



Northern Ireland  
Assembly

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**COMMITTEE  
FOR EDUCATION**

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**OFFICIAL REPORT**  
(Hansard)

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**Education Bill**

9 September 2009

# NORTHERN IRELAND ASSEMBLY

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## COMMITTEE FOR EDUCATION

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### Education Bill

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**Members present for all or part of the proceedings:**

Mr Mervyn Storey (Chairperson)  
Mr Dominic Bradley (Deputy Chairperson)  
Mrs Mary Bradley  
Mr Trevor Lunn  
Mr John McCallister  
Mr Basil McCrea  
Mr John O'Dowd  
Mrs Michelle O'Neill

**Witnesses:**

Mr Chris Stewart            )     Department of Education  
Ms Eve Stewart             )     Department of Education

**The Chairperson (Mr Storey):**

I am sure that, over the summer, members did not forget the Committee's scrutiny of the Education Bill. I remind members that this session is being recorded by Hansard, and I welcome our colleagues from Hansard. Members have a first draft report for their consideration. I am glad that Chris Stewart and Eve Stewart are present. Chris, you are welcome back to the Committee; I have no doubt that we shall see more of you over the next few weeks.

I shall go through the draft report to set the Bill in context at Committee Stage. The draft report sets out the background to the Committee's consideration of the Bill and the approach that

will be taken.

In the section that deals with consideration it attempts to record by clause, groups of clauses or schedules the concerns raised by stakeholders; any advice or assistance of which the Committee has had the benefit; the issues that emerged during the Committee's deliberations on the Bill; the Committee's engagement on those issues with the Minister, departmental officials and stakeholders; and the progress made on resolving issues.

Members will appreciate that the Committee must progress its scrutiny so that it can finalise the report, including its conclusions on each clause and schedule so that it either stands part of the Bill or is to be subject to a Committee amendment. We hope that more progress will be made in the next couple of meetings as the Committee finalises the report.

We will look at the draft report as we revisit some of the outstanding issues. After that, we will resume our consideration of the Bill at clause 24; there are only 55 clauses, so we are getting there.

**Mr Chris Stewart (Department of Education):**

And the schedules.

**The Chairperson:**

And the schedules.

I commend the Committee Clerk and his staff for the huge amount of work that they have done over the past weeks to bring us to this stage.

I propose that the Committee adopt the draft report in its present form. I stress that the draft report is a working document — I am not asking anyone to buy into something with which they cannot agree. The draft report is a working document; additional content and amendments that emerge from each Committee meeting and are added to the draft report will be tracked so that members can easily identify changes.

There are appendices to the report. Appendix 1 contains extracts from the minutes of the Committee's consideration of the Bill, which the Committee has formally approved.

Appendix 2 contains all the Hansard reports of oral evidence. Those reports have not been copied, because of the volume of paper that that would involve; each Committee member would have 14 files if all the reports had been copied. I remind Committee members that the Hansard reports of the evidence sessions on the Bill have been approved by the Committee, and that all 27 Hansard reports up to and including that of 1 July 2009 are available. They are sitting on the desk in my office if anyone wants to look at them, but I am sure that Committee members have received copies.

Appendix 3 contains the written evidence submitted by stakeholders; Committee members will be familiar with that evidence from the spreadsheet.

Appendix 4 contains correspondence and written submissions, including the Committee's correspondence with the Department, the Minister and the Secretary of State. It also contains letters and additional submissions from other bodies.

Appendix 5 contains a list of witnesses who gave evidence to the Committee during the Bill's Committee Stage. I ask Committee members to review the appendices over the next week with a view to approving them for inclusion in the draft report at next week's meeting. I am sure that Committee members will look forward to doing that over the weekend; I will ring you all on Saturday evening to make sure that that is what you are doing.

**Mr O'Dowd:**

An Indian summer has been forecast for the weekend. *[Laughter.]*

**Mrs M Bradley:**

That means that we can sit outside.

**The Chairperson:**

You can sit outside and get a tan.

During the Committee's September meetings, members will be asked to approve the additional items necessary to keep the draft report's appendices up to date. I appreciate the indulgence of Committee members in that; there is a huge amount of work to be done, and we

need to be as methodical as the Committee Clerk and his staff in collating all the papers.

Before the Committee continues its clause-by-clause scrutiny at clause 24, in light of information received from the Minister and the Department and advice received over the summer recess, I propose that we review several issues that were discussed at previous meetings, including the Minister's letter to the Committee of 5 August 2009.

The Department's responses of 31 July and 4 September are also included under item 2 in the white folder. Items 8 and 9 of matters arising are at tab 4 of the black folder.

Earlier, we referred to legal advice that we have received from the Examiner of Statutory Rules; we have agreed that we will pass that on to Chris. Perhaps we should deal with it now. Will we come to it later?

**The Committee Clerk:**

That issue will arise naturally, Chairman.

**The Chairperson:**

In that case, we shall work our way through the issues that are being revisited. The first is the membership of the education and skills authority (ESA). Paragraph 2(1) of schedule 1 proposes that the membership of the ESA will consist of a chairperson and between seven and 11 other members. Paragraphs 27 to 34 of the draft report set out the concerns of stakeholders and some members on that issue.

At the start of the summer recess, the Minister was still reflecting on the number of the ESA's members. On 5 August, the Minister wrote to the Committee, and her letter was circulated to members by the Clerk on 6 August. The Minister said that she will:

“continue to examine the issue of greater representation on the Board measured against factors such as finance and efficient delivery of services and will advise the Committee of my views as soon as possible.”

The advertised remuneration for non-councillor members of the ESA is £8,800 per annum, plus travel and subsistence allowance. Chris, do you have an update from the Minister and the Department on that issue?

**Mr C Stewart:**

No; there is no change in that position. The Minister continues to consider the matter of the number of members of the ESA and is aware of the Committee's deliberation on that point. To pick up on a point that Basil made earlier, it remains the Minister's policy that, irrespective of the number of members of the ESA, the majority should be local councillors.

**The Chairperson:**

OK. We will have to wait for further detail. Like ourselves, the Minister and the Department are constrained by time. As the Minister is still thinking about the matter, I remind the Committee that in previous discussions several members said that they wanted the ESA's proposed membership of one chairperson and between seven and 11 members to be increased to about 20. Bearing in mind that the Committee has only two more scheduled meetings in which to finalise its report and that the result of the Minister's long reflection may well be to approve membership of between seven and 11, do members want to discuss that problem and how we might fix a number for the ESA's membership? It looks as though we could run into difficulty if, on reflection, the Minister tells us that she is not prepared to increase the ESA's membership.

**Mr Lunn:**

Given that the advertisement has been published and the application stage of the process is now complete — the closing date for applications was 7 September 2009 — and that, presumably, the selection procedure is now under way, it seems highly unlikely that the Minister will change her mind about the number of board members. We can regard that as a given. The question now is whether there should be seven or 11 members. Does that depend on the quality and number of applications that have been received?

**Mr C Stewart:**

It is difficult for me to speculate; I am not involved in the selection process at all. However, I can reassure you with respect to the first part of your question. The fact that the application process has been completed will not, in itself, determine the number of members, which will be decided by the Minister, having considered the Committee's views. When the advertisements were placed and the process was under way, we were aware that a final decision on the number had not been made, and that was reflected in the advertisement and the material that was sent to candidates. The fact that we have gone through the first part of the selection process will not determine the number of members who will be appointed.

**Mr Lunn:**

However, for now, the selection panel will have to select a certain number, although I think that the Bill allows for additional members to be appointed in future as necessary.

**Mr C Stewart:**

The Bill allows for the number of members to vary, either up or down, by Order, although, as you rightly surmised, the likely direction will be up. Of course, the first part of the process involves determining which applicants are eligible to be appointed and who meets the criteria to determine the pool of candidates who are, to use the popular phrase, above the line. It will only be at the subsequent stage, when the Minister makes appointments, that it will be necessary to have a number for the appointments to be made. At this stage, it is possible to continue with the process, even in advance of a decision on the numbers.

**The Chairperson:**

I see that academic selection is not being used either. The advertisement states:

“Whilst there are no academic qualifications required”.

Therefore I will be looking for a comprehensive board.

**Mr C Stewart:**

I am sure that the Minister is looking for a broad range of competencies that will be assessed in various ways.

**Mr O’Dowd:**

We must be conscious of the cost of boards. If the number rises to 20, it will cost roughly an additional £64,000 a year just to pay board members to meet twice a month. Although I am open to persuasion about the number of members, we must be conscious of the cost.

**The Chairperson:**

We must also be conscious of the fact that we are moving from five boards with 40-plus members to one board with 11 members, and we must think seriously about whether that is a fair and reasonable transition. Consequently, the cost of increasing the number of board members to 20 is miniscule compared to the Department’s overall budget of £2·something billion. Although I do

not underestimate the importance of cost savings, the nature and composition of the board is paramount, because it will deal with the most important issue. I am not saying that other boards do not deal with important matters; however, given the complex nature of education, we must ensure that we get it right.

**Mr Lunn:**

I take a different view from John. Given the expertise and experience that is required for such key positions in what will be a huge organisation, I was surprised by the low salary being offered. The position probably merits a bit more than £8,800 a year. For that reason, I would be a bit worried about the quality of applicants.

**Mr O'Dowd:**

You have spent too long running down councillors, saying that they were not worth paying.  
*[Laughter.]*

**Mr B McCrea:**

How was the figure of £8,800 arrived at?

**Mr C Stewart:**

The short answer is that it was determined by considering the market rate to attract candidates of the necessary calibre, while bearing in mind, as John emphasised, the need to minimise the amount of money spent.

**Mr B McCrea:**

Given what you said about the Bill being the most fundamental reform of administration and the contribution that members of the board will be expected to make, it seems to me that the job is very big. Therefore, to value it at £8,800 is interesting. Perhaps we have not got the balance right to get the type of people that we want.

It is not for me to influence that, but perhaps it could be looked at. Perhaps you could provide us with more information. You said that that is simply the market rate, but how did you arrive at that?



**Mr C Stewart:**

I cannot comment on that in detail because the legislation team is not involved in it in any way. If the Committee wishes to have more information, I shall ask colleagues who are involved to provide it.

**The Chairperson:**

What is the position with regard to existing members of boards? It may differ from board to board. If, as is envisaged by the Minister, the 11 members will also chair the 11 local committees, they will not only be engaged in board meetings but in a raft of other activities. That will be pretty demanding. Is that mentioned in the job description in the advertisement? Perhaps it was not required to be mentioned. Our recollection is that part of board members' functions will be to chair the local groups.

**Mr C Stewart:**

That is certainly envisaged.

**Mr D Bradley:**

In theory, the board could have seven members; that is the minimum number that is required. Even with a maximum of 11, the board would still be quite small. Given the advice that a body's size would impose limits and restrictions on its ability to be representative, it makes sense for the board to have more than 11 members. I am in favour of the board's having about 20 members.

**The Chairperson:**

We shall return to that issue. Earlier today, we discussed the issue of how membership of the ESA will reflect the community in Northern Ireland. The Minister's position is set out in her letter of 17 June 2009, which stated:

"A representative membership is appropriate for Commissions that are operationally independent of Ministers and the Assembly. However, the ESA will not be operationally independent. Its role will be to implement the policies of the Minister of the day and legislation as passed by the Assembly with scrutiny and oversight by the Education Committee and the Assembly generally. As such, the ESA — like similar authorities for libraries, health and housing — ought to have a membership that reflects its core role of managing and delivering services."

Some members expressed the view that the provision of education, unlike other areas that are affected by the RPA such as health and libraries, is largely provided in two separate school

systems, reflecting the two largest political/religious communities in our society. Appointment purely on merit may — but will not necessarily — produce a broadly representative ESA regarding community background and education sector or, indeed, the geographic area of Northern Ireland and the gender balance of members. If one community, education sector, gender or sub-region of Northern Ireland is underrepresented, there is a risk that the underrepresented group will not have the confidence in the ESA. Members might have seen a recent article in ‘The Irish News’ that highlighted that point.

The Minister’s letter of 17 June also stated:

“I recognise that it will be important for the ESA membership to have the trust and confidence of education interests and the broader community. With this in mind, the appointment arrangements will reflect the need to ensure balance, insofar as this is compatible with the Commissioner’s Code of Practice and the merit principle.”

Members will recall that the Committee wrote to the Secretary of State regarding the arrangements by which he fulfils his statutory obligation in appointing a member from the Equality Commission and the Human Rights Commission and that, as far as is practicable, he secures that the commissioners as a group are representative of the community in Northern Ireland.

Members have been provided with a response to that issue from the Secretary of State, a summary of which is given in paragraph 31 of the draft report, and which includes the following extract:

“The second way in which the Secretary of State is able to take steps to meet the statutory requirements is at the final selection stage. The list of appointable candidates is provided to him, and he selects the candidates to appoint. In doing so, he can have regard to the community background of the candidates and other relevant information, including, for example, the practical expertise they could bring to the commission, and he can make selections that help to ensure that the commissioners as a group are representative of the community in Northern Ireland.”

We may wish to consider whether amending the Bill to include a duty on the Minister to, “so far as practicable”, ensure that the ESA membership is representative of the community in Northern Ireland would give the Minister greater freedom to ensure balance — a balance that, her letter of 17 June suggests, is desirable. Members will recall that the Minister’s ability to ensure balance was subject to that balance being compatible with the code of practice of the Commissioner for Public Appointments and with the merit principle. Does the Committee have a view on whether the inclusion of a statutory duty would give the Minister greater freedom to ensure balance and thereby ensure public confidence in the membership of the ESA?

**Mr B McCrea:**

We have discussed the issue, and I would like to hear what the departmental officials have to say.

**Mr C Stewart:**

I have not seen the Secretary of State's reply, but from your brief summary it does not strike me that the process outlined by the NIO is significantly different from the process that was followed under the guidelines of the Commissioner for Public Appointments. It strikes me as a sound approach, and one that the Minister will want to adopt.

**The Chairperson:**

We will ensure that Chris receives a copy of the correspondence from the Secretary of State.

**Mr B McCrea:**

Will you get back to us and tell us whether that is how the Department will deal with the matter?

**Mr C Stewart:**

Certainly. I have no doubt that the Minister will wish to respond to that. In her public comments and in her correspondence with the Committee the Minister has made clear her intention to have a process similar to that sought by the Committee that will produce an outcome similar to that which the Committee has said that it wishes to see. I cannot comment on whether an amendment along the lines described would assist or hinder the Minister in taking forward such a process. We would have to get legal advice on that.

**Mr O'Dowd:**

The sensible approach is to forward the Secretary of State's letter to the Department and await a response about its approach. I must say that the Secretary of State and the NIO are not great sources of guidance on appointments processes — or perhaps they are now, after losing two judicial reviews on the matter and having their practices severely criticised by the Commissioner for Public Appointments. Perhaps they have refined their systems and are now using the Commissioner's public-appointments system. It is worth knowing that what brought them back into line was the judicial review process, under which the legislation before us is open to challenge. If any person or group is concerned that the appointments process has not been open, fair and transparent, it is open to judicial review.

**The Chairperson:**

Surely we should ensure that we get it right in order to avoid judicial reviews and the difficulties that were encountered in the processes to which you referred. Without wishing to demean any other aspect of the delivery of government, education is not clean-cut; it is not the same as health. People make choices about where they are educated; therefore there is a distinct difference in the realm of education, although I will not go back over the history of it. That is why we need to get it right.

My understanding is that the Minister is not in favour of any proposed amendment to schedule 1 that would state that members of the board will be representative of the community in Northern Ireland. The Committee would appreciate clarification on that issue.

**Mr C Stewart:**

It would be best if that were put to the Minister formally and if she was asked to reply formally to the Committee. To date, she has not indicated to me that she would favour such an amendment.

The question relates to the earlier question on numbers and on the view that the Minister and the Committee might take on the nature and purpose of the membership of the ESA. We have sought to illustrate in previous evidence that if the policy intention is that the ESA board should be a management-type or technical board that will scrutinise and govern the affairs of the organisation, then the numbers currently outlined in the Bill are in line with current best practice. On the other hand, if the policy intention is that the board must be representative of communities, then practice tends to be that such boards have a larger membership. As Dominic pointed out, it is easier to achieve the sort of balance or representation that is being sought when the numbers are larger.

The Minister's current position is that while she wants to achieve balance and ensure that there is not a lack of balance in the membership, the emphasis to date has been on the managerial role of the membership, which is reflected in the numbers. The Minister is still considering that. If the Committee's view crystallises around a particular number, I am sure that the Minister would want to consider and formally respond to that view.

**Mr B McCrea:**

I agree, Chris; the seminal discussion is about the purpose of the ESA board. That is why we need to consider remuneration, the skills set and the numbers.

Let us take the scenario in which the board is composed of a smaller number of people and the focus is on management. It is still important to find a way of addressing concerns about community balance and other issues, because as the Minister herself has said, those issues are important. If the Minister suggested a smaller number, proposals would have to be made to outline how the Department would address the outstanding issues of community confidence and inclusion. Conversely, if the board were to be made up of a larger number because it is to try to deal with inclusivity and so on, then that raises certain issues about performance and management. It would be better if we could reach a consensus about the way in which those processes will work, because it would be easier to frame legislation that reflects a consensus.

Our underlying concern is that what is set up with good intent may end up working in a different way once the gates are opened. We need to find some way of safeguarding those legitimate concerns.

**Mr C Stewart:**

I understand that position. That is reflected in the fact that the Minister has indicated that she has not yet made a final decision and has not closed the matter down as far as the numbers and related issues are concerned. If the Committee has a consensus position on a number or range of numbers and on the need or otherwise for the sort of amendment on representativeness that has been discussed, I am sure that the Minister would want to respond formally very quickly.

**The Chairperson:**

There are two points. The Committee has received legal advice on aspects of the issue. Does the Committee have the power to forward that advice?

**The Committee Clerk:**

Not in full and specific terms, but it may be useful to communicate the bottom line of some of that legal advice to officials to help the Minister when she looks at the issue of representativeness, because there is a way to define what is representative of the community in educational terms. That was part of the advice that the Committee received.

**Mr C Stewart:**

That would be helpful. I do not expect the Committee to share the legal advice with us. I know that lawyers everywhere tend to be very resistant to that sort of notion. However, if the Committee could give us a broad steer on the direction in which it thinks we ought to travel — and which, on foot of legal advice, the Committee is convinced is sound — then the Minister would want to consider that.

**The Chairperson:**

There are two issues. One, of course, is the possible amendment. The amendment to paragraph 2 of schedule 1 to the Bill would be that members of the ESA, as a group, should be representative of the community in Northern Ireland. Would members be happy for that to be forwarded to the Minister for consideration? That does not tie any party down to agreeing to the amendment; rather it states that the Committee requests that that be considered and asks for a response, given the very tight timescale to which we are now working. Is that agreed?

**Mr O'Dowd:**

So we are not endorsing the amendment?

**The Chairperson:**

We are not endorsing the amendment. I have a letter that staff will give out now so that members have it. I want to be clear: this is not about members endorsing the amendment, so it is not tying any party down to the particular wording of the amendment. However, it is the Committee saying that there is an amendment that we would like the Minister and the Department to consider. We can then come back to that issue.

**Mr Lunn:**

Chris asked us to put a figure on the board membership, but we cannot do that. It is the other way around: the figure would be the end result of trying to satisfy all the criteria. There are 14 in the advertisement and there are four more of which I can think. There is specific mention in the advertisement of people aged under 40 and of women.

I would have far more sympathy with the Minister if she said to us that the Department wants to put together a board that is — whether or not we propose the amendment — representative of

the people and the various interests in education in Northern Ireland. However, we cannot really talk about a board of between seven and 11 members any more that we can suggest a figure of 20, or 18, which I proposed a few months ago. It is top-of-the-head stuff — we really do not know what the optimum number would be. I agree that the optimum number should be as small as possible. However, there are many interest groups, and four different education sectors for a start. If the board were to have seven members, there would leave only three places for those sectors.

**The Chairperson:**

In fairness to the Minister on this issue, she has indicated that she would like a steer from the Committee. Correct me if I am wrong, but this Committee's view is that the board membership should be more than what is currently outlined, which is seven to 11 members. The issue is whether it should be 18, 20, 25 or 30.

The simple way of doing this is for us to agree that the figure should certainly be more than what is currently proposed — seven to 11 — so that we do not get into the situation to which the Deputy Chairperson referred whereby it could be seven and not 11. It has to be a number that is greater than what is currently proposed, but consideration must be taken of the fact that some members said that there should be 18 members and others said that there should be 20.

**Mr C Stewart:**

That is what I was suggesting, and I would not necessarily ask the Committee to settle on a particular number. Indeed, legislation on such matters usually tends to be framed to include a range of numbers, recognising the fact that it is not an exact science. I must be very careful not to pre-empt any decisions or views that that Minister might come to. However, if there is a consensus among the Committee that the range that is currently indicated in the legislation is not right — because the Committee feels that it would not be possible for the ESA membership to do its job or to meet other criteria such as representativeness and inclusivity — and if it were minded to suggest a different range, the Minister would want to take that on board.

It would also be helpful if the Committee would express a view as to whether any changes to the numbers need to be reflected formally in an amendment to the legislation, or whether such changes are capable of being dealt with by the provision already in the legislation to vary the number of members.

**The Chairperson:**

Basil, I want to bring you in before we move to the issue that might help us to bring some sense to this matter.

**Mr B McCrea:**

I hesitate to speak too long, given that there is a solution coming up. *[Laughter.]*

The difficulty appears to be that when one asks for advice, that advice should come from the Minister, through her proposals. The Committee has outlined certain concerns, one being about inclusivity, but the number of members depends on the functions that they will undertake; form will follow function.

What is it that the Department intends those members to do? I raised an eyebrow earlier when you said that you expected that small number of people to be very influential in a very important body and to chair a load of subcommittees all for a relatively small amount of money. You must decide. Someone must present proposals and decide whether the board is expected to fulfil a management role. If that is the case, we must have some other way of addressing the inclusivity issues that people have raised. I am providing this as an example only — it is obviously not what would be acceptable — but the Department could decide that it wants a management board with an advisory board to sit alongside it to deal with the larger issues such as inclusivity. That advisory body would include people who are there to represent the interests of the community rather than undertake a managerial role.

The Committee could come up with 101 different ideas, but to what purpose? The Department must say to us that it is taking on board the Committee's desire to do this and the Department's desire to do that and present its proposals. If those proposals address the concerns then the Committee will be able to say that they are a good idea.

At the risk of ruining Trevor's morning by agreeing with him again, the Committee could pick a number out of the air, whether it be 20, 18, seven or 11, but it really depends on what the Department wants those people to do.

I will not go on, but I will put the ball back firmly in the Department's court. Unless the



Chairperson is able magically to create a solution, the solution must come from the Department. The Department must take on board the genuine concerns that have been raised by the Committee, and if the Department does that, the Committee will support it.

**Mr C Stewart:**

I take your point entirely. I would not wish to give the impression that the Department is waiting for the Committee to jump first on any particular issue. The Minister will give her view in due course, having considered the views of the Committee and of the stakeholders. I merely asked the question to find out whether there is an emerging consensus in the Committee on a particular approach or a particular number. If that were the case, the Department would put that suggestion to the Minister.

**Mr O'Dowd:**

As I said earlier, I am open to persuasion regarding the numbers. However, I do not want to re-establish an education board.

The ESA will be a management body, and its role will be to manage an education system through the policies of the Department of Education and legislation passed by the Assembly. People have referred to the scrutiny role and representative role of the ESA. Perhaps we have been out of power for so long that we have forgotten what the role of a politician is. We are the representatives; people elect us to represent their views. We are representative of the broader community, as a collective body.

The Education Committee's role is to scrutinise the Department of Education and the ESA, if and when it comes into operation. All those scrutiny layers already exist, so I am concerned that we could end up establishing yet another quango. As far as I am aware, most, if not all, of the parties are seeking to reduce rather than increase the number of quangos. I agree that we must get the balance right, and there are genuine concerns about a number of issues, but let us not get carried away. The body will have a management role; let us not undermine the Committee's scrutiny role.

**Mrs O'Neill:**

I would like to clarify one point. The legislation provides for the number of board members to be changed as required. If the Committee decides to specify a number in the legislation, that would

make the provision rigid. For example, say the board has 15 members but down the line it is decided that it is not able to cope with the demands being placed on it, another piece of legislation would then be needed to change the number of members. To specify a number would make the provision too rigid.

**Mr C Stewart:**

Not necessarily; the way in which the legislation is drafted deliberately includes a degree of flexibility — the means to vary the number by an Order. That is in recognition of the fact that as an organisation evolves and develops the interim conclusions on the number of members required can change. The issue is more one of pragmatic consideration. Given that a mechanism already exists to change the numbers if the need to do so arises, is an amendment to the legislation actually needed? That is a matter for the Committee to decide on.

**The Chairperson:**

That is the thing that worries me about Departments; they tell you what they cannot do, but there is always a clause in a Bill that tells you what they can do. Of course, paragraph 2(3) of schedule 1 states that:

“The Department may be order amend sub-paragraph (1)(b) by substituting for the numbers specified there such other numbers as may be specified in the order.”

So, if we set the number at 15, the Department could increase it to 20 if it discovered that that number was not sufficient. Therefore, being prescriptive does not hinder the Department’s powers. Even keeping the figure between seven and 11 will not mean that the Department does not have the power to change the number — the provision in schedule 1 gives it the power to do so.

**Mr Lunn:**

I would be satisfied with the provision that the number could be increased in years to come as needs require. That is not the issue. My problem is with the initial composition and how we square the circle as regards the need for representation, however we describe it, and the demands of the job. Purely as a way of trying to move things forward, I suggest that we propose that the figures seven and 11 be changed to 12 and 20 and that the provision to increase or diminish the number of positions remain in the Bill.

**The Chairperson:**

We will park that issue for one moment and move to a draft letter that has been prepared by Committee staff. I sound like I am appearing in a TV cookery class when I say that it is something that we have prepared earlier. Let me assure you that this is not an attempt to try to steamroll the Committee into a particular position; rather it is an attempt to try to respond to the Minister, and the draft gives us something on work on at today's meeting.

Members can appreciate where we are with this at the moment. Over summer recess, some correspondence was sent to the Committee, copies of which were sent to members. Just to refresh members' memories, I asked the Clerk to prepare during recess a draft response to the Minister's letter of 5 August so that the Committee could consider it and try to reach some agreement on the issue. The draft reflects the legal advice that the Committee received on the matter earlier today.

No doubt, there will be other matters about which the Committee will wish to write to the Minister, so I suggest that we add to the draft letter as we work our way through the Bill. There may be other points that members feel it is important to include in the letter, so I ask you to take a few minutes to read it and comment on whether it brings together in a coherent way the matters that we have been discussing.

Trevor, does the draft weaken or lessen your proposal?

**Mr Lunn:**

What will the second page say?

**The Chairperson:**

Do you want to include the suggestion that the number of ESA board members be increased to no fewer than 12 or more than 20?

**Mr Lunn:**

That is what I proposed, so yes. It does not bind anybody to anything.

**The Chairperson:**

If you had 12 —

**Mr Lunn:**

Make it 11 to 19, plus a chairperson.

**The Chairperson:**

I take Chris Stewart's point about us tying ourselves down to numbers —

**Mr Lunn:**

We are being pressed to provide some sort of steer on the numbers.

**Mr C Stewart:**

I would hate the Committee to think that I was pressing it about anything.

**The Chairperson:**

Is it not the case that we are looking at a minimum of 20 members, as opposed to a figure of between 12 and 20?

**Mr O'Dowd:**

We are not looking at anything.

**The Chairperson:**

I am in the Committee's hands, so I would appreciate it if someone would say. Trevor is suggesting 12 to 20 board members whereas, other members have said 20 or 18.

**Mr Lunn:**

All the suggestions have been in that range, and Dominic's offer of 20 is the highest yet. I am taking that range as a basis on which to move forward. Michelle has just whispered that we should wait another week until we see the Minister's response, but the Committee has been waiting for responses for more than two years and they have been very slow in coming forward, so I am just trying to move the ball forward a bit.

**The Chairperson:**

Trevor has made a proposal, so, as the Chairperson, I am duty bound to —

**Mr B McCrea:**

Let us split the difference between Trevor's 18 and Dominic's 20 and say 19.

**Mr Lunn:**

My figure of 18 was just a suggestion some months ago.

**Mr B McCrea:**

Pick a number.

**The Chairperson:**

Is that a minimum figure?

**Mr Lunn:**

I want to leave the Minister with a lot of flexibility. I am suggesting that, in effect, the current maximum should be the minimum, thus dramatically raising the maximum. That range provides a greater chance than the present one of satisfying the interests of all those involved.

**Mr O'Dowd:**

We will be throwing darts at a dart board in a minute. I thought that the purpose of the letter was to emphasise to the Minister a number of amendments that the Committee may wish to consider and to ask her to consider them. We are now getting into definitive proposals, but I do not think that that will help us to move the matter on.

**Mr Lunn:**

I am taking the letter as an invitation to put a figure on the number of ESA members. The draft letter has crossed out the figures 7 and 11, and I took that as an indication that we might provide a range of numbers. Is that not what it was meant to do?

**The Chairperson:**

Yes, but we are not reaching agreement about what the range should be, which is probably why it was left that way.

**Mr Lunn:**

We are not disagreeing.

**The Chairperson:**

I think that there is consensus that the figures should be greater than those that are currently being proposed.

**Mr O'Dowd:**

No; my exact words were that I was "open to persuasion." I believe that we could all sign up to the letter as it is currently worded. It asks the Minister to consider the number of members and emphasises that the Committee requires an answer and an end to her deliberations on it.

**Mr Lunn:**

OK. I will go with that.

**The Chairperson:**

Can we leave it at that?

**Mr O'Dowd:**

There is just one small point; the Minister's name is spelt incorrectly.

**The Chairperson:**

I certainly did not type it or there would be lots more spelling mistakes; it would not just be the Minister's name.

**The Committee Clerk:**

So are members proposing that we insert the words "a greater number of" as opposed to providing any new range?

**The Chairperson:**

We have not included the words "a greater number" in the letter.

**Mrs M Bradley:**

No, that has not been included in the draft letter.

**The Chairperson:**

The inference is that it should be a greater number than the seven or 11.

**Mr Lunn:**

Could we say something along the lines of “a greater number commensurate with the need to satisfy the various interest groups and sectors”?

**Mr O’Dowd:**

It is not a representative body.

**The Chairperson:**

Not yet.

I do not wish to begin to consider a whole raft of changes to the letter, because it could take a long time — although that is the reason why we are here. I ask members to look at page 2 of the letter. We could change the wording to read; “On the latter, the Committee could suggest Schedule 1, paragraph 2(1)(b) should be amended to increase the number of members”. That would leave it open-ended.

Chris is here, and he is aware of all the discussions that have taken place this morning. The sentiments expressed here can be reported back in conjunction with the letter that will go to the Minister. Are Members agreed?

**Mr D Bradley:**

Agreed.

**Mr Lunn:**

Should we not change it to read “increase the number of members to satisfy the requirements of the suggested amendment”?

**The Chairperson:**

I do not think that that would be needed. All that needs to be inserted is the phrase “increase the number of members”. Are Members agreed?

*Members indicated assent.*

**The Chairperson:**

The Committee is still examining the issues that it feels should be revisited. We now come to the issue of regulations for the ESA's local committees, which is dealt with in paragraphs 60 and 65 of the Committee's draft report on the Education Bill. This has been a significant issue for some stakeholders and members. Members may wish to scan those paragraphs to remind themselves of developments to date.

The Committee wrote to the Minister on 29 June 2009 and informed her of the Committee's wish for regulations to bring "clarity, certainty and confidence" to the arrangements for the ESA committees, as currently set out at paragraphs 7 and 8 of schedule 1 of the Bill and expanded on in the Minister's letter of 17 June 2009. In that letter, the Minister indicated that she was not proposing to specify local committee arrangements in the Bill. In the Minister's letter of 5 August 2009, she again rejected the idea of regulations to set out local committee arrangements. The Minister's rationale in both cases is the same, and I quote from her letter of 5 August 2009:

"The ESA's local structures will develop and evolve over time, and in response to need, and it would be difficult to accommodate this if the detailed structures were specified in legislation."

Members will recall that at our meeting of 1 July 2009 the Committee Clerk was asked to prepare a draft enabling provision for regulations on ESA local committees. We are in the process of distributing the draft wording of an amendment to paragraph 8 of schedule 1 for members' consideration. That draft wording would read:

"The Department may by regulations—

- (a) require prescribed functions of ESA to be exercised on its behalf by a prescribed committee or employee of ESA; and
- (b) regulate the appointment by ESA of an employee for the purposes of exercising such functions."

Members should note that, implicit in a Department making regulations is a provision that enables the Department and the Minister to vary or revoke the arrangements for local committees by way of another regulation under the same enabling provision. Thus there is a facility to review the ESA committee structure and change it in response to need as it evolves over time. That facility addresses the Minister's concerns. Members may wish to consider factors such as how urgently a change to the ESA committee structure may need to be made; whether laying further regulations would be an obstacle to the development and evolution of the ESA committee structure; or, given the importance of an effective system of local committees, whether changes



should be subject to Assembly control.

On that basis, members were minded in principle to see the ESA committee structure, particularly the structure of local committees, set out in regulations. During the recess, I asked the Committee Clerk to draft a section on that issue that could be inserted into the letter that the Committee will send to the Minister following today's meeting. I apologise for the amount of paper that is being given to you and, indeed, that it is only being given to you now. I would have preferred to have had this earlier, but that was not possible. The section would be additional to the letter that has been approved and will be sent to the Minister. The additional section attempts to formalise what I have said to members about local committees and asks the Minister to look at the issue and come back to us with a definitive view.

**Mr O'Dowd:**

How will it work in practice? Do we envisage that, under this amendment, Assembly regulation or legislation will be required for a change to be made to the structure or shape of the local committee that covers Fermanagh, for example, or a large rural community?

**The Chairperson:**

No; I do not think that that would be required.

**The Committee Clerk:**

As set out in the Minister's letter of 17 June, the vision is for 11 local committees as well as the subcommittees that would be part of the main ESA board. That is the broad form; indeed, the make-up and appointment process to such local committees could have a community or political aspect.

**Mr O'Dowd:**

I am aware of the structures. However, why is an amendment to regulate the structure of ESA committees necessary? Based on evidence, my understanding is that committee structures will become rigid if we include them in legislation. For example, if the subcommittee that will cover Fermanagh identifies issues that are particular to that area, and it wants to respond by making structural changes, does the amendment mean that that will have to go through the Assembly? If so, why do we need the amendment?

**Mr C Stewart:**

In her reply the Minister indicated her concern by stating that she did not want to specify the structure in the Bill, based largely on the point that John made about rigidity. There is no doubt that an approach based on subordinate rather than on primary legislation is less rigid and easier to change. Nevertheless, each time a change is proposed to a committee or to other structures, additional legislation will be required. However, that is, perhaps, putting a technical cart before a policy horse. The issue is whether the Committee feels that it is necessary to regulate such decisions at all. If so, subordinate legislation is certainly the preferable route. At this time, however, the Minister's view is that it is not necessary to regulate that matter.

**Mr O'Dowd:**

My understanding of the concerns that CCMS, ELB and NICIE raised is that the Bill says "may establish committees". Consequently, those bodies wish it to stipulate: "shall establish committees."

**The Committee Clerk:**

On a point of clarification, those bodies wanted clarity and information on who would be on, the role of, and the nature of the appointment process to the ESA's regional subcommittees, which will replace the existing five boards. That is the point that stakeholders were making: what representation will the ESA have at sub-regional level? We are told by the Minister that, in all, there will be 11 such subcommittees. However, in the Bill, there is no information about the form, purpose or process for arriving at the establishment of those subcommittees. That, in my recollection, is the point that the stakeholders raised.

**Mr O'Dowd:**

I am concerned that by attempting to resolve those matters we will put in place a structure that will not allow the local responses that will be required, whether in Fermanagh or in west or east Belfast. We are in danger of making things so rigid that that the ESA will have to come to the Assembly every time a structural change is required, and that would not assist anybody.

**Mr B McCrea:**

It is the absence of any proposals that causes me difficulty. All that I have picked up on is that, at some stage, the Minister will let us know what she has in mind. There are difficulties with oversight arrangements and agreement on A Shared Future. Therefore, I, for one, would support

a call for somebody to bring forward proposals about how it will operate. If those suggestions are broadly in line with what people want to see, agreement, with provision for amendments, can be reached.

Given that a huge amount of work is involved and that, legislatively, the Assembly is relatively immature and Members must learn a bit more about the way forward, I would prefer the legislation to include more scrutiny and oversight. At some stage, such arrangements may not be necessary. However, for now, can we please have definitive arrangements for the structures, including their powers; who will make appointments to them; their relationship with other bodies; the oversight arrangements that will be in place to supervise their activities; how we will ensure local inclusivity; and how equality legislation will be implemented? Let us have all those things laid out, and then we will be able to see whether we need to amend them. We have none of that detail, and that is why I am not prepared to give the Minister carte blanche and trust her to come up with a solution that will work, saying that if we do not like it she will change it. I am sorry, but that will not work for me.

**The Chairperson:**

That is what I tried to address in the letter, which stated that implicit in such a provision for the Department to make regulations is the power to vary or revoke arrangements. The situation to which John has referred would not happen. There would be no need for micro-management; if a change were required it would not have to go through all the processes. I take the point that Basil made: we still need to see exactly what is being proposed. It is not enough to say that there may be committees; we need to see what those committees will be, and that should be reflected in the Bill. The day-to-day running of it would not be included in the Bill, but at least we would know exactly what we were getting. At the moment, we do not know.

**Mr C Stewart:**

It may help if I summarise by saying that if there is ever to be a significant change to the committee structure of the ESA, the Minister of the day would of course want to approve or reject such a proposal by the ESA. The policy question that members have raised is whether that should be subject to a formal process of regulations or whether it should be an administrative ministerial matter to be decided in the normal course of events. Either option is technically possible; whether members prefer one option or the other is a political policy matter.

**Mr B McCrea:**

That was nicely summarised.

**Mr O'Dowd:**

I am still not convinced that the proposed amendment allays either Basil's concerns or the Chairperson's. I still reflect on the deliberations of the Committee, and our concern was that as the word "may" was used instead of "shall", there might be no committees established. I do not think that this amendment will ensure that committees are established, and I certainly do not think that it will help local delivery. I cannot endorse the proposed amendment today. I am sceptical about it, but I would like some time to ponder it.

**Mr B McCrea:**

How and when will we learn what the committee structures will be, whether in legislation or not?

**Mr C Stewart:**

I cannot give a straight answer to that today. I will have to speak to colleagues and come back to you.

**Mr B McCrea:**

We are going around in circles here. You are right to highlight whether those structures will be under ministerial responsibility or established through regulation. You know my position on regulation, for the reasons that I have outlined, but, given that people have made a plea to come up with something, it would help us to deliberate if we had at least a template as a good "starter for 10", and we could work from that. However, the position of the UUP remains that we prefer regulation.

**The Chairperson:**

In fairness, that does not tie John down to anything either. All that we are saying in both those elements of the draft letter to the Minister is that the issue should be reconsidered. We have been waiting. The point is made time and time again that the issue is urgent. I do not know how long we have to reflect before a decision has to be made, but it is not the place of the Committee to make that decision. It is for the Department and the Minister to decide what should be done, and then we will decide whether we agree or not.

We have tried to establish some context, and we are also trying to reflect the issues raised by stakeholders such as CCMS, the education and library boards and the Northern Ireland Commission for Catholic Education (NICCE), who have raised the issue as a particular concern. That is the reason for the letter. It is not being prescriptive; it uses the phrase “to reconsider”. Rather than further delay, as John suggested — although I appreciate that he saw the letter only this morning — the letter is an attempt to bring all the issues together and put them to the Minister, and we could then have a definitive response by next week.

**Mr C Stewart:**

I appreciate that, Chairperson, and I understand the point. I will relay to colleagues and to the Minister that members want to see more detail of what the Department has in mind for ESA committee structures and functions, and that those details will allow members to come to a view on what the levels of control and regulation of those matters ought to be. I cannot comment on the matter today, because at present it is outside the orbit of the legislation on which we are working. We will ask for more information and bring it back to the Committee.

**Mr Lunn:**

It seems like a lot of discussion over a two-word amendment. If the Department decided that it needed to regulate a function of the ESA — the Bill gives them the authority to do that — and to delegate it to a prescribed employee of the ESA who may have had a big hand in making appointments, is there anything to stop the ESA then allowing that prescribed employee to form a committee, which is a natural thing to do?

**Mr C Stewart:**

I am sorry; could you take me through that again? I am not sure that I followed all of it.

**Mr Lunn:**

I hope that I can. Paragraph 8(4) of schedule 1 says that:

“The Department may by regulations —

(a) require prescribed functions of ESA to be exercised on its behalf by a prescribed employee of ESA;”

The proposed amendment changes that to “an employee or a committee”. I am not sure why it is there at all, but if the Department enforced that regulation and gave authority to a prescribed employee of the ESA to have a particular function, is there anything to stop the ESA providing that employee with a committee to do the work?

**Mr C Stewart:**

No. It might be helpful to remind members that there is a boundary between employees of the ESA and members of the ESA — one cannot be both at the same time. If a decision is made to delegate a particular function to an employee, the ESA could set up a subcommittee to scrutinise the delivery of that function or the performance of a particular duty. The Bill allows committees to be established and functions to be formally delegated to committees or to employees. The issue that the Committee is deliberating on is whether it wishes to go one stage beyond that and ask the Department to take a power to regulate that delegation when establishing committees.

**The Chairperson:**

The important word is functions, not structures; there is a vast difference. We have almost created confusion between structures and functions. The structure is of little importance sometimes; it is the function that that structure is engaged in that is crucial. That is why the proposed amendment refers to required prescribed functions, not to prescribed structures.

Can we reach agreement? I take the point that Basil made and the concerns that John raised, but we will not tie parties or individuals in to a definitive position. It is another attempt to say that the Bill has raised issues, and that following the letter of 5 August that we received from the Minister, we want those issues to be “reconsidered”, which was the word that was used in the letter. Can we agree that that letter, with the amendment that was added to it earlier, be sent to the Minister?

*Members indicated assent.*

**The Chairperson:**

I will raise the next matter before we lose quorum. I do not want to disappoint members, but I have only a couple of pages to revisit, after which we will get to clause 24. However, when we get to clause 24, we still have to get to clause 55. I suggest that we finish the issues that we were to revisit and that we meet again tomorrow at 10.00 am to start at clause 24 and finish our consideration of the Bill. Many of the issues from clause 24 onwards are procedural, so we should not have to go into as much detail. However, we still have a duty to ensure that we have considered them.

**The Committee Clerk:**

On Friday, members received 34 departmental amendments. That adds to the burden of the Committee as we try to complete deliberations for a report at the end of September. It is becoming more urgent to address those 34 amendments and, if applicable, to get any issues back to the Department and the Minister.

**The Chairperson:**

We will include those tomorrow. We have to start from clause 1 again. I suggest that we commence at 24 and take the proposed amendments as we come to the relevant clauses.

**The Committee Clerk:**

We will go through the clauses until 55 and then return to the start and go through the clauses to which there are departmental amendments.

**The Chairperson:**

Tomorrow's meeting will be to first consider the amendments from clauses 1 to 24 —

**The Committee Clerk:**

The vision was that we go from clause 24 onwards and then return to the amendments.

**The Chairperson:**

Yes.

**The Committee Clerk:**

Some clauses have departmental amendments and some, fortunately, do not. We have to revisit some of the earlier clauses for which the departmental amendments have just arrived.

**The Chairperson:**

Do members agree that we will meet tomorrow morning?

**Mrs M Bradley:**

I have a Social Development Committee meeting in the morning.

**The Chairperson:**

Who will be available in the morning?

**Mr McCallister:**

I will be available for a short time.

**Mrs O'Neill:**

I will be available from 10.00 am to 11.00 am.

**The Chairperson:**

My suggestion is that we should meet —

**The Committee Clerk:**

For an hour at least.

**The Chairperson:**

For as long as we have a quorum.

**Mrs M Bradley:**

I will try to make myself available between the two Committees.

**The Chairperson:**

I apologise that, procedurally — I am talking about my own party — we will not be able to reach full complement until after Monday. We got caught in House procedure on that one.

**The Committee Clerk:**

The important thing is that any issues go back to the Department tomorrow afternoon. If we leave it until next week, time will run out.

**Mr Lunn:**

Will we have a quorum tomorrow?

**The Chairperson:**

At the minute, we have John, Michelle, and you. Dominic, will you be available in the morning?

**Mr D Bradley:**

I will.



**The Chairperson:**

We have a quorum.

**Mr B McCrea:**

I cannot attend. Perhaps we can meet earlier at, say, 9.00 am.

**The Chairperson:**

Do members agree to meet at 9.00 am?

*Members indicated assent.*

**The Chairperson:**

OK, the Committee will meet tomorrow at 9.00 am in room 21.

**Mr B McCrea:**

I have to leave at 10.30 am.

**The Chairperson:**

If we start at 9.00 am we should get a couple of hours. We will now revisit the issue of employment regulations. I remember that stakeholders and the Committee raised the point about bringing clarity, certainty and confidence to the employment relationships that are envisaged in the Bill. In her letter of 5 August 2009, the Minister confirmed her agreement to the insertion in the Bill of:

“an enabling power (not a duty) for regulations to be made on model schemes of employment and guidance on employment schemes. As requested at the Committee’s meeting on 1 July 2009, a paper on these employment scheme regulations will be prepared for the Committee.”

To date, that paper and the draft regulations have not been provided to the Committee. Chris, is there any indication as to when we will be provided with those?

**Mr C Stewart:**

They are in my briefcase, Chairperson, but unfortunately I cannot hand them over to you until the Minister formally signs off on them. We hope to have those papers with the Committee very soon.

**The Chairperson:**

Would it be possible to have them tomorrow?

**Mr C Stewart:**

Yes, and I will aim to do that; they are drafted.

Members who wish to have an early insight into the possible scope and content of the regulations should look at schedule 2 of the Education (Northern Ireland) Order 1998, because they are very similar to it. Schedule 2 sets out in some detail the respective roles and responsibilities of the education and library boards and CCMS on the one hand and the boards of governors on the other. We want the regulations to make it clear that the key functions of boards of governors are for boards of governors only; they cannot be infringed on by the ESA in any way, shape or form, and we will govern the content of schemes of employment to ensure that that is the case.

I apologise that the paper that we owe you on employment matters is not with you; however, I can provide members with early notice of other significant matters that will be addressed in that paper. I will cover three matters. As you said, stakeholders and members wanted clarity and certainty around respective roles. We hope that the regulations will provide that.

Another issue that you asked us to look at was the availability of an effective challenge mechanism that a board of governors could avail itself of if it felt that the ESA was acting or purporting to act unreasonably either in the approval or operation of a scheme. We previously told the Committee that we would take advantage of an existing mechanism, the infamous article 101 of the Education and Libraries (Northern Ireland) Order 1986, and that we would try to provide a link or cross-reference in the legislation to that mechanism.

When members get a chance to study the regulations, they will notice that that is not included in the list of amendments that we have provided. The reason for that is technical and reflects the advice of the Office of the Legislative Counsel. It advised that it is not appropriate to make that sort of cross- or linking reference in legislation because it would merely restate existing law. In effect, the counsel said that we already have such a mechanism — article 101. It applies to all functions of the ESA, so a further reference to it in legislation would be inappropriate because it

would not change the law. Therefore, our response to the Committee is that we accept entirely the need for such a mechanism and that it already exists.

**The Chairperson:**

Who has the power to instigate article 101? Is it the Department? Is that power available to boards of governors?

**Mr C Stewart:**

Yes. A board of governors could make a complaint under article 101 and the Department would be obliged to investigate it.

**The Chairperson:**

OK.

**Mr C Stewart:**

The third point is a fairly significant one. Some stakeholders raised concerns about staff dismissals and in particular about whether a decision of a board of governors to dismiss a member of staff could be made binding on the ESA. The advice that we have consistently given over the past few years to the Committee was that that was not possible. That reflected the legal advice that we had at the time. In essence, the legal advice was that employment law should always take precedence over education law. Employment law places certain responsibilities on the ESA as an employer and, because of that, the decision of a board of governors to dismiss a member of staff could not be automatically binding on the ESA.

The ESA would have to have its own consideration of that decision.

Quite a number of stakeholders were significantly concerned by that, and they raised the matter with the Committee on many occasions. On foot of that, we were asked to reconsider the matter, which we have now done, with the benefit of legal advice. Having looked at it again very carefully, the lawyers have come to a different conclusion, which I hope stakeholders and members will find helpful. The conclusion is this: education law in these matters would take precedence over employment law. Therefore, the Bill, as currently drafted, makes a decision of a board of governors to dismiss a member of staff automatically binding on the ESA, which would be under a legal duty to put such a decision into effect, whether it agreed with it or not.

That means that there is a disparity between education law and employment law. That disparity would not affect the power of a board of governors to make such a decision, but if not addressed, could give rise to difficulty with the ESA in any subsequent legal proceedings. What it would, in effect, mean is that a board of governors would take a lawful decision, a member of staff would be dismissed, but the ESA would be found to be at fault under employment law because it had not gone through the necessary processes. We can remedy that disparity with an Order that would modify employment law to ensure that there is no disparity with education law. Indeed, the power to make such an Order is already proposed in clause 12 of the Bill.

That is a quick trot over a very technical issue, and the paper will set it out in a little more detail. However, the core issue is that we can, without further change to the Bill, address the key concern that a number of stakeholders raised with us, which was that a decision of a board of governors to dismiss a member of staff ought to be binding on the ESA. The effect of the Bill is that it will be binding.

**The Chairperson:**

Chris, that is very helpful. That was a major issue that people from across the sectors had raised, and we will obviously consider it.

**Mr C Stewart:**

The policy intention was always that boards of governors would have that level of autonomy. We wrongly perceived that there was a barrier to that in employment law. We have found a way around that barrier.

**The Chairperson:**

I asked the Clerk to draft additional paragraphs for inclusion in the Committee's response to the Minister's letter of 5 August. Members will now be given a copy of those additional paragraphs. They deal with schemes of employment, and our purpose in drafting them is simply to find out the timescale for the formal regulations to be brought before the Assembly.

**Mr C Stewart:**

We certainly want the Committee to see the detailed text of the proposed regulations within a matter of days. We want those regulations to come into force on 1 January. In order for that to

happen, we need to have Royal Assent at the right time and the early commencement of the power to make the regulations. We then need to make the regulations and bring them forward for formal Committee scrutiny in order to have them operational in time for 1 January. That is tight but doable.

**The Chairperson:**

In the Minister's letter to the Committee of 5 August, she objected to the suggestion that the enabling provision would state that the Department shall have a duty to make regulations. In her letter, the Minister states that:

"To provide a duty to make regulations would be a most unusual approach as, normally, regulations are made under enabling powers. Your letter does not make clear why the Committee is seeking such a prescriptive approach or is this a unanimous view of the Committee. The Committee will be aware that the RPA related legislation tabled before the Assembly by Executive colleagues has not been subject to such restrictions."

The draft paragraphs welcome the Minister's decision to have regulations and states that the Committee does not wish to be prescriptive. It also emphasises the Committee's wish to be informed of the timescale for bringing the regulations formally before the Committee and of the planned date to lay the regulations before the Assembly. Committee members may wish to consider whether such information will be adequate to give the Committee sufficient clarity, certainty and confidence with regard to the Minister's proposals.

The Department's paper of 4 September 2009 on the full set of departmental amendments to the Bill includes an amendment to clause 4, which inserts an enabling provision to allow the Department to make regulations on employment schemes. That amendment reads:

"The Department may by regulations make provision as to the form and content of employment schemes."

Do Committee members have any comments on that? I am trying to crystallise our position.

**Mr B McCrea:**

To clarify, you are saying that if the Minister is able to bring forward her regulations, we will be able to have a look at them and move the process forward a bit more speedily.

**The Chairperson:**

That is a good summary of what we are trying to do.

**Mr C Stewart:**

We hope that the Committee will have the text of the regulations as early as tomorrow.

**The Chairperson:**

Is that agreed?

*Members indicated assent.*

**The Chairperson:**

There was an issue with clause 12(1). Earlier today, the Committee discussed whether the power to make Orders should be subject to an affirmative procedure since it will amend primary legislation. Chris, will you comment on the rationale for clause 12(1) being subject to negative rather than affirmative resolution procedure? We have had difficulty in getting our heads around that.

**Mr C Stewart:**

There is no particular policy intention behind that. I was as surprised as some members when I checked and found that the clause was subject to the negative rather than affirmative resolution procedure. As you rightly suggest, where there is a power to modify primary legislation, it is usually subject to the strong Assembly means of control through the affirmative resolution procedure. In the case of clause 12(1), I cannot explain why the Bill was drafted in the way it was; I can only assume that the legislative draftsman followed his normal practice for a clause that has the power to modify employment law. That is not new; there is such a power in the Education (Northern Ireland) Order 1998.

There is no particular policy intention behind the drafting of clause 12(1) in that way. The Minister has not adopted a formal position on the issue, so if the Committee wants her to consider subjecting the power in the clause to the stronger Assembly method of control, without pre-empting her decision, I am sure that she will do so.

**The Chairperson:**

The Committee discussed earlier whether the consultation requirements in clause 12(2) should be replicated in clause 50. Chris, will you comment on the absence of consultation requirements in clause 50 and say whether the Department would consider inserting some form of consultation

requirement?

**Mr C Stewart:**

Again, that is a matter for the Minister to consider. I have no reason to assume that she would resist the notion of consultation. The power to modify primary legislation through an administrative Act is serious and is not something that one should undertake lightly. It should never be done under the cover of darkness — there should be full consultation. Whether or not that should be on the face of the Bill is something on which the Minister may want to reflect.

**The Chairperson:**

The Committee should perhaps consider whether that makes the process more cumbersome or achieves more clarity. The reason that we raised some of those issues was to achieve clarity.

**Mr C Stewart:**

It could do —

**The Chairperson:**

Consultation is good, but it is sometimes considered to be another delay in bringing something into the public domain.

**Mr C Stewart:**

There is a trade-off. I should be candid and point out that the purpose of the provision, which is fairly standard, is not to give the Department the power to sneak around and make changes to primary legislation; rather it gives us belt and braces if something goes wrong. When the legislation is passed, if we discover that we got something wrong, left something out or included something incorrect, that clause gives us a means to — and the speed is important — rectify the problem quickly. We need to think carefully about the potential effect of consultation on the timescale for remedying mistakes quickly.

**The Chairperson:**

If such a situation arose now, without the provisions contained in the Bill, how would the Department react?

**Mr C Stewart:**

If something was discovered now, I think that the Minister would want to move an amendment at Consideration Stage. The provision takes account of something that might occur later.

**The Chairperson:**

I mean that if the Education Bill did not exist, how would the current legislation that governs the Department deal with the situation?

**Mr C Stewart:**

It depends; I cannot say off the top of my head where similar powers exist in current legislation. I imagine that they must exist —

**The Chairperson:**

I mean in the Department of Education.

**Mr C Stewart:**

Sorry; I do not quite follow the question.

**The Chairperson:**

You said that the provision provides belt and braces if something does not function properly. How do you address that situation now? How would you amend it?

**Mr C Stewart:**

We would bring forward an Order to amend the legislation.

**The Chairperson:**

Would you not have a consultation process?

**Mr C Stewart:**

It depends on the nature of the issue. I cannot provide a specific example; however, if an aspect of the education service could not function or would be unlawful unless we moved quickly, consultation might be impractical. On the other hand, if we had made a mistake and the legislation did not give proper effect to a policy intention, the case for consultation would be much stronger.



**The Committee Clerk:**

I want to clarify a technical or detailed point for the Committee. The Committee may not be suggesting that you replicate the consultation requirements of clause 12(1) in clause 50(1). We could be talking about a similar type of requirement, bearing in mind what you said about the need to rectify a mistake urgently. That issue was raised in a stakeholder's response, which said that there should be some kind of consultation requirement.

**Mr C Stewart:**

I understand that. With no disrespect to any stakeholders, they sometimes read legislation and interpret its intentions in the most draconian way possible. A colleague has advised me of an example where such a power was used to correct a simple spelling mistake in the Special Educational Needs and Disability (Northern Ireland) Order 2005. Such a matter is, perhaps, not particularly urgent nor does it require much consultation, but if such an error comes to light, it should be modified.

**The Chairperson:**

Does such an error fall under the definition of "reasonably practicable" that we discussed earlier?

**Mr C Stewart:**

Yes; an Order made under such a provision is no substitute for the normal legislative process that gives effect to a new policy.

**The Chairperson**

Thank you, Chris and Eve. You had an easy task again today, Eve. Endurance is all that is required. Today's session was important because it provides a starting point. Thank you for your time and attention; we will continue tomorrow morning.