

The Highland Council
ADULT AND CHILDREN'S SERVICES COMMITTEE
21 August 2013

Agenda Item	17.
Report No	ACS/77/13

Amending Schools (Consultation) (Scotland) Act 2010

Report by Director of Education, Culture and Sport

Summary

This report sets out the background to the consultation on Amending the schools' (Consultation) (Scotland) Act 2010 and outlines draft responses and supporting rationale.

1. Background

- 1.1 The commission on the Delivery of Rural Education reported in April 2013.
- 1.2 The proposed legislative amendments are required to enable some of the recommendation of the commission on the delivery of the Rural Education to be implemented.
- 1.3 The majority of the recommendations can be delivered through administrative measures.

However the Cabinet Secretary for Education and Life Long Learning is proposing legislation be amended to enable implementation of:

- Recommendation 24 – Presumption Against Closure
- Recommendation 21 – Providing Financial Information on Closure Proposals
- Recommendation 18 – Clarifying and Expanding Education Scotland's Role
- Recommendation 33 – The Basis for Determining School Closure Proposals
- Recommendations 33 & 34 – Establishing an Independent Referral Mechanism
- Recommendation 31 – A Five Year Moratorium Between School Closure Proposals

- 1.4 The Scottish Government is inviting written responses to the Consultation paper by 2 September and members are asked to consider the draft responses and agree the Highland Council's response to be submitted by the due date.

2. Draft Responses

2.1 Recommendation 24 – Presumption Against Closure

- Legislation would be appropriate in order to ensure clarity
- The 2010 Act set out to establish the presumption against rural school closure by requiring additional tests to be applied to proposals to close rural schools.

Legal Challenge has confirmed that this presumption has not been established legally leaving the situation very unclear for local authorities and communities.

Legislation will remove any doubt around the status of the additional tests which require to be satisfied in proposing closure of rural schools

2.2 Recommendation 21 – Providing Financial Information on Closure Proposals

- Legislation would be appropriate
- An amendment to the legislation setting out the requirement to provide relevant and transparent financial information will be beneficial in ensuring consistency of approach across local authorities.

A clear legislative position accompanied by guidance would define standards.

This would lead to improved information and remove confusion over what is relevant.

Compliance with the legislative requirement and guidance would put local authorities in a stronger position to resist challenge and will make the compiling of financial information more straightforward.

2.3 Recommendation 18 – Clarifying and Expanding Education Scotland's Role

- The consultation seeks views on a more sustained role for Education Scotland and also seeks a view on whether it would be better to establish this role through legislation or a Memorandum of Understanding.
- Local authorities are increasingly working in partnership with Education Scotland and a more sustained role for Education Scotland in rationalisation and closure proposals would be helpful.

Education Scotland currently has the role of providing Ministers with commentary on the proposals in particular the Educational Benefits Statement. Currently there is a defined period in which Education Scotland participate in the process and there is no opportunity of further involvement of Education Scotland after they submit their advice to Ministers.

A model of engagement based on partnership between Education Scotland and the local authority would allow for discussion and advice and might well reduce the number of proposals which are called in by Ministers.

A legislative change would be preferable to a Memorandum of Understanding which might not be sufficiently robust to support a consistent approach across all local authorities.

2.4 **Recommendation 33 – The Basis for Determining School Closure Proposals**

- Recent legal challenge has demonstrated that there is a lack of clarity in current legislation in regard to the extent of the powers of Ministers in determining a “called in” proposal.
- The Scottish Government proposes to amend the current legislation in order to make clear that Ministers will give consideration, not only to the process followed but also to the merits of the proposal.

Currently the legislation provides only for Ministers to consider the process which has been followed. The judgment in the recent case between Western Isles Council and Scottish Government indicated that the merits should be considered as well and this view was agreed with by the Commission.

It is likely to be beneficial to all parties that a proposal is looked at in the broader context of its merit rather than simply compliance with procedure and it is therefore recommended that The Highland Council’s response should favour a legislative change in order to ensure that there is full clarity for communities and local authorities on the role of Ministers.

2.5 **Recommendations 33 & 34 – Establishing an Independent Referral Mechanism**

- The consultation seeks views on whether or not there should be an independent referral mechanism for considering called in proposals or whether this duty should remain with Ministers.

The consultation proposes four key aspects which an independent referral mechanism should have:-

- **Accessibility:** it should be a low cost process thereby reducing barriers to communities (or local authorities) taking part in it;
- **Time Limited:** it should be able to make decisions efficiently to give confidence to all involved;
- **Authority and Certainty:** the decision must be final and only challengeable on points of law;
- **Fairness and Objectivity:** to determine whether the decision to

implement a closure proposal is one that a reasonable education authority could have reached;

and views on the replacing of the Ministerial function by an independent referral mechanism.

- The key aspects as set out above are seen as being sufficient to provide a robust framework for a future referral mechanism.
- The introduction of an independent referral mechanism would require a change in legislation and it is proposed that this would be a positive change in that Ministers would still retain the power to call in a proposal. However, the detailed determination of such a proposal would be considered by an independent body thereby emphasising objectivity and transparency.

2.6 Recommendation 31 – A Five Year Moratorium Between School Closure Proposals

- The Commission recommended that once a school closure proposal had been fully considered and agreement was reached not to close the school the local authority should make no further closure proposal for at least five years unless there is a **significant relevant change**.

The Scottish Government supports the Commission's recommendation and seeks a view on whether this recommendation would best be delivered through legislative amendment or inclusion in statutory guidance.

Additionally the consultation seeks a view on whether or not a change to a local authority's resources should be considered to be a **significant relevant change**.

The key issue here is the definition of **significant relevant change** against the background of projected revenue pressures over the next years. It is proposed that The Highland Council's response should support the view that an overall change to local authority resources should be considered a **significant relevant change** for the purpose of proposing a school closure.

Whilst it would always be preferable to ensure stability for a school community by adhering to a rule of thumb approach such as five years between consultations it is quite likely that local authorities may need the flexibility to re-visit school closure proposals in a shorter timescale given future financial projections.

If the five years were to be enshrined in legislation then such re-visiting would either be impossible or would be subject to potentially protracted legal challenge.

Whilst there is every possibility of challenge if the five years were set out in statutory guidance it is proposed that The Highland Council response should favour this mechanism as opposed to legislation in order to leave an element

of flexibility which would of course have to be justified through the quality of the information provided in the closure proposal.

3. Implications

3.1 There are no resource, Legal, Equalities, Climate Change and Risk implications arising from this report.

4. Recommendation

4.1 Members are asked to consider the draft responses and agree the Highland Council's response to the consultation.

Designation: Director of Education, Culture and Sport

Date: 6 August 2013

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Background Papers: