



Northern Ireland
Assembly

Committee for Education

OFFICIAL REPORT (Hansard)

Education Bill: Formal Clause-by-clause
Scrutiny

19 March 2013

"Is the Committee content with the clause or schedule as drafted or as amended?"

If there is a consensus that the Committee opposes a clause completely — that is to say that it is not content with the clause and is not prepared to support amendments — the minutes will reflect that the Committee opposes the clause. As before, if there is no consensus on opposition to a clause, the Committee will divide. Should the Committee oppose a clause through division or otherwise, I will ask members whether they wish to register their formal opposition to the clause for Consideration Stage. Were the Committee to do that, the opposition to the clause would be drafted at Consideration Stage. If we do not register opposition, the opposition to the clause may not be debated at Consideration Stage.

When we conclude our decision-making on all the clauses, I will ask members whether they are content with the Bill's long title. Members should note that the long title Question will be the Committee's final decision on the Education Bill. There will be no opportunity to vote on the Bill as a whole. As indicated previously, there will be no opportunity today or tomorrow for briefing from the Department, lengthy questioning or any significant debate by members. Where there is no consensus, we will not debate but simply vote. I am sure that that is as clear as the mud that was on the football and rugby pitches yesterday, when all those teams were playing.

As previously, I ask the Department to join us to answer questions as required during the formal clause-by-clause scrutiny, should anything arise. Chris has just arrived. Perhaps we should clarify one matter before we proceed: will the Committee have sight of any of the Department's amendments prior to the commencement of the formal clause-by-clause scrutiny?

Mr Chris Stewart (Department of Education): Those are with the Minister for his consideration. He has not yet come back to me.

The Chairperson: OK, members; we will commence the formal clause-by-clause scrutiny. I advise members to use a copy of the Bill and the clause-by-clause table, which is in their meeting pack. I am sure that you all know this off by heart, so let us get organised.

Clause 1 (The Education and Skills Authority)

The Chairperson: Clause 1 of the Bill applies schedule 1 and gives the name of the Education and Skills Authority (ESA). The Committee previously informally agreed that it was content with the clause as drafted.

Question, That the Committee is content with the clause, subject to the proposed amendment, put and agreed to.

Clause 1 agreed to.

Clause 2 (Functions and general duty of ESA)

The Chairperson: This clause places a duty on ESA to contribute towards the development of children, young people and the community. ESA must co-ordinate the planning and delivery of schools, educational services and youth services, with a view to promoting the achievement of high standards of educational attainment. ESA must also encourage and facilitate the development of education in Irish-speaking schools.

We had previously obtained legal advice on clause 2(5), relating to Irish-medium education (IME). We have also received legal advice on clause 2(3), which covers ESA's duty to treat schools on the same basis, whether or not their premises are vested by ESA. The Department has responded, indicating that there will be no policy clarity on shared education for some time. The Department previously advised that the Minister is bringing forward an amendment that would replicate the provisions of clause 2(5), which currently apply to Irish-medium education schools, for integrated education.

The Committee had previously reserved its position on this clause, but formally agreed not to support an amendment that was suggested by NIPSA to remove the duty on ESA to promote the spiritual development of children and young people.

Chris, is there an update on clause 2(5) from the Department?

Mr Stewart: To clarify that point, Chairperson, the Minister is considering bringing forward an amendment similar to clause 2(5). He has not yet made a formal decision.

The Chairperson: Do members have any comments in relation to clause 2?

Mr Lunn: I am sorry, Chairperson, I missed your opening remarks. Are we going through this proposed amendment by proposed amendment?

The Chairperson: No.

The Committee Clerk: It is exactly as you said, Chairperson. The Committee has already done that in its informal clause-by-clause consideration. We are now in clause-by-clause consideration to decide whether to amend, yes or no, or whether members are content with a clause, yes or no.

The Chairperson: We should remember that this is the Committee. This is not us speaking on behalf of individual parties. Members should be aware that although we have tried to be as thorough as we possibly can be on this, whether or not the Committee has an agreed position does not in any way preclude parties or individuals from tabling amendments to the Bill.

It would be right to place on record that the DUP members — I speak as a member of that group — will not support clause 2(5).

Mr Rogers: Is it here or later that we will discuss ESA's responsibility to encourage and facilitate faith-based education? Is that later on somewhere?

The Committee Clerk: The clause deals with the general functions and duty of ESA. Therefore, if the member wished to put forward an amendment in relation to that, this is the time to do it.

The Chairperson: Do any members wish to bring forward amendments in relation to clause 2?

Mr Rogers: No.

Mr Lunn: I am sorry; I am still slightly confused about procedure. You have indicated that some members will not support clause 2 because of subsection 2(5). I will not support clause 2 because of another subsection, which does not particularly matter at the moment. Do we take a vote on it?

The Chairperson: May I just clarify whether it is the case that if you do not support clause 2(5) or clause 2-whatever, that means that you are not in favour of the clause?

The Committee Clerk: Chair, do you wish to go into private session to talk about all this?

The Chairperson: Yes; OK.

The sitting was suspended at 9.45 am and resumed at 9.51 am.

Mr Hazzard: Am I right in thinking that, as well as deciding on clauses, we can put down a recommendation in the Bill report or seek an assurance? Shared education and its promotion are referred to throughout the Bill. In advance of the report from the Minister's advisory group, and given that we have no real and agreed definition of "shared" or "integrated", can we recommend or outline something along the lines that the Committee desires to see enhanced collaboration or sharing in the future, when the process is finalised?

The Committee Clerk: Yes, and I am grateful to the member. In addition to amending or opposing a clause or simply voting for it, members can also seek a ministerial assurance. So, you can ask the Minister to say at Consideration Stage, "Yes; this is what this clause means". In addition, the Committee can make a recommendation in its report. The report is never debated but, again, that would clearly signal the Committee's views on, say, something like shared education, if there is indeed an overall Committee view on that. I hope that that is clear.

The Chairperson: OK. So, the Committee Clerk has said that that our report can reflect issues of concern about clause 2 that were raised by Trevor; the DUP's objection to clause 2(5); concerns raised by Sean about faith-based education; and the comments made by Chris Hazzard about seeking the Minister's assurance that further work will be done regarding shared education and collaboration. Is that what we want?

Mr Hazzard: Yes, if something could be done along those lines.

The Committee Clerk: On shared education: is it the general view that the Committee would support the principle that ESA and the Department should have a responsibility to use resources efficiently by encouraging schools to collaborate for the betterment of the educational experience for pupils? Would that be the case?

The Chairperson: Yes.

Mr Kinahan: I would go with that.

The Chairperson: I think that we would agree on that.

The Committee Clerk: Jolly good.

Members indicated assent.

The Committee Clerk: I think that I am clear on Mr Lunn's concern, because he referred to amendment h, and about Mr Rogers's on faith-based education. Just to be clear on clause 2(5) —

Mr Kinahan: I have similar concerns with amendment h.

The Committee Clerk: So, if I understand correctly, is it the case that some members feel that the clause 2(5) provisions would lead to an inequality in education and an unfair advantage for what is always going to be a small sector, whereas other members would take the view that Irish-medium education is a culturally important sector and that failure to support it through the Bill would, in itself, lead to a different kind of inequality? Is that a fair summary of where we are?

The Chairperson: Yes.

The Committee Clerk: Jolly good.

Mr Hazzard: So, we do not vote on that though, do we?

The Committee Clerk: Well, I think that the Committee is deciding, Chair, if I understand correctly —

The Chairperson: I am entirely in your hands. It is whether you want to vote on that or you are content that we leave it as set out in a summary of what the Committee Clerk has said, which would be included in the report.

Mr Kinahan: I think it is too vague to vote on, Chair. I like the approach that you have gone for.

Mr Lunn: Chair, you said some time ago that the DUP would not support clause 2(5). Does that mean that your intention is to attempt to take it out completely?

The Chairperson: It is very clear, on the basis of advice that the Committee has received, that there are serious issues as regards having equality of provision across the piece. My view, and our view, is that clause 2(3) sets out clearly the parameters within which ESA should ensure that schools whose premises are not vested in ESA are treated on the same basis as schools whose premises are vested in ESA.

Mr Lunn: That is not the argument, Chair. I am not trying to get into a detailed argument here, but that is not the argument about clause 2(5). It is not the case that Irish-medium schools are not vested and all the rest are. It is a different argument, and that is why I am a wee bit confused.

The Chairperson: If you go back and read the legal advice that the Committee received, you will see that it sets the context for clause 2(5).

Mr Kinahan: We are considering adding other clauses to that, but I do not want to say what they are today. We will just leave that for the moment?

The Committee Clerk: If members wish to put down amendments in their own right, they can certainly do so at Consideration Stage. However, if they want to get the Committee's support, they need to do that now.

The Chairperson: Clause 3 is ESA to employ all staff of grant-aided schools —

Mr Lunn: Sorry, Chair. What did the Committee decide on clause 2?

The Chairperson: We decided that the report will reflect the issues and concerns expressed by the Committee Clerk. Do you want him to repeat all those again?

The Committee Clerk: The report will indicate the issues that were expressed by members: Mr Lunn, Mr Rogers, Mr Hazzard, etc. However, the Committee has decided not to vote on the clause and to withhold its overall opinion on that clause.

Mr Lunn: It sounds suspiciously like what we did a couple of weeks ago.

The Chairperson: The difference is that that was informal scrutiny and this is formal scrutiny. We have no other opportunity to come back to this after today and tomorrow. We cannot seek any further information. We cannot delay or ask for anything else. So, in a sense, it is make-your-mind-up time. In that process, there may be individuals, parties or whoever who decide not to say anything or do anything.

The huge difficulty and problem that we have is that we have no sight of the amendments from the Department. We have only partial sight of amendments from the Department for Employment and Learning (DEL). We have seen only part of what DEL is proposing in relation to the Bill. Yet, because of the timetable for the process that was set by us and the Assembly, we have to produce a report by 8 April. I reluctantly throw this comment to members. The timetable probably does not allow us to do this, but it is about whether we make any further request for delay. After today, there are no plenaries until 8 April, which is the date that we are due to report. Is that correct, Peter?

The Committee Clerk: Yes, Chair. If you were to seek a further extension, as we did previously, you would have had to do that about two weeks ago so that it could get to the Business Committee and then into plenary. As the Chair said, it is make-your-mind-up time. If I understand correctly, in the absence of departmental amendments and certain clarifications that it sought, the Committee has decided to not make up its mind on the clause but to set down its concerns.

Mr Hazzard: I would like a clarification. I mentioned shared education. Are we requesting an assurance from the Minister about that or will that be a recommendation in the report?

The Committee Clerk: If I understood the member correctly, I thought that he wanted a recommendation in the report.

Mr Hazzard: That is what I was thinking. However, I am open to discussion on what the Committee feels. Shared education in the future is mentioned throughout everybody's submissions. I just thought that a way forward might be to tidy that up into one recommendation.

The Chairperson: Chris, what you are asking is whether we put it in the report or just seek an assurance. The shared education working subgroup is due to report at some stage. Obviously, it is an issue for the Minister and the Department as to how it responds to that. However, if I understand you correctly, you are saying that, in the report, we should ask for an assurance that shared education

will be reflected. The difficulty is that it all depends on the Minister. When the Bill goes from here on 8 April, it basically goes back into the hands of the Department and the Executive, and they will decide on when to bring Consideration Stage to the Assembly.

The Committee Clerk: When to bring Consideration Stage is entirely in the hands of the Department.

The Chairperson: My understanding is that, at that stage, the Department would still be in a position to table its amendments and would probably do so. Although we could certainly come back and look at the amendments, as we will have completed our scrutiny of the Bill, we would not be able to make any formal change to them. It would then be an issue for the House to decide whether it accepts those amendments. Isn't that correct?

The Committee Clerk: The Committee could certainly seek evidence from the Department and, if it wanted to, produce another report on the amendments that we await from the Department. The only thing is that the Department would not be obliged to wait for us to report. When we report on 8 April, we are officially out of the process. It then goes back to the Department, which is in control of when Consideration Stage happens. If you want to produce another 10 reports on the Bill, you could do that. However, the Department does not have to wait. It could go ahead with Consideration Stage. However, if you wished, you could certainly take evidence from the Department, scrutinise those amendments and produce another report.

Mr Kinahan: How long can they delay Consideration Stage?

The Committee Clerk: Until the end of the mandate, and then it falls. That has happened to the Marine Bill.

The Chairperson: I remind those who were not on the previous Education Committee that that is what happened to the previous Education Bill when it left the Committee. I do not want to fill everybody with a sense of optimism.

Members, just so that we are clear, there will be a recommendation in the Committee's report that the Minister and the Department give further consideration to shared education. Are we happy enough with that?

Mr Kinahan: Do we not want to put it more strongly than that?

The Chairperson: In what sense?

Mr Hazzard: The danger is that we all have different definitions of shared education.

The Chairperson: I think that we do.

Mr Hazzard: It is important that we reflect that, in the consultation, there was a desire —

The Chairperson: We will not do it, but I think that if we went round the table, we would hear different views and interpretations. As I have always said, shared education is interpreted by different people in different ways, at different times, in different places; that is the issue. However, there is a general view that shared education, as an aspiration, should be pursued further and elaborated on. Some will call it integrated —

Mr Lunn: No.

The Chairperson: No? There is no point in me trying to explain everybody else's views, but there are different views.

Mr Kinahan: Chair, I wonder whether you should state "especially across sectors" or something, because that adds a different level.

The Chairperson: You would not have shared education within sectors. However, knowing some of the schools, it might not be a bad idea to have shared education within sectors.

Mr Kinahan: You do in some cases.

The Chairperson: We are all big enough to know that when we talk about shared education, we mean across educational boundaries and sectors.

Mr Lunn: Chair, I agree with you. However, since you mentioned it, the word "integrated" has a particular connotation, because there is a model for that. If you use the term "integrating of schools", that is, in a way, the same as "sharing of schools". That is where there is a distinction, in my mind.

The Chairperson: A popular suggestion is that we come back tomorrow with a recommendation that we can sign up to, rather than agreeing on it today. We are taking on board Trevor's comment. OK?

Members indicated assent.

Clause 3 (ESA to employ all staff of grant-aided schools)

The Chairperson: Are we doing all right? Aye, we are doing OK.

Mr Lunn: Good old clause 3.

The Chairperson: Yes, good old clause 3. OK, I remind members that this clause makes ESA the employer of all staff in grant-aided schools. The clause defines the term "submitting authority" in the case of voluntary schools. For example, this clause makes the trustees the submitting authority instead of the board of governors, as is presently the case. The clause requires trustees to consult with the board of governors and allows the board of governors to refer a scheme to a tribunal to test its compatibility with the heads of agreement.

The Department previously advised that the clause cannot be operated owing to contradictions with the heads of agreement. We have written to the Office of the First Minister and deputy First Minister (OFMDFM) and the Department, seeking amendments to the Bill or to the heads of agreement to resolve that problem. No response has been received. From the comments that Chris made, I take it that there are no amendments or anything forthcoming on this.

Mr Stewart: Not as yet, Chair. Discussions are ongoing, as I understand it.

The Chairperson: As the Department has advised, this clause is technically not operable. As the Department has not provided sight of relevant amendments, the Committee could reasonably decline to give its opinion. That has the same knock-on effect that we had with the informal clause-by-clause scrutiny. Clauses 3 right through to 9 deal with issues that are relevant to employment, and there is no agreement on, or sight of, an amendment and there is no indication that one is imminent. I do not speak as one who has any inside or outside track on that issue; I merely reflect what I read as being the case.

I think we are in a situation where we have to offer something. There are opinions, and we have gone through all of them and they are all reflected. The other issue is that members should not be concerned that somehow if they have not said today what has been previously expressed as a concern, it will somehow be read as though you were not raising robustly enough the issues on behalf of whoever it is or whatever sector it is or whatever organisation it is. When people look at this file and see all the evidence, they will be well aware that a huge amount of work has been done but that there remains an issue in problems emanating from and around clause 3.

The Committee Clerk: Just to be clear that I understand correctly, the Committee is not making up its mind on the clause because it has not seen the relevant amendments from the Department and is waiting for the response on this heads of agreement question. It would be helpful if members could indicate an opinion on the clause or the issue generally. Is it the case that some members view the clause as not wrong and feel that there are no contradictions with the heads of agreement, whereas others take the view that there are and that the issue of who is the sole employer is terribly important and has not been satisfactorily resolved or clarified?

The Chairperson: The other issue is that although we understand the concern that some have about the loss of what they view as autonomy, control or the flexibility to be able to do what they have always done, there are others, even in sectors that are of a similar type and nature, who would value

greatly having autonomy and the degree of flexibility to be able to do what others have done. So, we find ourselves with that conundrum. Therein lies the issue and the crux of the problem. If Peter were to reflect that in the way that he outlined, it would give us some sense of direction about people interpreting what they believe the Committee considered when it was looking at these clauses.

Mr Lunn: I am not too clear about how far to go with this. Putting something on the record might even assist people in another place. I do not really care whether ESA is the sole employer of all staff or whether there is a get-out clause for grammar schools and, perhaps, some controlled schools, but it is perfectly obvious that the heads of agreement clash internally with themselves and clash with the Bill. At one point, the Minister said that they do not clash and, at another point, he said that they do. We need clarification. That is the main obstacle that is holding up all these clauses right through to clause 13, never mind clause 9. It is not the case that some of us want to see ESA as the sole employer of all staff or that some of us want all of the grammar schools, if they were already employing their own staff, to be allowed to continue to do so, or whether bigger controlled schools should be put on the same basis as grammar schools. It is not really a matter of that, it is a matter of having a proposal before us that we can look at with some clarity. Given that tomorrow is our last day for scrutiny on this, we are not going to get it, so what else can we do but, once again, reserve our position?

Mr Rogers: I was interested in what you said earlier, Chair. I thought that maybe I missed some clarification when I was not at a meeting or two. We believe that there are contradictions between clause 3 and the heads of agreement and even contradictions within the heads of agreement, and the departmental response to the commission was that the Minister will advise the Committee of his proposals in respect of this clause in due course. I do not know when we got that, but it was quite a while ago. It is very difficult. I will not know what my view is of clause 3 until I see what the Minister is going to say.

The Chairperson: Yes. Any other comments?

Mr Hazzard: The report will reflect both positions and the different interpretations. We talk about shared education and even the word "contradiction". I do not see as big a contradiction as other people might. The delegated autonomy to schools sort of balances it up.

The Committee Clerk: I ask members to look at my issues paper. If I have captured your argument correctly, that is good. If I have not, please let me know. It is not my intention to misrepresent the argument.

The Chairperson: Members, because we cannot comment on clause 3, does that bring us to the place where we cannot make comment on clauses 4, 5, 6, 7, 8 and 9, because they all have relevance to and are interrelated with clause 3?

Mr Lunn: Yes, but I am not clear why you stopped at clause 9.

The Chairperson: I think because it may be that we had — did we not agree clause 10?

The Committee Clerk: The Committee informally agreed that it was content with clause 10 as drafted. Clauses 3 to 9 specifically reference employment schemes. Clause 3 actually references the heads of agreement itself, so it is technically inoperable, the Committee was told. Clauses 3 to 9 all reference employment schemes and are all about employment schemes. Clause 10 is not about employment schemes. It is about the transfer of staff.

Mr Lunn: It is about the transferring to ESA of staff employed by boards of governors. In the opinion of whoever wrote the heads of agreement, clause 10(c) is not going to happen. That is one of the most direct contradictions in the whole situation, and it feeds through to — I am not too sure about clause 11, but certainly clauses 12 and 13. Those clauses are on salary payments and modification of employment law, which is what we are talking about.

The Chairperson: So that we are clear, are we saying that, in our not having an opinion, the reasons that Peter has set out on clause 3 extend to clause 13? All of that relates to employment, to a lesser or greater degree.

The Committee Clerk: Perhaps the Committee might want to take the Department's view on that, particularly on clause 11. All that clause 11 does is substitute ESA for the boards in employing peripatetic teachers.

Mr Stewart: I can well understand members wishing to treat clauses 3 to 10 and 13 as a block, but I think that it would be possible to deal with clauses 11 and 12, which, I think, are clearly related to the other employment clauses, but could stand or fall as they are, without being directly affected by whatever members or Ministers might feel about the other employment clauses.

Mr Lunn: I am looking at clause 12 on that basis. The narrative at the top says that clause 12 provides that, while ESA will be the employer of all staff — that is what is under dispute.

The Chairperson: Sorry, where are you at?

Mr Lunn: Page 23 of our notes on the file. ESA will be an employer of all staff, but certain schools that currently operate their own payment schemes may continue to do so. I know that that is not quite the same thing as being their own employer, but I still think that it is confusing enough for us to try to take a view on it.

The Chairperson: That is a valid argument.

Mr Kinahan: Do we not, through this, still have vagueness on the legal interpretation of the Governing Bodies Association (GBA) amendments? We know the advice that we had from our lawyer, but, obviously, it is different from the GBA lawyer's advice. That is not clear.

The Committee Clerk: If members are waiting for lawyers to agree, they might have to wait for a long time.

The Chairperson: Therein lies part of the reason why this has gone on for the past six years.

The Committee Clerk: At this point, members will have to make a judgement. They have had the advice that the Assembly got and the advice that came from GBA, and they will have to decide accordingly.

The Chairperson: On the basis of Trevor's comments, and taking into account what Chris said, is it the Committee's view that we cannot express an opinion on clause 3 to clause 13, including clause 15 — was it clause 15 that you made reference to, Chris?

Mr Stewart: Clause 15 is a perfectly innocent clause.

The Chairperson: I could not understand why you said clause 15.

Mr Stewart: I said clause 13.

The Chairperson: My apologies; I thought it was clause 15.

Mr Stewart: Members may well wish to treat clauses 3 to 13 as a block; I can understand members wishing to do so.

The Chairperson: Even clause 11, which is in reference to peripatetic teachers?

Mr Stewart: I think that there is an argument for treating clause 11 differently, but members may feel otherwise.

The Chairperson: The Committee previously and formally agreed that it was content with the clause as drafted. At that time, members also agreed to defer consideration of the issues raised by Comhairle na Gaelscolaíochta on the separate legal status of IME schools until they looked at clause 63. I think there was a general agreement on clause 11.

Mr Lunn: I do not mind whether we agree clause 11 or not at this stage, but I am reading that the Committee informally agreed to reserve its position on that clause because it was waiting for a response from the Department on the availability of Irish-medium teachers. We seem to have got that today, but we have only just got it today.

The Chairperson: Then I think what we will do, so that we are not in any way creating an issue — sorry, Chris, did you want to come in?

Mr Hazzard: I am thinking along the same lines as Trevor. I thought that we had reserved our judgement until we got this information from the Department, and we have seen that information today. I think that that backs up some of the arguments that we made the last time.

The Chairperson: Members, are we saying that we will reserve an opinion on clauses 3 to 13 inclusive, so that we get an agreement on this?

Members indicated assent.

The Committee Clerk: Just to be clear, the Committee has got its opinion. What it is saying is that it cannot make up its mind or come to a decision because of the absence of clarifications, heads of agreement, etc.

The Chairperson: Yes.

Clause 14 (ESA to provide or secure provision of training and advisory and support services for schools)

The Chairperson: Clause 14 places a duty on ESA to provide or secure training for the boards of governors and staff of grant-aided schools. The Committee previously noted suggested amendments relating to shared education. The Department advised that there will be no policy clarity on shared education for some time. The Committee also sought a response from the Department on the policy position underpinning this clause. That response has not been received. Any comments with regard to clause 14? Are we prepared to wait until we clarify that tomorrow?

The Committee Clerk: I think that is what we are going to do. We are going to have that recommendation to come. If that covers it, I suggest that we agree or not agree the clause.

The Chairperson: Agreed?

Mr Rogers: I have two points. You would think that maximised delegated autonomy would mean that schools would have an option to buy in support and that sort of thing as well. I am a wee bit confused about the Department's response to the National Association of Head Teachers on page 28:

"The suggested change is contrary to the Minister's policy (which is for a 'mixed economy' of provision)."

My interpretation of "mixed economy of provision" would mean that if you could get better staff development or whatever outside the loop, you would go for it. There seems to be a contradiction in that response.

My other point goes back to the responsibility to develop and enhance faith-based education. If we are going to do that, there is a need for curriculum support there as well.

The Chairperson: Have you any suggestions in relation to amendments, Sean?

Mr Rogers: No. Leave it with me.

The Chairperson: That is OK. Is the Committee content, subject to consequential amendments, with clause 14 as drafted? When we say consequential amendments, we are not referring to amendments that may be drafted by individuals or parties. We are referring to consequential amendments that may come as a result of a change in some other piece of the legislation.

The Committee Clerk: That is right, Chair. If you got to clause 60, or whatever, and the Committee agreed to make an amendment that had consequences for earlier clauses, it would be silly to rescind your decision. If you do it subject to consequential amendment, you cover yourself for that but only that.

Mr Kinahan: Are you are saying that if we have a possible amendment in mind, we should signal it?

The Chairperson: Yes, that is entirely up to individuals. Is the Committee content with clause 14?

Members indicated assent.

Clause 15 (ESA to provide library services to grant-aided schools and other educational establishments)

The Chairperson: This clause requires ESA, in line with departmental arrangements, to provide library services in grant-aided schools and other educational establishments. The Committee previously informally agreed that it was content with the clause as drafted. So, no comment? Is the Committee content, subject to consequential amendment, with clause 15 as drafted?

Members indicated assent.

Clause 16 (ESA to secure provision of educational and youth services and facilities)

The Chairperson: The clause places a duty on ESA to provide adequate facilities for educational and youth services. It allows ESA to organise activities or make grants available, etc, in support of that. Additionally, the clause permits ESA to make bylaws in respect of those facilities. The Committee previously informally agreed that it was content with the clause as drafted. Is the Committee content with clause 16 as drafted, subject to consequential amendment? Trevor?

Mr Lunn: Actually, I was expecting Chris to say something about the shared education suggestion. Is this one of the clauses where you think all that would be —

Mr Hazzard: As I said earlier, I think it tidies up the whole way throughout the Bill.

The Committee Clerk: So, to clarify, the Committee has agreed to not amend the Bill in respect of shared education, but to put down a recommendation, the wording of which will appear tomorrow, encouraging the Department and ESA to facilitate efficient use of resources and betterment of educational experience for children by collaboration.

Mr Hazzard: Something that reflects the mood that has been displayed.

The Chairperson: OK. Agreed?

Members indicated assent.

Clause 17 (ESA to pay capital grants to voluntary and grant-maintained integrated schools)

The Chairperson: This clause transfers the Department's powers to pay capital grants to voluntary and grant-maintained integrated schools to ESA. The Committee previously informally agreed that it was content with the clause as drafted. Is the Committee content, subject to consequential amendment, with clause 17 as drafted?

Members indicated assent.

Clause 18 (Establishment of controlled schools)

The Chairperson: This clause gives ESA the power to establish controlled schools, nursery, primary, secondary or special schools. ESA can also establish nursery classes in controlled schools that are not nursery schools. The Committee informally agreed to support the Transferor Representative Council's (TRC) proposed amendment, which would require ESA to consult with the relevant sectoral

body before establishing a new controlled school. We had reserved a position on the clause. Are we now saying that the Committee is content to support the TRC's proposed amendment, which would require ESA to consult with the relevant sectoral body before establishing a new controlled school?

Members indicated assent.

The Chairperson: So is the Committee happy with the clause as amended? We have not seen a draft of —

The Committee Clerk: No, but you are agreeing in principle to the amendment.

The Chairperson: Is there a requirement on us to have the Bill Office look at that? Whose responsibility is it to bring that forward? Is it the Department's?

The Committee Clerk: After this meeting, I will write to the Department indicating that the Committee is going to support the amendment. Maybe the Department will be kind to us and it will support the amendment, too, and get the drafting done. Is it does not, I will go to the Bill Office and get it drafted.

Mr Lunn: I have some reservation about that in light of the Northern Ireland Council for Integrated Education's (NICIE) comment. It has quite a bit to say about it. On page 34 the departmental response sets out the process, and basically:

"If the proposal is not in conformity with the plan, then ESA must reject it. If the proposal is in conformity with the plan, then the usual development proposal process will apply, culminating in a Ministerial decision."

The trouble is that some of those ministerial decisions over the years have militated against the establishment of a new school because it was integrated. The only reason given for not allowing the school to be established was because it might upset the balance of some non-integrated schools in the same area or beyond. That is NICIE's problem here. I notice on page 35 that NICIE suggested a mechanism for the opening of new integrated schools. That is already provided for in existing legislation, but, even so, we are not satisfied — I said "we" there — that the existing legislation is strong enough, and this might be the opportunity to do something about that. I am not sure what Chris thinks.

The Chairperson: OK. Is that a slightly different argument from the issue raised by TRC, which was formally or informally agreed? TRC's issue was around the power to consult with the relevant sectoral body. Herein lies part of the difficulty, because that would — maybe not intended, but probably where it goes — determine who is the sectoral body for a controlled integrated school. At this minute in time, I assume that NICIE takes the view that it represents controlled integrated schools. I am not aware of the controlled sectoral body's view as to where it believes controlled integrated schools should sit. However, I would hazard a guess that it would be within the controlled sectoral body, the same as special schools, controlled Irish-medium schools or any school that is deemed to be under the remit of the controlled sector. I assume that it probably wants to have that under its domain. Chris, do you want to comment on that?

Mr Stewart: Yes, I will perhaps respond to a couple of points. On that last issue, we absolutely recognise that there will be schools that may have business with or an allegiance to more than one sectoral body, and you gave an example of that. We do not see that as a particular difficulty. It was never the policy intention that sectoral bodies would each have a list of schools that they would own or have any sort of exclusive rights to. The Department will recognise sectoral bodies on the basis and quality of what they do. We think that it would be perfectly legitimate for a controlled integrated school to want to have a relationship with the controlled sectoral body and, indeed, with NICIE, and to expect both bodies to represent certain interests.

The Minister has some sympathy with the suggestion that there should be consultation with the relevant sectoral body before a proposal for a new controlled school is brought forward. Indeed, he is considering an amendment that would introduce a similar requirement for all types of schools, so that, before any development proposal came forward, there would be a requirement for consultation with the relevant sectoral body or bodies. In this case, if there were a suggestion for a new controlled integrated school, and given that there will be a sectoral body for the integrated sector and a

controlled sectoral body, it would seem logical to consult both sectoral bodies and to consider carefully what both say.

The Chairperson: I appreciate that, Chris, but I suspect that what Trevor is saying is that the existing power to establish a new controlled integrated school is not robust enough, although the Department has given its view on the clause. Just let me go back to this: are we still content with the TRC amendment, which would amend the clause to require ESA to consult with the relevant sectoral body before establishing a controlled school?

Mr Kinahan: Should we make it "relevant sectoral bodies", after what you have said?

The Chairperson: Yes. "Bodies" would cover what Chris said in that, logically, if there is an integrated body and a controlled sectoral body, both would be consulted.

Mr Rogers: There is nearly an assumption here that there could be other sectoral bodies. I think that the Minister's position is that there will not be any other than what he has set out at the minute.

The Chairperson: Although "bodies" covers the eventuality of a change. I think that that is what we are trying to cover.

Mr Stewart: There is a way of wording that so that we do not exclude any body that is in existence and recognised but do so without tying the Minister's hands on what bodies he might recognise in the future.

Mr Rogers: That is fine.

Mr Lunn: I go back to the departmental response to NICIE. It sets out the power to establish new controlled integrated schools. That is fair enough. The response goes on to state:

"Development proposals for other types of schools will be subject to the same test, as would proposals to transform schools to GMI status".

Does that not fly in the face of the existing rule that a certain percentage of parents can request the process to transform to grant-maintained integrated to kick-start the process and, eventually, that a majority of parents have to vote in favour of it? This seems to say that, even then, that might fall foul of the area plan in some way. I find that astonishing. If an existing school wants to change its status and that is the parental preference, which is referred to elsewhere, what on earth could be in the area plan to stop that?

Mr Stewart: If, for example, the area plan deemed that the school was not sustainable.

Mr Lunn: That is a different argument. That could apply to any school.

Mr Stewart: As, indeed, the area plan would. Trevor has very neatly and accurately summarised the overall effect of the provisions, which is that any — if I may use the phrase in its broadest sense — development proposal, whether for a new school, transformation to a different status or other significant change to a school, would pass through or not pass through a filter of the area plan, if one is there. That is the same for all schools in all sectors and for all types of proposals. Members may take a view on whether that is the right policy approach, but it is consistent across the Bill.

The Chairperson: The 1986 legislation is not being repealed.

Mr Stewart: The relevant article — article 14 — is being replaced and re-enacted in schedule 7 to the Bill.

The Chairperson: Article 14 of the 1986 legislation is about development proposals.

Mr Stewart: Yes. There are some amendments to the articles in the 1989 order that are referred to in the departmental response. Articles 71 and 92 will, as Trevor said, make them subject to the test against the area plan in each case. It does not stop parents or a board of governors from initiating the

ballot on transformation, but it makes the taking forward of any proposal for transformation subject to consideration against the area plan.

Mr Kinahan: I go back to the idea in Crumlin of a shared maintained school. Are we, by discussing the clause in relation to controlled schools only, shutting the doors on any new form of combination of school?

Mr Stewart: No, but if we want to create new types of schools, that would require specific provision. It is not generally possible to have a hybrid between any of the management types. They are mutually exclusive in the governance provisions in particular. However, as I have said to a number of stakeholders who have been interested in exploring new options for delivery on the ground, the maintained model is extremely flexible. We tend to associate the maintained model with Catholic education simply because the greater number of maintained schools are Catholic. Irish-medium schools are maintained, and a small number of Protestant maintained schools are owned by the Church of Ireland. It is possible to have joint ownership and joint-faith schools that are owned by more than one Church using the maintained management model. It is extremely flexible.

Mr Lunn: We have probably said it all. NICIE has only sought clarification; it has not suggested an amendment. That is a valid clarification that it is looking for, because the Bill seems to introduce the situation where, on the basis of the area plan, the Minister might somehow have the power to reject a perfectly innocent proposal for a school to transform to integrated status, supported by whatever percentage of parents at the school, when the school is otherwise viable in budget, numbers, quality of education and all the rest of it. That is not my understanding of what is intended in the present process.

The Chairperson: I will try to bring all that together. I assume, from what the Department is saying about the Minister's view, that we support the TRC amendment. However, reservation is being expressed by a member about the existing powers to establish a new controlled integrated school in the light of area planning.

Mr Stewart: If members share Trevor's concerns, you will want to look very closely at the amendments in schedule 7 to article 71 and article 92 of the 1989 order. Those amendments will give effect to the matters that Trevor has raised concerns about. If that were the Committee's position, you might wish to consider rejecting the amendments in schedule 7.

The Chairperson: We will not get to schedule 7 until tomorrow. I take it, Chris, that, in relation to article 14, there are additional requirements where an area education plan is in force.

Mr Stewart: Yes. There are a number of particular amendments. As we said, there are particular provisions for establishing integrated schools, and there are particular amendments to those provisions to bring them into line with other types of schools so that they will be dealt with under area planning. If it is the Committee's view that they should not be dealt with in that way, you will want to consider changes to those amendments or perhaps even rejecting them completely.

The Chairperson: We could accept the clause as amended but make the statement that we will look at the issues that are relevant to that when we deal with schedule 7 tomorrow. Happy enough?

Members indicated assent.

Clause 19 (Responsibilities of ESA in relation to controlled schools)

The Chairperson: Clause 19 makes ESA responsible for the maintenance of school premises, providing and replacing equipment, employing all staff, and meeting the cost of all such other things as may be necessary for carrying out the functions of a controlled school. There are suggested amendments about shared education. The Department advised that there will be no problem in that regard. However, we have covered that in what we will bring to the Committee tomorrow. Is the Committee content, subject to a consequential amendment, with clause 19 as drafted?

Mr Kinahan: Is there no way of putting a time frame on it so that decisions are made quickly? Is that outside the Bill?

The Chairperson: Correct me if I am wrong, Chris, but this is another one that transfers what is currently the responsibility of an education and library board (ELB) into the hands of ESA.

Mr Stewart: There is a wee bit more to it than that, Chair. It is creating a quite different relationship between ESA and a controlled school than the current relationship between a controlled school and an education and library board. Members may feel that there is a ring of familiarity around some of the wording. That is because it is very similar to the current provision on maintained schools. The duties that ESA will have in relation to controlled schools are very similar to the duties that an education and library board currently has in relation to maintained schools. In that sense, it is a transfer of a function, but it is applying it to a different set of schools.

The Chairperson: It would be difficult to put a time frame on it. I assume that the Department would say that it is an operational issue that will be subject to individual schools rather than generic for the controlled sector.

Mr Stewart: It would be very unusual to try to specify a time frame for that sort of operational decision. If members were minded to consider that, I draw your attention to the fact that there will be a similar duty on ESA in relation to maintained schools. Therefore, you would perhaps be advised to think about that provision as well as this one.

Mr Lunn: Clause 19(c) puts a responsibility on ESA for:

"employing, in accordance with section 3, all teachers and other staff".

You are back to section 3 again.

The Chairperson: Should that read "clause 3" instead of "section 3"?

Mr Stewart: No. We refer to clauses in the Bill. They are clauses at present. Because the word sits in the body of what is currently a clause, it refers correctly to a "section", which is what it would be as and when the Bill is passed.

Mr Lunn: It may need to be amended in light of what is happening in other places.

The Chairperson: Controlled schools are currently employed by the boards.

Mr Lunn: Controlled schools are making a determined bid to get the same autonomy as voluntary grammar schools.

The Chairperson: Some are.

OK. Are we saying that we have to put clause 19 in the same place as clauses 3 to 13?

Mr Lunn: That was my suggestion, Chairman.

The Chairperson: Are we agreed?

Members indicated assent.

The Chairperson: The Committee Clerk says that to try to cover some of the issues that were raised about a timescale, we could put a recommendation in the report to the Assembly that a review is carried out, within a number of years, of how it has operated in meeting its provisions under that particular responsibility. We could do that. Whether it would have much clout is another thing. At the end of the day, this would be how it was passed in the legislation. I suspect that if ESA were to come into operation, we would all want to see a review of how it has functioned and performed in a very short period of time, not just with regard to controlled schools specifically, but right across the piece. Are you happy to leave it as it is, members?

Members indicated assent.

Mr Lunn: So, what do we do?

The Chairperson: We are not recommending anything other than that clause 19 is now with clauses 3 to 13. We will leave it as it is. OK?

Clause 20 (ESA to contract for certain works)

The Chairperson: Clause 20 gives ESA the power to enter into contracts for the provision or alteration of school premises. The contracts may be public-private partnerships or traditional procurement contracts. However, the contract is between ESA and the contractor or may be between ESA and the trustees or board of governors of a voluntary or grant-maintained integrated school. The Committee previously reserved its position on the clause. Are there any comments?

Mr Kinahan: It is the same as the last one.

The Chairperson: I think that I remember that the Department made the comment at that stage that it was a permissive clause, although I think that some concern was expressed about contracts. The comment by GBA states:

"Clause 20(1) should be amended to remove ESA's blanket authority to enter into contracts relating to the provision or alteration of premises which are not vested in ESA."

The Department's response is:

"Any contract let by ESA would, of course, require the consent of the owner of the school. This is already the case without amendment."

"The proposed amendment is technically flawed, as some schools are not vested in boards of governors."

Is the Committee content to agree the clause, subject to consequential amendments and on the understanding that this is a permissive role of ESA rather than one that is seen by others as allowing it to do something that it would not be able to do at this time and even after its inception? By that, I mean the owners of the school. I think that that is what is set out in the Department's comment:

"Any contract let by ESA would, of course, require the consent of the owner of the school. This is already the case without amendment."

Mr Stewart: That is correct. We do not feel that the clause would give ESA the power to carry out capital works against the wishes of a school. Some stakeholders may ask why, if that is the case, it does not say so in the legislation. We simply never would have conceived of such a situation arising. I have to say that I think that the concern raised by stakeholders — the notion that ESA would somehow inflict upon a school some capital work against its wishes — is bizarre. It is more often the case that we are criticised for not carrying out or not providing for capital works. The notion that we would somehow go in and build a new school with malice aforethought is not something that would have occurred to us.

The Chairperson: I know that this goes back to something that we have dealt with, but ESA would have that power in relation to a controlled school.

Mr Stewart: As the owner of the premises.

The Chairperson: As the owner, as is currently the case with ELBs. ELBs currently have that power. Do ELBs undertake the contracts on behalf of controlled schools?

Mr Stewart: They would do, yes. However, even there, I suppose that it is technically possible that ESA could let a contract to do something against the wishes of the board of governors of a school, but that would have had to be subject to a development proposal and consideration against the area plan.

The Chairperson: The question is whether that brings us into contradiction with clause 2(3), which states:

"In exercising its duty under subsection (2) in relation to schools, ESA shall ensure that schools whose premises are not vested in ESA are treated on the same basis as schools whose premises are vested in ESA."

Mr Stewart: I do not believe that it does.

The Chairperson: There are those who would argue that it does.

Mr Stewart: Yes, there are those who would argue that.

Mr Lunn: Is the voluntary category "B" that the Royal Belfast Academical Institution (RBAI) refers to defined somewhere?

Mr Stewart: It is in the 1986 order. It is not quite defined in those terms. Those schools are almost defined by the absence of any reference to them. Category B schools have no agreement with the Department. For the other schools that have such an agreement, the nature of it is that their boards of governors are constituted in a particular way. It gives nomination rights to the Department for a certain proportion of the board of governors in return for being eligible for capital grant aid. Those schools have decided not to enter into such an agreement; therefore, the Department has no nomination rights for their boards of governors, and they are not eligible for grant aid. They can change their mind on that at any stage and become eligible. However, the notion that any school would be subject to or have inflicted upon it either capital development or grant aid is simply not the case. That will not happen.

Mr Lunn: So, because they are not set up in a way that provides for capital grant funding —

Mr Stewart: That is because it is their choice.

Mr Lunn: Are they entitled to ask for it?

Mr Stewart: They are entitled to ask for it, but they would have to enter into an agreement with the Department and drop out of category B. This is a choice that those schools have made. It is, if you like, the purest form of the voluntary model. They wish to have a relationship with the Department, the education and library boards and, in due course, ESA that does not involve any capital funding. Of course, they receive revenue funding, as other schools do. However, they prefer to have that — I use the word advisedly — independence from educational authorities.

Mr Lunn: If the scheme of management and scheme of employment situation goes against the perceived wishes of the grammar schools, they will be drawn into the system to some extent anyway.

Mr Stewart: They will, in that sense, yes, but not in relation to capital funding. If those schools wish to continue to be solely responsible for their own capital development, it is absolutely their right to do so.

Mr Lunn: You say that it is bizarre, but I can sort of understand where GBA and RBAI are coming from. It is another one of those situations where it does not need to be written into the Bill but what harm would it do? If everybody is content, fair enough. I note that we informally agreed to reserve our position the last time. We probably got the same advice.

The Chairperson: OK, members. We are not content that there is agreement on clause 20. Is that the view of all members?

Mr Kinahan: Would you say that again?

The Chairperson: Are we agreeing to clause 20 as set out?

Mr Lunn: Is it one of those situations where, as Chris suggested, or perhaps you did earlier on, the Minister might be asked to make a statement about it?

The Chairperson: If members wish that that should be the case, we could reflect that in our report.

The Committee Clerk: Just to be clear, Chair, what assurance would members like to have from the Minister?

Mr Lunn: It would be helpful to both bodies that clearly have a concern, even if it is unfounded, were the Minister to reiterate what is in the departmental response. That is an internal response. It would be helpful if he said it during the passage of the Bill at some stage. We have already said that there may be situations where we would like the Minister to clarify something.

The Chairperson: We are seeking ministerial assurance. On that basis, we will agree clause 20.

Members indicated assent.

The Chairperson: Thanks for that, Trevor.

Clause 21 (ESA to pay superannuation benefits of teachers)

The Chairperson: Clause 21 transfers responsibility for the payment of teachers' pensions benefits from the Department to ESA. The Committee informally agreed that it was content with the clause as drafted.

Question, That the Committee is content with the clause, subject to the proposed amendment, put and agreed to.

Clause 21 agreed to.

Clause 22 (Ancillary powers of ESA)

The Chairperson: Clause 22 allows ESA, subject to other statutory provisions, to do anything that appears to it to be conducive or incidental to the discharge of its functions. The Committee previously noted the Department's response, comparing ESA's powers with those of the Charities Commission.

The Committee previously reserved its position. I think that it was probably around the wording of clause 22(1):

"Except as otherwise provided by any statutory provision, ESA may do anything that appears".

A number of concerns were raised around the phraseology "may do anything". Some suggested an amendment with the words "with departmental approval". Others said that if we did not want ESA to do something, would we want the Department to be doing it? It is an out of the frying pan and into the fire situation.

I took a note at the time, in the margin of my well-worn copy of the Bill, which is probably a comment from Chris. It says "cannot invent new functions". That is part of what is being alluded to here, although I think that some members are still concerned about the power of clause 22.

Do members have any comments? I remind members that we previously reserved our position on this clause. You will see that a number of comments were made by different bodies. The Irish National Teachers' Organisation said that the Bill should be amended to include clear guidelines as to the limits of the proposed increased autonomy for schools and that those limits should make it impossible for the free school, academy and chartered schools variants to come into being. NICIE said the opposite.

Mr Kinahan: Will you clarify what you were saying just now about functions?

The Chairperson: I am trying to reflect the concerns raised. Clause 22 states:

"Except as otherwise provided by any statutory provision, ESA may do anything".

Some suggested that the words "with departmental approval" should follow "may do". However, that raises the concern that we would give both organisations, the Department and ESA, too much power. The point was made by Chris, at the time, that this does not mean that ESA could create or invent new functions.

Mr Stewart: Chair, that is a core point. The Library Authority has an identically worded power. The core business of the Library Authority is to provide library services. So it can do anything "conducive or incidental" to the running of library services. ESA, if given this power, would operate under the same stricture. It could do anything incidental or conducive to its other functions, such as approving employment schemes, approving schemes of management, delivering the schools library service, providing support services to schools and carrying out area planning. However, it could not, without the approval of the Assembly, take on additional statutory functions.

The Chairperson: So it cannot take on additional functions without the consent of the Assembly.

Mr Stewart: Even "consent", or my use of the word "approval", is wrong. The Assembly would have to decide to legislate for such an occurrence. It is not that ESA could do so and then ask permission, or even seek forgiveness. The statutory functions of ESA are laid down in legislation, and only the Assembly can change those.

The Chairperson: Although the clause states:

"Except as otherwise provided by any statutory provision, ESA may do anything".

Mr Stewart: Again, Chair, that is a qualification. It means that ESA could not take unto itself functions that are assigned elsewhere in legislation.

Mr Kinahan: The Minister or the Department could do so.

Mr Stewart: The Minister could seek to legislate at any time, but that would go through the normal legislative process. I really cannot overemphasise that this is a standard provision that legislative counsel would insert, even without being asked, into any draft Bill to establish a new non-departmental public body.

Mr Kinahan: At our previous meeting, I asked for examples, and you gave those of the Charities Bill and Libraries Bill. Do any other Bills contain a similar clause but one that has had further checks and balances placed on it?

Mr Stewart: Not that I am aware of. I have never before encountered this sort of concern about that sort of clause.

The Chairperson: Let me put this as a suggestion of what we could agree, members. I take the point that Chris is making, and I reiterate that we respect the advice given to the Committee and the manner in which Chris has always, to the best of his ability, given the Department's views. The way in which we have been informed is a given. Sometimes, however, that does not dilute people's concerns. Is it possible that we could amend clause 22 to take out everything after "may do" and reiterate what is in (a), (b), (c), (d) and (e)? We could take out the part that is seen to be the most difficult for people to get their head around and not include:

"may do anything that appears to it to be conducive or incidental to the discharge of its functions."

If we just take that out, it would read:

"Except as otherwise provided by any statutory provision, ESA may

(a) enter into agreements;

(b) subject to Article 106 of the 1986 Order, acquire or dispose of property;

(c) subject to the approval of the Department, form bodies corporate or acquire or dispose of interests in bodies corporate;

(d) carry out, or commission or assist in the carrying out of, research;

(e) co-operate with, or provide advice to, other bodies established by or under a statutory provision."

Would that help to provide at least some satisfaction that we are not giving ESA a blank cheque? When people see the phrase "do anything", you can imagine the headlines about us creating an organisation that is Pol Pot for the 21st century.

Mr Lunn: OFMDFM. *[Laughter.]*

The Chairperson: I could not possibly comment on whether there is a comparison.

Mr Stewart: I must say, Chair, that is not one of the more flattering comparisons. *[Laughter.]*

The Chairperson: No, it is not.

Mr Stewart: Chair, may I make a suggestion? I understand the thrust of what you suggest, and that would certainly be technically possible as an amendment. That would then put the onus on the Department. If there is anything that we think ought to be on the list of things that ESA can specifically do, we should, of course, put that in. If you are minded to move in that direction, members may want to consider giving the Department the power to modify clause 22 by order subject to affirmative resolution. The reason for suggesting that is this: if, at some point in the future, we think of something that needs to be added to the list and do not have such a modifying power, we would need primary legislation, perhaps to allow ESA to sign a contract for its headquarters' catering arrangements.

Miss M McIlveen: I agree with your comments, Chair. I am just concerned by what Chris said about our ending up with an amended clause that is amended just for the optics but does not really alter the original clause.

Mr Stewart: I would reassure Michelle by saying that the effect would be profound. It would mean that rather than a power to do anything, however qualified, ESA would have a power to do a specific list of things. I am suggesting that you may consider a power for the Department to add to that list. However, even that power is qualified by the requirement of the affirmative Assembly control procedure for there to be a vote in the Assembly in favour of such change before the Department could add to the list.

The Chairperson: I will just try to clarify that. Under the current power of direction — the infamous article 101 — if the Department wished to direct a board to do a, b or c, it could do so.

Mr Stewart: It could direct a board in the discharge of its functions but could not use that power to create additional functions.

The Chairperson: Right, and this would be the same. However, you are saying that if the Department wanted to create a new function, and we were minded to take this element out and put in a new paragraph (f), that new paragraph would allow the Department to give direction but subject to Assembly control.

Mr Stewart: I think that it is possible to do that without departing from the fundamental constitutional position, which is that a body such as ESA should not have any statutory functions other than those assigned to it by the Assembly.

Mr Kinahan: I like the amendment that limits the functions to a list. I wonder whether there is another way of looking at trying to alter the phrase "may do anything".

The Chairperson: I also take Michelle's point. Is there a halfway house through creating paragraph (f)? Clause 22 would then read:

"Except as otherwise provided by any statutory provision, ESA may".

That would be followed by paragraphs (a), (b), (c), (d) and (e). Finally, (f) would read:

"or appears to be conducive or incidental to the discharge of its functions."

However, would we, having simply taken out the words "may do anything", still be in the same place?

Mr Stewart: That might give rise to Michelle's concern because I think that it would be just the same again.

Miss M McIlveen: Maybe I am just overly suspicious.

The Chairperson: I would never have picked that up.

Miss M McIlveen: Will you come back with an alternative so that we can look at it again?

Mr Stewart: I can put this point to the Minister, but it is certainly technically possible to restrict the clause from its current provisions so that ESA is entitled to do things that are on a list in the clause. You could stop at that point. However, I suggest that you may also wish to consider a power for the Department to add to the list but subject to the stronger of the Assembly control mechanisms. You might expect someone in my position to suggest that as a matter of administrative convenience because, if the need to change the list were to arise without our having such a power, the Minister of the day would have to bring primary legislation back to the Floor of the Assembly simply to add to a list of administrative functions that a body might do.

Mr Lunn: I have listened to all of this, and I cannot help thinking that if it were left as a list, something not on the list would nearly be bound to pop up.

Mr Stewart: Precisely.

Mr Lunn: What I do not like about the clause is the fact that the very first line states that ESA can "do anything" it likes — even start a world war.

Mr Stewart: That does not currently feature in the business case. *[Laughter.]*

Mr Lunn: That goes back to what Michelle said. It might be worthwhile considering adding a paragraph (f) that encapsulated something reasonably vague just to allow for what you might call minor and consequential matters.

Miss M McIlveen: If it is vague, are you not going back to the situation in which the Department and ESA could do anything?

Mr Lunn: It depends how you word it.

Miss M McIlveen: It would then be ambiguous, so ESA would be able to —

Mr Lunn: Paragraph (f) could state that ESA could take actions "conducive or incidental" to the discharge of its functions. It would not state that ESA could do anything. Alternatively, it could state that ESA could take actions that are "clearly conducive or incidental." There are different ways to put a few words together.

Mr Stewart: It is possible to amend the clause or draft a different clause that avoids the particularly frightening pair of words "do anything", but the net effect would be the same. The Assembly will have to decide whether it wishes ESA to have a power that is limited to a specified list or a power that has some form of catch-all in it, however it is worded. It is not difficult to make the cosmetic change to take away the particularly scary form of words, but the real decision is whether you leave a catch-all or not.

Miss M McIlveen: By having a catch-all, we are back to the same situation, which means that any change is really for the optics. I think that we have to be careful. I would like to see the alternative form of words and then make a decision.

Mr Kinahan: With negative resolution.

The Committee Clerk: With affirmative resolution. If I have understood correctly, members would like to park clause 22 for today and come back to it. You want to consider an amendment that would take out the words after "ESA may" up to "(a) enter into agreements" and add a line at the end of the clause that states:

"The Department may, subject to order, allow ESA to undertake other functions"

That would, however, be subject to —

Miss M McIlveen: I would be concerned about that line.

The Committee Clerk: Yes, but it would be subject to affirmative resolution, so the Assembly would have its say, and that would strike the balance that you want. Members feel that it is a balance between ESA having the power to be able to run its organisation and having Assembly controls that prevent ESA from being able to "do anything", even if it appears to be conducive or incidental to the discharge of its functions.

I will speak to the Bill Office and have that tomorrow, I hope.

Mr Kinahan: How long does affirmative resolution take to get through?

The Committee Clerk: The statutory rule takes a couple of weeks, but it automatically goes to the Assembly for debate and a vote.

Mr Rogers: My question is basically on the same point. Whatever way the words are reworked, the reworking needs to reduce ambiguity and suspicion. No matter who you talk to, the phrase that jumps out is that ESA "may do anything" it likes. Along with that reworking of words, maybe we should have a ministerial assurance about it.

The Chairperson: Some would argue that —

Mr Craig: No comment.

The Chairperson: We have had a lot of those assurances in the past, across the piece. So are we happy to park clause 22?

Members indicated assent.

Clause 23 (Power of ESA to undertake commercial activities)

The Chairperson: Obviously, our concern about clause 22 means that we have concerns about clause 23 because this leads us into an area where, at the end of the day, the Department has considerable power over the commercial activities to be undertaken by ESA. Clause 23(5)(b), for example, provides:

"the Department may, by notice served on ESA -

(i) revoke the approval; or

(ii) modify the approval, whether by modifying the particular commercial activities or any conditions specified therein."

That provision applies :

"(5) Where it appears to the Department that ESA—

(a) has failed to comply with any conditions subject to which an approval under this section has been granted, or

(b) has in undertaking any commercial activity in pursuance of such an approval contravened subsection (4)".

Subsection 4 relates to the undertaking of commercial activities.

There is a wider concern about the definition of "commercial activities". Is the procurement of services deemed a commercial activity? Does ESA's ability to provide training and advice also come under the generic term "commercial activity"? The Bill does not specify what commercial activity is. It just uses the phrase and leaves it there.

Mr Stewart: It is, as you say, Chair, generic. The fact that it is not defined means that the term would carry its ordinary meaning. The other provisions in that clause, such as requiring departmental approval and the Department's ability to restrict that, are there to ensure that such commercial activity as ESA engages in is not in any way detrimental, or an alternative, to its main business. Were ESA, for example, to develop a particularly good approach to staff training and development or to the delivery of HR functions that another public or even private sector organisation — say a district council or health organisation — wished to procure from ESA, the clause would allow for that to be done. It would allow ESA to recoup the costs of doing so and perhaps contribute to a greater overall efficiency in the public service of the provision of these sorts of services. However, it is important that the provisions allowing the Department to keep control of that remain so that ESA does not drift off into becoming a service-provision organisation but retains its core mission of being the Education and Skills Authority.

The Chairperson: Any comments?

Mr Lunn: I note that we previously agreed that we were content with this clause.

Mr Stewart: It does not seem to have lasted, Trevor.

The Chairperson: Some things change.

Mr Lunn: The same wording is used at clause 23(3)(a):

"to do anything which appears to ESA to be conducive or incidental to the exercise of any power".

The Chairperson: Yes. I think that I would be more content to wait to see the outcome of clause 22 before we decide on clause 23 because they are, to use a well-worn phrase, inextricably linked. Is that OK?

Members indicated assent.

Mr Kinahan: We will have a very busy Assembly in the future, with lots of affirmative resolutions.

The Chairperson: Well, that will keep us busy. I draw members' attention to clause 23(7) and 23 (8), which state:

7) Any approval or notice under this section shall be in writing.

(8) In this section "commercial activity" includes—

(a) the carrying out of work for any other body or person;

(b) the supplying of goods and services to any other body or person; and

(c) the developing and exploiting of ideas and the exploiting of intellectual property.

I would love to know what "intellectual property" means. I am not going to say what was on my mind, and I will not mention planes.

Miss M McIlveen: You started, so you really should finish.

The Chairperson: Is a private jet intellectual property?

Mr Stewart: No, Chair, it is not.

The Chairperson: Members will know that I am referring to the hire, by another organisation, of a private jet.

Mr Stewart: Let me assure you that the Department would not give approval to ESA being involved in any way in the procurement or leasing of aeroplanes. An example of intellectual property might be a particularly good or effective training course.

The Chairperson: Yes, it is not property in the sense of a material building; it is property in the sense of ideas.

Mr Stewart: Something that might be patented or copyrighted.

The Chairperson: We will reserve judgement on the clause until Chris comes back tomorrow.

Do members have any more concerns about clause 23, or do they all relate to what Sean said earlier about the phrase "do anything"? If we resolve that, we may have fewer difficulties with clause 23.

Mr Hazzard: Are you making the link?

The Chairperson: Yes, maybe I am not making it very well.

Are members happy to leave it there?

Mr Craig: Chris, is there a timescale attached to that? I believe that you cannot hold on to intellectual property for ever.

Mr Stewart: This provision would not affect the law generally on intellectual property and the rights of intellectual property owners. It simply uses the phrase as an example of something that ESA might make available on a commercial basis.

Mr Craig: Will the 10-year rule still apply?

Mr Stewart: If there is a 10-year rule, it will still apply.

The Chairperson: Members, with your indulgence, we will draw a line there. That will give the Committee Clerk and his staff time to do the necessary work and rehearse how we have come from clause 1 to clause 23. Some members want to be in the House, I am meeting at 12.00 noon the chair of the all-party working group on science, and there is a chairpersons' liaison meeting at 12.30 pm. With your permission, we will suspend proceedings and resume at clause 24 tomorrow morning.

The Committee Clerk: There will be quite a lot to do tomorrow, so it will be a long meeting, but it will be the final Committee meeting on the Education Bill. I ask members to prepare for a long session that will go into the afternoon.

The Chairperson: Are members content that we suspend the meeting?

Members indicated assent.