

Government Response to the Consultation on the Proposed Amendments to the Schools Consultation (Scotland) Act 2010

GOVERNMENT RESPONSE TO THE CONSULTATION ON THE PROPOSED AMENDMENTS TO THE SCHOOLS CONSULTATION (SCOTLAND) ACT 2010

Executive Summary

This paper sets out Ministers' intentions following the Scottish Government consultation "*Amending the Schools (Consultation) (Scotland) Act 2010*" and how these will be taken forward.

We are grateful for the strong response that was received to the consultation – from more than 220 individuals and organisations, and that this was despite the relatively brief consultation period which fell partly in the school holidays. We regret the inconvenience this caused which was unavoidable to take the opportunity to bring these changes into force during 2014 rather than significantly later. The formal responses were supplemented by meetings officials held with parents and parent organisations, and with other correspondence received around the consultation period.

An independent analysis of the consultation responses was commissioned by the Scottish Government and this paper should be read in conjunction with that report "Consultation on Amending the Schools (Consultation) (Scotland) Act 2010: Analysis of Written Responses".¹

The independent analysis found that respondents were supportive of the Scottish Government's proposals to amend the Schools (Consultation) (Scotland) Act 2010² (the 2010 Act) and in most cases very strongly supportive. On this basis, Ministers have decided to proceed with all the proposals in the consultation paper. This will deliver the recommendations made by the Commission on the Delivery of Rural Education³ (the Commission) which have been identified as requiring legislative change. These changes will be taken forward by making amendments to the 2010 Act through the Children and Young People (Scotland) Bill which is currently before Parliament.

This paper discusses each of the consultation proposals, the response it received and legislation Ministers propose to bring forward.

¹ The analysis of consultation responses is available on the Scottish Government website: <http://www.scotland.gov.uk/Publications/2013/11>

² The 2010 Act is available here: <http://www.legislation.gov.uk/asp/2010/2>

³ The Report of the Commission on the Delivery of Rural Education is available here: <http://www.scotland.gov.uk/Publications/2013/04/5849> and the Government response is available here: <http://www.scotland.gov.uk/Publications/2013/06/6087>

Section 1: The Presumption Against Closure

Commission Recommendation 24: A new, clearer understanding of “a presumption against closure” should be set out by the Scottish Government in the statutory guidance accompanying the 2010 Act to reduce conflict and provide clarity and protection for communities and local authorities.

1. In the 2010 Act, Scottish Ministers set out to create what was widely referred to as a “presumption against closure” for rural schools, and this policy received unanimous support from Parliament. It recognises the importance of rural schools to their communities and the wider impact on the community that closure might cause.

2. The way the Government chose to deliver this “presumption against closure” was to define in legislation a series of rural factors which local authorities have a duty to pay “special regard”, so that these factors would operate as a presumption against closure. If there were viable alternatives to closure, or if the likely effects on the local community or of altered travel arrangements were negative, these factors would be weighed by the local authority in their decision on the closure proposal.

3. The Commission advised that the “presumption against closure” had been unclear and divisive for communities and local authorities, and that the Government should make it clearer through guidance.

4. However, the recent judgement by the Inner House of the Court of Session in the case of the Comhairle nan Eilean Siar v Scottish Ministers held that the 2010 Act does not give rise to a legislative presumption against closure. This meant that clarification could not simply be made through an addition to the statutory guidance. Instead, the Government proposed amending the 2010 Act to make a clear presumption against the closure of rural schools, matching Parliament’s intention when it passed the 2010 Act. This could then be backed up by any necessary amendments to the statutory guidance.

5. The consultation document asked: **“Do you support clarifying the presumption against closure of rural schools by stating it in legislation by means of an amendment to the 2010 Act?”**

6. There was strong support for this proposal, with 84% of respondents agreeing with the proposal, including 89% of organisations. However, it is worth noting that while clear legislation in this area was strongly supported by stakeholders of all types, respondents divided between those who sought the strongest possible protection for rural schools and a significant minority who made it clear that their support was simply for increased clarity and they opposed any additional strengthening of this policy.

7. The Scottish Government therefore intends to bring forward amendments to the 2010 Act to clarify the presumption against the closure of rural schools.

8. Our intention is not that the presumption against closure should mean that no rural school can ever close, but that the education authority must give very careful

consideration to the matters “of special regard” **before** bringing forward a closure proposal. Remoteness should be a key consideration, recognising the impact of moving education provision an unreasonable distance from communities.

9. We understand the concerns, particularly from local authorities, that the desire to preserve rural schools should not be a barrier to change that is necessary to reflect demographic change, or the delivery of the best possible education for children and young people. Therefore, the amendment that we bring forward will seek to carefully balance the delivery of a clear presumption against closure that has the support of stakeholders and Parliament while avoiding making the presumption so strong that it stifles legitimate changes to schools which become necessary over time.

Section 2: Providing Financial Information on Closure Proposals

Commission Recommendation 21: School closure proposals should be accompanied by transparent, accurate and consistent financial information, rigorously evidencing any financial argument deployed. The impact, if any, of the proposal on the General Revenue Grant that the authority would receive in future should be clearly stated.

Commission Recommendation 22: Clear guidance and a template for financial information should be developed to ensure financial information is presented in a complete and consistent manner.

10. The Commission commented that “The current interpretation of the 2010 Act does not enable local authorities to acknowledge the impact of the financial climate on their decision making. The Commission concluded that it was not sustainable or transparent for financial factors to be hidden from closure proposals.... If financial factors are to be a factor in school closure decisions, alongside educational factors... it is critical this is based on accurate and transparent data, not assumptions or crude estimates of complex matters.”

11. The consultation document posed the following question: **“Do you support amending the 2010 Act to make it clear that relevant financial information should be included in a school closure consultation?”**

12. This proposal received very strong support with 94% of respondents agreeing that there should be a requirement to provide clear supporting financial information. All local authorities who responded to the consultation supported this proposal, with parent groups also strongly supportive of receiving clear, verifiable information on the financial issues.

13. This proposal is not intended to diminish the Scottish Government’s policy, delivered through the 2010 Act, that educational benefits must be the primary consideration in making the case for all school closure proposals. However, we agree with respondents and the Commission that clear and consistent financial information is essential to inform the consultation process.

14. As a consequence, the Scottish Government will bring forward amendments to the 2010 Act to make it a requirement that school closure proposals must be accompanied by financial information.

15. This requirement will not apply to other “relevant proposals” under the 2010 Act – such as proposals to establish new schools, relocations or changes to catchment areas. This would be an unduly onerous burden on local authorities in relation to proposals which are less controversial and where financial information is likely to be less relevant.

16. It will be essential, as the Commission recommended, that the requirement to provide financial information is supported by detailed guidance to ensure that the information local authorities provide is clear and consistently presented so that communities can readily understand it. The Government is committed to working with COSLA and other interested stakeholders to develop a financial framework or template which all education authorities should complete when bringing forward a school closure proposal.

Section 3: Clarifying and Expanding the Role of Education Scotland

Commission Recommendation 18: Education Scotland should have a wider role in providing a detailed response to the proposed educational benefits and a more sustained involvement in a school closure proposal.

17. Education Scotland (delivering its function as Her Majesty’s Inspectorate of Education) already has a statutory role under the 2010 Act to provide a detailed report on the educational aspects of school closure proposals as set out in the Educational Benefits Statement made by the local authority. Education Scotland also gives consideration to and comments on the written and oral representations made to the authority during the consultation.

18. The local authority is then required to review its proposal in light of the issues raised by Education Scotland before preparing and publishing a consultation report. However, educational issues can remain unclear beyond this point, if for example, the local authority suggests a new solution to an issue that has been highlighted by Education Scotland. The Scottish Government agreed that, given the primary importance of educational considerations, it would be desirable to make clear that when a closure proposal is notified to Scottish Ministers, they can draw on professional educational advice provided by Education Scotland.

19. There is a wider issue that Educational Benefit Statements provided by education authorities have not always met the expectations of Education Scotland or communities, in their detail or the evidence for their assertions. The consultation paper set out proposals that Education Scotland should offer more support to local authorities to improve this.

20. The consultation paper asked the following question: **“Do you support giving Education Scotland a more sustained role in a school closure proposal?”** It went on to ask whether respondents **“would prefer Education Scotland’s role to be clarified through legislation or a Memorandum of Understanding?”**

21. A majority of respondents supported giving Education Scotland a wider role, with 77% indicating support including 14 local authorities (out of 19 responding) and 80% of other organisations.

22. However, there was some confusion around what was proposed and this may have led to a relatively high number of “don’t knows” in response to this question. The Government also recognises that there is a tension between the two aspects of the proposed wider role for Education Scotland. On the one hand, parents value Education Scotland’s independence and impartiality and expected that a stronger role for Education Scotland would reinforce the importance of the educational benefit of closure proposals and the likelihood that weak proposals would ultimately be refused consent. On the other hand, local authorities welcomed the proposal on the basis that further guidance and support from Education Scotland would help them to make a robust assessment of the educational benefit of a proposal and reduce the likelihood of a proposal failing.

23. It will be essential to manage this tension and deliver both benefits. Firstly, support for local authorities to produce higher quality Educational Benefit Statements without undermining the independence of Education Scotland and its statutory role to comment on these. And secondly, strong, independent educational advice for Ministers on the school closure proposals which are referred to them.

24. Respondents were asked whether they would prefer Education Scotland’s role to be clarified through legislation or a Memorandum of Understanding, and the majority favoured using legislation (54% supported, compared to 21% for a Memorandum of Understanding).

25. The Scottish Government agrees that it would be appropriate to amend the 2010 Act to provide that Scottish Ministers may seek further advice or additional information from Education Scotland in considering whether or not to call in a school closure proposal. Educational input can also be important in determining a proposal that has been called-in. We will give consideration to ensuring that the independent referral body that it is proposed will take on responsibility for determining school closures can also receive appropriate educational information and advice.

26. Once amendments to the 2010 Act have been agreed, Ministers will consider with Education Scotland whether it would also be helpful to set out further detail regarding its role under the 2010 Act in a Memorandum of Understanding. This would supply more detail and be flexible to address changing circumstances. For example, the Memorandum of Understanding might include time limits for providing advice in order to ensure that the determination process is not unduly delayed.

27. The Scottish Government will work with Education Scotland and local authorities to resolve the best way in which Education Scotland can support an

improvement in the quality and consistency of Educational Benefit Statements without undermining its independence. This could include provision of good practice guidance or a self-evaluation toolkit for authorities.

Section 4: Basis for Determining a School Closure Proposal

Commission recommendation 33: Scottish Ministers' role under the 2010 Act, as set out in the judgement in the case of Comhairle nan Eilean Siar v. Scottish Ministers, requires consideration of both the process followed and the merits of a school closure proposal has been called in. Ministers should have three options in relation to these proposals, to:

- **Consent, including consent with conditions;**
- **Refuse consent; or**
- **Remit the proposal back to the local authority for reconsideration.**

28. The Commission commended the recent court judgement that the 2010 Act requires Ministers to look at the merits of school closure proposals as well as the education authority's compliance with the legal process set out in the Act. The Government has accepted the Commission's recommendation that closure proposals should be considered both in terms of the process followed and the merits of the proposal. Although the recommendation reflects the Courts' interpretation of the legislation as it currently stands, the Government considers that, given that this is a change to the previous policy, the 2010 Act should be amended to make this approach absolutely clear.

29. In addition, the Commission recommended that an additional option should be available when determining school closure proposals, that in addition to consenting to or refusing a closure proposal, it should also be possible to remit the proposal back to the education authority for reconsideration. This would give the authority an opportunity to address flaws that had been identified in the consultation process or proposal without necessarily having to repeat all aspects of the consultation process.

30. The consultation set out the following question: **"Do you support amending the 2010 Act to provide clarity regarding Ministers' role in considering both the process and merits of the closure proposal?"**

31. This proposal received very strong support, with 93% of those who responded to this question agreeing and the Government will bring forward amendments to provide this clarity.

32. Some respondents commented on the additional option of remitting a decision back to the education authority, and there were a range of views on this proposal. Education authorities generally viewed this proposal in a positive light, suggesting that it would ensure that the time and effort in undertaking a consultation was not wasted if a flaw was discovered involving a minor technicality or administrative error, and it clearly provides an opportunity to address issues that have been identified. However, some individuals and parent groups disagreed, considering that authorities

which had made errors in its consultation process or in its proposal, should not receive a second chance.

33. On balance, the Scottish Government considers that there is value in the additional option to remit a decision back to the local authority, and that it would be appropriate in cases where there are concerns regarding a proposal that are too substantial to address through conditional consent, but where it is not clear that a proposal should be refused. Ministers are mindful of the Courts' view that these decisions are primarily for education authorities and this option allows the onus to be placed on the authority to come up with an improved proposal or to fix an error in the consultation process. The proposed moratorium on repeating a school closure proposal is also relevant here, as refusing a closure proposal could mean that an authority was required to keep a school open for a significant period due to a flaw in their proposal or consultation process which could be remedied.

34. Alongside amendments to the 2010 Act, the statutory guidance will be revised to make it clear that in determining a closure proposal it is not for Scottish Ministers, or in future the independent referral mechanism, to consider a closure proposal afresh as if they, and not the education authority, were taking the decision independently for themselves. This role is instead to determine whether the education authority may have erred in a significant regard in relation to the consultation process set out under the 2010 Act or may have failed to take account of a material consideration when appraising the merits of the proposal.

Section 5: Establishing an Independent Referral Mechanism

Recommendation 34: The referral mechanism for school closure decisions should continue to be to Scottish Ministers, as an accessible mechanism that communities value. Once a sufficient period of time has elapsed for the impact of the Commission's other recommendations to be assessed, a further review could consider the effectiveness of alternative approaches.

35. The Scottish Government consulted on the proposal to build on the Commission's recommendations regarding Ministerial call-in, and address the issue of who should determine a school closure proposal that is called in by establishing an independent referral mechanism.

36. There is a perception that given the difficult nature of these decisions it can at times make it difficult for Ministers to be totally impartial and that these decisions do not sit well with Ministers. The Government therefore proposed to take this opportunity to establish an independent referral mechanism which would put beyond doubt that these decisions are taken objectively, transparently and at arm's length from any political influences.

37. At present the Scottish Ministers take the decision both to call-in a closure proposal and then "determine" the proposal, i.e. take the decision to consent, consent with conditions or refuse the proposal. The consultation proposed that the

first stage, the determination of whether or not to call-in a proposal, should continue to be for the Scottish Ministers. The Government is developing a number of changes to ensure that this process is as effective and transparent as possible, and that proposals are not called in which could have been resolved at an earlier stage.

38. However, the cases which have been called-in, which would be expected to be the most difficult cases, will continue to require to be called-in and the Government proposed that in future closure proposals should be referred to a new independent referral mechanism for determination. This would aim to ensure that there was a process that was thorough and objective and both communities and education authorities had full confidence that there was no element of political influence. It was proposed that this mechanism should have key characteristics to ensure that it met communities' and authorities' needs. The independent referral mechanism should be characterised by:

- **Accessibility;** it should be a low cost process thereby reducing the barriers to communities (or education 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 a point 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.

39. The consultation paper sought views on firstly whether the above criteria **"...are appropriate as a dispute resolution process under the 2010 Act?"**; and secondly, whether respondents **"...support replacing the current Ministerial determination of school closure proposals that have been called-in with an independent referral mechanism such as arbitration?"**

40. Consideration of how the independent referral mechanism might operate was still being developed and as a result this part of the consultation paper did not provide much detail and looked at principles rather than a clear proposal. The majority of respondents (58%) agreed that the criteria presented were an appropriate basis for dispute resolution process, however a third of respondents did not know, perhaps reflecting a need for more information and clarity.

41. The majority of respondents (70%) supported replacing the current Ministerial determination of school closure proposals that have been called-in with an independent referral mechanism. 15% opposed the proposal, preferring the current arrangements.

42. Only a small proportion of respondents (19%) commented on other options for dispute resolution, and some used this opportunity to request further details on how the mechanism might operate and its independence and composition. There were also strong views that the new body should be easily accessible, not incur excessive costs, and not lead to lengthier decision-making times.

43. The Scottish Government intend to introduce an amendment through the Children and Young People Bill to amend the 2010 Act so that in future a decision to implement a school closure proposal, once called-in by Scottish Ministers under Section 15(3) of the 2010 Act, would be reviewed by an independent referral body, which could be known, for example, as “the school closure review body”.

44. The school closure review body would be established with the processes and powers it would require to take objective, transparent and final decisions on closure proposals which Ministers have called in. It is likely to consist of a panel of members, chosen for each proposal from a pool of people appointed for this purpose. The panel would require administrative and other support, and we will explore whether this can be provided most efficiently by an existing body, such as the Scottish Arbitration Centre.

45. We expect to set out the core role and responsibilities of the school closure body through amendments to the 2010 Act. Details of the process and rules that the new body would be developed subsequently. These will follow the criteria or principles proposed in the consultation paper: that the review process must be accessible, timely, provide certainty and be fair and objective.

46. We recognise that there are concerns that the review body as well as providing a low cost mechanism for communities, should not be a costly burden on the public sector and nor should it introduce further delays on what is already a lengthy decision making process. Using an existing body to support the review body will keep costs low and other changes to 2010 Act and its guidance are intended to reduce further the number of cases that require to be called-in. However, it is right that thorough consideration be given to the most difficult decisions. In order to ensure that, as far as possible, this consideration is completed in a short time, we propose that the referral body should be required to reach a decision on a school closure proposal within 8 weeks of the date of the Ministerial call-in notice. However, in recognition of the particularly complex issues raised by some closure proposals, we propose that there should be a provision that would allow the body to seek an extension to this period in exceptional circumstances. In such circumstances the referral body would require to give notice stating the reason for the delay along with an expected date for their decision.

47. Bearing in mind concerns about delay and cost, we confirm that the new school closure review body’s decisions will be final and only appealable on a point of law.

Section 6: Five Year Moratorium Between School Closure Proposals

Recommendation 31: Once a school closure proposal has undergone full consideration under the 2010 Act that it is agreed not to close the school, local authorities should make no further closure proposal for at least five years unless there is a significant relevant change.

48. The Commission on the Delivery of Rural Education reported that some small schools faced repeated closure proposals at short intervals, and this had a corrosive impact on the school roll and staffing, increasing the likelihood of closure as parents avoided placing their children at a school perceived to be at a high risk of closure. The Commission's report suggested that following a failed closure proposal, a community should be given "breathing space" by having a period of time where no further school closure proposal is brought forward in order that the school has time to stabilise.

49. The consultation paper asked: **"Do you support a five year moratorium between closure proposals for the same school?"**. It also asked the follow up question: **"If so, would you prefer this provision to be made in guidance or legislation?"**

50. Three quarters of respondents were in favour of a 5 year moratorium between closure proposals for the same school, with 19% opposed. There was a difference between how local authority and other respondents viewed the proposal, with the majority of education authorities (68%) against it, whereas most other organisational respondents, such as parent groups, were in favour (91%). It was also strongly supported by individual respondents.

51. Responses were divided on the most appropriate periods for the moratorium. Several parents and parent councils in communities which had experienced closure proposals described them as stressful and traumatic, and felt that a 7 year moratorium, or longer, would be better as it would prevent any child having to go through a closure proposal twice. Others considered that 5 years was too long, arguing that pupil numbers in a small rural community can alter rapidly and unpredictably and suggesting that 3 years or even 1 year would be more appropriate. Some respondents suggested that the introduction of a mandatory moratorium on school closures was in conflict with the primacy of local authorities in making decisions about the use of their resources.

52. On the question of whether such a moratorium should be delivered through legislation or through statutory guidance, 65% of respondents felt that it should be made in legislation while 25% favoured the use of guidance. 94% of local authorities which responded to the question thought that a moratorium would be best delivered through guidance.

53. The Government confirms that following a closure proposal being refused under the 2010 Act, or where, following a closure consultation, an education authority has taken the decision not to proceed to close the school, a new proposal may not be made for a period of 5 years. It was clear that respondents considered

the moratorium would be more effective and reliable if it were in legislation and doubted the impact of placing it in guidance. We will therefore bring forward amendments to the 2010 Act to deliver this provision. We consider that 5 years, as recommended by the Commission, is the appropriate period given the need to balance giving children and communities stability and not unduly restricting future administrations.

54. The Government understands and accepts that circumstances and opinion can change during a shorter period, particularly in terms of pupil numbers in small rural communities, and that significant, relevant changes may occur. Therefore the amendments will provide scope for exceptions to be made where such a change has happened. We expect to provide guidance on what constitutes a significant, relevant change in statutory guidance accompanying the 2010 Act, which is more flexible than prescribing this in the 2010 Act given the wide range of circumstances which might arise.

55. There were requests that the moratorium should apply immediately to schools which have faced closure proposals which would qualify under the new legislation. We consider that while in some ways desirable, this retrospective application of a provision that was not known at the time would not be reasonable. Therefore, the moratorium will only apply to decisions taken once the relevant provision in the 2010 Act as amended has come into force. It was also proposed that, to give stability to children who have experienced a school closure, there should be a period of moratorium of any closure proposal on the receiving school they had been moved to. While sympathetic to this aim, and that authorities should give careful consideration to the stability of the proposed new arrangements in assessing options and their educational benefits, we concluded that this could be unduly complex and restrictive if put into legislation.

**Scottish Government
November 2013**



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The Scottish Government
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EH1 3DG

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