would have to be non-denominational. So, the maintained model is more likely. What would such a school look like? It might be jointly owned by the Catholic Church and one or more of the Protestant Churches. That represents a significant challenge for the Protestant Churches because they would have to get back into the business of school ownership that they left many years ago, but there is nothing in law to stop that. So, that school would have trustees. Again, we tend to use the word "trustee" as a euphemism for the Catholic clergy. In law, trustees are the people who own the schools. There are Protestant trustees of Protestant maintained schools today. If it were a jointly owned school, it would be a maintained school in law. It would have trustees who would come from the Churches that owned the school. Those trustees collectively would have the right to appoint a certain proportion of the board of governors. Under the Bill, this would be a voluntary school, so they would be the submitting authority, and they would write the scheme of management and the scheme of employment for the school.

The two major challenges there, which were emphasised by board colleagues quite correctly, are getting buy-in and acceptance by the local community of that particular model and approach and then the very practical difficulty of how the Churches would come together and agree on the proportions. How many Protestant trustees would there be? How many Roman Catholic trustees would there be? How would they divide or share between them the nomination rights for boards of governors? Those are very real issues and challenges, but they are not challenges for the Bill. They are challenges to be worked out in communities and between parties locally. I say again, Chairman, that that can be done under the current legislation and would not be affected in any way by the Bill.

In giving that digression, I have failed to answer the first part of your question, which was what happens in the transfer of undertakings protection of employment (TUPE) situation or the requirement for a Catholic certificate? I recognise the challenge pointed out by board colleagues, but I think that that is only likely to arise in a situation where there is a new post or where a post becomes vacant. At the point of transfer, if we are bringing two schools together, TUPE applies. Currently employed staff would transfer under their current terms and conditions and would have those protected. If a post became vacant or if a new post were established, and the board of governors of the new school

decided that it was a post that required a Catholic certificate, they would be free under the law to do so, but that ought not to affect any staff transferring from the current controlled school, unless they, as internal candidates, wished to apply for that post.

**The Chairperson:** Does ESA carry all the liabilities as the employer?

**Mr Stewart:** Yes.

**The Chairperson:** What happens if the employment scheme is referred to the tribunal? I think that point was made in the presentation.

**Mr Stewart:** It was, and I accept that the clauses in that regard are rather complex. The bottom line is that if there is a dispute, until that dispute is resolved by the tribunal, the existing scheme or the new scheme that the submitting authority proposes to bring forward would apply. The danger in that is what would happen if some element of the scheme was clearly grossly unlawful? Could ESA stand by and allow that to go forward? Well, there is an additional safeguard in the Bill that empowers ESA to make representations to the tribunal if it thinks that some part of the scheme really was grossly deficient, and the tribunal could set that part of the scheme aside while it reaches an overall decision as to whether the scheme should be approved or modified.

**Mr Kinahan:** I asked the question, and the witness said that there was an informal system for resolving a dispute. I am just worried about gearing up a tribunal and everything being stalled.

**Mr Stewart:** It is actually formal, and there are two mechanisms. This is one of the areas where we need to ensure that we do not overlook what is in existing legislation. The totality of this is not just the provisions in the Bill. There are two mechanisms in the Education and Libraries (Northern Ireland) Order 1986. Article 100 provides for a dispute resolution between boards and the Department or between schools and the Department. Article 101, which you have heard me mention many times, is an even more heavyweight mechanism for the Department to rule on disputes or complaints. Those mechanisms would be available for that sort of situation.

**The Chairperson:** Clause 9 raises a question that you have probably answered, but who is the final arbiter if ESA thinks that a board of governors is not following the employment scheme? Can ESA compel a board of governors to take a particular action?

**Mr Stewart:** ESA is the final arbiter, in the sense that there is no tribunal mechanism, although I have mentioned dispute resolution mechanisms that are already there. ESA is the final arbiter, but it cannot second-guess the decision of a board of governors or substitute its own decision for that of a board of governors. ESA's power to intervene is very tightly circumscribed; all that it can ask a board of governors to do is to look at the matter again. Now, one has to concede the possibility there for stalemate and that it could go round in circles forever. However, the Minister and many stakeholders thought it important that ESA should not have the opportunity or authority to substitute its own decision for that of a board of governors. All that it can do — as was rightly described by Helen Duffy — is discharge a quality assurance role. That quality assurance role is to ensure that a board of governors has followed its own procedures. If it has not done so, it should be asked to look at the matter again and to follow its own procedures.

**Mr Lunn:** On the back of that, would it not be normal for legislation to include a mechanism to resolve a stalemate?

**Mr Stewart:** It would, and —

**Mr Lunn:** The tribunal is referred to in other sections of the Bill. Clause 9 just tells you:

*"ESA may require the Board of Governors to reconsider that matter".*

**Mr Stewart:** It could, and that is a fair point, Trevor. However, I think that our starting point would be that, given the existence of articles 100 and 101, ample dispute resolutions already exist. The Executive felt very clearly that that was not enough and there was need for an additional mechanism, in the form of a tribunal, around the specific issue of approval of schemes. Over previous weeks, the Committee has heard representations that the role of that tribunal may be expanded to cover any

number of things. That is a policy decision. If the Committee or, eventually, the Executive are minded to go in that direction, it is technically possible to do so.

**Mr Lunn:** Yes, but it is always this business of having to refer back to previous orders and other legislation. You cannot seem to put it into the new Bill, which would be so much simpler. If ESA and a board of governors are going round the houses and will not give way, can either refer it back to the Department for a ruling under article 100 or article 101?

**Mr Stewart:** Yes; that would be the case.

**Mr Lunn:** OK.

**Mr Kinahan:** So, it can be resolved?

**Mr Stewart:** Yes.

**The Chairperson:** Is the situation likely to arise where the tribunal takes a decision that may favour the existing school, but the Department believes that that was wrong and uses article 101 to implement what the Department considers to be the best solution?

**Mr Stewart:** No; that could not happen, Chairman. The tribunal's ruling would be final. If it disagreed, the Department's only recourse would be to seek a judicial review of the tribunal's finding.

**The Chairperson:** How will the Youth Service be represented on the ESA board? Currently, it is not.

**Mr Stewart:** It is not specified, but neither is any other profession or part of the education sector. However, there is a requirement for the four community members to be experienced in a field that is relevant to ESA's functions. That gives scope for someone from a Youth Service background to be a member of ESA, and I am sure that the Minister would welcome that if it transpires.

**The Chairperson:** It has been said by a number of people, and even, to some degree, admitted by the Department, that clause 3(4) was clumsy or is not the final version of what we want in the Bill on the issue of compatibility with heads of agreement. All sorts of comments have been made about the rights and the wrongs of having or not having the heads of agreement. First, what is the current position on any changes to that? Has the Department considered any? Secondly, aligned to that is the issue that, in a few weeks, we will come to the end of the evidence-taking part of our scrutiny and move into clause-by-clause scrutiny. Do you envisage that, within that time frame, we will have sight of any amendments that the Department wants to make, because that would colour and inform the views of the Committee? We could go through a process and have reviews and even consider Committee amendments, and the Department could then say that it has an amendment to propose. Logically, how do you see that working out over the next few weeks?

**Mr Stewart:** It is difficult for me to answer that last question because I will have to take a steer from the Minister on that.

Perhaps it would be helpful to put that issue in a little bit more context. As with colleagues from the board, it is not for me to comment on whether it is a good or bad thing for the heads of agreement to be referenced in the Bill, but there are certain facts and consequences of having done so that need to be pointed out. The heads of agreement is a political document. Like many political documents, it is not written in the form of legislation and was not written with the necessary precision and clarity of legislation. It is an observable fact that there is what one might call a tension or an inconsistency between paragraph 5 and paragraph 10. My job, as an official, was to take that political agreement and convert it, first, into a policy memorandum and, ultimately, into a Bill that resolved that tension or inconsistency. The Minister and the Executive believe that we have done so. Clearly, some stakeholders, notably the Governing Bodies Association, feel that that is not the case and that a different approach is required. Nevertheless, the Executive took the decision that the Bill would resolve any tensions or inconsistency and deliver the heads of agreement.

A difficulty arises because of the direct reference to the heads of agreement in the Bill. That might best be described as a short circuit. It means that we can no longer rely on the policy process having dealt with any tensions or inconsistency, and it means that the words in the heads of agreement have to have the force of law. The difficulty that arises is that they do not have sufficient clarity to be

applied with the force of law, and the legal advice that I have received is that the clauses, as drafted, are not capable of being operated and need to be changed. I await a steer from the Minister on how that is to be done.

**The Chairperson:** Are there any other questions?

**Mr Lunn:** Sorry, we keep asking you political questions.

**Mr Stewart:** I will keep avoiding them, Trevor, do not worry.

**Mr Lunn:** You could read it that 10(c) of the heads of agreement is a nod to the voluntary grammars so that they can, if they want to, believe that they are still the sole employer of their own staff. That is what it is about.

**Mr Stewart:** If I misquote or paraphrase what the voluntary grammars have said, I am sure that they will correct it. It is their view that the heads of agreement can only be given effect if they have some form of opt-out from the employment arrangements in the Bill, and that involves them remaining as formal legal employers in their own right. That is not the view of the Minister or the Executive today.

**Mr Lunn:** Would the Bill's provisions take precedence over political heads of agreement?

**Mr Stewart:** The Bill's job and mine, in causing it to be prepared, is to deliver the heads of agreement. We believe we have done that in a way that resolves the tension or the incongruity in the heads of agreement. However, that is short-circuited by the direct reference back to it. As I said, the legal advice that I have is that those clauses, at present, simply will not work.

**Mr Lunn:** The clauses in the Bill or the heads of agreement?

**Mr Stewart:** The Bill, as drafted, would require employment schemes and schemes of management to be compatible with the Bill, because that is a legal requirement, and with the heads of agreement. The legal advice is that it is not possible to be compatible with the heads of agreement because two paragraphs in it are mutually exclusive.

**Mr Lunn:** Yes; a bit like the Good Friday Agreement. Thank you, Chairman.

**Mr Craig:** Chris, I have listened to all of this in fascination because it reminds me of something else that I will not refer to. Why is the Department so insistent on ESA being the employing authority and having employment rights over, I suppose, everyone in the education sector? That is clearly causing an issue in the voluntary sector. What is the rationale there? What rationale is driving the Department to that position?

**Mr Stewart:** That is a fair question. The policy development challenge for us over the past almost seven years that I have been involved in this was to deliver two policy aims. The first was to deliver the benefits of a single employing authority, such as easier and more effective workforce planning, easier —

**Mr Craig:** Chris, I know that you are in a train of thought, but can I challenge you on that? We have already heard from the bishops and others. There is not going to be a single employment market out there. That fact is blatantly obvious to me from what I have heard today. It is a great aspiration. I was under the foolish impression that you were going to get somewhere on this one, but it is not going to be the case. I do not see even two areas of employment in education anymore. When I dig down into this, I see about seven separate areas where there are different criteria for whatever poor teachers want to go for those jobs, and that will not change under the Bill.

**Mr Stewart:** You are right that it is not going to change under the Bill. I understand the point that you made, and there may be a range of views as to whether we will see more or less movement between sectors than we currently do. Nevertheless, one of the two policy aims that the Ministers asked me to take forward was to provide for a single employer that would deliver those benefits — whether one thinks that they are real or not — of greater sharing and co-operation across sectors and better and more effective workforce planning.

At the same time, however, we heard a range of stakeholders from right across education argue strongly that it would be a mistake to have a single monolithic, top-down commander and control employer; that good schools were autonomous schools; and that schools worked better if they had the autonomy to run their day-to-day affairs, specifically, as you heard again today, if the boards of governors — the people charged with running such schools — made the decisions on the appointment, management, promotion, disciplining and dismissal of staff.

The challenge for me was to weave those two things together. They are not easily woven together. I willingly concede that it is a difficult recipe, but we genuinely believe that we have done that. We have a model that will provide the benefits — whether one believes in them or not — of a single employing authority, but which will still allow for as much autonomy to be in the hands of a board of governors as that board wishes to discharge. It is not a model that has been arrived at easily. It took us a number of goes to get there, but we genuinely believe that it delivers both those policy aims.

**Mr Lunn:** Will it get around the clause in the heads of agreement that you referred to?

**Mr Stewart:** No; the heads of agreement is a difficult problem. Again, colleagues from the voluntary grammar sector would say that that is all very well, but even maximised delegation does not do it for them. They object on principle to the loss of employer status, and we recognise that concern.

**Mr Craig:** We are at an impasse.

**Mr Lunn:** It comes down to who is the employer. I thought we had settled that. It is pretty plain in the Bill who the employer is. We have been following that long enough, and I think that the legislative draftsman has done a good job.

The fly in the ointment here is the heads of agreement. I do not think that we can bypass this. As a Committee, we need to clarify what is happening here and see what the solution is. We have had this discussion, Chris, here and with the schools as well. Under the ESA provision, the board of governors of a voluntary grammar school would no longer need to carry liability insurance because ESA is the employer. If you accept the heads of agreement, boards of governors would have to carry such insurance. That is the starkest example that I can think of, but it is totally unsatisfactory to have that contradiction. I am glad that the Western Board has highlighted it because it had not occurred to me. We really have to tie that one down.

**The Chairperson:** OK. Any other comments? OK. Thank you very much, Chris.

**Mr Stewart:** Thank you, Chair.