

REVIEW OF PUBLIC ADMINISTRATION (RPA): PUBLICLY OWNED SCHOOLS – OWNERSHIP AND REPRESENTATION

Context

1. Publicly owned schools (currently known as controlled schools) represent the largest group of schools in our education system. The Department recognises the important role controlled schools have played within the education system over the years and wants to ensure that, under the post-RPA arrangements, this sector is empowered and strengthened to enable it to continue to deliver high quality education, accessible by all, meeting the needs and expectations of the communities served by these schools.
2. The earlier RPA policy papers and the recommendations of the Bain review raised a number of issues related to ownership and advocacy in respect of publicly-owned schools. A number of stakeholders have also expressed strong views on this subject. The key issues of concern are described below. The purpose of this paper is to consider the issues raised, and propose possible solutions, while ensuring appropriate accountability arrangements and controls are in place to safeguard what is a very valuable public asset.

Ownership

3. Controlled schools are currently owned and managed by the Education and Library Boards (ELBs). Under the RPA proposals ownership of these schools will transfer to the ESA in January 2010 (along with the other assets of the ELBs). However, for a number of reasons this may not be the most appropriate long-term arrangement.
4. Firstly, it is intended that the operational relationship between publicly-owned schools and the Education and Skills Authority (ESA) will be radically different from the relationship between a controlled school and

an Education and Library Board. This relationship will be characterised by 'accountable autonomy' with support provided by the ESA at the request of the schools, rather than 'command and control' – hence these schools will no longer be known as “controlled” although an alternative title has not yet been agreed. Therefore, the ownership arrangements for publicly-owned schools need to be considered carefully, as ownership by the ESA may tend to promote a command and control relationship rather than accountable autonomy.

5. Secondly, notwithstanding the fact that decisions on individual school development proposals will be taken by DE, there is an acknowledged risk of a perceived (or actual) conflict of interest, stemming from the ESA's role in planning the whole schools' estate while owning the block of publicly-owned schools. It has been argued by some stakeholders that this conflict of interest could result in controlled schools receiving more favourable treatment as the ESA may put the interests of its own schools first. Others have made the converse argument – that these schools could receive less favourable treatment because the ESA will be actively trying to demonstrate that it is not showing them any favouritism and it is responding to the strong voices lobbying on behalf of the other sectors. The controlled sector does not have a voice independent of the ELBs/ ESA, and as the ESA must treat all schools on a fair and equitable basis it cannot champion the cause of one group of schools.
6. It has therefore been suggested by both sets of stakeholders that the potential for differential treatment of this group of schools (whether favourable or unfavourable) would best be addressed if ownership of these schools were to be removed from the ESA. This paper will consider where ownership might reside and what should be the functions of the new legal owner.
7. However, given that some stakeholders have highlighted the need for a strong, coherent voice to look after the interests of the sector, it may be

appropriate to consider how the controlled sector might be “empowered and strengthened” under the post-RPA arrangements to enable it to engage with government in the same way as the other sectors, before considering the more technical issue of alternative legal ownership arrangements for the controlled schools estate.

Representation/ Advocacy

8. It is recognised that the education sector here remains pluralist, and that there is a strong desire on the part of the various sectors to continue to play a significant role. There are a number of functions, which may be grouped under the heading of “sectoral support”, including the following:
 - A representational and advocacy role, including advice and support in responding to consultation exercises in respect of education policies, initiatives and schemes, and in regard to relationships with the Department, the ESA, other Departments and the EAF. ;
 - Working with schools within the sector to develop and maintain the collective ethos of the sector;
 - Identifying/nominating foundation governors and encouraging others to put themselves forward as community governors;
 - Participating in the planning of the schools estate (area based planning), and engaging where appropriate in strategic planning processes, including community planning;
 - Building co-operation and engaging with other sectors in matters of mutual interest, including promotion of tolerance and understanding, and respect for diversity.

9. It is generally accepted that the effective discharge of these functions, combined with the efforts of Governors, school-based staff, parents and others, can add value to education, and the Minister has agreed that the various sectors will require some professional support capacity in order to discharge this role. However, this raises an issue in relation to publicly-owned schools. The requirement for the ESA to treat all schools equitably means that it could not perform these functions for publicly-

owned schools. However, without sectoral representation, publicly-owned schools could be left in the invidious position of being the least coherent 'sector', without an effective mechanism for its governors and principals to provide mutual support, and the only sector without an effective voice in relation to the provision of policy advice to DE, and the planning and development of the schools estate.

Role of the TRC

10. Historically, the Protestant Churches, represented by the Transferors Representative Council (TRC), have been the sectoral voice for the controlled sector, with the seats for foundation governors or former owners filled by nominations from the three main Protestant (or transferor) churches.

11. The Transferor Representative Council (TRC) will remain a prominent voice within the publicly-owned schools sector, and could discharge some of the above functions. However if the TRC were to be the sole voice for the sector, this could be perceived as equating all publicly-owned schools (including those that were not transferred) solely with a Protestant ethos. This sector is clearly very rich in diversity. It serves a wide variety of faiths, beliefs, ethnic backgrounds and a broad cross-section of the section 75 groups; therefore it is important that the arrangements for this sector can reflect this, and cater for all those served by the sector equally. Therefore, while the TRC clearly remains a key voice within this sector, it may be necessary to consider more broadly based arrangements for publicly-owned schools.

Sectoral representation – way forward

12. It is proposed that DE should provide grant aid for a sectoral representative body for the publicly-owned sector, with sufficient professional capacity to discharge the role outlined above, in the same way as grant aid for sectoral support is to be provided to the other sectoral interests.

13. It is suggested that, whilst the TRC should have membership of such a body, it should also continue to have a direct relationship with government on issues that are of particular interest to the protestant churches. This arrangement would recognise the need for representation and advocacy for the entire publicly-owned sector, whilst also acknowledging that, from time to time and in relation to specific matters (e.g. religious education, or development of a Christian ethos within schools) there may be a need for the Protestant churches to play a complementary, but separate role.

14. As there is no pre-existing organisation that could undertake the envisaged role, it is proposed that a working group, comprising a number of principals and other vested interests from within the controlled sector, be established to develop proposals for an organisation to undertake sectoral representation for controlled schools that can then be put to the whole sector for approval. As this organisation would exist to represent the views of its members it would be best for the members (i.e. those within the controlled sector at present) to design the new organisation. For expediency the Department, in consultation with Education and Library Boards will nominate members of the working group to establish the organisation, but once established it will be for the membership of the organisation to decide who should be on the Board/Executive of the organisation, and represent the views of the organisation publicly.

15. As with the various organisations providing representation for the other sectors, the representative organisation for publicly owned schools should be a voluntary organisation that will receive sectoral support funding from the Department. It will be a condition of the grant that the organisation must be able to demonstrate that the way in which it is structured and operated reflects fully, and takes account of, the broad spectrum of interests and backgrounds of those who are served by the sector. This may include, for example, demonstrating how it will represent those who are served by the sector and come from a range of faiths and ethnic backgrounds, as well as those who fall within the

various section 75 categories, taking into account the specific needs and requirements that those groups may have.

16. As a voluntary body it would not be appropriate for this organisation to own these schools as this would not provide adequate security and accountability for such a valuable public asset. However, it would be appropriate to put in place a statutory requirement for the new legal owner to take account of the views of the representative organisation in its management of the assets under its stewardship. In this way, those within the sector would be guaranteed a meaningful role and strong voice in relation to the maintenance and development of high quality facilities necessary to ensure high quality and continuously improving standards of education. While legal ownership may reside elsewhere, this arrangement should allow those in the sector to have a greater sense of ownership of their schools.

Legal Ownership

17. There are over 600 controlled schools, including primary, secondary, some grammar, integrated and Irish Medium schools. The total value of the estate is **over £2.3 billion** (2006 figures), this is currently in the ownership of the Education and Library Boards (ELBs). Due to the legislative timetable, all controlled schools will transfer to the ESA in January 2010 as originally proposed, however, the Minister has taken a decision in principle that as soon as is practicable thereafter, the ESA should divest itself of ownership of these schools. In order to facilitate this, an acceptable alternative ownership arrangement needs to be identified, and to this end the Department has been investigating the implications associated with a full range of options. In order to make an assessment of the suitability of these options we need to be clear about what we mean by ownership, define the role and remit expected of the legal owner, and also the necessary controls and accountability arrangements required.

Role of Ownership Organisation

18. What do we mean by “ownership” of these schools? They are currently owned by the ELBs who are also the managing authorities for the schools. In future, the Board of Governors for each school will be the managing authority for the school, having responsibility for the day to day management of the school, including its land and assets. The ELBs currently provide landlord maintenance (looking after the physical structure of the school) for both controlled schools and maintained schools; therefore in future the ESA should undertake this role. The new legal owner of controlled schools would therefore appear to have a very limited role – that of simply being the technical legal owner of the schools.
19. Some functions that could be assigned to the new legal owner include, where appropriate, nominating foundation governors, bringing forward development proposals, and the disposal of surplus assets. As these would involve significant changes to the controlled schools estate the legal owner would have to have a close working relationship with the controlled sector representational body. As suggested earlier, those within the sector should be guaranteed a strong voice and this may be facilitated by placing a statutory duty on the legal owner to take account of the views of the representational body before taking any action in relation to the schools estate or the nomination of governors. The relationship may also be strengthened if there was overlap in the membership of the Boards of the two organisations - perhaps there could be a joint chairperson for the two organisations. Whatever the formal arrangement, it is the representational body that will have the relationship with the ESA necessary to voice the needs of that sector in the context of area –based planning of the schools estate. The legal owner could be the vehicle for implementing plans for the sector once the area-based planning process is complete – i.e. ensuring that the necessary development proposals are brought forward within the context of the agreed area plan and in consultation with the representative organisation.

20. However, it is also possible that the ownership organisation could have a more dynamic role, helping to transform the controlled sector from a group of schools owned, managed and controlled from above by the local education authorities, to schools more directly connected to their local communities. A possible long-term vision for the sector is one where the capacity of the staff and governors of the majority of schools is developed to the point where the Board of Governors in each school is able and willing to become the legal owner of the school, thereby increasing the vested interest in the school. The Board of Governors (that may include representatives of staff, parents, employers, churches and the local community etc) would then own and manage their school, with the full range of support services provided by the ESA at the request of the school. This is a vision where former education authority controlled schools would become truly local schools, owned and managed by local people for the benefit of the local community.

21. This is, of course, a very long term vision and would require the support of those within the sector to work towards it. If this is the direction this group of schools would want to go, the organisation established to own the schools in the short-medium term could have a transformational role, assisting these schools over a number of years to move towards the goal of being owned and managed at a more local level.

Characteristics of the legal owner of publicly owned schools

22. Ownership needs to be vested in some arrangement that is totally separate from the ESA as well as sufficiently arms-length from the Department of Education to avoid any real or perceived conflict of interest, particularly in relation to funding and planning issues.

23. This arrangement needs to have the ability to safeguard both the educational resource (ensuring that there are good quality, well maintained schools to provide education for all now and for the future)

and protect the public purse/public asset by having robust financial and accountability arrangements.

24. From a legal perspective “ownership” is associated with certain rights and duties, and it is essential that the implications of the various types of possible ownership arrangements are fully understood in order to protect the public purse. While we are clear about what we want to achieve by transferring ownership away from the ESA (i.e. removing any perceived or actual conflict of interest), we must be equally clear about what will be required in terms of accountability and control of the assets.

Accountability Arrangements

25. Ownership is more complex than simply holding the title deeds of land and buildings. It confers a range of responsibilities and rights on the legal owner, including the right to use or dispose of the property as the owner sees fit, or being liable for any expenses associated with the property including insurance etc. Regardless of whether these schools are owned by a body established for that purpose, or by individual Boards of Governors they will always be publicly-owned schools and there will need to be certain controls in place to ensure that the legal owner cannot misuse or dispose of these assets inappropriately. There will always have to be a direct line of accountability to the Department, the Minister and the Assembly.

Safeguards

26. This is a hugely valuable asset (the estate is worth over £2.3billion), and wherever legal ownership eventually rests the following should apply:

- These schools should remain publicly owned assets
- The legal owner must be accountable to the Minister and the Assembly for stewardship of the asset;
- The legal owner needs to have well defined relationships with the Department, the ESA and the sectoral representation body;

- The Department should retain some control over the future use, development and disposal of these assets;
- The ownership organisation should be separate from the ESA, but wholly funded by DE;
- DE should have the right to appoint the members of the ownership organisation in accordance with OCPANI principles;
- Bureaucracy should be kept to a minimum.
- The ESA should provide services to all these schools in the same way as it does to schools in other sectors – there should be no overlap or duplication of the activities of the ESA.

Options

27. There are a number of potential options that could achieve this aim,:

- establishing a separate statutory public body to own controlled schools (at odds with a key RPA policy objective);
- ownership by DE (at odds with the Department's future role, and would exacerbate rather than address conflict of interest issues);
- a public Trust (would be subject to Trust law and may not provide adequate protection of the asset);
- the establishment of smaller trusts by individual schools or groups of schools that would allow ownership to pass to the Boards of Governors (most schools in the sector currently lack the capacity to undertake this role);
- A limited company (would be subject to company law and the additional bureaucracy that requires);
- A company with charitable status (would be subject to charities law which may have advantages in relation to exemption from VAT, but disadvantages in that case law suggests the public purse may not be adequately protected).

Cost Considerations

28. The transfer of ownership away from the ESA will inevitably have cost implications. For example there will be additional costs associated with increased administration. The new body will need a publicly appointed Board, staff and premises. It will also have to produce its own accounts, annual reports etc.
29. Unlike the ELBs, the new body may have to pay VAT. The Department is currently seeking VAT exemption for the ESA, as the direct successor of the ELBs. A second public body, established to accept some of the functions of the ELBs may be granted this dispensation but that cannot be guaranteed at this stage. If VAT exemption is not granted, the VAT costs of the estate would be considerable. For example, the VAT liability on the unitary payment for a single school with a long-term enrolment of 1830, recently built under PPP arrangements, will be approximately £700k per annum for the 25 year life of the contract¹.
30. Under Public Service Commission principles, existing ELB staff will transfer with their functions to the ESA. If a second public body is set up to assume the ownership function, the staff associated with this function may have to transfer a second time with all the upheaval and additional costs etc that might involve.
31. Although land transfers due to major government re-organisations are exempt from Stamp Duty, it is not yet clear if a second transfer (i.e. from ESA to a second public body) would also be exempt – if not the stamp duty on an estate worth in excess of £2.3billion would be considerable.
32. If any fees are payable (e.g. to the Land Registry) for the transfer to the ESA, they will be payable again upon the second transfer. Likewise, any waiver of fees that might be negotiated for the initial transfer may not apply to a second transfer.

¹ Figure supplied by Schools Finance Branch

33. The ELBs currently 'self insure' for the controlled schools estate, a new ownership body may need to purchase commercial insurance.

Other Considerations

34. The ESA will be placed under the same legal duty as the ELBs currently are, to provide "sufficient schools" here. This will mean that the ESA must retain the ability to submit development proposals for the estate when necessary, even if it no longer owns controlled schools. For some stakeholders, this may mean that the perceived conflict of interest would not be addressed by removing ownership responsibility from the ESA.

Preferred Option

35. Whether the legal owner was established as a trust, company, charity or any other sort of legal entity, as it will be wholly funded by the Department, and the Department will seek to retain a high degree of control over the body and its assets, it will be classed as a public body. A statutory public body will be subject to clear governance and accountability arrangements, similar to those that will be in place for the ESA. These are likely to be more transparent and flexible than those facilitated by Trust and Company law.

36. On balance, therefore, it would appear that the most appropriate option would be to establish a statutory public body, that would then be automatically subject to the financial controls, governance and accountability arrangements set out in Managing Public Money Northern Ireland (MPMNI), and not to add to the burden of bureaucracy on the organisation by establishing it as a particular type of legal entity, subject to additional legal requirements of specific legislation that governs that type of entity (ie Company Law, Trust Law etc).

Questions

- 1. Assuming acceptance of the need to transfer ownership of controlled schools out of the ESA while still retaining public ownership, and balancing the need to address the legitimate concerns of stakeholders against the added costs of new ownership arrangements, and the contravention of a key RPA principle, is it appropriate to proceed with the establishment of a statutory ownership body?**

- 2. Would the proposals in this paper address the concerns of stakeholders on this issue?**

- 3. Is there a more appropriate ownership arrangement that would address the concerns of stakeholders while keeping costs and risks to a minimum, and ensuring robust financial controls and accountability arrangements safeguarding this asset for future generations?**

- 4. Should the legal owner simply hold the deeds of these schools, or have a long term transformational role?**

- 5. Do you agree that the ownership body should have a statutory obligation to take account of the views of the representative organisation?**