



Northern Ireland
Assembly

**COMMITTEE
FOR EDUCATION**

OFFICIAL REPORT
(Hansard)

Education (No.2) Bill

21 October 2009

NORTHERN IRELAND ASSEMBLY

**COMMITTEE
FOR EDUCATION**

Education (No.2) Bill

21 October 2009

Members present for all or part of the proceedings:

Mr Mervyn Storey (Chairperson)
Mrs Mary Bradley
Mr Basil McCrea
Miss Michelle McIlveen
Mr John O'Dowd
Mrs Michelle O'Neill
Mr Alastair Ross

Witnesses:

Mr Chris Stewart) Department of Education

The Chairperson (Mr Storey):

I again welcome Mr Chris Stewart from the Department of Education.

A copy of the draft Education (No.2) Bill, together with the relevant extract from the Department's briefing paper and the Department's response to the comments of the Transferor Representatives' Council (TRC) on the review of public administration (RPA), can be found in members' packs.

Mr Chris Stewart (Department of Education):

Thank you, Chairman. Good afternoon, members.

Members will recall the presentation and discussion last week on the clauses in the draft Bill that relate to the education advisory forum and area planning. During that discussion, Members indicated that they wished to focus on the remaining significant provisions that relate to controlled schools, which are contained in clauses 11 to 18 and schedules 3 to 5 of the Bill.

The purpose of the provisions is twofold. First, they allow for the ownership of the controlled schools' estate to transfer to a new body known as the holding body, and that will address the risk of a perceived conflict of interest if the education and skills authority (ESA) were to retain ownership of that estate. Secondly, the provisions will also ensure that controlled schools have the same relationship with the ESA as other schools, which will principally be achieved by placing controlled schools under the control and management of their boards of governors rather than the ESA or the education and library boards, as happens at present.

Clause 11 establishes the holding body, and schedule 3 contains a fairly standard set of provisions, with which members will by now be very familiar, that deal with issues such as membership and governance. Those provisions are very similar to the provisions in the schedule on the education advisory forum, which we discussed last week, and to the provisions in the first Education Bill. Those provisions reflect the very limited, single-function role that the holding body will have.

Clauses 12 and 13 and schedule 4 define the function of the body, which is quite simply to hold the land of controlled schools. There are many references to land in the draft Bill, and it is important to remember that that term does not just mean the grounds; it means the land and everything that is built on it. Therefore, when I refer to land, I mean land and premises.

Clause 14 introduces a new definition of controlled schools to reflect the change in ownership of the land. That definition is in two parts, which reflects the fact that ownership will pass initially to the ESA and, thereafter, to the holding body. The definition allows for that transfer.

Clause 15 is an important provision, because it defines the duties of the ESA in relation to controlled schools and the relationship between those schools and the ESA. That duty is very similar to the duty in relation to maintained schools, which is contained in article 8 of the Education and Libraries (Northern Ireland) Order 1986. The net effect of that provision will be to

turn controlled schools into a form of publicly owned maintained schools. In view of that, the Department had considered changing the name of controlled schools. However, it decided against doing that on the advice of legislative counsel, who warned that that change could cause confusion and would necessitate making a great many changes throughout the body of legislation. Therefore, controlled schools will still be called controlled schools, but their management arrangements will be very different, and their relationship with the ESA will be very different to their current relationship with the education and library boards.

Clause 16 is an important provision that relates to what I would term the “safety-net duty” of the ESA. That duty is contained in article 7 of the Education and Libraries (Northern Ireland) Order 1986. The ESA, like the present education and library boards, will be under a duty to ensure that sufficient schools are provided to meet need. It will meet the requirements of that duty principally through its operation of the area-planning system, but also by establishing new controlled schools when planning indicates a need to do so.

Clause 17 is a comparatively short provision. However, it is one of the most significant in either of the two Education Bills and its effect is profound. It places controlled schools under the management and control of their boards of governors, which is a very significant change.

Finally, clause 18 and schedule 5 make several consequential and quite complex amendments to a wide range of existing legislation to take account of the other provisions in the draft Bill. I will pause now to take questions from Committee members.

The Chairperson:

OK. Thank you, Chris. Basil needs to leave, so he may ask a couple of quick questions.

Mr B McCrea:

TRC has received legal advice about its membership, as of right, of the holding company. Has the Department reached a view on that legal advice?

Mr Stewart:

I am not privy to legal advice that TRC may have received. TRC shared with me a paper that was written on its behalf and, possibly, with the benefit of that legal advice. In essence, that paper set out and attempted to argue a case for making provisions that would guarantee TRC the majority

of the membership of the holding body. We have not responded formally to TRC on that paper as yet.

However, we met TRC and had a useful discussion on the paper. During the discussion, I indicated that, first, the Department is far from convinced by the legal argument that has been put forward as to the soundness of the approach that TRC recommends to be taken in legislation. Quite simply, we do not believe that it gets past the barrier of section 6 of the Northern Ireland Act 1998, which we have discussed a number of times in the Committee. Secondly, and, perhaps, more importantly, TRC has not advanced, in any way, a convincing policy argument or rationale in support of the course of action that it recommends.

Mr B McCrea:

Its argument is based on equality. It wants representation equal to that of other sectors. It contends that there is no legal impediment to such equality being provided.

Mr Stewart:

I am not certain that what TRC argues for is sufficiently clear. At times, it seemed to argue for a membership model that would be similar to that of education and library boards. At other times, it seemed to argue for a membership model that had a more exclusive focus on TRC and gave it a majority of seats on the holding body. Those two models are different.

The membership of education and library boards is broad: it includes trustees as well as TRC. In discussion, it was not clear whether TRC was arguing for membership on its own behalf or for an education-and-library-board model of composition for the holding body. The latter would, of course, be much easier to achieve in legislation than the former.

Mr B McCrea:

I have no doubt that other members will pick up that point. There was a suggestion to change the name of the controlled sector. You decided against that after advice from legislative counsel.

I must say that I get quite frustrated that we can never do anything because it has always been done a certain way previously. It seems that there would be some benefit in renaming the schools what they actually are; community schools. If we are to do something about it, we should take the opportunity to do some work on the presentational issues. I will leave you with that thought.

I am sure that other members will pick it up.

Mr Stewart:

I hate to dismay you with what will probably strike you as a bureaucrat's answer. First, I assure you that we would not base a decision to do something simply on whether it had always been done that way. It is a brave civil servant who would set aside the advice of legislative counsel on what represents a sensible way forward.

Mr B McCrea:

Who is this legislative counsel? I need names. Some bloke is running around this establishment and putting the mockers on everything that we try to do. We need to find that fella and give him a good talking to.

Mr Stewart:

He is not far away. I mention his name with reverence. He is Mr George Gray. He works in this very Building.

Mr B McCrea:

Well, tell George to get down here. We need to have a word with him.

Mr Stewart:

I imagine that he is listening as we speak. He follows these debates closely.

Mr B McCrea:

Right, George, your card is marked.

Mr Stewart:

I should say that we have put considerable thought into a potential alternative name for controlled schools, because, like you, I see a need to look at that. Notwithstanding the advice from legislative counsel, we may need to return to the issue in the future.

One of the many options that we considered was community schools. Immediately, we ran into difficulties because the phrase "community schools" already exists in legislation. That nice, convenient term is already used. Unfortunately, therefore, we could not adopt it as an alternative

name for controlled schools. I think that it is used in the Education and Libraries (Northern Ireland) Order 2003.

Mr B McCrea:

I rest my case.

The Chairperson:

In her letter to the Committee of 17 June, the Minister said of the ownership body for the controlled sector:

“I recognise the importance of ensuring that the body is sensitive and responsive to the views of the sector that it will serve. Therefore, I propose to include in the second Education Bill, along with the proposals to establish the body, a clause placing a statutory duty on the ownership body, in exercising any of its functions, to consult the representative body, and take account of its views.”

Has that been done in the second Bill?

Mr Stewart:

We have taken that forward in a slightly different way.

The Chairperson:

So, that clause is not in the Bill.

Mr Stewart:

There is a clause in the Bill that places a duty on the holding body to keep the sectoral body informed of its actions. We did not express that provision through a straightforward duty to consult, because, when we looked at the final list of the body’s functions, we found that the body has, in fact, only one function — holding land — and that it has no discretion in exercising that function. In effect, the body has no discretion at all: it will hold the land of existing controlled schools, receive the land of any new controlled schools and transfer back to the ESA the land of any controlled schools that close, but it has no discretion in doing any of those things. We, therefore, concluded that a duty to consult on the exercise of a function over which a body has no discretion would be meaningless.

Nevertheless, in view of the commitment given by the Minister, we thought that it was important to include a provision requiring the holding body to advise, communicate and keep the representative body informed of its actions.

The Chairperson:

Earlier, you drew a parallel with other sectors and said that the new body, if established, would have the same relationship as its counterparts in other sectors. Surely that is a contradiction? How can they be the same when they are fundamentally different, or is that a particular version of equality?

Mr Stewart:

They are not fundamentally different. Once the provisions are in force, the only difference between a maintained school and a controlled school will be ownership. The relationship that a controlled school has with the ESA will be almost exactly the same as its relationship with a maintained school.

The Chairperson:

You missed the point. I did not mean the schools; I meant the holding body and the body in the maintained sector that would exercise similar functions. You said they would have the same relationships. Will the trustee of a school in the maintained sector and a member of the holding body in the controlled sector have the same relationship with the ESA?

Mr Stewart:

In relation to the ownership of land, yes, they would.

The Chairperson:

And only in relation to the ownership of land?

Mr Stewart:

Yes.

The Chairperson:

The functions will be fundamentally different.

Mr Stewart:

The trustees have other functions that are not related to their ownership of schools. However, as far as the ownership of land is concerned, the relationships will be the same.

The Chairperson:

So, we now discover that the assurance that was given on 17 June cannot be delivered.

Mr Stewart:

Sorry, I do not follow.

The Chairperson:

On 17 June, the Minister said in her letter that she would include in the Bill a statutory duty on the ownership body to consult. That cannot now be done.

Mr Stewart:

It could have been done using the exact words in the Minister's letter. The reason why we did not include that statutory duty was that, in light of the functions of the holding body, it would be meaningless. If we placed a duty on the holding body to consult the representative body, it would have no effect whatsoever, because the holding body has no discretion in how it exercises its functions.

The Chairperson:

If, as proposed in the legislation, we dissolved the education and library boards, which of the transferors' legal rights would disappear?

Mr Stewart:

All of the legal rights held by the transferors in relation to their membership of education and library boards would disappear.

The Chairperson:

What are those rights at present?

Mr Stewart:

They have the right to nominate a certain proportion of education and library board members. Therefore, they have a right to be part of education and library boards and to have a say in the governance and management of those organisations and the exercise of all of their functions.

Mr O’Dowd:

The ESA will transfer land to the holding body, but has it been specified for how long the ESA will hold the land? When does the holding body come into existence?

Mr Stewart:

The ESA will hold the land until the date on which the holding body comes into existence. On that date, existing land will be transferred. That depends on the timescale for the second Bill.

Mr O’Dowd:

Following on from the Chairperson’s questions, clause 12(5)states:

“The Holding Body must take such steps as it considers necessary to ensure that such persons as appears to it to represent the interests of controlled schools are kept aware of the activities of the Holding Body.”

Is that consultation or notification?

Mr Stewart:

That is notification. The Committee would probably take a dim view if I were to claim that the effect of that clause was consultation. Most people would agree that consultation means more than merely telling someone what you are doing. Clause 12 simply means that representatives of the controlled sector will be told what the holding body is doing. That is not consultation, and I think that it would be unfair and improper to describe it as such. For a body that has no discretion in how it exercises its function, consultation would be meaningless.

Mr O’Dowd:

Could the holding body consult on behalf of the ESA in relation to the lands held?

Mr Stewart:

I am not sure that I understand what you are getting at.

Mr O’Dowd:

Is the holding body in a position to consult, on behalf of the ESA, on any land held or on any projects that the ESA has to dispose of lands and then report the findings back to the ESA?

Mr Stewart:

No. We would expect the ESA to do that itself.

Mr O'Dowd:

Under the new plans, is it correct that boards of governors can become the ownership body of the school?

Mr Stewart:

That is not reflected in the legislation. It was reflected in the policy consultation document that we issued some time ago; however, support for that suggestion was lukewarm at best. Similar to changing the name of controlled schools, that is something that I think would merit being revisited in the future. That would allow boards of governors and others, such as the TRC, who are guaranteed membership of boards of governors to achieve something that they hold very dear; the ownership of the schools that they represent. It would certainly provide a vehicle for doing that.

Mr O'Dowd:

What is the intention of clause 17, which refers to the management of controlled schools?

Mr Stewart:

Clause 17 provides for a very profound change. In effect, it makes controlled schools no longer controlled. The current definition of a controlled school is that it is a school that is owned and managed by an education and library board. At present, the degree of autonomy that a controlled school has is significantly less than that of a school in any other sector. The effect of clause 17 is to give controlled schools a level of autonomy, a level of say over the running of their own affairs, comparable to that of a maintained school. I would not go so far as to say that the clause gives controlled schools quite as much autonomy as voluntary grammar schools have; however, it comes fairly close to doing that.

Mr O'Dowd:

I want to tease that point out. Does that give the boards of governors a say in the control of the assets of that school; for example, the land and the buildings on it? Could the ESA or the holding body decide to dispose of that land without any consultation with the board of governors?

Mr Stewart:

No, they absolutely could not. That is why we have quite deliberately constrained the functions

and powers of the holding body. It absolutely cannot sell out the school from under the noses of the board of governors, or, indeed, make any change to the school. The authors of any change to the school would be either the board of governors or the ESA. The holding body is entirely neutral.

The Chairperson:

How do you marry that with what is stated in the Department's submission? It says:

“where a Controlled school closes, the holding body must transfer the land back to the ESA, which may use or dispose of it according to the normal rules.”

For example, there was a proposal to close a school in my constituency. The board said that it would close the school and that the school did not, in fact, belong to it; rather, it belonged to a board of trustees from a number of Churches in Ballymena. If the school was transferred to a holding body and then the school closed, ownership of the school would not return to the ESA. The school would be returned to whatever body originally owned it. Is it not correct that we still do not know how many schools are owned by bodies other than the state? I, and others, have asked for that information, but we have still not received it.

Mr Stewart:

You are talking about a particular set of circumstances. Take the example of the transfer of a school that was formerly owned by a Church or some other organisation. The terms of that transfer may have stated that the school was transferred to the state for use as a controlled school and that if at any time in the future it was not being used as a controlled school, its estate should revert to the original owners. If that is the nature of the transfer agreement, that is what will happen.

We have constructed the clause in the way that we have for a particular reason. If a school closes because it is no longer required as a controlled school but can be used for another educational purpose that is not at odds with the terms of the original transfer, the ESA should do that. If that is not the case, the ESA should dispose of the land according to the usual rules. Part of those usual rules is that whatever the original document of transfer requires to happen should happen.

The Chairperson:

If the ESA does not own a school, how can it dispose of that school? Surely ownership of the

school must revert to whoever owned it originally.

Mr Stewart:

That is what I am saying, Chairman; I am agreeing with you. However, when it comes into existence, the ESA will own schools before they are transferred to the holding body.

The Chairperson:

What if it does not?

Mr Stewart:

It will, Chair. When the ESA comes into existence, ownership of controlled schools will be transferred to the ESA under the provisions of the first Bill.

The Chairperson:

You are making a big assumption, Chris. That may not happen, and that is why I am asking the question. What would be the consequence if it did not happen?

Mr Stewart:

Sorry, Chair; I do not follow your question.

The Chairperson:

What if there is no interim period between the establishment of the ESA and the establishment of the holding company? If the ESA and the holding company are established simultaneously, the lands will be transferred to the holding company rather than the ESA.

Mr Stewart:

We are talking about a hypothetical situation.

The Chairperson:

Yes, we are.

Mr Stewart:

In that hypothetical situation, where the timings of the implementations of the first and second Bills were very close, we would simply use the commencement arrangements in both Bills to

establish the holding company on the same day, or one day after, the establishment of the ESA. As the Bills are currently constructed, I do not think that we could move from two transfers to one. If necessary, the second Bill could be amended to allow for a single transfer of property to the holding company rather than an initial transfer to the ESA and a subsequent transfer to the holding body. However, the Department must continue to plan for extant Executive policy, which is that the ESA will be established on 1 January 2010.

The Chairperson:

I wish to return to the amendment to clause 3 of the first Bill. That provides for boards of governors of controlled schools to become submitting authorities, not only for employment schemes but for management schemes. In other sectors, the trustees become the submitting authorities in relation to employment and management schemes. One of the reasons for that was so that there would be a cohesive approach; the trustees will be the owners and will also sit on the representative body. How will the proposal for the submitting authority arrangements for controlled schools produce cohesion in the controlled sector?

Mr Stewart:

That question merits a full explanation of the submitting authority provisions, if the Committee will indulge me for a moment or two.

The starting point is to remind ourselves of the purpose and the significance of the submitting authority proposals. The submitting authority is the body or person who will draw up for each school the scheme of management and the scheme of employment. The significance of the provisions is that they are the means by which we will ensure that the ethos of each particular school and sector is reflected in the governance and employment arrangements.

If we take that as the starting point, two criteria have to be met in order to assign the submitting authority function. First, as a statutory function, it has to be assigned to a legal entity or a statutory body of some description. Secondly, if it is the means by which we ensure ethos, it has to be assigned to some body or person that is recognised as the custodian of ethos for the particular school or the particular sector.

In relation to Catholic schools, a very straightforward solution presents itself. The trustees of those schools are clearly the custodians of the ethos and, as trustees, as owners of schools, they

are a legal entity and the submitting authority function can, therefore, be assigned to the trustees. For the controlled sector, finding a solution and meeting those criteria present a greater challenge. There are three possible options that can be considered: the holding body, the representative body, and boards of governors.

Let us consider the holding body first. It is a statutory entity, so that criterion is satisfied. However, it is not possible to give the TRC the sort of controlling influence over the holding body that it would wish for or that would make it a credible custodian of ethos for the sector. Therefore, that solution is not satisfactory. For the representative body, the converse is true. The TRC will have a guaranteed and very significant role in the representative body, but as a non-statutory organisation, it cannot be given the statutory function of a submitting authority.

That leaves us with boards of governors. They are legal entities, so they can be given statutory functions; and, because we are not changing the governance provisions in legislation, the TRC will continue to have a role. Therefore, boards of governors satisfy the criteria of being a statutory body and of containing the TRC, which will be recognised as a leading voice in the custodianship of ethos for that sector. Therefore, it appears to be appropriate to give boards of governors the role of submitting authority.

As to cohesiveness, we envisage boards of governors, like the individual trustees of Catholic schools, using their sectoral body to do the heavy lifting for them and develop an input into the draft schemes of governance and draft schemes of employment that those schools will adopt. In practice, the TRC will be able to play a role in relation to submitting authority arrangements, schemes of governance and schemes of management that is very similar — certainly as similar as we can make it, because that is our intention — to the role that will be played by the trustees and their support body.

I do not feel that I have fully convinced you, Chairman.

The Chairperson:

It would have been easier if you had said that there is just no equality. That is the bottom line. We either have equality or neutrality. I have to say that we are now in a situation where it is abundantly clear that the legal position that is currently enjoyed by those who represent the majority of the children from the Protestant community will be removed. No legal status will be

given to protect that position, other than “a voice” or “heavy lifting” — call it what you will. That is not good for equality, because it is not equality. Whether we are talking about a holding body, a representative body or a board of governors, there are serious problems. We must find ways and means to address those problems. I think that they can be addressed procedurally; that is, perhaps, a bigger issue.

Mr Stewart:

It is not for me to comment on the position that you and other members might take. However, not only will the legal position of TRC members as members of the education and library boards be removed, but the legal position of Catholic trustees as members of education and library boards will be removed. If there is something that might be described as an inequality in the current arrangements, some might say that it is the the existence of a statutory Catholic education authority, the Council for Catholic Maintained Schools (CCMS), which is a body that espouses the Catholic ethos. The RPA reforms will remove CCMS; there will no longer be a Catholic education authority. A single education authority, the ESA, will serve all sectors. Against that background, it is difficult to sustain the argument that the controlled sector or the TRC will experience inequality.

The Chairperson:

We will undoubtedly return to that issue. Thank you very much.