Northern Ireland Assembly

Committee for Education

OFFICIAL REPORT (Hansard)

Education Bill: Draft Model Employment and Management Schemes

27 February 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Mervyn Storey (Chairperson)
Mr Danny Kinahan (Deputy Chairperson)
Ms Michaela Boyle
Mr Jonathan Craig
Mrs Jo-Anne Dobson
Mrs Brenda Hale
Mr Chris Hazzard
Mr Trevor Lunn
Miss Michelle McIlveen
Mr Sean Rogers

Witnesses:

Mr Mervyn Gregg	Department of Education
Mr Robbie McGreevy	Department of Education
Mr Paul Price	Department of Education
Mr Chris Stewart	Department of Education

The Chairperson: We are very glad to welcome colleagues this morning. Safety in numbers, they say, Chris. Welcome back to the Committee, Paul. We have not seen you for a while. Robbie and Mervyn, thank you for coming. It would be only right and proper to place on record, because Committees are never done asking for more information on all sorts of things, the amount of work that has gone into the information provided to the Committee in the past number of weeks and months and also, I know, in trying to bring these two documents to us. It is appreciated. I ask Paul, Chris, or whoever, to speak to the documents, after which members will have questions.

Mr Paul Price (Department of Education): I will just give a five-minute overview, if that is OK. You have received two documents since 14 February: guidance for schools on their schemes of management; and guidance for schools on their schemes of employment. Both were issued, for comment by 19 March, to the current employers of the school workforce and to other key educational stakeholders. The most important thing about both documents is that they are in draft form. They are clearly marked as such, the preface indicates that, and they will remain in draft form until the Bill becomes law.

I will point out some details about each in turn. The scheme of management guidance is generally issued for information purposes only. Even when it issues in guidance, when the Bill becomes law, it will be issued for information purposes only, generally. The Education Bill will place no new schemes of management requirements on schools, except for Irish-medium schools. It will consolidate existing requirements. There is no equivalent on schemes of management to, for instance, schedule 2 to the

Bill, which provides such detailed provisions for schemes of employment. The relevant clauses of the Bill provide for the ownership and procedures of boards of governors, for the management and control of the school by the principal and board of governors and for the committees of boards of governors. They are fairly general.

The guidance on the schemes of management explains that, in fact, schools shall not be required to prepare new schemes of management. Their existing scheme of management, which is already a requirement, will be deemed approved by the Education and Skills Authority (ESA) once it is operational. It will be for a school, if it feels that its existing scheme does not comply with the existing statutory requirements, to seek ESA approval. Otherwise, its scheme of management shall be approved. That document is issued for information. It is to assure schools of that very fact — that there is not too much to do on schemes of management — and to create context for the scheme of employment.

The guidance on schemes of employment is quite different. It explains that the Education Bill will place a requirement on all schools to have in place schemes of employment approved by ESA, which is a new requirement. The guidance will formally communicate that requirement to schools when the Bill becomes law so that, then, it can be achieved by all schools and ESA before the day that ESA comes into being or as soon as possible thereafter. The importance of having in place employment schemes approved by ESA is so that there is clarity on the arrangements governing employment matters in all schools when ESA takes up its business. I will clarify what ESA approval of employment schemes consists of: it must follow where schemes fulfil the statutory requirements as set out in schedule 2 to the Education Bill and other education law.

Perhaps the most important thing about the guidance on employment schemes is the way in which it illustrates how the employment provisions in the Bill will deliver on the single employing authority role for ESA and autonomy for schools in matters of employment. I refer members to specific points of the document: page 3, paragraph 6 of the main guidance, and page 46, paragraph 15 of the model employment scheme. These demonstrate the important device of the specified post, which will enable schemes, as their submitting authorities shall determine, to opt in to ESA support on appointments. The default, otherwise, will be board of governors' autonomy and responsibility on appointment matters.

The support available from ESA is flexible. It can be nothing, as determined by a submitting authority and its scheme; it can be the provision of administrative support to a recruitment process, while the board of governors remains responsible; it can be professional support to an appointments panel of a board of governors, but in a non-voting capacity; or it can, for a post specified in an employment scheme, be full responsibility for a recruitment process. That is one of the key aspects of the employment scheme guidance to point out.

Elsewhere, the guidance on employment schemes explains the roles of submitting authorities and the process that they shall go through in preparing and submitting a scheme to ESA; the process of ESA approval; and the role of and route to the tribunal that the Bill shall provide for in this area.

My final comment about both documents is that the approach that we tried to take is that they shall be minimal; they shall reflect statutory requirements and no more; and that they are, if you like, as customisable and adaptable to individual schools as possible. That is all that I have to say.

The Chairperson: You will be glad to know that I do not plan to say a lot either. Will you clarify one thing for me, Paul? The documents are being sent out to managing authorities for consideration — is that right? Who has now seen them?

Mr Price: They have gone to all current employers of the school workforce and to key educational stakeholders.

The Chairperson: Have the unions seen them?

Mr Price: Yes.

The Chairperson: We had a meeting with representatives from the Northern Ireland Public Service Alliance (NIPSA), the GMB and UNISON, representing the non-teaching staff, and we said that we would clarify whether they had received them. You are saying that the documents have been sent to them?

Mr Price: Yes.

The Chairperson: Have you received any response, collectively? Do you have any anecdotal evidence of issues raised?

Mr Price: Not yet, no. The date of 14 February was probably just before half-term break for the schools, so we await their response.

Mr Kinahan: Thank you very much. When we read through the Bill, we see that the schemes are subject to statutory requirements and guidelines. Have those all been written? Are there any that you are aware of that are still being worked on? That would concern me. Do we know all of the statutory requirements? Do we know all of the guidance that is coming through from the Department?

Mr Price: The guidance and the model scheme of employment are written so as to deliver exactly on schedule 2 to the Education Bill. It is appended by guidance and a model scheme of appointment, which have been written so as to deliver on otherwise existing statutory requirements in employment, education and law. That is the approach.

Mr Kinahan: Is nothing else looming?

Mr Price: There should not be. There should be a comprehensive guide and model.

Mr Hazzard: Page 19 of section 2 of the guidance on schemes of management for grant-aided schools refers to:

> *"the power of the Department and other relevant authorities under regulations to remove a member ... of the Board of Governors".*

Will you outline which are those other authorities and the regulations under which they can remove a member?

Mr Chris Stewart (Department of Education): Chair, with your permission, I will answer that. The regulations have not, in fact, been made yet. The power to do so is provided in article 23 of the Education and Libraries (Northern Ireland) Order 2003. A draft set of regulations is being worked on by Mervyn's colleagues, but we are not yet ready to bring the regulations to the Committee. We will, of course, want to give the Committee early sight of those, even in draft form, before bringing them to the Department. In essence, the authorities other than the Department or, in due course, ESA that could remove governors are those that appoint them: for example, trustees.

Mr Kinahan: That is why I asked the question. So there are some regulations yet to be written?

Mr Stewart: There are some regulations in the pipeline. We think that they are important as a backstop, but we do not want members, still less governors, to feel that the Department is somehow planning to remove a vast swathe of school governors. That is absolutely not the case. As we have said before, the 14,000 school governors working in a voluntary capacity do a marvellous job. Our first resort, and ESA's first resort, is to assist them and provide advice and support. However, as an absolute backstop, it is important that we have a statutory mechanism to remove a member of a board of governors in the very extreme situation in which that becomes necessary. We certainly do not envisage that power being used regularly.

Mr Kinahan: Are those the only regulations that are behind?

Mr Stewart: Yes.

Mrs Dobson: Thank you for your briefing. Rather than seeking comments from stakeholders on the documents, would it not have been better for the Department to have involved them in the drafting from the beginning? Is there not a danger that drafting the guidelines without the input of educationalists may lead to more rather than fewer cases of loggerheads between the schools and ESA, with the associated cost of any independent tribunals falling on the taxpayer? Will you elaborate on that? What is the estimated cost of taking a scheme through an independent tribunal?

Mr Price: First, it is important that we do this so that we fulfil the relevant parts of the Bill. Secondly, we thought that it was important to alert schools. Yes, we are issuing the documents for comment but, as far as the guidance on the scheme of employment is concerned, it alerts schools to a requirement that they shall face, perhaps with short notice, when the Bill becomes law. The best way to communicate that to schools was to provide them with an example of the requirement that they shall be obliged to produce, i.e. the model employment scheme. The key for us is how these documents are ultimately presented when they become statutory guidance. The point that I tried to make earlier was that they are minimal: they give schools the maximum possible room for customising and producing their own scheme. We can adapt their presentation, and that brief window for comment might elicit responses that push us towards showing in schemes what was a statutory requirement, what was a suggestion and what was a recommendation. In that case, we would issue the schemes and very successfully manage, I hope, the potential for any dispute between a school and ESA.

I am afraid that I do not yet know the cost of a typical case going before the tribunal.

Mr Stewart: It is too early to say. At this stage, we do not even know the composition of the tribunal, nor do we have any detail about its procedures. However, as that work is taken forward and firmed up by colleagues in the Office of the First Minister and deputy First Minister (OFMDFM), we will be happy to bring that back to the Committee.

Adding to Paul's point on the schemes, I would say that this is a starting point, and we have to start somewhere. We do not see these documents as tablets of stone: they are guidance and models, and they will remain as guidance and models. However, we expect them to evolve over the years. As the sectoral bodies mature into their role, it would not surprise me if they began to come forward with model schemes for their particular type of school, and those schemes could be incorporated into future versions of the guidance that we produce.

Mrs Dobson: You talked about the circumstances surrounding the board of governors, and paragraph 24 on page 10 of your paper states how they will be indemnified on matters relating to employment.

Mr Price: The basic position is that boards of governors are indemnified where they remain within the provisions of their employment scheme. Their employment scheme is approved by ESA where they take decisions or proceed in matters according to their scheme, so the indemnification must extend to that point. I do not know whether you want to add any more detail to that, Robbie.

Mr Robbie McGreevy (Department of Education): That is the intention. Provided that the scheme has been agreed by ESA and followed, whether for an appointment or an employment process, the board of governors would be indemnified.

Mr Price: One of the benefits for a school is that it will not need to have an arrangement that covers its liabilities because ESA will provide that for them.

Mrs Dobson: The Bill requires governors to "consider" advice from ESA when making a decision to dismiss a member of staff in that context. What exactly does consider mean?

Mr Price: It means to have regard, to take on board, to have involved ESA in the processes. You will also see that, in some ways, schedule 2 provides for an ESA presence in matters of dismissal, so it should be a healthy state of affairs in any case.

Mrs Dobson: Are you confident that boards of governors will fully understand what "consider" means?

Mr Price: I am happy to look at the wording, but —

Mr Stewart: I think that it would be the age-old test of reasonableness. ESA and the Department would look for evidence that a board of governors had given reasonable consideration to ESA's advice. If it was clear that it had done so and had thought about it, but nevertheless decided to disagree with that advice, it would have fulfilled the requirement to consider the advice. If, on the other hand, there was evidence that it had been dismissed without any proper consideration, or not considered at all, that clearly would not comply with the requirement. As Paul said, we can take a look at the wording if it is not clear, but our position at this stage is that we prefer not to go any further on tying that down in detail and specifying exactly what a board of governors needs to do.

The thread running throughout all this is, as Paul outlined, to give as much autonomy and choice to boards of governors as possible, with certain backstops built into the schemes and guidance that simply reflect the requirements of law. We have not started out with a point of view that ESA should direct a board of governors on what it does in detail on any particular matter. We are trying hard to stay away from that.

Mrs Dobson: For the sake of clarity on the principles: boards can disregard ESA's advice on the matter, make their own decisions and still remain indemnified against employment-related matters by ESA?

Mr Stewart: Yes. Advice is advice; it is not a direction. Like guidance, it does not have the force of law. The requirement is to give reasonable consideration to advice, but that does not mean having to follow it slavishly.

Mr Lunn: Thanks, gentlemen, for your presentation. On the same tack, about indemnity and liability, our notes state:

> *"The Employment and Management Schemes must be compatible with each other; comply with legislation and must also be compatible with the Heads of Agreement".*

The heads of agreement actually state that, when it is already the case, schools will continue to be their own employer and employ their own staff. Given the indemnity side of the issue, I think that Paul is saying that it is pretty clear that ESA will pick up the tab in almost any circumstances that you can envisage. How can ESA pick up the tab if a school is the employer of its own staff?

Mr Stewart: It is important that the reference to the heads of agreement is in the guidance. It is central to the political agreement that underpins the Bill. However, it is our view that the arrangements in the Bill give effect to paragraph 10(c) of the heads of agreement. It will continue to be the case that all boards of governors that wish to — not just those that currently do it — will employ and dismiss their own staff. That is the case today for Catholic maintained schools. CCMS is the employer, but the boards of governors of Catholic maintained schools take the act of employing or dismissing teaching staff. It is our view that the arrangements in the Bill provide for that to continue.

Mr Lunn: I am not arguing about that at all. I have always agreed with you, and the Bill is very clear, but the heads of agreement also seem to be quite clear, and they say something different. If I were a member of a board of governors of a voluntary grammar school, and assuming that all this goes through as it is now, I would not be convinced by the argument that ESA is the ultimate employer and that there is no need for that school to carry liability or professional indemnity cover. If I were giving them advice, I would tell them to keep themselves right because they still have to cover themselves.

Mr Stewart: A school could choose to do that if it wished, but it is our view that those arrangements involve a risk transfer from schools, and others that are currently employers in their own right, to ESA. It is not a reason for proceeding in the way in which we are proceeding, but it is a consequence of the employment arrangements that are in the Bill, which we have to recognise and provide for.

One of the first questions that we were asked about these employment arrangements way back when this all started was: who gets sued if something goes wrong? The advice that we received from our lawyer, who was in the Departmental Solicitor's Office (DSO) at the time and is now vice president of employment tribunals, was that that is really a question for a court or tribunal to decide. Commonly, any person or body that had a role in the action being complained of is likely to be joined to the legal proceedings, and ultimately it is for a court or tribunal to decide who is responsible and to apportion the blame and the fine, if there is one. Therefore, it is possible, under these arrangements, for a tribunal to find that a board of governors has acted improperly and to apply some sanction or fine to the board of governors. However, the arrangements underpinning all that are that ESA, the Department, can pick up the tab because ESA is the employer, and we have the indemnification arrangements that are set in Paul's guidance. A board of governors could find itself in the firing line, as it were, early on, but it has the backstop of ESA and the indemnification arrangement to support it. However, if a board of governors feels that that is not enough and wants to use part of its budget share to take some additional cover, which we think is unnecessary, that is a decision for a board of governors.

Mr Lunn: A board of governors will always be in the firing line because any claim against a school or a board of governors will not be because of the actions of ESA but because of the actions of a board, a school or a headmaster. I will put myself in the position of a judge to do it the other way round. If a judge were looking at a situation whereby the Act says that ESA shall be the employer of all staff, but he looks at the heads of agreement that clearly state that a school, when it is already the case, shall be the employer, why should he go beyond the school? We have been telling people — I am not quite sure whether the Department has been so specific — and the general feeling for quite some months now is that one of the benefits of this — particularly, let us face it, in a voluntary grammar school — is that they will not need to carry those types of cover. However, unless there is clarification, which we have been looking for for five weeks now from various Ministers and cannot get it, schools would be very ill advised to discontinue those sorts of cover.

Mr Stewart: We would be happy to provide further clarification if it would be helpful. However, I think that it remains our view that there is a transfer of risk from boards of governors to ESA, and that could be legitimately reflected in the decisions that they make on insurance cover. We do not think that this sort of insurance cover is necessary.

Mr Price: An ESA action is involved. ESA will have approved the scheme that a school has submitted, presumably maximising its autonomy in those employment matters, that puts it in the line of the case. Therefore, ESA will have a role.

Mr Lunn: I am interested to hear, Chris, that you would be prepared, on behalf of the Department presumably, which effectively means on behalf of the Minister, to provide clarification because we cannot get that.

Mr Stewart: I can certainly clarify the issue around insurance cover and the need for it or otherwise. If you are referring to potential amendments that might be brought forward to the relevant clauses, that is a different matter; the Minister will provide clarity on that in due course. To go back to your original point, Trevor: if a judge or a chair of a tribunal is faced with the question of who the employer is and who he or she should be looking at, he or she may look at the heads of agreement. That judge or chair will certainly look at the Act and at the modification order and the specific pieces of employment law that we mentioned last week, and there the matter will be put beyond doubt. When there is a reference in a relevant employment statute, we will modify that reference so that it is a reference to the board of governors. If an act is required to be taken or not taken under employment law by the employer, and it has not been taken, a board of governors will be held to account.

The Committee has heard many times from a number of stakeholders, particularly those representing schools that are currently employers, that this is what they want. The old maxim of being careful what you ask for comes into play. They will get exactly that. It has always been our intention that they will be regarded under employment law as the employers and will be accountable under employment law for the employment decisions that they take. Under paragraph 10(c) of the heads of agreement, they will continue to employ and dismiss staff and will be accountable for doing so.

Mr Lunn: Paragraph 10(c) states that they:

"will continue to employ and dismiss"

their own staff. That is not quite the same as saying that they will continue to be the employer.

Mr Stewart: I agree.

Mr Lunn: Maybe I —

Mr Stewart: They will continue to exercise that function.

Mr Lunn: — will regret having said that. I am almost starting to agree with you but do not. Voluntary grammar schools in particular would like nothing better than to have paragraph 10(c) clarified to the point at which they could quite clearly continue to be the employer and in all respects responsible for their own staff-related employment matters.

Mr Stewart: Absolutely, but we understand their position on that. They would like it to be the case that we simply not change the employment arrangements at all for those schools. Unfortunately or

fortunately, that is not the Executive's policy, and it would ignore paragraph 5 of the heads of agreement, which we cannot ignore.

Mr Lunn: I do not know whether it is the Executive's policy and do not expect you to comment on that. We all know that the Executive's policy is completely ambiguous and needs clarification. If you think that I am putting this on the record just because Hansard is here, you are exactly right. The situation is intolerable and has to be clarified. We are running out of time to scrutinise the Bill properly, and a major issue such as that remains to be clarified.

Mr Stewart: Trevor, we absolutely recognise the importance of the point and the centrality of resolving this. As we said before, and forgive me for repeating this: the starting point is the heads of agreement. It does not have the clarity and precision of law. There is a degree of tension or incompatibility between two of its paragraphs. We have sought to resolve that in the Bill, and it is the Minister's view that we have done so. It is the view of some stakeholders that we have not. Those stakeholders have been making representations to political parties, which will decide whether they feel that any changes to the Bill are necessary. We appreciate that the Committee will wish to see the outcome of that as soon as possible — much sooner than now. However, as soon as it is available, we will bring it to Committee, but it is unfortunately not available today.

Mr Lunn: I have one more question, Chairman. You will be thankful that I am off that tack.

The tribunal will be able to order ESA to approve a scheme or a modified version of a scheme. The tribunal will also be able to devise an alternative scheme and require it to be approved by ESA. I may not have read it in enough detail, but that seems fairly strong, given that ESA is putting down model schemes. Why would a tribunal want to devise something that goes beyond a model scheme already submitted?

(The Deputy Chairperson [Mr Kinahan] in the Chair)

Mr Stewart: It is extremely strong and, I must say, a very unusual function of a tribunal. In my experience, tribunals normally review the decisions of other bodies but do not often take on, as it were, the function of another body and perform its function for it. However, that is exactly what is provided for in this case. I think that the only answer that I can give is that it reflects the grave concerns expressed by stakeholders about ESA acting properly in the spirit and to the letter of the heads of agreement. It was felt that there would be sufficient safeguards only if the tribunal had this ability to make a scheme. It is unusual but reflects the concerns that were brought forward. After listening to those concerns, the Minister has provided for this in the Bill.

Mr Lunn: I suppose that in some quarters it may be a comfort. However, the tribunal is appointed by OFMDFM, so a tribunal appointed by a completely different Department has the power to impose a scheme on the overarching body that is supposed to be running the administration of education. That is quite strong, is it not?

Mr Stewart: It is very strong. I think that it reflects the public and political importance attached to education and the need for, in this case unusual but necessary, arrangements that enable everyone to have the trust and confidence that the arrangements will work properly and legitimate interests in education will be protected as we move forward. It is unusual; I have never seen this sort of approach in any other public service, but it reflects how unique education is and the strength of feeling attached to it.

Mr Lunn: It is definite, at least. There is no ambiguity in it, and it is not like the clause — I forget which one — that requires ESA and boards of governors to bat things back between themselves till kingdom come. This at least provides a procedure to bring something to a conclusion.

Mr Stewart: I know the clause to which you refer, and I hope that it does not end up in a situation in which things are batted back and forth endlessly. Certainly, this one is clear, and the intention from the outset was to limit very significantly what ESA could do in any situation in which it disagrees with a board of governors. In the previous Bill, or in the earlier iterations of the thinking that led to this Bill, we started off with ESA having a great deal of discretion about how it might act if it felt that a scheme had not been properly drawn up. That led to considerable concern among many stakeholders, and we have moved to a point at which ESA has no discretion. It simply applies a test that is clearly set out in the Bill, and the test is whether the scheme complies with statutory requirements. If it does, it must

approve a scheme; if it does not, it goes off to the tribunal, and the matter is out of ESA's hands, and the tribunal will decide.

Mr Lunn: As the meerkats would say, "simple".

Mr Rogers: I was going to go back to the indemnification issue, but I think that it has been flogged to death.

I am looking at paragraph 6 of the schemes of employment. There was some confusion — perhaps confusion is the wrong word — when the voluntary grammar schools were here giving evidence about the role of trustees and so on. Is there a change in the power of trustees? The draft guidance states:

> *"a school's submitting authority will determine the role of the Board of Governors and of ESA within the processes for the selection of persons for appointment to posts within the school."*

Is there a slight change there? Is it more definite now?

Mr Stewart: There is a change for voluntary grammar schools for schemes of management. At present, the submitting authority is the board of governors; on foot of the Bill, it would be the trustees of a school.

Mr Price: May I clarify that sentence? It refers to how a submitting authority develops its scheme. In that scheme, it will determine the role of the board of governors and of ESA, within the processes for the selection of persons for appointment. That has always been the case. That is a constant of the Bill.

Mr Rogers: Schools' schemes will have to have the level of specification of which posts they will require assistance with and so on. Will that be determined in the scheme?

Mr Price: They must say something about specified posts. They must clarify that none of the posts in a school will be specified, in which case a board of governors will retain responsibility for the appointment of those posts, or they must clarify which posts, if there are to be any, are to be specified posts. It must be clear, one way or the other. They have total flexibility.

Mr Rogers: However, as Chris said last week, they can adjust that scheme at various times.

Mr Stewart: They can adjust it at any time.

Mr Price: It is up to them.

Mr Rogers: I will now move to paragraph 117 of the schemes of management. It mentions guidance from the Department with regard to "In Committee" minutes or sessions. Are boards of governors obliged to comply with the Department's guidance?

Mr Stewart: Guidance is sometimes referred to as soft law. It does not have the force of law, but there will be a requirement on a board of governors to have regard, or due regard, to reasonably take it into account, but boards certainly do not have to follow it slavishly. I think that that reflects the emphasis that Paul was placing earlier on the guidance and model schemes being minimalist. Genuinely, we do not want to tie down or restrict the autonomy that submitting authorities have in devising these arrangements. The guidance is intended to be helpful to them, and, along with the model schemes, it is intended to set out the minimum content and things that we feel absolutely must be, or ought to be, in schemes. Beyond that, the way in which submitting authorities take that into account is a matter for themselves. What they do beyond that, and whether they use it or add to it to draw up their schemes, is entirely a matter for themselves. It is not a case of command and control around those arrangements. That concern has often been expressed to the Committee. What you are beginning to see now, as we have the outworkings of particular clauses, is clear evidence that that is not the case. It is simply not an approach that we are taking to command and control what submitting authorities will do in relation to those schemes.

Ms Boyle: Paragraph 46 of the schemes of management states:

"It is the duty of the Board of Governors, under Article 18 of the Education and Libraries Order, 2003, to decide on the measures to be taken by all persons associated with the school (whether by the Board of Governors, the school staff or other persons) to protect pupils from abuse, whether at school or elsewhere".

I am looking for some clarity on the word "abuse" — what types of abuse that will include — and, in particular, the word "elsewhere". I am asking for clarity because a number of elected representatives and I are contacted from time to time about issues that happen outside of a school. Perhaps people went to a school and to a board of governors and were told that if something happens outside of a school, they do not have any control. That paragraph also refers to "child protection within the school".

Mr Stewart: The definition of abuse would be the very broadest definition, including all forms of abuse — physical, emotional, sexual and neglect, for example. There is nothing that we have consciously left out of that. Indeed, that point was questioned by colleagues in the Department of Health, Social Services and Public Safety (DHSSPS), and legislative counsel clarified that abuse as drafted is a very broad term and covers everything that we could think of that could possibly be covered.

Ms Boyle: What about abuse by social media — texting and social networking sites?

Mr Stewart: Absolutely. Bullying would definitely a form of abuse.

As for the use of "elsewhere", we cannot legislate to place a duty on boards of governors beyond the places or activities that they have control of. If something happens in the street, for example, that would not be covered by the duty, but if something happens while a child is being transported to and from school, it would be covered; I think that it is the responsibility of a board of governors to ensure that arrangements cover that. If something happens on a trip away from a school, even though a board of governors is not in charge of the premises, it is essential that it puts in place suitable child protection arrangements to ensure that children are safe. So the use of the word "elsewhere" broadens the duty. It gives a considerably broader scope, but there are limits. We cannot, for example, make boards of governors responsible for what happens in a child's home. That would clearly not be reasonable.

Ms Boyle: If there was abuse of a pupil by other pupils outside of school hours, perhaps on the way home from school, is that included?

Mr Stewart: Yes, I think that it would be.

Mr Lunn: I am sorry to come back again, Chairman. The schemes of management indicate that ESA may nominate an officer to attend a board of governors meeting, but it seems that that is not a mandatory part of the management scheme.

Mr Price: Is that paragraph 87?

Mr Lunn: Yes. What are the circumstances in which a board of governors would be obliged to admit an ESA representative to a board of governors meeting?

Mr Price: Schedule 2 provides, for instance, that an ESA officer must attend proceedings to dismiss a member of staff. That is to do with clause 38(2), which provides that schools and ESA must work together to raise standards. In the draft scheme of management there is an example of how a school may, in its scheme of management, reflect that co-operative duty. However, paragraph 87 is of itself optional. A school can choose not to have that in its scheme of management. Although we have tried to keep the statutory requirements to a minimum, occasionally we cannot avoid practical suggestions or recommendations. We need to be clear in identifying those for a reader when there are, perhaps, explanatory notes locating the basis for each statutory requirement or otherwise.

Mr Stewart: One of the challenges for Paul and his team is that we have to produce guidance that covers the needs of all schools. As we know, that is extremely variable. There are many large post-primary schools in all sectors that will feel that they have a great deal of capacity in their boards of governors to deal with all these matters and that they, quite rightly, need little, if any, help from ESA. However, other boards of governors, particularly in smaller schools simply because the boards of governors are smaller, will feel that they do not have sufficient capacity. They will, quite rightly, look to

ESA to provide advice and support, particularly on professional HR matters, which is entirely legitimate. Trying to capture those contrasting needs in one piece of guidance is difficult, and Paul and his team have taken the right approach, which is to provide the backstop. Paragraphs such as paragraph 87 are there to be incorporated in schemes if schools feel that they need them, but if they do not, they can easily leave them out.

Mr Lunn: According to paragraph 117, if a board of governors decides that it wants to meet in closed session, it seems that it has to comply with departmental guidance, but that is not mandatory, apparently. I am trying to frame a question here. If that is just departmental guidance, to what extent are boards of governors obliged to give due regard to it?

Mr Price: I will parrot my colleague: they do not have to follow it slavishly. It is a reasonable application for guidance.

Mr Stewart: Again, forgive me for repeating the answer, but guidance is guidance. The misdemeanour that we are most frequently accused of is trying to command, control or interfere in schools. When possible, we try not to do that because the evidence is very clear — we have said it previously — and we know what successful schools look like. Successful schools are those that have the autonomy to run their own affairs and an effective mechanism for holding them to account, but successful education systems are not those that are characterised by command and control. So we tend to provide for guidance rather than regulation, and guidance is guidance.

Mr Lunn: As you probably know by now, I am perfectly happy with the situation in which schools run their own affairs under management and employment schemes but have access to ESA when they need it. That is the way it ought to be. Are there any circumstances, apart from dismissal, in which ESA can demand to be represented at a board of governors meeting in respect of a failing school or something like that? Can they demand that a school discuss a particular matter in an open rather than a closed session?

Mr Stewart: Not specifically, Trevor, apart from an issue that we mentioned last week around child protection. Paul referred to a particular provision, which is central to ESA's key role in raising standards. It is a duty on boards of governors to co-operate with ESA. We have put it no more strongly than that, so there are no specific powers for ESA to command, control or direct schools in raising standards, but there is a duty on a board of governors to act reasonably, co-operate and engage with ESA in what it is trying to do.

There are strong backstop powers in legislation, but they remain with the Department. So article 101, which is the power to direct, is for the Department. The power to remove boards of governors is for the Department, not for ESA. On the rare occasion when it is necessary, powers generally to intervene in schools will be reserved for the Department.

Mr Lunn: I will return to the issue of indemnity. If ESA is going to be the —

Mr Stewart: We clearly have not satisfied you on this point. We will have to work harder.

Mr Lunn: I can relate indemnity to insurance. If an insurance company is dealing with a liability claim, it expects the claim to be handed over for it to deal with. If an employer or customer takes actions off their own bat that may be prejudicial to the claim, it could be prejudicial as to whether or not they are paid. If I were ESA and were looking at a serious situation involving child abuse, for instance, I would have concerns if a board of governors kept saying, "We do not need you; we will not admit you to these discussions. We will operate in closed session so you do not see the minutes, but we expect you to pick up the tab at the end of it all."

Mr Stewart: I think that we would also have concerns. Paul has rightly emphasised the indemnity that ESA and the Department would provide. That is not entirely unheard of today. We indemnify boards of governors, particularly those with delegated budgets. The advice that we normally give to them is that, having taken advice, with indemnification comes an expectation that a board of governors will act reasonably and in good faith. If a board of governors, acting reasonably and in good faith, nevertheless makes a mistake, I think that it is reasonable that it is indemnified for the consequences of the action that it has taken. However, if a board of governors wilfully disregards advice and assistance, acts in bad faith and does something wrong, it may find that the indemnity does not extend

to cover that action. I defer to your knowledge, Trevor, but I doubt very much whether an insurance policy would cover that either.

Mr Lunn: Would a refusal to allow ESA to be involved in discussions about a particular situation constitute a wilful act? If an action is reasonable, accidental or unintentional, liability is, obviously, fairly clear.

Mr Stewart: I think that it would depend on the circumstances. If, for example, a board of governors said that it had HR expertise on its board, that one of its governors was a HR director with a long experience of employment law and that there was nothing that ESA could tell it that its member could not tell it, that would be perfectly reasonable. If, on the other hand, a board of governors said that none of its members had dealt with HR matters and that, nevertheless, it was refusing to take our advice, that would begin to press against the limits of reasonableness.

Mr Rogers: I want a wee bit of clarification on inspections. Paragraph 62 of the schemes of management states that there is an option to invite other members of an inspection team to a meeting during a formal inspection. Is there also an option to bring in other members of an inspection team at the end of the process?

Mr Price: Absolutely. The scheme can be adapted. I think that it is right to describe it as an option. Is that correct?

Mr Stewart: Yes.

Mr Rogers: Would that be through consultation between the chair and the reporting inspector?

Mr Price: Yes.

The Deputy Chairperson: To be clear: these schemes are drafts and provide models. We will wait to see what OFMDFM and others think about them. They are out there with everybody.

Chris, Paul, Mervyn and Robbie, thank you very much indeed.