



Northern Ireland
Assembly

Committee for Education

OFFICIAL REPORT (Hansard)

Education Bill: DE Briefing

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Mr Stewart: Yes; there was a great deal of concern during the last Bill about the extent to which the Department could unilaterally change some of the rules. The Committee pressed strongly at the time for the affirmative resolution procedure to be used wherever possible. It is in the Bill that wherever there are significant powers for the Department to modify legislation, those will be subject to the affirmative resolution procedure. That is one example.

Mr Lunn: That would be regarded as a significant change or significant power?

Mr Stewart: We could not change it without the affirmative resolution of the Assembly.

Mr Lunn: How would you know? I imagine that that sort of thing crops up throughout the Bill. Who decides or what are the criteria for deciding whether it is a significant power, significant change or otherwise?

Mr Stewart: Ultimately, the Assembly would decide. The rules on that are in the Bill itself. A clause towards the end of the Bill sets out the Assembly control procedure to be used in each case. However, it would be well-established practice that wherever a Department has been given a power to amend other legislation — to avoid what is called a Henry VIII situation — it is always subject to strong Assembly control procedure.

Mr Lunn: What is the Henry the VIII analogy?

The Chairperson: You knew that you would be asked that. *[Laughter.]*

Mr Lunn: I have to ask.

Mr Stewart: Essentially, a Henry VIII situation is where you give yourself the power to change the rules as you go along.

Mr Lunn: That is chopping off heads.

The Chairperson: Which we always thought the Department had, but anyway.

Mr Stewart: There is certainly no power in the Bill for capital punishment.

The Chairperson: Yet.

Mr Lunn: I have only got to page 3; just to make it clear to me, away back in the schedules somewhere —

Mr Stewart: You have not yet come to the good bits.

Mr Lunn: — does it clarify the matter of affirmative and negative resolution and where the Assembly has a right to intervene?

Mr Stewart: Certainly, Trevor, if the concern on the part of the Governing Bodies Association is that the Department has set out rules that look superficially fair but has given itself a back door to change them, let me assure you that that is not the case. They would be subject to Assembly approval.

The Chairperson: Danny wants to come in on that point. Is the Henry VIII clause in the Bill?

Mr Stewart: Yes; the power to prevent a Henry VIII situation is in the Bill.

Mr Craig: Is it on page 37?

Mr Kinahan: That is what I wanted to ask. I have gone through the Bill and have not found the power.

The Chairperson: Henry VIII is not mentioned in the Bill.

Mr Stewart: He is not mentioned by name, but clause 65 sets out the provision.

The Chairperson: Chris, thanks for that clarification.

Mr Stewart: Chairman, forgive me. I did not intend to delve into such matters in detail quite so early.

With your approval, I will cover four areas stemming from the paper provided to the Committee. First, to step back a bit, I will provide a little policy context, which may help the Committee to appreciate the Minister's intentions in the Bill. I will then look at the four main functions of the Education and Skills Authority (ESA) that are provided for in the Bill. I will then give a little overview of the Bill to explain how it is constructed and where it has come from. I will then look at some of the key provisions, and I will touch on some of those that Caroline outlined in her paper.

First, a bit of policy context: as members will know, this has been a long time coming. The review of public administration began in 2002, and we have had a number of goes at this. The policy emphasis has changed; it has ebbed and flowed down the years, but the Minister is very clear that this particular proposal and this particular Bill focus on improving education rather than on reducing bureaucracy, important though that is. Although much of the focus of the Bill is on ESA as an organisation, ESA is merely a means to an end. That end, the policy goal, is better schools. We already know from the evidence what better schools look like. They have, of course, excellent teaching in the classroom; they have strong and effective leadership from their boards of governors and senior management teams; they have a strong sense of belonging to the communities that they serve; and they each have an ethos that pupils, parents, staff and governors will support. Very importantly, they have the autonomy and the support that they need to manage their day-to-day affairs. Added to that, of course, we have to have effective planning arrangements to ensure that those schools are in the right place and are sustainable.

The purpose of ESA, and the Bill to establish it, is to deliver that policy vision of good schools, and we invite the Committee to judge it against that yardstick: will this Bill lead to better schools? To achieve that, the Bill sets out four main functions of ESA. First, it will plan the education estate; it will consult and involve stakeholders, but it will be the only body with a statutory education planning function. I know that members are looking forward to hearing about its second function, which is that it will be the employing authority, and its role will focus on system-wide workforce planning and development, not on interfering in schools on a day-to-day basis. Boards of governors will, if they wish, take all the employment decisions in their schools from hiring to firing, and that includes everyone from the principal to the visiting music tutor. Thirdly, ESA will promote the raising of standards, but, as a supporting critical friend to schools, not as an interfering education authority. Fourthly, it will support professional development in schools, providing or procuring support and development services itself but also supporting and enabling schools to provide those services themselves, as many schools have shown they are capable of doing. In addition to those new functions, it will, of course, take on a range of existing functions from the bodies that it will replace, including school maintenance, the school library service, school meals, transport and youth services.

To deliver that, we have the Bill that is before members; it has 69 clauses and eight schedules. Members will be relieved to know that it is considerably shorter than the Bill that you were looking at yesterday evening. To use a boxing analogy, it is a middleweight Bill at best, but, like every boxer, it punches above its weight. It is complex, but you will see many larger Bills. Anyone who is on the Committee for Social Development could expect to see a housing Bill typically of around 200 clauses. If you are unfortunate enough to be on the Treasury Select Committee at Westminster, you might well see a tax Bill that runs to 1,000 clauses. This one is comparatively short, but it is complex. Part of that complexity stems from its relationship to existing education legislation, which, as you will recall, Chairman, we have rather a lot of. There are 11 existing primary orders. They are particularly important, especially the 1986, 1989 and 1998 orders, and, as we go through the Bill, we will have recourse to look at those in some detail quite frequently. Each time one of those orders came along, it amended all the previous ones, and the latest Bill will be no different. It affects, and is in turn affected by, all the previous legislation in a variety of ways. For example, it will carry out major surgery to the 1986 order and change it radically. It will make minor changes to all the other orders, and it will repeal one order completely: the Youth Service (Northern Ireland) Order 1989. It is best if members, from the outset, think of all education legislation together, almost as if it were a single Bill, because all the orders and the Bill are closely linked.

The Bill stems directly from the heads of agreement that were published by the First Minister and the deputy First Minister last November. It derives from previous Bills that were considered by the Committee, but it contains significant changes. Some provisions have been dropped completely; for example, those on the General Teaching Council, which will be in a separate Bill, and those on the holding body for controlled schools. Chairman, I know that you will be particularly disappointed that there are no provisions on an education advisory forum. Sadly, those do not form part of the Bill.

The Chairperson: I am gutted.

Mr Stewart: Some of the other provisions are radically different from those that you saw before; for example, those on membership and on the regulation of governance and employment arrangements in schools, which Caroline mentioned. However, some others are almost identical to the previous Bill, such as those on inspection and on area planning.

I will go through the key provisions fairly quickly because Caroline has covered some of them. The membership provisions are as set out in the heads of agreement. A chair, eight political members appointed by the d'Hondt mechanism — exactly the same as that in the Northern Ireland Act 1998, which is used to appoint Executive Ministers — four trustee members, four transferor members and four members representative of the community, who will be chosen for their particular skills and experience. If the Bill's Second Stage is agreed next week, that appointment process will begin almost straight away.

As I said, the provisions are very different from those in the previous Bill. However, the remainder of the provisions on ESA as an organisation, which are in schedule 1, are identical to those in the previous Bill, and those are the standard approach to establishing a non-departmental public body.

The provisions on employment and governance are significantly different. There are two blocks of provisions to look at there: clauses 3 to 9 on employment, and clauses 33 to 37 on management. At this point, I remind members of two central concepts and what they mean — employment schemes and schemes of management. The employment arrangements are best described — and this takes us to the nub of the difficult question that you raised earlier — as a delegated autonomy model. ESA is the employer, or the employing authority if you prefer, but employment functions are delegated to schools. Schools, not ESA, decide on the level of delegation, and they set that out in their schemes of management, along with the detailed arrangements for carrying out employment functions. Schemes of management are not delegated, but they set out the governance arrangements for each school. The role of ESA is to approve those schemes.

The Bill's approach is significantly different from that taken in the previous Bill. In the previous Bill, we had relatively light regulation of what schools had to do but a fairly strong potential intervention role for ESA. We now have almost the opposite. We have much more regulation of what schools must do and what they cannot do, but a significantly restricted intervention role for ESA. In fact, it is very restricted indeed. In practice, ESA must approve a scheme that meets the statutory requirements as laid out in the Bill; it has no discretion to do otherwise. ESA can modify a scheme only with the agreement of the school or with the order of the independent tribunal, and any unresolved disputes are automatically referred to the independent tribunal for decision. Therefore, ESA's role is very much circumscribed and reduced from that set out previously.

There are also provisions in the Bill to give the boards of governors of voluntary schools a right of referral to the tribunal. However, as acknowledged in the paper, those clauses were added to the Bill at a very late stage and, frankly, they need some work. We have considerable work to do to develop them to the point where they are ready to go forward.

Mr Kinahan: Good.

Mr Stewart: I will briefly mention two other things, one of which is the provisions on the Council for the Curriculum, Examinations and Assessment (CCEA). As referred to in the heads of agreement, the Minister considered whether CCEA should be part of ESA or remain separate. His conclusion, endorsed by the Executive, was that the priority for now is to establish ESA. CCEA will remain as a separate body, but that does not rule out some change in future. The provisions on CCEA and its functions are in the 1998 order, but they were long overdue a bit of tidying up. The Office of the Legislative Counsel's advice was that that was best done by repealing them and re-enacting them in the Bill. That is why the Bill contains CCEA provisions. Finally, sectoral bodies are mentioned in the Bill and will have an important role in representing and acting on behalf of their sectors. However,

they are not statutory bodies. They are not established in statute, and they will not be given any legal functions. They are mentioned in several places in the Bill, for example, on consultation around area planning and on governor appointments. They will be funded by a grant from the Department, using a range of existing powers, one of which, similar to the CCEA provisions, needed a bit of tidying up, so we have re-enacted it in the Bill.

As usual from me, that has been a whistle-stop canter over the ground. I will pause and take questions from members. Chair, if you are minded to do so, it would be very useful if you and the members could give me a steer on the sort of papers and evidence that you would find useful as you go through the Bill.

The Chairperson: Chris, thank you very much. In the past, we have always found you to be helpful and knowledgeable in giving us advice.

Mr Stewart: Thank you, Chairman. In the words of Sir Humphrey Appleby, I am glad that you thought so.

The Chairperson: We will get down to the substance. I will raise a couple of points initially, the first of which is on the financial structure of ESA. We have seen the savings delivery plans and the budget that has been set. The savings that were envisaged have already been taken out of the existing education and library boards, and those are almost £15 million. The savings were originally envisaged to be in the region of £20 million. Your paper states:

"By the end of the budget period, through the establishment of ESA and other measures, the Department's savings delivery plan will achieve savings of £40 million."

Can you give some indication of what you think those other measures are? Is that £40 million made up of £20 million that has already been saved as a result of what has been set out in the budget plus another £20 million? How does that figure sit in regards to the Budget period that we are working in with the savings delivery plan and the savings that are already indicated?

Mr Stewart: It is £40 million in total; it is not £40 million and another £20 million from ESA. As you rightly say, the savings delivery plan is already in place. The budget had been set, so those sums had already been removed from the education budget. The other measures that we refer to are the things that, as you rightly say, have already been happening in the education and library boards and other organisations. Significant numbers of posts have been removed from the organisations to achieve those savings. Indeed, that is one of the reasons why the Minister feels that it is vital that we move ahead with the Bill and establish ESA as quickly as possible. The boards, CCMS and other organisations are under very considerable pressure now, because those savings have been taken out. They are struggling to maintain services as they would like, and they are desperate for us to establish ESA. To be clear: it is not a question of saying that we have saved £40 million and will save another £20 million. It is £40 million in total.

The Chairperson: The savings delivery plan included departmental administration, including for ESA, which was the Education and Skills Authority implementation team for those of us who need to be reminded. Savings were envisaged to be £2.7 million, £3.2 million, £3.7 million and £4.2 million. If my maths is right, that is £13.8 million. Is that figure included in the £40 million?

Mr Stewart: Yes.

The Chairperson: You will not be surprised to hear me raise a concern about why Irish-medium schools are given preferential treatment in the Bill over and above every other sector of education and way above their place in educational provision. Why is that the case? Irish-medium schools are not only given a place in the Bill, but the Bill is very blatant in that it does two things. First, clause 2(5) states:

"ESA shall ensure that its functions relating to grant-aided schools are (so far as they are capable of being so exercised) exercised with a view to encouraging and facilitating the development of education provided in an Irish speaking school."

If I am right, that is probably a reference to the Belfast Agreement, where a duty was placed on the Department to promote and facilitate Irish-medium education. I am also aware that another sector was placed upon it — the integrated sector — which seems to have fallen off the cart.

When you turn to the appointment of boards of governors, we are told that for Irish-medium schools, those appointed have to be in favour, or supportive, of the ethos of the school and its continued viability. I would love it if that provision were given to every school in Northern Ireland. Then we might not have had the crisis that we had in the school in Londonderry a few weeks ago.

Mr Stewart: I will answer your last point first. If you look at the clause on the appointment of governors by ESA, there is a requirement for ESA to choose:

"persons appearing to ESA to be committed to the ethos of the school."

On your earlier point, I do not know that the Minister would agree with your description of the Bill as giving preferential treatment to Irish-medium schools. He would point out, and you have referred to this, that the Department has two relevant statutory duties in existing legislation. In the 1998 order, there is a duty:

"to encourage and facilitate the development of Irish-medium education".

In the 1989 order, in article 64, there is a duty

"to encourage and facilitate the development of integrated education".

Some of the specific provisions that you refer to are clearly on foot of that statutory duty. If members are concerned that they do not see corresponding provisions on integrated education, that is because they are already in existing law, particularly in the 1989 order. Therefore, to the extent that those two sectors are treated in a particular way, it stems directly from the statutory duties that already apply to the Department.

The Chairperson: Chris, why then take one article of the 1989 order and place it in the ESA Bill and not the other article?

Mr Stewart: We have not done that, Chair. Some of the provisions in the Bill were clearly inspired by provisions in the 1989 order in relation to integrated education. The one in particular to which you refer was not in the Bill last time round as originally drafted but was proposed as an amendment by the former Deputy Chair. The Minister at the time had indicated that she was prepared to agree with that amendment and to incorporate it into the Bill. Looking at the Bill this time round, the Minister felt that this was something that should be included from the outset.

The Chairperson: I have one other query. With regard to planning, you said that ESA will be the only body with a statutory area-planning function for the development of the education estate. Can you explain to us how that differs from the current process, especially in light of who can produce a development proposal? It would be useful for members, including the Chair, to be clear on the current situation. Who can produce a development proposal to close school A, B, or C. What change, if any, will be made to the role and function of ESA, given that it will be the only body with a statutory planning function for the development of the education estate?

Mr Stewart: Certainly. In simple terms, at present, anyone may bring forward a development proposal in relation to any school, whether it is for an existing school or a new school. It is, in large degree, analogous to the situation of making an application for planning permission. In theory, you could submit an application for planning permission for your neighbour's house. Thankfully, not many people do that, but it is possible. Likewise, under education law, anyone can bring forward a development proposal for schools. In practice, that does not happen. Education and library boards bring forward development proposals in relation to the controlled sector, CCMS in relation to Catholic maintained schools, and voluntary grammar schools in relation to their own schools. Fundamentally, that will not change under the Bill, because it reflects the fundamental nature of education, which is that it is not top-down.

The Department does not simply create all the schools. We have a strong, healthy tradition of voluntary schools, and legislation needs to reflect that and allow the development proposals to be

bottom-up in order to emerge from those who have a commitment to education. However, the handling of development proposals would be significantly different under the new provisions in the Bill. At present, any development proposal coming forward has to go through the full process, so it would be published by the relevant education and library board for consultation. The board would consider the results of the consultation. It would submit the proposal to the Department, along with its views and analysis of the consultation, and the Minister of the day would decide.

Under the provisions in the Bill, there would be a different approach depending on whether there is an area education plan in force. If, for any reason, there is no area plan in force, development proposals would continue to be handled in exactly the same way as they are now. If there is an area plan in force, they will be handled in a different way, and there is an additional early step. The first thing that would happen is that ESA would examine the development proposal to see whether it is compatible with the area plan. If it is, then it goes through the remainder of the process in the same way: published for consultation; analysis; decision by Department. If it is not compatible with the area plan, it stops at that point. It is rejected, is not published for consultation and does not go any further.

So, if you like, the area plan serves two functions. It is a statement of need for a particular area, but it is also a filter for development proposals, and only development proposals that are compatible with an area plan would get through for the remainder of the process.

The Chairperson: How does that work with article 101? Are there proposals to enhance the powers of article 101?

Mr Stewart: No, Chair.

The Chairperson: Is article 101 staying as it is?

Mr Stewart: It is. I think that many feel that it is powerful enough without enhancing it any further.

The Chairperson: Yes.

Mr Stewart: It is extremely powerful. It allows the Department to, essentially, direct any education organisation, including the board of governors of a school, to do something, not to do something or to do something in a particular way or not to do it in a particular way, and such directions are enforceable by the courts. That will not change.

The Chairperson: In fairness, will you explain that article 101 is the power that the Department has to make any decision that is not in any other piece of legislation? My view of article 101 may be biased.

Mr Stewart: It is certainly uniquely powerful, Chair. I think that that is a fair description.

The Chairperson: I want to put on public record the fact that I welcome very much the establishment of the controlled sector body. It is something that we have worked very hard to try to ensure that we get delivered. It is a sector that has been, as I have repeatedly said, the Cinderella of education for far too long. It needs to be brought into the public domain in a way that respects and reflects the huge contribution that it makes to education, while recognising that there are huge challenges and issues. It is a very diverse sector. It is not as defined as other sectors, so I think that the working group that has been set up to consider the controlled sector body has a huge task. However, it is a welcome move, and I hope and trust that the working group will do well over the next weeks and months, as it gets up and running. I know that contacts have been made between individuals, but has it had its first meeting?

Mr Stewart: Not that I am aware of, Chair. In passing, I should say that the Minister would strongly endorse what you have said about the role of sectoral bodies generally and also about the absolute importance of the controlled sector having the same opportunity — a level playing field — as any other sector. It is a huge challenge for the working group. We are conscious of that and very grateful to the individuals involved who have taken on this challenge. We in the Department will, as the Minister absolutely expects, provide every assistance that we can and that is necessary. That is because we recognise that there is a lot of catching up to be done and that it is very important that all sectors have an effective champion to speak for them on the date the legislation is implemented. So we will certainly work very closely with the working group to that effect.

Mr Craig: Good to see you back, Chris. Long time, no see.

Mr Stewart: Thanks. I did not hear any other members endorse that, Jonathan. *[Laughter.]*

Mr Craig: I may be on my own, but there you go.

Mr Kinahan: We were not here before.

Mr Stewart: Trevor was reading his papers very carefully.

Mr Craig: The one sitting beside me was. Chris, have we any timescales for or ideas about the process for establishing the sectoral bodies?

Mr Stewart: Yes. In essence, two of them already exist in that the Northern Ireland Council for Integrated Education (NICIE) and Comhairle na Gaelscolaíochta will be the sectoral bodies for the integrated and Irish-medium sectors. On the Catholic side, things are not as far advanced, but the organisation will be known as the Trustee Support Body and will be established by the Commission for Catholic Education. I understand that it technically exists at present; it has been established as a limited company and a registered charity, but it has not yet really got off the ground. It does not have any staff and does not exist in any real form yet, but it is ready to go, or fairly close to it. The one that we openly acknowledge as being a long way behind is the controlled sector, and we cannot allow that situation to continue.

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

Mr Craig: Are efforts being made to get that brought together and implemented?

Mr Stewart: The working group has literally just been established, with the announcement in the past week or so. I do not think that the group has yet had an opportunity to meet. We will certainly be proactively making early contact with it. We are very conscious that we have to get the balance right here. We must offer all the help and assistance that the group feels it needs but, for the group and the work that it does to have credibility across the controlled sector, it must not be seen as something that the Department is controlling or directing. Our help must not be seen as suffocating or taking over, but we are certainly willing to provide any assistance that it requires from the Department.

Mr Craig: As Trevor mentioned earlier, are there any ideas or plans to have a sectoral group or anything similar for the grammar school sector?

Mr Stewart: The Governing Bodies Association will, I am sure, wish to continue to speak for the schools that wish it to do so. With the reference to sectoral bodies in the Bill, there has to be a definition of sectoral bodies. The important thing about sectoral bodies is that although they are referred to in the Bill, the Department does not, as it were, choose them or appoint them. It is perfectly open to any sector to establish a sectoral body if it wishes.

Mr Craig: That neatly brings me to my next question, Chris. Will we have a list or an idea of what the Department will look upon as sectoral bodies representing their particular group? Will a specific list be set up?

Mr Stewart: I do not know whether there is an intention to publish a list, but there has to be a clear understanding and recognition of the bodies that the Department and ESA intend to deal with. That is not a formal legislative process, but given that the mechanism for funding them is grant aid, it is open to any organisation to apply for funding if it wishes. For an organisation to receive funding, the Department would have to be satisfied that it had received a credible application from an organisation that represents a group of schools of a particular description.

Mr Craig: Clause 63 defines a sectoral body as one that "is recognised by the Department" and which represents:

"the interests of grant-aided schools of a particular description".

I think that is open to a bit of interpretation. What does that actually mean to a layperson — someone who is not writing legislation?

Mr Stewart: It probably seems Machiavellian, but it is not intended to be. It is a recognition that we do not create these things. They are created by the sectors from within the sectors, and they could change over time. I recall the principal of a controlled integrated school asking which was his sectoral body: was it the controlled sectoral body or was it the integrated sectoral body? The only answer that I could give him was that it could be either, both or neither, and that it was for him to choose which one he wanted to speak on the school's behalf. That clause is constructed to give us flexibility as things develop and as organisations come along and change, also recognising that this is not something that we specify in legislation. We do not say that there "shall be" five sectors and that there "shall be" a sectoral body for each. It would not be feasible or, indeed, desirable to try to do it that way.

Mr Craig: How will those sectoral bodies be funded, and will they be given any sort of guidance on what they should be doing?

Mr Stewart: They will be funded through grant aid, so it will be incumbent on each sectoral body that applies to the Department for grant aid to provide a business case setting out what it proposes to do and the functions that it proposes to deliver. The bodies will seek grant aid for that, and, if they are successful, they will receive a letter of offer with conditions attached to it, as there always is for any form of grant aid. It is a relatively light-touch control framework. Of course, there has to be accountability for how public money is spent, but we will not have a command-and-control relationship with the sectoral bodies. It is not even the sort of relationship that we will have with ESA. Obviously, there will be very clear, formal lines of accountability between ESA and the Department.

Mr Craig: Flexibility is the key, then.

I have one last question. Chair, I beg your indulgence on this, because it intrigues me. From what I have read of the Bill, ESA is the employing authority. I understand what it is saying; it is a bit like the relationship between a controlled sector school and a board — or am I wrong in that?

Mr Stewart: I disagree with you on that, although there are certain elements of that. If you want a comparator in the existing system, the closest is the CCMS model. In the past, members will have heard me describe this as, to a great extent, the CCMS model, broadened out to cover all schools.

We could have a very lengthy debate about the difference between an employer and an employing authority. Sometimes I think that we are in danger of drawing an artificial distinction. There is not really any distinction. The employing authority is — forgive me, I am not trying to sound glib — simply the authority that employs. ESA will be the employer in law. I much prefer to refer to it as "the employer" rather than as "the employing authority". However, it is a delegated model, so boards of governors of schools will do the employment functions on a day-to-day basis, but they will do them on behalf of and in the name of ESA, which is the employer — much in the way that Catholic maintained schools do for CCMS, which is the employer of its teaching staff.

Mr Craig: That is the intriguing thing for me. I have to declare that I am on several boards of governors, so this will directly affect what I do. We all talk about the controlled voluntary sector, and how it treasures its independence on this issue. It can employ whom it wants for whatever it wants, within its budget and in keeping with how it runs the school. Instead of seeing this as clamping down on all that, I look at it from the controlled sector point of view, where you could, technically, set yourself up on a similar basis. Is that right?

Mr Stewart: Yes, and that is exactly the policy intention behind it. Anyone who is a governor of a controlled school knows that if you are appointing a new principal, you interview the candidates, put them in merit order, pick the top three and send those names to the education and library board, which would interview them again, and might come up with a different merit order to the one that the board of governors had arrived at. So, in effect, the board of governors of a controlled school is not, at present, able to appoint the principal: the key person in the school. Under these arrangements, it would be able to do so, and it is the same for all schools.

If a school decides that the board of governors should make all the appointments, no member of staff could be imposed on a school by ESA. Equally, no member of staff could be taken away from a school, by dismissal or by any other means, by ESA, unless there is a statutory requirement to do so. For example, if there were someone who was not legally able to be a teacher because they were not

on the teaching register or because they had been convicted of some terrible offence, ESA could dismiss them. However, in no other circumstances could ESA usurp the role of the board of governors, if that is what the board of governors wishes.

It is a very complex set of provisions, and I absolutely acknowledge that. Part of the reason for that is to try to allow for flexibility. We know that our colleagues in the voluntary grammar schools do not like this; they remain opposed to it in principle and would rather that they were not part of it at all. However, the policy intention is, as you say, to allow for them, under these arrangements, to continue to do what they already do, with no interference from ESA. It is to allow controlled schools that want to move more in that direction, or all the way in that direction, to do so, and likewise with maintained schools.

Sometimes, we might give the impression that we are saying that everything about the controlled sector, or everything about education and library boards, is bad. That is absolutely not the case. Many people in controlled schools get a very good, very supportive service — I am not just saying that because the Rev Herron is here — from their boards, and they want to continue in that way. So maybe some controlled schools will say, "No, we do not want to do that. We do not want to make all the appointments. We might want to make some of them, perhaps for the senior staff; or we might want to make all the teaching appointments, but we are quite happy to leave the non-teaching appointments in the hands of ESA to carry out on our behalf, because we are busy people, serving in a voluntary capacity, and we do not have time to do all of that." The key thing is that that choice is made by the school and not by ESA. It is a delegated model, but it is the school that decides on the extent of delegation.

Mr Craig: All of that intrigued me, Deputy Chair. The controlled sector could put itself on almost the same footing as the voluntary grammar sector. An amazing degree of flexibility is built into the Bill.

Mr Stewart: Something struck me from talking to some post-primary principals, particularly controlled grammar principals. I asked each of them the question that I would always ask in that sort of situation: if you were given three wishes for this, what would they be? Without fail, they all gave the same first wish. They said that they were very jealous of their colleagues in voluntary grammar schools, which all have bursars, and that they would love to have the flexibility to employ a bursar. That key person is almost the chief administrative officer in the school, who does a lot of the heavy lifting for the teaching staff and performs a whole range of functions that enhance the workings of the school and leave teachers free to concentrate on teaching. These provisions allow for exactly that. If the board of governors of a controlled school were to decide that having a bursar is a good thing, they could have a bursar. If they were to decide that it would be a good thing to get together with two or three other schools in a learning community to employ a bursar who would work on behalf of all of them, they would absolutely have the flexibility to do that.

The Deputy Chairperson: On the back of that, Chris, flexibility works both ways, so it is quite frightening if you are slightly suspicious of what could be behind the Bill. If I have read it correctly further on, if a school were to want to have a bursar and ESA were to decide that that is not something it should have, it could force the school to take that out of its budget. If I have read the Bill correctly, it indicates that that could then punish the school because it would be losing a chunk of its budget by choosing to have a bursar, or can we read into that that ESA will not be going down that route and would let schools have bursars if they were to want them?

Mr Stewart: ESA should have no role in that whatsoever. The school's budget share should be set under the common funding formula or whatever will come after the common funding formula as a result of the current review. Unless a controlled school were in a situation where the delegation of its budget were withdrawn, which would be a very extreme situation indeed, the complement of staff would be for the board of governors to decide. ESA would have no role in that whatsoever.

Mrs Hale: Good afternoon, Chris. My questions revolve around boards of governors. How will boards of governors be appointed under ESA, and how is that different from the current situation? Recognising the additional responsibilities, is the Department confident that it will attract the right people to the roles, given that they are voluntary roles?

Mr Stewart: The provisions for boards of governors are quite complex, and there are a lot of complex calculations in there. However, when you boil it all down, the composition of the boards of governors is not changing. The provisions are simply shifting the function of appointing governors from the Department and from education and library boards to ESA, but the numbers are all the same. We are

not changing any of that. As I mentioned earlier, the other significant addition at that point is a requirement on ESA to choose for appointment persons appearing to be committed to the ethos of the school, whatever that may be.

The short answer to your question is that there is very little change, other than it is going to be done by a different organisation. You make the very important point about the responsibilities on boards of governors. The legislation includes, for the first time, a statutory duty on boards of governors in relation to raising standards and levels of attainment. We recognise that that is a very significant challenge to place on groups of people who take on an incredibly important role in a voluntary capacity. That is why, alongside that, there is a statutory duty on ESA to provide the support, training and development that boards of governors need.

Your final point is difficult for me to answer. From time to time, we have great difficulty in getting sufficient numbers of people to come forward for membership of boards of governors.

Mrs Hale: I have one more question. You mentioned appointing governors who take on the ethos and viability of the school. Mervyn touched on that just before he had to pop out. What is the definition of viability? Is it a financial definition, is it based on educational achievement, or on pupil numbers? How would that all work when you have an Irish-medium unit in a mainstream school?

Mr Stewart: The reference to "viability" is to be found only in that clause to which the Chairman referred in relation to Irish-medium schools or units. The duty is on the board of governors to, in essence, do everything in its power to ensure the continuing viability of the school. The corresponding duty for integrated schools does not talk about "viability". In essence, that duty is to preserve the integrated nature of the school: to ensure that it continues to attract numbers of children from Protestant and Catholic backgrounds. So there is not a viability requirement for every school; it is for only Irish-medium schools and Irish-medium units in other schools.

Mrs Hale: Thank you.

Miss M McIlveen: You are very welcome, Chris. I have fond memories from our last encounter.

Mr Stewart: Thanks Michelle. Two down, nine to go.

Miss M McIlveen: I have a few more grey hairs since the last time. I have a number of questions, and I did keep my files from the last time. I had the opportunity last night to look at some of them. To start very generally, has a headquarters for ESA been identified yet?

Mr Stewart: Not yet. There is no location strategy yet. Some initial work has been done, really about identifying the sorts of principles that may apply in developing a location strategy for ESA. At this stage, we do not have a site for its headquarters or any other office.

Miss M McIlveen: In our last go at this, there were discussions around there being seven functional directors with locations perhaps within existing board premises. Is that still a thought?

Mr Stewart: That is still a thought and, I think, a very likely outcome. However, perhaps in due course, it may be best to have Gavin Boyd and his team along to set out their thinking for you on that. I know that one of the types of options that they looked at in their initial thinking — in a similar fashion to the things that have happened in health — is that, to minimise cost and minimise disruption to staff, ESA may at least start off with a "footprint" derived from those of the existing organisations. You may find that, within that, there would be functional hubs. So there may be a finance hub in a particular location and an HR hub in another — something like that. That would largely mirror what Health colleagues have done.

Miss M McIlveen: At that time, you also talked about having local managers and that local footprint. I know that you mentioned a policy paper to the Chairman, and we had the very useful one from last time that set out the hierarchal nature of ESA and its likely functions. Would it be possible to develop that and forward it to us? It would be really quite useful.

Mr Stewart: Certainly.

Miss M McIlveen: Back then, I was interested in the transfer of staff, and I know that there are two levels to the transferring of staff: from the boards and the Department to ESA, and within the employing authorities where ESA becomes the employer, for want of a better term. There are many different staff with different levels of pay, terms and conditions, and so on. The paper you presented for today mentions the Transfer of Undertakings (Protection of Employment) Regulations 2006 — TUPE — being applied. Will that be the case right across the board or just for administrative staff?

Mr Stewart: It is right across the board. There are three sets of transfers involved in this. Some staff from the Department will be transferring. There will be the staff of all the dissolved organisations: the education and library boards, including staff in controlled schools; the CCMS; the Staff Commission for Education and Library Boards; and the Youth Council. The third set of transfers involves staff who are employed by boards of governors in voluntary grammar schools and grant-maintained integrated schools. In all three cases, TUPE regulations will apply. We are also taking a further step. I am sure that you recall that TUPE does not extend to pension entitlement, but the Bill requires pension entitlement to be protected as well. That applies to all three strands of transfer and to all the staff who will be transferring to the employment of ESA. The question that I am most often asked by groups of staff, not least in our own Department, is how long that protection will last for and what happens afterwards: will ESA be levelling up or levelling down in terms and conditions? The short and sometimes unhelpful answer on the TUPE question is that it lasts until someone changes it. There is no time limit on TUPE. When someone transfers and takes their existing terms and conditions with them, they are protected until and unless their new employer manages to negotiate different terms and conditions with trade union side. That is certainly what will be happening in ESA. ESA will, of course, inherit a number of staff groups with varying terms and conditions and, as an organisation, it will have to look at its strategy for terms and conditions. If it were to do nothing, it would be exposed to risks of equal pay claims from its employees. If it were to attempt to level down, or have a race to the bottom, it would have a very difficult relationship with trade union side. If it were to attempt to level up and race to the top, I think that the Finance Minister would have stern words with our Minister. ESA will have to look very carefully at that and come up with a strategy for addressing the differences in terms and conditions among its various groups of employees.

Miss M McIlveen: Thank you. I appreciate that you are only giving a cursory overview today rather than a line-by-line explanation. You mentioned that the legislation should be tidied up in relation to CCEA. Can you give us some detail as to what the changes will mean once the Bill goes through?

Mr Stewart: Yes, certainly. There is a whole raft of them. None of them is a significant policy change; they are technical changes. To give one example, in current legislation you will see terminology such as "vocational qualifications" and "academic qualifications". For some time, policy in our Department and in the Department for Employment and Learning has been to move away from using that sort of terminology. So there is a different approach in the Bill. Rather than say that academic qualifications should be treated in this way and vocational qualifications in that way, the provisions allow each Department to "designate" qualifications; that is, to identify particular qualifications for which we would expect CCEA, in this case, to do the accreditation or — I hesitate to mention testing — to carry out the testing or to develop qualifications.

Miss M McIlveen: Finally, paragraph 2(1)(c)(iii) of schedule 1 refers to four persons:

"appearing to the Department, so far as practicable, to be representative of the community in Northern Ireland."

The community in Northern Ireland is obviously very varied and multifaceted, as we are all very aware. What process will the Department use to appoint those members?

Mr Stewart: It will be the standard public appointments process, as regulated by the Commissioner for Public Appointments. Given the requirement for that proportion of the membership to be representative, we must ensure that we have the broadest possible process of advertising or inviting applications to make sure that we have an inclusive pool of potential applicants from which to draw. However, as I think your question implies, with a number as small as four, it is quite challenging to achieve representativeness.

Miss M McIlveen: What would the criteria be for that?

Mr Stewart: I do not think that at this point there are hard and fast criteria, Michelle. I am not certain that we could easily draw up criteria. It is one of those situations where it is easier to see a perverse or wrong outcome than to define a right one. If we chose four men, we would have a problem. If we chose four women, we would have a problem. If we chose four people from one community background, we would have a problem. So we have to avoid those sorts of perverse outcomes.

(The Chairperson [Mr Storey] in the Chair)

Miss M McIlveen: Seeing as we have a change of Chair, I will have one wee final question.

The Chairperson: Taking liberties?

Miss M McIlveen: The independent tribunal is obviously something new to this Bill, and it is to be welcomed tentatively at this stage. It is in the heads of agreement. Can you tell me how and when that tribunal will be established?

Mr Stewart: I am afraid that the short answer is no. The Bill takes a slightly unusual approach. The tribunal will be appointed by the Department of Education but according to regulations that will be made by the Office of the First Minister and deputy First Minister (OFMDFM). We have had a couple of initial meetings with colleagues from OFMDFM, but we are not yet at the point where they have even scoped what the content of those regulations would be.

Miss M McIlveen: So it is a work in progress.

Mr Stewart: Very much so, and it is still at stage one.

The Chairperson: I thank the Deputy Chair for helping me out. There was something that I had to attend to.

Mr Kinahan: Thank you. That was really stressful.

The Chairperson: Now you know the pressure that I am under. *[Laughter.]*

Mr Kinahan: Thank you very much, Chris. I am afraid that I have loads of questions. Chair, could I have three questions to start with and then maybe come in again at the end?

The Chairperson: Yes.

Mr Kinahan: My first questions are on the heads of agreement and whether they should be in the Bill rather than left out of it. Within the heads of agreement, there is one sentence that completely floored me. I read it to my wife two or three times. It is in paragraph 10, which begins:

"Notwithstanding the foregoing, nothing in the new arrangements will undermine the following principles".

The one that I want clarified states:

"There will be no change to the ownership arrangements which negatively affects the respective role of the Boards of Governors of a school."

Mr Stewart: I shall answer your question very carefully, if I may. To deal with the first point, which was about whether heads of agreement should be in the Bill, let me give the civil servant's evasive answer: that is a political question and not one for me. The Executive have decided that they ought to be. I will say that it is unusual to have a document such as that referenced directly in legislation. It is not entirely unprecedented, but it is unusual. It presents a challenge, because the heads of agreement document is a political document. The process that came after it was that that political document was converted into policy proposals in a policy memorandum, in which we sought to clarify some of those issues and add more detail to what was proposed. That was agreed by the Executive, and we then went several stages further in the drafting of the legislation and added yet more layers of detail. The direct referencing of the heads of agreement in the Bill, as it were, somewhat short-circuits that process; it brings us back to that political document, which is simply not drafted in the same way.

In developing the policy proposals, we were aware of the tension between paragraph 5 in the heads of agreement and paragraph 10. It was the Minister's suggestion, and the Executive agreed, that the way to resolve that tension and to give effect to the heads of agreement was through the employment arrangements that we have set out in the Bill. They are that you have a single employer, ESA, which satisfies paragraph 5, but you delegate the carrying out of employment functions to boards of governors, which satisfies the requirement of paragraph 10. Regarding the particular clauses where the heads of agreement are referred to, I think we need to look at just how we can be certain that we have captured the detailed policy intention of the Executive in making that reference in the clause. I have to confess, Danny, that, at this point, a fairly considerable amount of work probably needs to be done on those clauses.

Mr Kinahan: OK; thank you. My second query stems from that and is a matter that we have touched on before. It concerns the role of a tribunal, which will be at OFMDFM level. What will its scope be? Who will be appointed? Is it a legal body or otherwise? It is going to be the main power over the first year or two as every dispute is sorted. Therefore, we really need to know what it will be and what its guidelines are.

Mr Stewart: Like you, I await the proposals from our colleagues in OFMDFM to see where that will go. It is still at a very early stage. We simply do not have any firm proposals yet as to the membership of the tribunal or how it will operate. It would not surprise me if it were a straightforward three-person tribunal, probably with a legally qualified chair, such as a barrister or solicitor of, typically, five or seven years' standing, and perhaps two other people who might be chosen because they have a particular background in, say, employment law or education. It may be that the First Minister and the deputy First Minister will wish to have a role in choosing people for appointment to the tribunal, or will at least want to be consulted before the appointments are made. All of that has yet to emerge by way of proposals.

The tribunal will essentially be able to do three things if a disputed scheme is referred to it. It can either order ESA to approve the scheme as it is, without modification, or it can order ESA to approve the scheme with some modifications, or the tribunal could decide to make a scheme itself. The outcome is definitive whichever way; the intention is that, at the end of the tribunal process, the school has a scheme, the dispute is settled and matters can go forward.

Mr Kinahan: My third question follows on from that. You talk about flexibility and the role being restricted. However, on my first and second reading of the Bill, there seemed to be a large number of areas — whether to do with the employment scheme, a scheme of management or everything that is being passed down to the governors — where, if the governors are not doing what ESA thinks they should, either on educational excellence or children's welfare, ESA has the overbearing power to come in and say, "You are not doing that right". You can read it that there is an overpowering role for ESA and the Department. That is what concerns me, which is why my last question was on the tribunals. I assume that, if another, say, five or six sets of rules, guidelines and legislation are to come in, the tribunal will interpret them. Therefore, the Bill gives massive power to the Department and ESA, yet we do not know half the regulations and the rules that are coming in the future, and those will shape the Bill.

Mr Stewart: That is a fair point, and I am sure that the Committee, as was the case last time, will want to see the colour of our money on that. You will want to see the detail of those regulations before the Bill passes to the end of Committee Stage. I do not think that that would be an unreasonable thing for you to look for.

On the overall interpretation, it is not meant to be the heavyweight interventionist role that you may fear. It is perhaps worth looking at the history and the evolution of the provisions. We started off deliberately with the intention of having very little regulation on this. The core principle was that it was to be delegated, and schools were to choose the extent of the delegation. In essence, schools were to write the rules that they would follow day to day. ESA would simply approve those, and on it would go. There would be, and there will be, a statutory duty on ESA to put into effect decisions that boards of governors make. The only role for ESA in challenging a decision would be if it felt that a board of governors had not followed its own rules. If ESA were to come to that conclusion, it would not be allowed to second-guess and impose its own alternative decision. Its powers are limited simply to referring the matter back to the board of governors and saying, "You did not follow your own rules, so please have another go and please follow your own rules this time." It cannot substitute its own decision for that of the board of governors.

There were many concerns about that, not least among Committee members, who felt that leaving things as open as that, first, left schools in a position of uncertainty and, secondly, perhaps might leave the door open for interference by ESA or by the Department. So, we gradually added more layers of regulation. The first proposal was that we would move beyond guidance and have regulations in subordinate legislation to say what must be in a scheme and what cannot be in a scheme. That resolved some of the concerns, but some stakeholders still felt that that was not enough and that the Department could change the regulations and interfere with this. They felt that it did not give them enough certainty. So, instead of regulations, we have moved these provisions into the Bill, and that is why they are in schedule 2.

That still did not resolve all the concerns, and it was felt that there was a need for this independent challenge mechanism as regards ESA. That still did not resolve the concerns. It was still felt that there were too many opportunities for ESA to interfere, either by rejecting a scheme unreasonably or by modifying a scheme unreasonably, so all of that has been cut back as well. As I said in my presentation, we have moved from having minimal regulation and potential heavyweight intervention to the opposite. It is now very limited intervention and quite significant and heavily engineered regulation. That is a double-edged sword. On the one hand, it gives schools and other stakeholders some certainty about what they can and cannot do and what ESA can and cannot do. On the other hand, we now have a very complex set of provisions and a very complex set of rules for a board of governors to sit down and find their way through. All of that, of course, is an Executive decision.

Mr Kinahan: It still terrifies me.

Mrs Dobson: Chris, it is nice to meet you for the first time. I will follow on from Brenda's comments and explore a bit further the matter of ethos. I have met representatives from the voluntary grammar sector, which you spoke about earlier. They are extremely concerned that the ethos of their school will be lost once ESA is established. How do you intend to specifically define the commitment of governors to the school ethos? How will you know how committed they are to the ethos?

Mr Stewart: I think that that will have to be built into the application process for potential governors. In one sense, it is not an entirely new thing. Potential governors already indicate the types of schools or the particular schools that they wish to serve. So, in nominating themselves for governorship, they are already indicating at least an interest in, if not outright support for, the ethos of a particular school. I think that we will need to sharpen up the questioning and the application forms.

Mrs Dobson: Who decides on the ethos? Does ESA decide? Ultimately, whose decision is the ethos of the school?

Mr Stewart: That would be a matter for the school. Ethos is one of those difficult things to define. We can all recognise it, but defining it or writing it down and capturing it in any sort of documentation is incredibly difficult. A core principle is that it is not for ESA, the Department or any other statutory authority to define something like ethos. For ethos to be effective, it has to be something that comes from within the school, with the genuine buy-in of the whole school community. As I said, we need to look for that by sharpening up the questioning on the application forms for prospective governors, asking them to indicate, perhaps, which schools or types of schools they wish to serve on and why. In asking the question why, we would be looking for commitment to the ethos of the school.

Mrs Dobson: I am pleased that you spoke about retaining the school ethos, because that is a major worry out there. Do you want to come in on that, Jonathan?

Mr Craig: Is that all right, Chair?

The Chairperson: If you want to, yes. That just made my job a lot easier, Jo-Anne. Thanks.

Mr Craig: Jo-Anne raised an interesting point. Last week, I sat down with Friends' School, one of the local grammar schools. As a Quaker school, its ethos is very much a religious one. Is there a role for the trustees when it comes to the appointment of the board of governors? Have I read the Bill right? In the case of Friends' School, the trustees are the governing body that appoints the majority of governors to the school, so the concept of keeping that religious ethos stays within the school. Will that continue?

Mr Stewart: Absolutely; that will continue for that school and other schools in the same situation, where what are usually known as foundation governors are appointed by trustees. That is not changing. The proportion of governors and the make-up of boards of governors are not changing. The only change is that those appointments that are currently made by the Department or by education and library boards will in future be made by ESA. The proportion and make-up of boards of governors are not changing. Those appointed by the trustees of a school to reflect its ethos, history and traditions will still be there.

Mrs Dobson: I want to move on to area planning. Clause 28 requires ESA to consult relevant bodies when drawing, changing or revoking plans. However, clause 28(3) states that ESA does not need to consult if it:

"determines that the changes to the plan for the area are not of sufficient importance".

How will you determine "sufficient importance" and who makes the final decision?

Mr Stewart: The final decision would be for ESA. However, as with any other such decision, if ESA were behaving unreasonably, that could be challenged by someone seeking judicial review. That clause has perhaps given rise to more concern than we hoped it would and certainly more than we thought it would. It is not a particularly unusual thing. If you look at the provisions on area planning generally, you can see that they actually follow quite closely the Planning (Northern Ireland) Order 1991, in terms of how development planning would work. That provision is a straightforward lift. In practice, it means that if there is going to be a major or significant change to a plan or there is a new plan, the full consultation and involvement mechanism should come into operation. However, if it is a very minor change, such as shifting a boundary by 50 metres or something, and there genuinely is no significant consequence, the provision recognises that going through the panoply of consultation and involvement may be unnecessary and disproportionate. It is absolutely not intended to give ESA an opportunity to avoid full and proper consultation when key decisions are being made about the future of schools.

Mrs Dobson: That is a massive concern. What would happen in the case of a dispute where it is alleged that the changes are of sufficient importance and the Department has chosen not to consult?

Mr Stewart: An aggrieved party could take two routes, assuming that the aggrieved party is a school, its board of governors or another stakeholder. There are two particular clauses in the Education and Libraries (Northern Ireland) Order 1986 that relate to this. Article 100 contains a dispute resolution mechanism whereby such disputes could be referred to the Department for resolution. Article 101, which we mentioned earlier, goes a bit further. Article 101 has two limbs to it. The Department can decide to use article 101 to direct ESA to do something if it feels that that is necessary, and there is also a complaint mechanism in article 101. If the Department were to receive a complaint that ESA has been acting unreasonably, perhaps in an example such as this, the Department must investigate that complaint. If the complaint is upheld, the Department must direct ESA to remedy the matter. If a failure to consult on a minor change to the plan were challenged, the Department would be obliged to look at that if a complaint were raised. If the complaint were upheld, ESA would be directed to go through the full consultation and involvement process.

Mrs Dobson: There are major concerns in my constituency of Upper Bann.

Finally, the Bain review recommends:

"ESA should establish, lead and co-ordinate planning groups that are representative of all the educational interests".

What are the details of how the Department intends to establish these groups to ensure that they are representative? I asked Caroline that earlier.

Mr Stewart: There is no detailed specification on that as yet, Jo-Anne.

Mrs Dobson: You will ensure that they are representative?

Mr Stewart: Yes. In the Bill, we have provided for, if you like, the ability to regulate that if it is necessary. There is quite heavy engineering around the area planning clauses. We can provide

guidance that ESA must take into account, or we can bring forward subordinate legislation — regulations — on the content of plans and on the process for drawing up plans. So, if it were felt necessary to place in legislation how those planning groups would be constructed and involved, we could do so. The opportunity is there.

Mrs Dobson: As you say, it needs to be based on proper understanding of local communities. Presumably, that means that there would be a requirement for the full involvement of local community groups, parents, and so on, who have the best knowledge — more than ESA officials.

Mr Stewart: Absolutely. Again, there are three levels or strands of consultation and involvement in that. There is a fairly standard requirement to consult district councils and to publicise plans and invite public comment on those. You see that all the time in development planning. There is also a specific duty to go further than to consult: to consult and involve sectoral bodies and certain other named persons in bodies on the area planning groups. Then there is a more general power to consult and involve more widely than that, and that involves parents, staff and providers of youth services and early years services. You might well ask why there is a duty to involve some stakeholders but only a power to involve others. The answer is, simply, practicality. It would not be practical to have an absolute duty to involve every parent, every child and every member of staff, but, clearly, it is good practice and the Minister's policy intention that that involvement will be widespread and real. It is practical, hence there is an absolute duty to involve the relevant sectoral bodies and the other key stakeholders.

Mrs Dobson: So, is it up to ESA and the Department to decide, rather than following statutory requirements?

Mr Stewart: The backstop of statutory requirement is there if we need it. The Minister will want to see ESA's proposals on how it will carry out area planning. They will all be subject to ministerial approval. If he is not satisfied and feels that regulation is necessary, the power is there to make the regulations.

Mr Lunn: It is good to see you back, Chris.

Mr Stewart: Thank you, Trevor.

Mr Lunn: It will be nice to get some unambiguous, clear and lucid advice.

Mr Stewart: I think that I have had at least five votes so far.

Mr Lunn: I think that you are safe enough for the time being.

I am sorry to harp on again, but I return to the issue of ethos. Clause 39 refers to the appointment of governors and the requirement that they must subscribe to the ethos of the school. I think that is what it says. I am sure that the Bill contains various requirements or conditions that would allow a school or, perhaps, ESA to dismiss a governor. Would evidence that a governor did not subscribe to the ethos of the school be sufficient grounds for dismissal?

Mr Stewart: I doubt it. Let me expand on that a little, if I may. The powers to dismiss individual governors or an entire board of governors are, if I recall correctly, in the Education and Libraries (Northern Ireland) Order 2003. Article 23, I think, allows the Department to make regulations that would provide for the dismissal of governors or an entire board in prescribed circumstances. Those regulations have never been made. The Department is considering such a set of regulations. Therefore, we would have to think through very carefully what the particular circumstances would be to justify dismissal. Clearly, when that power was first legislated for, I do not think ethos considerations were part of the deliberations. We were thinking about things such as financial impropriety, some sort of improper behaviour or a gross failure to do the job of governor. We would have to think long and hard about whether it would be feasible or desirable to add a test of commitment to ethos into that.

Mr Lunn: It is in the Bill.

Mr Stewart: It is in the Bill as something that should be taken into account when choosing people for appointment. However, to use it as a test for dismissing someone would be a whole different ball game. We would have to think long and hard about whether that is practicable.

Mr Lunn: Hypothetically, if the Department appointed someone to be a school governor, despite that school having considerable misgivings about that person's ethical suitability — "ethos" now being in the Bill where it never was before — and that person came to board meetings and declared an intention to change the ethos of the school because they did not approve of its voluntary status, pupil selection method, the fact that it had a bursar or whatever else, could that be grounds for dismissal?

Mr Stewart: I note from the early part of your question that we are talking about a hypothetical situation —

Mr Lunn: Absolutely; yes.

Mr Stewart: — and I will answer in similar vein, if I may. I think that the view that the board of governors might take of such behaviour, or the ultimate view that ESA or the Department might take of such behaviour would be, "How does it manifest itself? What is the effect on the running of the school?" Governors, as individuals, are entitled to have whatever views they wish on any matter. However, if their behaviour is such that it is interfering with the operation of the board of governors and with the running of the school, that is something that, yes, could be taken on board. I stress that we are talking entirely hypothetically.

Mr Lunn: Absolutely; yes.

I go back to the employment role and the employer/employing authority situation, which I take to be the same thing, so ESA is the ultimate employer or employing authority. Who is legally responsible, then? Is there any change to the legal liability situation when it comes to claims for injury or something more complicated? I understand that, at the moment, except in the case of voluntary grammars, the Department picks up the tab and that, without any insurance of its own, claims that are settled just have to come out of general funds. At present, voluntary grammars have to carry their own quite onerous and expensive insurance, which includes director and officers' liability, and the whole works. Would the new arrangements mean that, at least theoretically, voluntary grammars would no longer have to carry that cover because ESA would pick up the tab?

Mr Stewart: I think that the answer is yes, Trevor, specifically around employment matters. There may be certain other types of insurance that they will continue to need to carry because they are still the owners of premises.

Mr Lunn: I am talking only about liability cover.

Mr Stewart: For employment liability, yes, I think that the situation is as you described it.

Mr Lunn: I would be interested to hear more about that.

My final question concerns — I forget who raised it earlier — the contrast between the explicit requirement on ESA to foster the Irish-medium sector and the lack of mention of the integrated sector. You said that the integrated education provision goes back to the 1989 order, whereas the Irish-medium one comes from the 1998 order. Is that correct?

Mr Stewart: The duty on Irish-medium education is in article 89 of the 1998 order, while the duty on integrated education is in article 64 of the 1989 order, I think.

Mr Lunn: I did say that you were lucid. That is fair enough.

Mr Stewart: I cannot sleep at night without a good feed of the 1986 order. *[Laughter.]*

Mr Lunn: I think that you said in your presentation that bits of these orders had been done away with and that some of them had been carried into this Bill. Why, when a major Bill is being prepared, is the opportunity not taken to tidy up the whole thing? It does not make sense to me. I accept what you say, but NICIE and the Irish-medium sector appear to be getting slightly different treatment. It would have been so easy to bring forward the NICIE requirement as well.

Mr Stewart: You ask two questions. One is a technical one, and the other is a policy one, on which I can hide behind my usual answer that that is a matter for the Minister. The Minister and, ultimately, the Executive make the decisions on which provisions are included in the Bill and which are not, and that is not a matter for me. On the technical question about consolidation, yes, that is almost a civil servant's prayer. The short answer is that you cannot hit a moving target. We cannot consolidate the legislation until we stop making more. It may be that, after this Bill, the General Teaching Council Bill, which is in the pipeline, and perhaps another Bill that will come after that, we will have an opportunity to pause and say let us move from having 14 orders, as it might be then, to one or two. That is a huge task. It would be well worth doing and be of considerable benefit to everyone in education if we can have a much simpler canon of education law that people can easily access.

Mr Lunn: You could not say, in a Bill such as this, that all the provisions of the 1989 order, except those that have been expunged, are now considered to be part of this Bill? You could add an addendum to say what the 1989 order said.

Mr Stewart: You might think that I would say this as a civil servant, but it is not as easy as that. Some people might look at this Bill and say that it is just the Bill that we had last time and the second Bill that did not really see the light of day with a few bits chopped off and put together. In a sense, it is, but the instructions to the draftsman to prepare run to 55 pages. The task of consolidating existing legislation is possible, but it would be a mammoth one. It would be one that the Office of the Legislative Counsel would take forward rather than administrative civil servants, and it would be a very major task that would probably require a year or two.

Mr Lunn: I am finished, Chairman. I am told that the argument about substitute teachers and the Department's ability to restrict the use of retired teachers that is before the Public Accounts Committee started in the early 1980s. It is still going on, so it must relate to some order that was made even before that.

Mr Stewart: This started in 2002, when I was a young man.

Mr Lunn: You are still a young man.

Mr Stewart: Thank you. Can we have that recorded?

The Chairperson: It is recorded.

Chris, we have opened up the discussion, and there is a raft of other things that we need to come back to. I will put some other concerns on the table, the first of which is to do with inspections. People were worried that ESA would be Big Brother, and a lot of that has been clawed back, albeit in regulations that are subject to the control of the Assembly so that ESA is not seen as Big Brother. The powers that have been given to the inspectorate make it look like some organisation from a former Communist state. I cannot see what giving an inspector the power to collect papers, documents and computers has to do with ensuring that a child is getting a good education, other than an inspector being used to identify primary schools that are not complying with guidance from the Department on independent tests. It has other wider implications. That is a personal view, not the Committee's view, that the inspectorate should be separate from the Department and should have the power to inspect the Department as much as it does the schools. I can tell you that that would raise some concerns. It should be there for the benefit of children, not for the benefit of an institution. I have major concerns about the inspectorate.

The other concern is about clause 3(4) and clause 3(5), which are on employment. More work needs to be done, and I understand that those subsections were put in very quickly.

When will we get the Department's view as to how that will be modified, changed or enhanced? The Bill has its Second Stage on Monday, and we do not want to delay the way in which we deal with it. However, the changes that the Department tells us that it will bring in will form an integral part of our decisions. Have we any indication now as to what the timescale is for that further piece of work?

Mr Stewart: Not as yet, Chair, but I absolutely recognise your point that the Committee will want to see our proposals on that as early as possible. I will take a further steer from the Minister on what direction he wants those clauses to go in.

The Chairperson: The other point — this may help Trevor, and it will certainly help us all — is that we have the repeals at the end of the Bill. You may tell me that they are already there and we have not seen them, but do we have the orders that will remain in operation, as regards the 11 other pieces of subordinate legislation? We have all the repeals, but may we also have a list of what remains in existence, for the purpose of cross-referencing?

Mr Stewart: Yes. If I recall correctly, I think that last time we produced for you a paper that set out the scope of the existing orders. We can get that out and dust it off again, yes.

The Chairperson: That would be very helpful.

Mr Stewart: On inspection, the effect of the particular provisions differs for the three Departments for whom the inspectorate operates. For the Department for Employment and Learning, the powers are essentially unchanged. They are the same as those in the 1986 order. For the Department of Culture, Arts and Leisure (DCAL), they are actually chopped back a bit. DCAL did not see the need for extensive specific powers for inspection; hence they are not in the Bill. DCAL inspections will be carried out under one very simple, broad provision that is in the Libraries Act (Northern Ireland) 2008.

On the provisions on the inspection of schools, I absolutely hear what you say about inspecting the Department. I think that, for the time being, we will simply have to submit ourselves to scrutiny by the Committee until or unless that changes.

Yes, the powers are enhanced from those in the 1986 order. We will of course take on board carefully the views of the Committee and of individual members as to whether that is the right direction. However, they are perhaps not as progressive or as unusual as you fear. Those particular provisions are almost a direct lift from some of the powers that Ofsted has in the Education Act 2005, and we did not even carry them all across. Therefore, they are not unusual but would be a standard tool in the box that any inspectorate would have.

The Chairperson: Yes, but those were not the powers that CCEA wanted Ofsted to have for its inspection. That is one of the reasons why CCEA decided that it might want to go down a separate route and not become as much under the oversight of Ofsted or Ofqual — Ofsted for the purpose of inspections. We will have to revisit that one.

Mr Stewart: CCEA would be within the scope of the inspection provisions that are in the Bill, as would be ESA.

Mr Kinahan: Consultation is one of my biggest concerns. From the brief that we got beforehand, we know that consultation was last done, I think, in 2006. A whole lot of children have gone through the system in that time; a whole lot of parents are no longer involved; and a lot of new parents and teachers are involved. Are there any plans to re-consult? On the back of that, having spoken to various bodies yesterday that represent parents and teachers, I get the sense that there is a great feeling out there that they have no idea what is coming. No one has explained it, given them a chance to discuss it and get us to the point at which we get to how we all see consultation, which is that it has been decided that this is your last chance to have a good go at us. Is there a plan for proper consultation?

Mr Stewart: The point is well made about communicating what is happening to the education sector and those in it. I absolutely accept the point that you make on the importance of doing so. There are no plans for formal consultation. Like everyone else in the Department, I have to follow the decisions that have been made by the Executive. The Executive decided to proceed with what was set out in the heads of agreement. In the heads of agreement, the timescale was very exacting. In fact, the Bill should now be law. It should have come into effect last July, but there simply was not time, within the timescale that was set for us by the Executive, for public consultation.

Mr Kinahan: I move on to an issue that we touched on earlier. How is ESA going to work locally? There will no longer be five boards, but Fermanagh or Omagh or Antrim may want to work in different ways. Will there be a local management grouping or system?

Mr Stewart: Yes, there will. Last time, this was a very significant concern on the part of many members that there was a real danger that ESA could be some sort of remote monolith, interfering in schools from a distance. They felt that, on the one hand, it would be a heavy hand from the centre,

while, on the other hand, it would not provide the close support and understanding that we know that colleagues in education and library boards do provide.

In response to that, the previous Minister made it very clear that the location strategy needed to include proposals for local offices. The idea was not that services would be withdrawn. What you might call back-office services could be concentrated in a number of hubs, but front-office services, which need to face schools and other education providers, far from being moved further away from them, needed to be moved closer, through a network of small local offices that would be on hand and very responsive to what schools need. That remains the policy.

Mr Kinahan: Is there a draft of that plan?

Mr Stewart: No, not yet. It is one of the pieces of work that had got a certain distance last time around and that went into abeyance when the Bill fell, and it now needs to be taken forward again.

Mr Kinahan: I have two more questions. Your briefing paper talks about supporting professional development and says that ESA will support schools or groups of schools to provide or procure services themselves. Is there a plan to pass more spending decisions down to schools in future?

Mr Stewart: Yes. One of the criticisms that is often made, rightly or wrongly, of education and library boards is that although it has very good people working in it, the Curriculum Advisory and Support Service (CASS) is too inflexible. It provides certain services, and if those are what schools need, they can avail themselves of them. If those are not what schools need, there is nothing else, so the proposal here is for something much more flexible. ESA will still provide services, but schools may wish to provide them themselves. They may wish to get together in groups and either provide them for themselves or procure them for themselves. It is to provide for that flexibility and to ensure that schools get what they need, as opposed to what ESA wants to provide.

Mr Kinahan: My last question is on clause 2(5), which deals with Irish-medium education. It begins:

"ESA shall ensure that its functions relating to grant-aided schools".

That implies to me that all grant-aided schools are going to have to teach Irish in future.

Mr Stewart: No. Let me reassure you on that. It is about ESA's functions rather than the school's functions.

The Chairperson: Following on from that, I take issue with you, Chris, about CASS. In lots of boards, CASS does not even exist because of the vacancy controls from 2006. Where it is located unfortunately has not become an issue, because it is hardly there.

One of the biggest issues to do with financial arrangements in schools is the split. I know that there is not a straight comparison between authorities in England and here, but we see all the figures that show that the delegated budget in other jurisdictions is 75%-plus, whereas here a huge amount of money is still retained. Depending on what figures you look at, anything from 55% to 60% is still held by the centre. We were always told that one of the reasons why the delegated budget could not move more towards the schools is because you have to give it to the education and library boards, who then decide to do all the things that they have done historically. What is the financial model that will underpin that process? Have we any idea about what the new delegated budget will look like?

Mr Stewart: That is not so much an issue for this Bill as an issue for the review of the common funding scheme, which Sir Bob Salisbury is taking forward.

The Chairperson: He is coming to us next week.

Members, thank you. Chris, thank you very much. I have no doubt that we will be seeing more of you in the weeks ahead.

Mr Stewart: I apologise to members for that.

The Chairperson: Thank you for coming to Omagh. I appreciate that it is a journey for you.