

SCHOOLS (CONSULTATION) (SCOTLAND) ACT 2010 STATUTORY GUIDANCE

Introduction

This statutory guidance is issued under Section 19 of the Schools (Consultation) (Scotland) Act 2010 (hereinafter referred to as ‘the Act’), which came into force on 6 January 2010, the day after Royal Assent was given. The guidance should be read in conjunction with the Act.

Purpose of the Act

The Act’s principal purpose is to update and strengthen the statutory consultation practices and procedures that local authorities apply to their handling of all proposals for school closures and other major changes to schools. It aims to establish a new consultation process that is robust, open, transparent and fair, and seen to be so. In doing so it aims to ensure consistency of consultation arrangements across Scotland. The Act also introduces a presumption against the closure of rural schools by ensuring that a decision to consult on a rural school closure proposal is not made until the local authority has had regard to all viable alternatives and assessed the likely implications of closure. The Act also replaces the previous system for referring certain local authority decisions for Scottish Ministers’ consent with a new system of call-in, but in school closure cases only.

To whom is this guidance addressed - who should read it?

Section 19 of the Act states that “...*an education authority must have regard to any guidance issued by the Scottish Ministers for the purposes of or in connection with this Act*”. This guidance is therefore issued to local authorities and is intended to assist those who are involved in overseeing the consultation and decision making processes around proposed changes to their schools, as set out in the Act. It is intended to help ensure that full, fair and rigorous consultations are undertaken and does so by providing guidance and illustrative examples of the good practice which is expected to be the norm. It will also be helpful to read the Explanatory Notes that accompany the Act which are designed to help understanding of its detail – www.oqps.gov.uk/legislation/acts/s-acts2010a

This guidance will also be of interest to parents and carers; school pupils and staff; members of the local community; and anyone else with an interest in how authorities undertake consultations on proposed changes to schools. It is important that they are reassured that the consultation and decision making process and procedures are fairly, fully and rigorously carried out by the local authority.

The structure of this guidance follows the order of the provisions in the Act. The specific areas covered and the level of detail offered on those areas reflect the discussions and debate during the course of the passage of the Bill through the Scottish Parliament. The Scottish Government has been keen to respond to issues and areas of concern and interest as they have arisen during the consultations and the various stages of Parliamentary scrutiny. In preparing this guidance, we have

taken into account the engagement and contribution of MSPs and other stakeholders.

The Educational Benefits Statement – Section 3 of the Act

The Act reflects the Scottish Government's view that the educational benefits should be at the heart of any proposal to make a significant change to schools. Consequently, the Act specifies that the local authority must, for all consultations, prepare an educational benefits statement (EBS) and publish it within the proposal paper¹. The Act requires authorities to consider both current and future pupils of the school, current and future users of its facilities and also to explain how the authority intends to minimise or avoid any adverse effects of the proposal. It must also include its reasons for reaching the views which it sets out regarding the educational benefits. Reasons should be supported by evidence to assist consultees in their understanding of the envisaged educational benefits.

Effect on different school users

The Act specifies that the authority must set out within the EBS its assessment of the effect of the proposal on a range of school users. The first such group is the pupils at the affected school or schools. It applies to all pupils, not just some. It will often be important for an authority to distinguish between different groups – for example those with additional support needs – and how a proposal may benefit/impact on them differently. An affected school would include a school proposed for closure either in its entirety, or in part (where for instance a stage of education or where all nursery provision was proposed to be discontinued). Where the proposal was to establish a new school, those schools whose rolls would be consequently reduced or changed as a direct result of the new school should be counted as affected schools. Proposals to change catchment areas normally also affect more than one school – and in some cases schools from across neighbouring authorities. In such cases authorities will want to consider carefully how any proposal might have a consequential effect on other schools.

The EBS must also set out the assessed impact on other users of the school's facilities, both currently and in the future. That may include for instance adult or community users, perhaps who attend school-based classes, or users of a school's theatre or hall or sport and recreation facilities. The authority must also consider and set out the impact of its proposals on children or young people who would have been likely (but for the proposal) to have become pupils of the school. In the case of a primary school that would generally affect children who would within two years be expected to attend, or in the case of a secondary school it would include children in associated primaries. However, authorities should consider the interests of any and all children or young people they know may come into this category.

Finally, the authority is required to set out its assessment of the likely effects of the proposal – its potential implications and consequences – on some or all of the pupils in other schools across the authority's area.

¹ The proposal paper is covered in more detail in pages 4 and 5 of this guidance

In assessing the likely benefits and effects on users, authorities will want to take into consideration a range of factors which will vary from case to case and in scale, depending on the particular circumstances and the type of proposal being consulted on. In many circumstances, the affected groups will not necessarily share a common benefit from what is proposed. In these cases, it will be important that the EBS demonstrates clearly how the authority has identified and intends to balance these diverse interests. In order to make the EBS as clear and easily understood as possible, authorities will wish to emphasise and highlight the main beneficiaries of what is proposed and how they will benefit.

Factors which may be candidates for consideration

Neither the Act nor this guidance are framed in a way that either lists or limits the range of factors that may be relevant in the case of a particular proposal, that an authority might take into consideration and/or articulate in the EBS. The Government, however, expects that, as a matter of course, the rationale and arguments offered in the EBS, indeed in the whole of the proposal paper, will be set within the context of an authority's range of statutory duties – which is addressed in more detail in the section below.

Also of relevance will be the way a proposal sits within the context of a range of national and local policies. *Curriculum for Excellence* sits at the heart of what both national and local government are looking to achieve in terms of raising levels of achievement and improving educational outcomes for all children and young people. It is intended to nurture successful, effective, confident and responsible young people, able to learn and utilise learning in a way that helps them reach their full potential and to respond to the increased variety and pace of change in today's and tomorrow's world.

In preparing the EBS, authorities will want to set out how a proposal will improve the quality of the curriculum and create positive environments for more effective learning and teaching better matched to the needs of learners. The EBS should focus on how the proposals will improve the depth, breadth, coherence, relevance, challenge and enjoyment provided by the curriculum. It should also demonstrate how opportunities for greater personalisation and choice in learning and improved progression will enhance children's experiences. This will include the use of information and communications technology (ICT) and arrangements for assessing and planning learners' progress. It will also be important to highlight the impact of the proposals on the overall ethos of the school, including the care and welfare of pupils and their personal and social development. A key aspect will be to ensure that the proposal improves equality of opportunity for all within an inclusive educational experience, in the widest sense, for pupils and achievement, and for interdisciplinary learning and beyond.

Other potentially relevant issues in connection with educational benefit in some cases may include the condition and suitability of the school buildings and facilities (and where a proposal would involve pupils moving from one school to another, the relative condition of both), changing patterns of demand for school places if there is a growing mismatch between supply and demand, and the travel and transport context and implications of a proposal if for instance they would impact differently on

pupils' broader social experiences and opportunities to participate in and benefit from out-of-hours learning. Financial and budgetary considerations may also be relevant in situations where disparities in the costs of the delivery of education may have grown, to the detriment of the greater good, at least to the point where an authority considers that they require to be reviewed.

Other statutory obligations pertaining to education

Local authorities have other education-related statutory duties which they require to fulfil and therefore need to consider when contemplating proposals to change the way in which education is delivered. The EBS is the place for the authority to set out the relationship between a proposed change and these other education-related statutory duties – and how what is proposed fits with the continued fulfilment of these other obligations. The following list of statutory duties is illustrative rather than exhaustive:

Education (Scotland) Act 1980, section 1 of which requires authorities to secure for their area adequate and efficient provision of school education; and section 17 which deals with sufficient school accommodation.

Standards in Scotland's Schools etc Act 2000, section 3 of which requires authorities to endeavour to raise standards and secure improvement in the quality of school education provided in their schools.

Section 2 of this Act states that it is the duty of the education authority to ensure that the education it provides is directed to the development of the personality, talents and the mental and physical abilities of the children or young people to their fullest potential.

Education (Additional Support for Learning) (Scotland) Act 2004. This requires authorities to identify and provide support for any children with additional support needs and prepare co-ordinated support plans for those with the most extensive needs. This is a critically important group of pupils whose particular needs require special consideration.

'Personal' or 'attributable' information

In the EBS, sensitive or personal information that could be linked to or attributed to individuals – for instance individual pupils – should be avoided, although it is recognised that this may be more difficult where very small numbers are involved. The objective should be to couch the text of the EBS in such a way as to avoid the identification of individuals and focus on the generic or on groups or categories of persons affected.

The Proposal Paper – Section 4 of the Act

Whereas the EBS provides the local authority with the opportunity to set out the educational case for their proposal, the proposal paper itself is where the authority can and should set out all the other contextual and relevant evidence and information around and in support of the proposal. The EBS will be included within

the published proposal paper, so that consultees can consider the whole case together.

Authorities are required to prepare a proposal paper to set out the detail of the relevant proposal or proposals. In order to minimise confusion, authorities should only consider grouping together more than one proposal in the paper where they are in some way inter-connected. In considering what material to include in the proposal paper (in addition to the educational case set out in the EBS) an authority may wish to explain what has given rise to consideration of the matter being consulted on and why it has decided upon the particular proposal set out for consultees. If appropriate, it should also give details of other options considered but rejected (in the case of rural school closures this will have to be done as part of the process – see page 8 for more detail).

There may also be legislation - other than that directly relating to matters educational - that is relevant to the proposal and its context. These include:

Local Government in Scotland Act 2003, section 1 of which sets out what a local authority is expected to demonstrate in fulfilment of a series of obligations placed upon it. One such is the duty to secure best value by continuous improvement in performance of the authority's functions, while maintaining an appropriate balance between quality and cost and having regard to economy, efficiency, effectiveness, equal opportunities and the achievement of sustainable development.

An authority may wish to demonstrate how a proposal helps to fulfil this duty and achieve best value by setting out clearly cost benefit analyses of the financial and budgetary factors and implications of the proposal. Aspects of this may already have been covered in the EBS but if there are cost issues which go beyond the purely educational, the proposal paper is where these should be set out, again, with full financial details and supporting evidence where these are significant factors in relation to the proposal.

Equal opportunity legislation – it will also be important in the proposal paper to set out how the proposal squares with and assists the authority in fulfilling its obligations under various statutes such as the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995. Preparing and publishing an Equality Impact Assessment in the proposal paper would be one way of fulfilling this.

Other factors

As well as best value, financial costs and equality issues, and matters already covered in the EBS, the proposal paper is the place to focus on wider community and other issues, beyond the purely educational – both where they have relevance to the context, timing and detail of the particular proposal and also where community and other implications of what is proposed may have been identified and how the authority plans to address or handle those.

Many local authorities undertake Asset Management Plans on a corporate basis to ensure the most effective use of assets and control of both revenue and capital costs – the school estate is a major aspect of this planning process. Where such plans do

exist the proposal paper would be an appropriate place to make reference to how the proposal under consideration fits into this wider authority planning.

Proposal Paper inaccuracies and omissions – Section 5 of the Act

As the proposal paper must include the EBS, any such omission from or inaccuracy in that statement is also covered by this section of the Act. Omissions of relevant information or inaccuracies may be discovered by the authority itself or may be brought to its attention. In either case it is for the authority to consider whether or not relevant information has been omitted or the paper is inaccurate and if so, decide what appropriate and proportionate action to take.

Where the implications of the omission or inaccuracy are minor, with little or no impact on the ability of consultees to understand the proposal paper, an authority may decide to do nothing beyond fulfilling the requirement to inform whoever brought the matter to its attention of that decision. Where an authority judges the omission or inaccuracy to be more significant it may, as it considers appropriate, do one or more of the following. It may issue an erratum or corrected proposal paper and issue consultees (and HMIE) with a notice with the correct or omitted information. This issue of a corrected paper or erratum note may include extending the consultation period if this is considered warranted. It will also be good practice to publicise the corrected or additional information as widely as possible, for instance on the council's website.

Notice and Consultation Period – Section 6 of the Act

An authority must notify the relevant consultees of the proposals and the consultation period cannot commence until this has been done. The authority must also set a consultation period of at least 6 weeks, to include 30 days of term time at any affected school, not including school holidays or any other days when the school is not open to pupils. For example, a consultation period commencing say a week before the Easter holidays would run for 30 school days up until sometime in May. The 30 day period would be calculated as not including any Easter holidays, the early May bank holiday, if that is also a school holiday, and any intervening in-service days.

The Public Meeting – Section 7 of the Act

A public meeting must be held (at which the authority is represented) during the consultation period and advance notice given of its date, time and location to the relevant consultees and to HMIE (if that information has not already been given in the notice issued just prior to the start of the consultation period advising consultees of the proposal).

Maximum advance notice of the details of the public meeting is desirable. If the details can be included in the initial notice of the proposal then there will be no need for the authority to have to issue a second notice at a later stage.

The Act leaves the details of the public meeting to authorities. As to timing, authorities will wish to balance the need to give interested parties enough time to

read and digest the proposal paper, in order to inform discussion and questions at the meeting, with the need to allow sufficient time after the meeting to reflect and consider what representations and response to make to the consultation. Unless there are good reasons to do otherwise it would be appropriate to avoid holding the public meeting during the first week or so of the consultation period, but ensuring that it has taken place by around the halfway stage.

For the convenience of consultees and other interested parties the public meeting should take place outwith normal/office working hours and at a convenient location.

If an authority considers it appropriate to hold more than one public meeting, for example in response to a request for a subsequent meeting during normal/office working hours, the provisions of the Act and this guidance should apply to each one.

Her Majesty's Inspectorate of Education's involvement – Section 8 of the Act

The Act provides for Her Majesty's Inspectorate of Education's (HMIE) involvement in the consultation process. This involvement will culminate in HMIE preparing and submitting to the authority a professional and independent report on the educational aspects of the proposal being consulted on. As this guidance is addressed to local authorities rather than to HMIE, it focuses on authorities' responsibilities in relation to this section of the Act.

An authority will wish to engage with HMIE before a consultation on a proposal is taken forward to ensure that practical arrangements are in place. For example, to ensure that papers and representations are sent to the appropriate person at HMIE. There will also need to be discussion as to how this shall be handled at the end of the consultation period. The 3 week period within which HMIE must prepare and submit their report (unless the authority and HMIE agree a longer period) does not commence until the representations have all been forwarded to HMIE.

The Parliament's Education, Lifelong Learning and Culture Committee discussed the question of HMIE's attendance at public meetings at some length. They assumed that HMIE would in most cases send a representative to the public meeting and the Scottish Government is of a similar view. However, the absence of an HMIE representative would not 'invalidate' the public meeting and the authority in any event must send HMIE a summary of the oral representations made. Where an HMIE representative does attend a public meeting it is important to emphasise to those present that he/she is doing so exclusively as an observer and cannot be asked to participate or offer any comment.

The Consultation Report – Sections 9 & 10 of the Act

The Act requires the authority to review the proposal consulted on in light of the written and oral representations it has received and HMIE's report, and then prepare and publish a consultation report. Section 10 sets out what the consultation report must contain. It should provide the number of written representations received, a summary of the written and oral representations made and the authority's response to those representations, the full text of the HMIE report and finally a statement

explaining how the authority has reviewed the proposal in light of the representations and HMIE report.

In addition, if omissions were identified from, or there were inaccuracies in the proposal paper, the consultation report must set out their details and the action taken and, if no action was taken, why.

In the case of closure proposals the consultation report must also explain the opportunity which people would have for making representations to the Scottish Ministers in the event that the Council decided to close a school. The report should make clear that they would have a period of 3 weeks after the Council decision was taken to bring to Ministers' attention any matter which they considered would justify the decision being called in under section 15(4) of the Act. This is explained more fully below under the section entitled 'Possible Call-in'.

Further Consideration – Section 11 of the Act

The purpose of this provision within the Act is to ensure that a period of 3 weeks elapses between the authority's publication of the consultation report and the Council actually taking the decision on whether to implement the proposal(s). The intention is that interested parties should have time to see and digest the contents of the consultation report and also have time if they so wish to voice concerns and approach and lobby the councillors who will shortly be deciding on the proposal(s).

Special Provision for Rural Schools – Sections 12-14 of the Act

These sections of the Act set out special safeguards for rural schools (rural schools will be defined in terms of a list which Ministers will issue and maintain, in accordance with section 14 of the Act). The Act requires authorities to have special regard to three factors before deciding to propose and consult on a rural school closure. These factors acknowledge and reflect the special importance of a school to the more fragile and vulnerable rural and remote communities of Scotland. Closure of a school in these communities almost inevitably means that pupils will have to travel elsewhere to be educated and there will be a significant loss of service provided locally.

The first factor which an authority must have special regard to is any viable alternative to the closure proposal. The intention here is to ensure that when an option to close is proposed, the decision to consult on that option is a last resort, only proposed after all the other viable alternatives have been considered. For example, consideration could focus on how the school roll might be increased; how recruitment to the teaching posts might be improved; whether other management options might be a possibility; and how the buildings might be more intensively used. These are just some illustrative examples of a wide range of alternatives to closure than an authority may have considered and even tried to implement.

The second factor focuses on the likely effect of the school's closure on the local community - whether that will affect the local community's viability and whether the asset of the school's buildings, facilities and grounds would still be accessible, or lost, to the community. Many considerations are likely to be relevant in terms of

community viability: whether closure would encourage families with school-age children to leave the community or discourage similar incomers; what impact closure might have on other services provided locally, for instance if the school is the only remaining public building in a community and a real hub of community life, used for other purposes such as public meetings, local events, fetes, surgeries, and other get-togethers.

The third factor focuses on the likely consequences of the closure on travel and transport arrangements of the school's pupils, staff and other users, and the effect on them (perhaps in terms of pupil health and wellbeing if they are less able to walk or cycle to school) as well as the overall environmental impact (for instance as a result of increased car usage). In some instances longer journeys to school may increase the likelihood of bad weather impacting on home to school travel.

Section 13 of the Act requires the authority, in consultations on rural closure proposals, explicitly to set out in the proposal paper how it gave special regard to these three factors, and in the consultation report how it again had regard to these factors in reviewing the proposal at the end of the consultation period, and any changes of attitude to the three factors which it had in that context.

Possible 'Call-In' of closure decisions by Ministers – Sections 15-17 of the Act

Section 15 of the Act requires an authority to notify Scottish Ministers and send them copies of the proposal paper and consultation report (within 6 working days of taking the decision) if, following a consultation, it decides to implement a closure proposal. The requirement to notify Ministers does not apply to any other category of decision.

There is a three week period (commencing on the day the decision is made) during which anyone can make representations to Ministers requesting that they call in the Council's decision. Ministers have up to six weeks from the date of the decision to decide whether or not to call in a closure decision. If they do decide to call it in, they effectively remit the authority's decision to themselves i.e. Ministers will then decide whether or not to allow the closure to go ahead and if so, if there should be any conditions attached to their consent. This means that an authority may not proceed further with the implementation of a closure decision until that six-week period has elapsed, unless Ministers have earlier informed the authority that they do not intend to call in the decision.

The grounds on which Ministers may call in a decision are set out in section 17 of the Act. These are - where it appears to Ministers that the authority may have failed in a significant regard to comply with the requirements imposed on it under this Act or to take proper account of a material consideration relevant to the decision to implement the proposal. The Act does not further define what might or would constitute a 'material consideration' – any particular case will be considered on a case by case basis, if representations are received. This Ministerial power is intended as a safeguard, in closure cases, to help to ensure that the consultation and decision-making processes and procedures are fairly, fully, openly and transparently carried out. The following examples are however included by way of illustration of the sort of issues and scenarios that would constitute a material consideration relevant to an

authority's decision to implement a proposal (these are by no means exclusive or exhaustive):

- a school closure proposal is consulted on so far in advance – for example 3 years – of its implementation date that it would not be possible to identify all of the pupils that would be affected.
- a consultation on a proposal to close a school that contains a special unit, which includes details of where pupils in the mainstream section of the school would move to if the proposal is implemented, but contains no information about the pupils at the special unit.
- a consultation on a proposal to close a school, which contains details of one alternative school but no details on another school which could reasonably be considered as a suitable alternative, where evidence would suggest that it is a popular school that parents are already choosing to send their children to (instead of the school proposed for closure or the school formally proposed as the alternative).
- a consultation that fails to take account of the number of times when the road between the school proposed for closure and the alternative school would be shut due to bad weather (in an area where this was a known occurrence) – meaning that the pupils could not get to the new school.

Since the grounds for call-in focus entirely on the activities of the authority, much will depend on how the authority signals its response to material considerations raised in the proposal paper and commented on by consultees, or raised by consultees or by HMIE, how it reviews the proposal in light of all of the above and how it reaches and explains its overall conclusion and final decision on the proposal.

If Scottish Ministers do call in a closure decision the authority cannot proceed to implement the decision - either in full or in part - until Ministers have informed the authority of their own decision in the case. Ministers may refuse to consent to the decision's implementation or grant their consent to it, either unconditionally or subject to conditions. During the six week period when Ministers are deciding to call in a closure decision, and subsequently if they do call it in, authorities are required to provide Ministers with such information as they may reasonably require in relation to their consideration either of the call-in or consent decision.

Definitions – Section 21 of the Act

This section of the Act also came into force on 6 January 2010, the day after Royal Assent. It provides appropriate definitions of terms in the Act.

In particular, the schools to which this Act refers are public schools as defined in section 135(1) of the Education (Scotland) Act 1980. This means any school under the management of an education authority and includes nursery schools which are under authority management i.e. are run by them.

The Act does not cover independent schools or nursery schools or nurseries which are managed and run independently ie by other than local authorities.

Relevant Proposals – Schedule 1

This Schedule sets out all the categories of proposal to which this Act applies.

The provisions of sections 15-17 of the Act, relating to closure proposals, relate to all the categories of closure covered by paragraph 1 of the Schedule, not just to proposals for the closure of a whole school.

Authorities sometimes ‘mothball’ a school whose roll has either naturally fallen to zero or has done so as a result of placing requests made in respect of alternative schools. Authorities may take the view that mothballing the school is appropriate if there is a possibility of the school roll increasing again in the future, warranting the school’s reopening. Mothballing, as temporary rather than permanent discontinuance, does not require consultation in terms of the Act. If the authority, at a later date, decided to permanently close a mothballed school, such as to preclude its reopening if local demand for school places should rise again, the provisions of this Act would require to be complied with, before such a decision could be taken.

The reference in paragraph 10 of this Schedule to further education centres is only to such centres which are managed by local authorities. At the present time such centres exist only in Orkney and Shetland.

Relevant Consultees – Schedule 2

This schedule identifies a core set of relevant consultees who should be consulted in connection with every type of proposal set out in Schedule 1. These are the Parent Council, parents of pupils attending an affected school as well as the pupils themselves, parents of pupils likely to attend an affected school, staff at an affected school, any trade union which appears to the education authority to be representative of those staff, and any other users whom the authority considers relevant. The Schedule also specifies other relevant consultees in relation to specific categories of proposal - for instance the community council is included where the impact is likely to affect the wider community. Additionally, paragraph 11 specifies that Bòrd na Gàidhlig is to be consulted when a proposal affects the provision of Gaelic medium education (GME) such as where a GME class is to be established or discontinued or a GME school’s catchment is to be changed. Paragraph 12 makes clear that where a change is being proposed which affects a denominational school, the relevant church or denominational body must be consulted.

Consulting children and young people

One way of seeking to ensure that Scotland’s children and young people become responsible citizens, one of the cornerstones of Curriculum for Excellence, is by helping them to understand the decisions that are made about them and for them by adults, and by involving them and ensuring that they have an opportunity to have their say. The Act requires pupils to be consulted in so far as the authority considers them to be of suitable age and maturity. The presumptions should be “no lower age

limit” and a focus on the pupils’ capacity rather than incapacity – yet recognising that some proposals will be technical or incomprehensible or of little or no interest to certain categories or age of pupils. However, Article 12 of the UN Convention on the Rights of the Child gives a child the right to express a view on matters that affect his or her life and to have that view taken into account.

The Act therefore provides for pupils’ views to be sought and taken into account on an equal basis to other statutory consultees and there is a clear expectation that authorities will make all reasonable efforts to ensure that the greatest number of pupils are meaningfully consulted, in ways that are appropriate to their age and maturity. They should also consider how best to provide feedback to pupils on how their views have been taken into account in the Council’s coming to a decision. This should be done in an accessible and age-appropriate way that will help them understand the process and how and why the decision has been taken.

Pupil councils are relatively commonplace throughout Scottish schools and in many cases will provide an ideal platform for proposals to be shared and views to be expressed and captured. The authority should though consider a range of means for communicating and consulting with children and young people of varying age groups and levels of maturity.

The office of the Commissioner for Children and Young People, and Children in Scotland, produced, in light of this Act, guidance aimed at assisting local authorities in undertaking their duty to consult children and young people. It is designed to ensure best practice across Scotland and can be viewed at either of the following links:

www.sccyp.org.uk/admin/04policy/files/spo_142146Participants,%20not%20pawns%20guidance%2020100315.pdf
www.childreninscotland.org.uk/docs/Participantsnotpawnsguidance20100315.pdf

Transitional provisions – Schedule 3

Paragraph 3 onwards of this Schedule sets out the transitional provisions for moving from the current system of statutory consultations under the Education (Publication and Consultation Etc.) (Scotland) Regulations 1981 (“the 1981 Regulations”) to the new set of procedures in the Act.

There are essentially 2 transitional options, which were included in the Bill from the outset so that authorities would be able to plan ahead, well in advance. Indications have consistently been given that the Act (beyond sections 19-22 which are already in force) will be brought into force at or around Easter 2010. The 2 options between them cover all circumstances where authorities launch consultation processes prior to 5 April 2010.

The first option is where an authority has commenced or commences statutory consultations regarding a proposed change to a school in accordance with the 1981 Regulations and has taken, or will take, a post-consultation decision on implementing the proposal prior to the 5 April 2010 commencement of this Act. If

that decision is not referable to Ministers – under the distance, % occupancy or denominational criteria – then the authority may proceed to implement it. If it is referable, implementation will need to await a Ministerial decision on consent (and only proceed if Ministerial consent is given). In some of these cases it may take until some time after 5 April 2010 for Ministers to reach and deliver their decision regarding consent.

The second option is where an authority wishes to start a consultation before commencement of the Act (5 April 2010) but will not be at the stage of taking a post-consultation decision until after the Act is wholly commenced. In these cases the authority may only ‘continue’ with the consultation and decision making processes through and beyond the date of commencement (5 April 2010) if the consultation processes have ‘anticipated’ the provisions of the Act – i.e. have consisted of or included what is set out in Sections 1 to 10 of the Act. Paragraph 3(4) of the Schedule sets out specific requirements relating to the proposal paper and consultation report if the consultation thus underway involves a proposal to close a rural school; and when the post-consultation decision is taken by the Council, sometime after 5 April 2010, sections 12 and 15 to 17 of the Act will apply – in other words there will be no further referrals to Ministers after 5 April 2010; their only consideration will be potential call-ins of closure decisions.

For the avoidance of any doubt, any consultations which are commenced *after* the coming into force of the Act on 5 April 2010 are not in any sense ‘transitional’ and must of course comply with all of the Act’s provisions.

A further issue to consider relating to answering questions or requests for additional information

In considering questions put or requests for additional information or advice on the proposal, from parents or Parent Councils, authorities will be mindful of their obligations under the Scottish Schools (Parental Involvement) Act 2006. That Act places two specific duties on authorities - to give advice and information when a Parent Council reasonably requests it from them on any matter (section 11(1)) and to give advice and information to a parent of a school pupil when reasonably requested, on any matter relating to the education provided to that pupil (section 12(1)).

Beyond those statutory obligations it is also important that authorities – as a matter of good practice and courtesy - attempt to answer all relevant questions and requests for additional information timeously and, as far as is reasonably practicable, before the end of the consultation period. This particularly applies where the question or request is raised by a relevant consultee. Doing so will enable people to digest and consider the answer and/or additional information provided, prior to finalising their response to the consultations.

In some cases the questions posed or requests for information will be personal, sensitive or relate to individuals, in which case it will be appropriate for the authority to keep its response entirely confidential. In other cases though, authorities are encouraged to consider whether the matters raised and answers provided or additional information supplied would be of wider interest to other consultees. In that

case the authority should consider how best to share and publicise the material – perhaps via its website (the FAQ section or some other prominent part) or some other means.

Scottish Government
Learning Directorate
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