

Lecture delivered at Update Conference 9 September 2014

EDUCATION LAW UPDATE

9 September 2014

CLOSURES, MERGERS AND OTHER CHANGES

*Janys M Scott QC*

**Introduction**

[1] School closures, mergers and other changes in the provision of public education are often highly contentious. There is a long history of litigation in this area, going back to *Harvey v Strathclyde Regional Council*<sup>1</sup> and beyond. In that case a parent challenged a scheme to close a school, merging it with another school, in the face of overwhelming parental opposition. She persuaded the Lord Ordinary that the education authority had failed to “have regard to the general principle that ... pupils are to be educated in accordance with the wishes of their parents” as required by section 28 (1) of the Education (Scotland) Act 1980 and the merger decision was reduced. That decision was reversed on appeal, and appealed again to the House of Lords, where it was held that authorities are not bound to act in accordance with the wishes of parents. When making changes in the provision of education, it is sufficient to consult parents and to have regard to their views. Compliance with the statutory requirements, said the House of Lords, goes a long way towards satisfying the general principle relating to the wishes of parents.

[2] Education authorities cannot simply run schools in compliance with parental wishes. They have a duty to secure adequate and efficient provision of school education for their area.<sup>2</sup> They must also provide sufficient accommodation in public schools.<sup>3</sup> They are obliged by the Local Government in Scotland Act 2003 to make arrangements which secure best value by continuous improvement in the performance of their functions, while maintaining an appropriate balance between quality and cost and having regard to efficiency, effectiveness, economy, equal opportunities and the achievement of sustainable development.<sup>4</sup> In addition they have duties in relation to the quality of school education, in particular to endeavour to secure improvement in

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<sup>1</sup> *Harvey v Strathclyde Regional Council*, 1989 S.L.T. (HL) 612.

<sup>2</sup> 1980 Act, s.1(1).

<sup>3</sup> 1980 Act, s.17(1).

<sup>4</sup> 2003 Act, s.1.

the quality of education provided in schools under their management with a view to raising standards of education.<sup>5</sup> There are also duties to individual pupils, to secure that education is directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential, and so far as reasonably practicable to have regard to their views.<sup>6</sup> Pupils with additional support needs may require particular consideration as education authorities have duties to make adequate and efficient provision for additional support.<sup>7</sup> The education authority has the unenviable task of balancing these often competing considerations.

[3] The process of change does involve consultation with parents, and is now controlled by the Schools (Consultation) (Scotland) Act 2010. This Act specifies the proposals that require consultation, the persons who should be consulted and the process by which consultation should take place. The procedure is specified in considerable detail and it will not be possible to explore all the detail here. Reference should be made to the Act. Guidance was issued to assist in implementation of the legislation.<sup>8</sup> As with many other interventions in education law, the Scottish Parliament has found that the Act has not been implemented in accordance with its intentions and there are lacunae. Difficulties emerged in the case of *Comhairle nan Eilean Siar v Scottish Ministers*.<sup>9</sup> Meantime the Scottish Government and CoSLA established a Commission on the Delivery of Rural Education, which reported in April 2013. Substantial changes to the 2010 Act have been made by the Children and Young People (Scotland) Act 2014.<sup>10</sup> Many of the changes to procedures for school closures were brought into force on 1 August 2014.<sup>11</sup>

### **Relevant proposals**

[4] The 2010 Act applies where an education authority has formulated “a relevant proposal” in relation to any school.<sup>12</sup> A list of such proposals is found in schedule 1.<sup>13</sup> First in that list is a

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<sup>5</sup> 2000 Act, s 3(2).

<sup>6</sup> 2000 Act, s.2.

<sup>7</sup> 2004 Act, s.4(1).

<sup>8</sup> 2010 Act, s.19; Schools (Consultation) (Scotland) Act 2010, Statutory Guidance, available [www.scotland.gov.uk/Resource/Doc/91982/0097130.doc](http://www.scotland.gov.uk/Resource/Doc/91982/0097130.doc).

<sup>9</sup> [2012] CSOH 94. 2012 SLT 1184, *affirmed* in part [2013] CSIH 6, 2013 SLT 269 and [2013] CSIH 45, 2013 SLT 687.

<sup>10</sup> 2014 Act, Part 15.

<sup>11</sup> Children and Young People (Scotland) Act 2014 (Commencement No 2, Transitional and Transitory Provisions) Order 2014, SSI 2014/165.

<sup>12</sup> 2010 Act, s.1(1).

<sup>13</sup> 2010 Act, s.2(1) and sch 1.

“closure proposal”.<sup>14</sup> Such proposals are generally the most contentious. There is a closure proposal if an education authority propose permanently to discontinue:

- a school.
- all the nursery classes in a school.
- a stage of education in a school (apart from a nursery class).<sup>15</sup>
- certain provision of Gaelic medium education and of English medium education in a school providing Gaelic medium education.<sup>16</sup>

[5] There is also a closure proposal if arrangements are proposed which would, if they were implemented, result, or be likely to result, in a permanent discontinuation.<sup>17</sup> For example, if catchment areas were changed such that the area from which pupils would be drawn for admission to a school would result in no children being eligible to attend the school, that should be treated as a closure proposal. If the catchment area were reduced such that only a very small number of children were eligible to attend the school as a result of which the school would be likely to close, it could be argued that this was a closure proposal.

[6] The other relevant proposals relating to schools are proposals to:

- establish a new school or new stage of education at a school.<sup>18</sup> But not nursery schools or nursery classes, where extra places are required to implement the 2014 Act, and education authorities are released from their obligations under the 2010 Act until 31 March 2017.<sup>19</sup>
- relocate (in whole or in part) a school or nursery class.<sup>20</sup>
- vary admission arrangements for a school including a proposal to establish, terminate or otherwise alter the catchment area of a school.<sup>21</sup>
- make or modify guidelines in respect of the handling of placing requests.<sup>22</sup>

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<sup>14</sup> 2010 Act, sch 1, para 1.

<sup>15</sup> A “stage of education” is a yearly stage of primary or secondary education, or a nursery class in a school or a special class in a school which is not itself a special school; 2010 Act, sch 1, para 12.

<sup>16</sup> 2010 Act, sch 1, para 1(1) to (3).

<sup>17</sup> 2010 Act, sch 1, para 1(4) and (5).

<sup>18</sup> 2010 Act, sch 1, para 2.

<sup>19</sup> Children and Young Persons (Scotland) Act 2014 (Ancillary Provision) Order 2014, SSI 2014/132.

<sup>20</sup> 2010 Act, sch 1, para 3.

<sup>21</sup> 2010 Act, sch 1, para 4(a). “Catchment area” is defined in para 12, to have the same meaning as in 1980 Act, s.28A(3D), ie “the area from which pupils resident therein will be admitted to the school in terms of any priority based on residence in accordance with the guidelines formulated by the authority under s.28B(1)(c) of this Act.” This is the area, not the streets that exist in that area at the time the area is defined; *Bowie v East Renfrewshire Council* 2010 S.L.T. 647.

<sup>22</sup> 2010 Act, sch 1, para 4(b). Guidelines are required by 1980 Act, s.28B(1)(c), to be followed by the education authority in the event of there being more placing requests made in respect of a school or schools, or stages of education there, than there are places available.

- vary the arrangements for the transfer of pupils from a primary school to a secondary school.<sup>23</sup>
- change the school commencement date of a primary school.<sup>24</sup>
- vary arrangements for the constitution of a special class in a school other than a special school.<sup>25</sup>
- discontinue arrangements for the provision of transport by the education authority for pupils attending a denominational school.<sup>26</sup>
- change a denominational school into a non-denominational school.<sup>27</sup>
- discontinue a further education centre which is managed by the education authority.<sup>28</sup>

[7] If a proposal covers closure together with another proposal it is generally treated as being solely a closure proposal and there should be a single consultation exercise. There is nothing to prevent education authorities consulting on a number of proposals together, including proposals which are alternative to one another.<sup>29</sup> Several categories of person may require to be consulted in relation to a proposal, alternative proposals, or a set of proposals. If there is consultation in respect of alternatives, the education authority are under no further duty to consult if they decide to implement one of the alternatives. Even where proposals are not presented as alternatives, but as linked proposals in a "package" the authority may generally proceed with a proposal which forms part of the "package" without necessarily implementing the rest provided they have consulted on the actual proposal they are proposing to implement.<sup>30</sup> Where, after consultation the proposal is modified to the extent it becomes an entirely different proposal, there must be further consultation.<sup>31</sup> This may give rise to difficult questions of fact and degree about what is an acceptable modification of the original proposal, and what is a new proposal.<sup>32</sup>

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<sup>23</sup> 2010 Act, sch 1, para 5.

<sup>24</sup> 2010 Act, sch 1, para 6. A school commencement date is the date fixed for the commencement of attendance at a primary school, pursuant to 1980 Act, s.32(1); see 2010 Act, sch 1, para 12.

<sup>25</sup> 2010 Act, sch 1, para 7. "Special school" is defined in 2004 Act, s.29(1) as (a) a school or (b) any class or other unit forming part of a public school which is not itself a special school, the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance there by reason of those needs. 2010 Act, sch 1, para 12 defines a "special class" as a class of the kind described in 2004 Act, s.29(1).

<sup>26</sup> 2010 Act, sch 1, para 8.

<sup>27</sup> 2010 Act, sch 1, para 9. There are further requirements in the case of proposals which affect or relate to denominational schools; see below.

<sup>28</sup> 2010 Act, sch 1, para 10. There are few such centres remaining, as further education colleges and centres are generally no longer managed by education authorities.

<sup>29</sup> See 2010 Act, s.4(3).

<sup>30</sup> *Shaw v Lothian Regional Council*, 1992 G.W.D. 33-1949, Lord Abernethy, August 26, 1992; cf. *Legg v Inner London Education Authority* [1972] 1 W.L.R. 1245.

<sup>31</sup> *R. v Brent LBC ex parte Gunning* (1986) 84 L.G.R. 168, cf. *Buchan v West Lothian Council*, 2001 S.L.T. 1452.

<sup>32</sup> See *Legg v Inner London Education Authority* [1972] 1 W.L.R. 1245.

[8] Guidance suggests that where a school roll has fallen to nil, but the authority considers that there may in the future be a need to use the school for pupils, they may “mothball” the school as a temporary measure. Such a temporary expedient, it is suggested, would not be a permanent discontinuance, and would not require consultation.<sup>33</sup> The Commission on the Delivery of Rural Education expressed some disquiet about the lack of any legal safeguards for the process of “mothballing”. The solution they advocated was “more guidance”.

### **Relevant consultees**

[9] Consultation generally requires to take place with persons involved in a school that is affected by a proposal. A school is affected by a proposal if the proposal directly concerns that school. Any other school which would be significantly affected in consequence of the proposal, if implemented, is also a school affected by the proposal.<sup>34</sup> Thus, if a particular secondary school is closed, another secondary school that will receive the primary school pupils who would otherwise have attended the discontinued school will also be affected.<sup>35</sup> The 2010 Act gives examples of affected schools. An affected school is, for example:

- (a) a school which it is proposed be discontinued,
- (b) a school to which the education authority proposes to transfer some or all of the pupils of a discontinued school,
- (c) a school in respect of which it is proposed to alter the catchment area (including where that is the result of the discontinuance of another school),<sup>36</sup>
- (d) a school from which it is proposed to transfer pupils as a result of the establishment of a new school.

A school is not affected solely because it would be likely to become the subject of placing requests as a consequence of implementation of the proposal. If a school could become “affected” as a result of the actions of persons other than the education authority, then this could potentially involve consultation with the parents of all pupils attending schools in the area, which would make consultation provisions unworkable.<sup>37</sup>

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<sup>33</sup> Schools (Consultation) (Scotland) Act 2010, Statutory Guidance, issued under 2010 Act, s.19.

<sup>34</sup> 2010 Act, sch 1, para 11.

<sup>35</sup> See *eg Hughes v Strathclyde Regional Council*, 1994 S.C. 53.

<sup>36</sup> But in such a case the proposal would be treated solely as a closure proposal; 2010 Act, sch 1, para 1(6).

<sup>37</sup> See *Regan v City of Dundee Council*, 1997 S.L.T. 139.

[10] The persons to be consulted are specified in schedule 2 to the Schools (Consultation) (Scotland) Act 2010. There are certain “consultees” common to every proposal relating to a school. These are:

- the Parent Council or Combined Parent Council<sup>38</sup> of any affected school,
- the parents of the pupils at any affected school,
- the parents of any children expected by the education authority to attend any affected school within two years of the date of publication of the proposal paper,
- the pupils at any affected school (in so far as the education authority considers them to be of a suitable age and maturity),
- the staff (teaching and other) at any affected school,
- any trade union which appears to the education authority to be representative of the staff, including teaching and other staff,
- any other education authority that the education authority advancing the proposals considers relevant.<sup>39</sup>

[11] The requirement to consult with pupils gives express legislative effect to the general duty of education authorities to have due regard, so far as practicable, to the views of children and young persons in decisions that significantly affect them, taking account of their age and maturity.<sup>40</sup> The office of the Commissioner for Children and Young People, in conjunction with Children in Scotland, has produced guidance for education authorities, to assist in the consultation of children.<sup>41</sup> There is in the 2010 Act a recognition of the importance to the community generally of proposals concerning schools. If there is a community council,<sup>42</sup> this should be consulted in relation to closure proposals, proposals to establish a school, relocate a school, vary admission arrangements or guidelines for handling placing requests, and proposals to change arrangements for transfer of pupils from primary to secondary school.<sup>43</sup> Community planning partnerships, established whether formally or informally under the Local Government in Scotland Act 2003, should also be consulted in relation to these proposals.<sup>44</sup> Further, in the case of closure proposals,

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<sup>38</sup> Established in accordance with Scottish Schools (Parental Involvement) Act 2006, ss.6 or 16; see 2010 Act, sch 2, para 13.

<sup>39</sup> 2010 Act, sch 2, paras 1 to 9.

<sup>40</sup> 2000 Act, s.2(2).

<sup>41</sup> See: [www.sccyp.org.uk/admin/04policy/files/spo\\_142146Participants,%20not%20pawns%20guidance%2020100315.pdf](http://www.sccyp.org.uk/admin/04policy/files/spo_142146Participants,%20not%20pawns%20guidance%2020100315.pdf)  
[www.childreninScotland.org.uk/docs/Participantsnotpawnsguidance20100315.pdf](http://www.childreninScotland.org.uk/docs/Participantsnotpawnsguidance20100315.pdf).

<sup>42</sup> Established by the local authority under Part IV of the Local Government (Scotland) Act 1973; see 2010 Act, sch 2, para 13.

<sup>43</sup> 2010 Act, sch 2, paras 1 to 5.

<sup>44</sup> 2010 Act, sch 2, paras 1 to 5. Local Government in Scotland Act 2003, Part 2.

proposals to establish a school or to relocate a school the education authority should consult with any other users of the affected school that the authority considers relevant.<sup>45</sup>

[12] There are two further relevant consultees in particular cases. If the proposal affects the provision of Gaelic medium education then Bòrd na Gàidhlig is also a consultee. For proposals affecting a denominational school then a person duly authorised for the purpose of consultation by the church or denominational body in whose interests the affected school is conducted should be included in the consultees.

### **The consultation process**

[13] There are certain general principles of law relating to consultation, which are fulfilled by following the process set out in the 2010 Act. In the context of changes in the provision of school education, it has been held that a proposal means the "putting forward for discussion of a certain course of action".<sup>46</sup> Proposals for consultation may be of a tentative nature but a proposal is more than a bare statement of intention.<sup>47</sup> The nature and practical implications of the proposal require to be set out, together with the reasons for it. The information given should not be misleading.<sup>48</sup> There are four general criteria to satisfy in a consultation process:

- (1) The consultation must be at a time when proposals are still at a formative stage.
- (2) The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.
- (3) Adequate time must be given for consideration.
- (4) The product of consultation must be conscientiously taken into account in finalising any statutory proposal.<sup>49</sup>

[14] The 2010 Act provides that before proceeding with certain proposals in relation to a school an education authority must comply with some initial requirements. These are –

- (a) to prepare an educational benefits statement,

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<sup>45</sup> 2010 Act, sch 2, paras 1 to 3.

<sup>46</sup> *Walker v Highland Regional Council*, Lord Morison, October 11, 1985, unreported, but referred to in *Scottish Hierarchy of the Roman Catholic Church v Highland Regional Council*, 1987 S.L.T. 169; see also *Comhairle Non Eilean Siar v Scottish Ministers* [2013] CSIH 6, 2013 SLT 269 at para [47].

<sup>47</sup> *Legg v Inner London Education Authority* [1972] 1 W.L.R. 1245.

<sup>48</sup> *R v Brent LBC ex parte Gunning* (1986) 84 L.G.R. 168.

<sup>49</sup> *Buchan v West Lothian Council*, 2001 S.L.T. 1452, adopting propositions from in *R. v Brent LBC ex parte Gunning* (1986) 84 L.G.R. 168. The propositions are quoted here in their original form. There is a transcription error in the second proposition as stated in *Buchan*.

- (b) to prepare and publish a proposal paper,
- (c) to give notice of the proposal to the relevant consultees and invite representations,
- (d) to give notice of and hold a public meeting,
- (e) to involve HMIE.

The authority must then review their proposal and prepare and publish a consultation report. Only when all these requirements have been complied with may an education authority decide to implement a proposal, whether wholly or in part, or actually implement the proposal in whole or in part.<sup>50</sup>

[15] The first of the initial requirements is to prepare an educational benefits statement.<sup>51</sup> This must include the authority's assessment of the likely effects of the proposal (if implemented) on the pupils of any affected school, on any other users of the school's facilities, on any children who would (in the future, but for implementation) be likely to become pupils of the school and on the pupils of any other schools in the authority's area. The statement should set out the authority's assessment of any other likely effects of the proposal, were it to be implemented and an explanation of how the authority intends to minimise or avoid any adverse effects that may arise were the proposal implemented. There should be a description of the benefits which the authority believes will result from implementation of the proposal, with reference to the persons whom the authority believes will derive them. The authority's reasons for coming to such beliefs as to benefits should be set out in the statement. The effects and benefits covered by the statement are educational effects and benefits. The statutory guidance indicates the areas to be covered.

[16] Second the authority must prepare and publish a proposal paper.<sup>52</sup> This is a paper setting out details of the relevant proposal. The paper should propose a date for implementation. It should contain the education authority's educational benefit's statement.<sup>53</sup> The proposal paper should also refer to such evidence of, other information in support of, or otherwise relevant in relation to, the proposal as the education authority considers appropriate. A summary of the statutory consultation process should be given. The proposal paper must now contain information about the financial implications of the proposal.<sup>54</sup> This follows a recommendation of the Commission on

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<sup>50</sup> 2010 Act, s.1(2) and (5).

<sup>51</sup> 2010 Act, ss.1(3)(a) and 3.

<sup>52</sup> 2010 Act, ss.1(3)(b) and 4.

<sup>53</sup> 2010 Act, s.3; see above.

<sup>54</sup> 2014 Act, s. 78, amending 2010 Act, s.4.



the Delivery of Rural Education, who considered that it would facilitate honest debate about why, in many cases, education authorities felt compelled to propose a school closure.

[17] There are then provisions for publication of the proposal paper in electronic and printed form. It should be available for inspection, together with any separate documentation to which it refers, at all reasonable times and without charge. The places at which it should be made available are at the education authority head office and on their website, and at any affected school or at a public library or some other suitable place within the vicinity of the school. Notice of the proposal must be given to the relevant consultees,<sup>55</sup> who should be invited to make representations.<sup>56</sup> Where only part of a proposal affects a particular consultee, or category of consultee, they need only be given notice of that part of the proposal. The notice must give a summary of the proposal, or the relevant part. It should also give information about where a copy of the proposal paper may be obtained and how to make written representations on the proposal, including to whom such representations should be submitted.

[18] There should be a consultation period of at least 6 weeks starting on the day on which notice is given, or where notice is given on different days, the last of such days. The period of 6 weeks runs continuously and must include at least 30 school days of any affected school. A school day is a day on which the school in question is ordinarily open to its pupils for the purposes of their school education. The notice of the relevant proposal must state the last day of the consultation period for that proposal and advise that this is the period within which written representations must be received by the authority, for them to be taken into account. If the public meeting on the proposal<sup>57</sup> has been fixed at the time of giving the notice, then the date, time and place of the meeting should be stated. Unlike the legislative provisions which pre-dated the 2010 Act<sup>58</sup> there are no prescribed arrangements for how notice should be given or advertised. It is a matter for the education authority to ensure that notice reaches the relevant consultees, whether via pupils, post or other means. It is mandatory for the education authority to hold a public meeting on a relevant proposal.<sup>59</sup>

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<sup>55</sup> 2010 Act, s.2(2) and sch 2; see above.

<sup>56</sup> 2010 Act, ss.1(3)(c) and 6.

<sup>57</sup> See 2010 Act, s.7.

<sup>58</sup> Ie SI 1981/1558, reg 5 - 8.

<sup>59</sup> 2010 Act, ss.1(3)(d) and 7.

[19] Finally, HMIE (ie “Her Majesty’s Inspectors”) must be involved in the proposal.<sup>60</sup> The Inspectors currently operate within the organisation known as “Education Scotland”. The education authority are required to send a copy of their proposal paper,<sup>61</sup> when it is published, to HMIE. If written representations are received during the consultation period, the authority should send these to HMIE, or if HMIE agree the authority may send a summary of the representations. They should also send a summary of any oral representations made at the public meeting. Finally they should forward to HMIE a copy of any other relevant documentation, as available and so far as practicable. HMIE are then to prepare a report on the educational aspects of the relevant proposal. HMIE may enter any affected school and make such reasonable enquiries of such persons as they consider appropriate. They may also make reasonable enquiries of other persons. HMIE have only 3 weeks from the date they receive the proposal and other documents from the education authority, to submit their report back to the authority, unless a longer time period is agreed.

[20] There are provisions for correction of a proposal paper where during the consultation period<sup>62</sup> the education authority are notified of, or discover, an alleged omission of relevant information or an alleged inaccuracy.<sup>63</sup> The authority must determine whether there is in fact an omission or inaccuracy. The provisions relating to correction are extended by the 2014 Act,<sup>64</sup> so the authority must tell the ‘notifier’ what has been determined and the action proposed to address the omission or inaccuracy and invite representations. If the omission or inaccuracy does not related to a material consideration, no action is required, but the authority may publish a corrected proposal paper, issue revised notices and send a copy of the corrected paper to HMIE. The authority should, of course publish a corrected proposal paper, issue revised notices and send a copy of the corrected paper to HMIE if the omission or inaccuracy is material. The consultation period may be extended, or if it has already ended there may be a further period.

[21] Following compliance with the initial requirements the 2010 Act imposes subsequent requirements on the education authority to review their proposal and to prepare and publish a consultation report.<sup>65</sup> The proposal must be reviewed having regard, in particular, to any relevant written representations received from any person during the consultation period and oral

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<sup>60</sup> 2010 Act, ss.1(3)(e) and 8.

<sup>61</sup> 2010 Act, s.4.

<sup>62</sup> For consultation period, see 2010 Act, s.6.

<sup>63</sup> 2010 Act, s.5.

<sup>64</sup> 2014 Act, s.79

<sup>65</sup> 2010 Act, s.1(4).

representations made by any person at the public meeting.<sup>66</sup> The consultation report must then be prepared and published in electronic and printed form. It should be made available for inspection at all reasonable times and without charge, at the head office of the education authority and on their website. It should also be available at any affected school or at a public library or some other suitable place within the vicinity of the school. These provisions for publication are identical to those which apply to the proposal paper.<sup>67</sup>

[22] The consultation report is required to contain certain information.<sup>68</sup> It should record the total number of written representations made to the authority during the consultation period and contain a summary of those representations and of any oral representations made at the public meeting. It should contain a statement of the authority's response to those representations and to HMIE's report. A copy of the HMIE report should be contained within the consultation report. The education authority are required in the consultation report to explain how they complied with the obligation to review the proposal in the light of the representations received and HMIE's report. If there was an omission from, or inaccuracy in the proposal paper then details of the omission or inaccuracy should be included in the consultation report and a statement made of the action taken in respect of the omission or inaccuracy. If no action was taken then this should be stated and reasons given for the lack of action. Finally, in the case if a closure proposal, the report must explain that the opportunity to make representations about the proposal to the Scottish Ministers.<sup>69</sup>

[23] Once the consultation report is published the education authority must wait for three weeks from the date of publication. They cannot make a decision on the proposal, nor can they implement it, in whole or in part, until that three week period has expired.<sup>70</sup> If they decide not to implement a closure proposal, then the provisions of the 2014 Act now prevent any fresh closure proposal relating to that school for 5 years, unless there is a significant change in the school's circumstances.<sup>71</sup>

### **Call-in by the Scottish Ministers**

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<sup>66</sup> 2010 Act, s.9(1).

<sup>67</sup> 2010 Act, s.4(4).

<sup>68</sup> 2010 Act, s.10.

<sup>69</sup> See 2010 Act, s.15(4).

<sup>70</sup> 2010 Act, s.11.

<sup>71</sup> 2010 Act, s.2A (inserted by 2014 Act, s.77).

[24] The Scottish Ministers retained a measure of control over school closures, but this aspect of the 2010 Act proved controversial and will be substantially amended by the 2014 Act. When an education authority decide to implement a closure proposal they must notify the Scottish Ministers within six working days of making the decision. At the same time as giving notice of the decision, the education authority must give to the Ministers a copy of their proposal paper and consultation report. The Scottish Ministers may issue a call-in notice. Originally the Ministers had 6 weeks to do so, but the 2014 Act extends this period to 8 weeks<sup>72</sup>. In considering whether to issue such a notice the Ministers are required to take account of any representations made to them within the first 3 weeks of that period. The education authority cannot proceed further with the proposal until the 8 week period has expired, unless the Ministers inform them before the end of that period that they do not intend to issue a call-in notice.

[25] A call-in notice may only be issued if it appears to the Scottish Ministers that the education authority have failed in a significant regard to comply with the requirements of the Schools (Consultation) (Scotland) Act 2010 so far as they are relevant to the proposal, or if the authority have failed to take proper account of a material consideration relevant to their decision to implement the proposal.<sup>73</sup> The education authority are obliged to provide the Scottish Ministers with such information as they may reasonably require for the purposes of considering whether to issue a call-in notice. Under the 2010 Act as drafted the Ministers could refuse consent to the proposal or grant consent subject to conditions or unconditionally, but this provision will be repealed by the 2014 Act.<sup>74</sup>

[26] In *Comhairle Nan Eilean Siar v Scottish Ministers* the Ministers called in closure proposals relating to a number of schools in the Western Isles and refused consent on the grounds that the consultation process was flawed. They maintained that their role was limited to checking whether the education authority had complied with the process and that they had no role in considering and adjudicating on the merits. The council sought judicial review. Lord Brailsford reduced the call-in notices on the basis that the legislation required the Scottish Ministers to determine the issues on their merits.<sup>75</sup> The Ministers appealed. The Inner House agreed with Lord Brailsford that the Ministers should consider the merits of the proposals. The misconception by the

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<sup>72</sup> 2010 Act, s 15, as amended by 2014 Act, s.81(1)(c).

<sup>73</sup> 2010 Act, s.17.

<sup>74</sup> 2010 Act, s.16, to be repealed by 2014 Act, s.81(2).

<sup>75</sup> *Comhairle Nan Eilean Siar v The Scottish Ministers* [2012] CSOH 94, 2012 SLT 1184.

Ministers of their own powers did not however invalidate the call-in notices.<sup>76</sup> At this point the Inner House paused. The case then resumed before a court that happened to be differently constituted, for consideration of the whether the call-in notices should be set aside on their merits. Lady Smith gave the principal opinion. Her decision supported ‘local decision-making’ and set limits on the circumstances in which central government may intervene, confining this to cases where there had been a failure in a significant regard to comply with the requirements of the 2010 Act. The Ministers role was one of “safeguarder in relation to the core objective of securing genuine consultation.” As the Ministers had failed to consider the important question of whether failures were in a significant regard, they had proceeded on the basis of an error of law.<sup>77</sup> There was a further issue in this case, which relates to rural schools and I will return to this.

[27] Lady Smith’s decision is consistent in this respect with a long line of cases relating to failure to comply with statutory procedure. Breach of procedural or formal rules may be treated as mere irregularity if the departure is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding the requirements to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision impugned.<sup>78</sup> Total non-compliance is likely to lead to a different result.<sup>79</sup>

[28] It should however be noted that the response of the Scottish Parliament to the decision in *Comhairle nan Eilean Siar* has been a major change in the process for decisions. There are to be new School Closure Review Panels, with a new office of Convenor.<sup>80</sup> This part of the 2014 Act is only in force for the purpose of making regulations, but we can probably expect to see the School Closure Review Panels in operation sometime in 2015. When a call-in notice is issued as respects a closure proposal the Scottish Ministers must then refer the proposal to the Convenor of the School Closure Review Panels, who is required to constitute a Panel of three persons to consider the case. The Panel must consider whether the education authority have failed in a significant regard to comply with the requirements of the Schools (Consultation) (Scotland) Act 2010 so far as

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<sup>76</sup> *Comhairle Nan Eilean Siar v The Scottish Ministers* [2013] CSIH 6, 2013 SLT 269.

<sup>77</sup> *Comhairle Nan Eilean Siar v The Scottish Ministers* (No 2) [2013] CSIH 45, 2013 SLT 687.

<sup>78</sup> See *Coney v Choyce* [1975] 1 W.L.R. 422.

<sup>79</sup> *London and Clydeside Estates Ltd v Aberdeen District Council*, 1980 S.C. (H.L.) 1, per Lord Chancellor (Hailsham of St Marylebone) at 29 – 31; *Imrie, Petitioner*, 2000 S.C.L.R. 364.

<sup>80</sup> 2010 Act, s.17A and sch 2A (inserted by 2014 Act, s.81).

they are relevant to the proposal, or if the authority have failed to take proper account of a material consideration relevant to their decision to implement the proposal.<sup>81</sup> The Panel may:

- (a) refuse to consent to the proposal,
- (b) refuse to consent to the proposal and remit it to the education authority for a fresh decision as to implementation,
- (c) grant consent to the proposal, either subject to conditions or unconditionally.<sup>82</sup>

The decision must usually be notified within 8 weeks, although the Panel may give notice that they will take longer. If consent to the proposal is refused there is a five year moratorium on a further closure proposal.<sup>83</sup> The most interesting point for practitioners is that an appeal from the decision of the School Closure Review Panel is to the sheriff, on a point of law only.<sup>84</sup> The sheriff's decision is said to be final, so there is no appeal, albeit there may be scope for judicial review.

### **Rural schools**

[29] Part of the anxiety in the *Comhairle Nan Eilean Siar* case related to the fact that the schools concerned were classified as "rural schools". A "rural school" is a school that is designated as such by inclusion in a list of rural schools maintained by the Scottish Ministers for the purpose of the 2010 Act.<sup>85</sup> Approximately 35% of Scotland's schools are classified as rural. The Commission for the Delivery of Rural Education made 38 recommendations, some of which have found their way into the 2014 Act.

[30] If a closure proposal relates to a rural school then the education authority are required to have special regard to particular factors.<sup>86</sup> To date they have been required to have regard to any viable alternative to the closure proposal and the likely effect on the local community in consequence of the proposal, were it to be implemented. This was to be assessed by reference in particular to the sustainability of the community and the availability of the school's premises and its other facilities for use by the community. The likely effect caused by different travelling arrangements that may be required in consequence of the proposal should also have been considered. This included the effect on the school's pupils and staff and other users of the school's facilities of travelling to and from the school as well as any environmental impact. In the case of a rural school the proposal

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<sup>81</sup> 2010 Act, s 17B (inserted by 2014 Act, s.81).

<sup>82</sup> 2010 Act, s.17C (inserted by 2014 Act, s.81).

<sup>83</sup> 2010 Act, s.2A (inserted by 2014 Act, s.77). This is already in force on a transitional basis, see SSI 2014/165, para. 3.

<sup>84</sup> 2010 Act, s.17D (inserted by 2014 Act, s.81).

<sup>85</sup> 2010 Act, s.14. The list of rural schools is available at <http://www.scotland.gov.uk/Topics/Education/Schools/Buildings/changestoschoolestate/Ruralschoollist> .

<sup>86</sup> 2010 Act, s.12.

paper should have explained how the education authority has complied with these requirements when formulating the proposal, reviewing the proposal and any change of attitude on review attributable to these considerations.<sup>87</sup>

[31] The Scottish Ministers argued in *Comhairle nan Eilean Siar* that the legislation gave rise to a presumption against rural school closures, but Lady Smith disagreed. The 2010 Act, she said, simply imposed an obligation to have regard to particular factors when considering whether to close such a school.<sup>88</sup> The Scottish Parliament responded in the 2014 Act by passing a new section 11A entitled “Presumption against rural school closures”. Interestingly the section does not contain any such presumption, it simply sets out more stringent requirements when an education authority proposes to close a rural school. The authority must still consider reasonable alternatives to the proposal, the likely educational benefits, likely effect on the community and the likely effect that would be caused by any different travelling arrangements. The proposal paper must contain detail of how the authority set about its considerations.<sup>89</sup> These sections came into force on 1 August 2014.<sup>90</sup>

### **Changes in Denominational Education Requiring Sanction**

[32] There is one further significant point to mention. The Schools (Consultation) (Scotland) Act 2010 left untouched the provisions of the Education (Scotland) Act 1980 which relate to changes which affect denominational schools. In addition to any consultation required under the 2010 Act the consent of Scottish Ministers is also necessary if a proposal would have the effect that all or some of the pupils attending a denominational school will no longer receive the education provided in such a school, or that children who would have been likely to attend the school, will be unlikely to receive such an education.<sup>91</sup> The Scottish Ministers cannot grant consent unless satisfied that there are adequate arrangements for the religious instruction of pupils and children, who will no longer attend a denominational school. The Ministers may impose conditions with regard to religious instruction. The Ministers themselves are responsible for deciding any question which arises in relation to the application, implementation or fulfilment of these provisions.

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<sup>87</sup> 2010 Act, s.13.

<sup>88</sup> *Comhairle Nan Eilean Siar v The Scottish Ministers* (No 2) [2013] CSIH 45, 2013 SLT 687 at para [46].

<sup>89</sup> 2010 Act, ss 11A, 12A and 13 (inserted by 2014 Act, s.80).

<sup>90</sup> SSI 2014/165.

<sup>91</sup> 1980 Act, s.22C.

[33] There are apparently separate provisions which apply when a denominational school is discontinued, amalgamated in whole or in part with another school, the site of such a school is changed, the arrangements for admission are changed, or a decision is taken to manage the school as a non-denominational school.<sup>92</sup> In these cases the Scottish Ministers are required to consult the education authority and consider written representations from the church involved. In the case of the Roman Catholic Church representations should come from the Scottish Hierarchy of the Church. In the case of other churches they should be from a person authorised for that purpose. The issue for consideration by the Scottish Ministers is whether the proposal will result in a significant deterioration in the provision, distribution, or availability of denominational education for pupils in the area of the education authority or any other area, or areas combined, compared with the provision, distribution or availability in other public schools. Consent cannot be given unless the Ministers are satisfied that there will be adequate arrangements for the religious instruction of children who will no longer receive a denominational education. Conditions may be imposed as to religious instruction. The Ministers are again responsible for deciding any question which arises in relation to the application, implementation or fulfilment of the provisions. The two sets of provisions requiring the consent of the Scottish Ministers overlap and have caused considerable confusion.<sup>93</sup>

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<sup>92</sup> 1980 Act, s.22D.

<sup>93</sup> See *Scottish Hierarchy of the Roman Catholic Church v Highland Regional Council* 1987 S.L.T. 169; 1987 S.L.T. (HL) 708.