



# The Scottish Parliament

## **Education, Lifelong Learning and Culture Committee**

### **7th Report, 2009 (Session 3)**

### **Stage 1 Report on the Schools (Consultation) (Scotland) Bill**

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### **Stage 1 Report on the Schools (Consultation) (Scotland) Bill**

**Published by the Scottish Parliament on 19 June 2009**





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## Education, Lifelong Learning and Culture Committee

### 7th Report, 2009 (Session 3)

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# The Scottish Parliament

## Education, Lifelong Learning and Culture Committee

### Remit and membership

#### **Remit:**

To consider and report on (a) further and higher education, lifelong learning, schools, pre-school care, skills and other matters falling within the responsibility of the Cabinet Secretary for Education and Lifelong Learning; and (b) matters relating to culture and the arts falling within the responsibility of the Minister for Culture, External Affairs and the Constitution.

#### **Membership:**

Claire Baker  
Aileen Campbell  
Kenneth Gibson (Deputy Convener)  
Kenneth Macintosh  
Christina McKelvie  
Elizabeth Smith  
Margaret Smith  
Karen Whitefield (Convener)

#### **Committee Clerking Team:**

##### **Clerk to the Committee**

Eugene Windsor

##### **Senior Assistant Clerk**

Nick Hawthorne

##### **Assistant Clerk**

Emma Berry





# The Scottish Parliament

## Education, Lifelong Learning and Culture Committee

### 7th Report, 2009 (Session 3)

#### Stage 1 Report on the Schools (Consultation) (Scotland) Bill

The Committee reports to the Parliament as follows—

#### EXECUTIVE SUMMARY

- 1. The Committee accepts that it is sometimes necessary to take difficult and controversial decisions about schools, including decisions to close a school, and that those decisions should never be taken lightly. The Committee also recognises that pupils, staff, parents and the wider community may well have strongly held views on school closure proposals and it is important that there are appropriate opportunities for all views to be heard before a decision is made.**
- 2. The Committee therefore supports the broad aims of the Schools (Consultation) (Scotland) Bill to strengthen the consultation process. The Committee also recognises the need for the decision-making processes to be as widely understood and transparent as possible.**
- 3. The Committee is content with the consultation process set out in the Bill, including the proposal paper, educational benefits statement, corrections process, and the public meeting and consultation paper elements. The Committee acknowledges that the procedures proposed in the Bill largely formalise current best practice amongst many local authorities.**
- 4. Her Majesty's Inspectorate of Education (HMIE) has an important role to play in this process, and it is essential that its involvement is focussed on the educational aspects of any proposal, reflecting its area of expertise. The Committee welcomes the Scottish Government's clarification of HMIE's role in the ministerial call-in process.**
- 5. It is recognised by the Committee that the proposed power of ministerial call-in represents a compromise between a wide range of opinions on this issue and is an improvement on the current automatic referral system. The Committee calls on the Scottish Government to provide**

**clarification, either in the Bill or in guidance, on what would constitute a “material consideration”.**

**6. The Committee acknowledges that rural schools face particular circumstances and notes that the Scottish Government has sought, in the Bill, to specify three additional factors to which local authorities must have regard when proposing the closure of a rural school. However, the Committee notes the arguments in the evidence that it received that these three additional factors in the process could apply to all schools, and recommends that the Scottish Government gives further consideration to this matter.**

**7. The Committee recommends, subject to satisfactory clarification of the points above, that the general principles of the Bill be approved.**

## INTRODUCTION

8. The Schools (Consultation) (Scotland) Bill<sup>1</sup> was introduced in the Scottish Parliament on 2 March 2009 by Fiona Hyslop MSP, Cabinet Secretary for Education and Lifelong Learning. The Bill was accompanied by a Policy Memorandum (SP Bill 23-PM), Explanatory Notes (SP Bill 23-EN) including a Financial Memorandum, and a Delegated Powers Memorandum (SP Bill 23-DPM).

9. The Parliamentary Bureau referred the Bill to the Education, Lifelong Learning and Culture Committee for Stage 1 consideration at its meeting on 3 March 2009. The Parliament agreed on 22 April 2009 that Stage 1 consideration should be completed by 4 September 2009.

10. Extracts from the minutes of the Committee can be found in Annexe A. The delegated powers provisions were considered by the Subordinate Legislation Committee and its report is provided in Annexe B. Correspondence from the Finance Committee regarding the Financial Memorandum is provided in Annexe C. Finally, oral evidence, associated written evidence and other written evidence can be found in Annexes D and E.

## PURPOSE OF THE BILL

11. The Bill was introduced following the Scottish Government’s consultation *Safeguarding our rural schools and improving school consultation procedures – proposals for changes to legislation* and seeks to protect the place of schools in rural communities and to update the legislation relating to local authority consultations on changes to the school estate.

### **The consultation process for all schools (sections 1 - 11)**

12. The Scottish Government believes that the current regulations relating to school consultations, the Education (Publication and Consultation Etc.) (Scotland) Regulations 1981, do not encourage consistency of approach across local

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<sup>1</sup> Schools (Consultation) (Scotland) Bill, Policy Memorandum, Explanatory Notes and Delegated Powers Memorandum. Available at: <http://www.scottish.parliament.uk/s3/Bills/23-Schools/index.htm>

authorities. The Policy Memorandum states that the Bill's overarching policy objective is to address this by updating and strengthening the consultation practices and procedures that local authorities apply to all relevant proposals.<sup>2</sup>

13. The relevant proposals are set out in schedule 1 of the Bill, and are listed as:

- Closure
- Establishment
- Relocation
- Admission arrangements
- Transfer from primary to secondary school
- Primary school commencement date
- Special class outwith a special school
- Transport to a denominational school
- Changing from denominational to non-denominational school
- Discontinuance of a further education centre.

### **Special provision for rural schools (sections 12 – 14)**

14. The consultation drew on recent concerns relating to the proposed closure of rural schools, which had faced heavy opposition from the affected communities, who argued that their schools acted as a community hub and provided a good education for their children. Murdo Fraser MSP proposed a member's bill, the Rural Schools (Scotland) Bill, which sought to introduce a "presumption against" the closure of rural schools. Murdo Fraser withdrew the proposed bill on 14 January 2009.

15. The second objective of the Bill, therefore, is to place the consideration of rural school closures in the wider context of the implications of such closures on the community. Section 12 requires local authorities to consider three factors when considering whether to consult on closing a rural school.

### **Ministerial involvement in the process**

16. The third objective is to replace the current situation where some local authority decisions relating to school closures require ministerial consent. This would be replaced by a power for Scottish Ministers to call in any closure decision after that decision has been made, where they consider that there has been a failure to comply with the new requirements of the Bill or where an authority has failed to take appropriate account of a material consideration relevant to its decision.<sup>3</sup>

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<sup>2</sup> Schools (Consultation) (Scotland) Bill. Policy Memorandum, paragraph 2.

<sup>3</sup> Schools (Consultation) (Scotland) Bill. Policy Memorandum, paragraph 20.

## ISSUES CONSIDERED BY THE COMMITTEE

### Consultation process for all schools

#### *General consultation proposals*

17. Sections 1-11 of the Bill propose a range of provisions to revise the current process for consulting on school closures and other changes to the school estate. The intention, as outlined in the Policy Memorandum, is to “establish a consultation process that is coherent, easy to understand, fair, workable, open and transparent and above all commands the trust and confidence of the public.”<sup>4</sup>

18. Under the Bill, the education authority (which is the local authority) would be required to:

- prepare a proposal paper which would be sent to Her Majesty’s Inspectorate of Education (HMIE) and all other mandatory consultees
- hold a public meeting on the proposal
- hold a consultation which would run for at least six weeks, including at least 30 days’ term time, during which consultees could challenge any information that they believed to be inaccurate
- publish a consultation report which would detail all the responses received and information gathered during the consultation period
- announce its final decision on its proposal after a period for further consideration.

19. Broad overall support for these changes was expressed in both written and oral evidence submitted to the Committee by stakeholders, including local authorities and parent councils.

20. In particular, the general view expressed by local authorities was that the proposed changes reflect current good practice. In its written evidence, East Renfrewshire Council stated—

“It is considered that the procedures merely formalise in legislation existing practice that any public body should be following in terms of transparency, fairness and accountability.”<sup>5</sup>

**21. The Committee is content with the general consultation processes as outlined in the Bill and makes specific comment on particular elements elsewhere in this report. The Committee notes that much of the Bill formalises what is currently considered to be best practice amongst many local authorities.**

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<sup>4</sup> Schools (Consultation) (Scotland) Bill. Policy Memorandum, paragraph 2.

<sup>5</sup> East Renfrewshire Council. Written submission to the Education, Lifelong Learning and Culture Committee.

*Proposal paper (including educational benefits statement)*

22. The Bill proposes that education authorities would prepare a proposal paper, which would include details of the proposal(s) (the proposal paper could include more than one proposal), an implementation date and a summary of the consultation process to be undertaken. The Bill also proposes that education authorities would publish an educational benefits statement within the proposal paper, setting out their view of the potential educational benefits and disbenefits to those affected by the proposed changes to the school estate.

23. Giving evidence to the Committee on 6 May 2009, a Scottish Government official set out the purpose of the educational benefits statement as—

“To provide councils with an opportunity to set out their case from an education perspective. The requirement to include an educational benefits statements in every consultation shows that the Government regards the education aspect of the process as a high priority. The statement will allow councils to give their views on the educational benefits of their proposals. It will be for councils to make that case, which will then be included in proposal papers that will go out for consultation.”<sup>6</sup>

24. Widespread support for the inclusion of such a statement was expressed in evidence to the Committee. The Scottish Rural Schools Network (SRSN), for example, told the Committee that it viewed “the educational benefits statement as vital to the first part of any proposal to close a school.”<sup>7</sup>

25. The Committee notes that responses both to the Scottish Government’s consultation and the call for evidence issued by the Committee argued that there was a need for consistency between educational benefits statements across local authorities and that guidance should be issued to promote this. When questioned on this issue, a Scottish Government official stated—

“When we launched the consultation, we explored whether there should be guidance. We started from the point of view that it was not appropriate to have a checklist approach because we would inevitably miss some things out of the list and it might also lead to local authorities just ticking off the items on it. However, we picked up from the consultation responses that some kind of guidance would be welcomed. We are certainly considering guidance on educational benefits statements.”<sup>8</sup>

26. Scottish Government officials went on to confirm that such guidance would be statutory guidance. The Committee notes that the Bill as drafted makes provision, in section 20, for the Scottish Government to make such regulations if it chooses to do so.

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<sup>6</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2287.

<sup>7</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Cols 2331-2332.

<sup>8</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2287.

27. The Committee asked the Cabinet Secretary for her views on introducing statutory guidance on the educational benefits statement. She said—

“Having heard the views of the witnesses, I think that the idea of providing guidance on the educational benefits statement, rather than being too prescriptive in the Bill, makes perfect sense. The Committee will consider whether we need such guidance, but I am sympathetic to the proposal.”<sup>9</sup>

28. The Committee questioned Scottish Government officials on whether other factors that might impact on educational benefit would be included in the statement itself, including, for example, school buildings’ condition and transport costs. A Scottish Government official indicated that such issues would be more appropriately considered as part of the overall proposal paper—

“The Bill has been drafted so that, when a council consults, it would not only produce the educational benefits statement but provide the wider information in the proposal paper. There would be scope to include in that paper evidence or information that supported the council's case. The condition of buildings might be included in an educational benefits statement, depending on the circumstances, but there is certainly scope for all such factors to be covered in the proposal paper. Educational benefits statements would focus on what a council believes the educational benefits of its proposals would be, but we accept that the other factors would also be important in the process and should be included in the wider proposal paper.”<sup>10</sup>

29. The Scottish Parent Teacher Council (SPTC) noted that the Bill would require that the educational benefit statement assess the impact of any proposal on four distinct groups (pupils of any affected school; any other users of the school’s facilities; any children who would be likely to become pupils of the school; and the pupils of any other schools in the authority’s area). The SPTC went on to state—

“It is interesting that the authority is required to put forward educational benefits for four different groups. We would like to highlight that those four groups will not necessarily share a common benefit from what is proposed [...] the interests of the different groups are not identical. It is important that that is recognised and reflected in some way in educational benefits statements so that there is an understanding of how those different interests can be balanced.”<sup>11</sup>

30. Some written and oral evidence submitted to the Committee also argued that a cost-benefit analysis should be carried out alongside the educational benefit statement. Fife Council, in its written submission, stated—

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<sup>9</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2453.

<sup>10</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2288.

<sup>11</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Col 2329-2330.

“We would propose that a cost-benefit test, including both educational and financial considerations, for both the local and wider community, should be applied to all proposed closures. We would not wish, as is proposed in the Bill, the question in a consultation about a proposed school closure to be limited only to a test of educational benefits for the local community. For local authorities the duty to secure best value is at the heart of making efficient and effective educational provision; the test must reflect the principles of best value as well as the question of local educational benefits.”<sup>12</sup>

31. The Committee heard conflicting evidence on the factors that could form part of a cost-benefit analysis. For example, on the issue of spare capacity, Professor Neil Kay commented—

“The Accounts Commission promoted spare capacity as an issue that should at least encourage scrutiny of possible closures. However, spare capacity should in no way be a criterion in considering school closure. Briefly, if two schools are virtually identical in terms of numbers and the communities that they serve, but one of them is 50 per cent unoccupied, what is the extra cost of that spare capacity? There will be some costs for heating, lighting and possibly maintenance. Apart from that, the extra cost of that spare capacity will be close to zero.”<sup>13</sup>

32. However, in its written submission to the Committee, the SPTC argued—

“It is important to emphasise that money spent on maintaining an empty school place is money that cannot be spent on pupils actually within the system. We offer the following very rough calculation as an illustration. Currently in Edinburgh City, 27% of the primary school places that it provides (i.e. has teachers and classroom space for) are unoccupied. Given that staff and buildings constitute the main part of the education budget, then this means that something like £30,000,000 is spent on maintaining empty places and the real per pupil spend in primary schools is cut from a notional £4,515 to £3,299.”<sup>14</sup>

**33. Throughout evidence taking, the Committee was made aware of different views regarding cost-benefit analysis methods, which raised concerns about what criteria were being used by local authorities in their decision-making. The Committee recommends that the Scottish Government encourage local authorities to include a cost-benefit analysis as part of the proposal paper and gives consideration to issuing guidance to support local authorities in preparing such a cost-benefit analysis.**

34. Questioned by the Committee on whether statutory guidance would also be considered for the proposal paper as a whole, Scottish Government officials said—

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<sup>12</sup> Fife Council. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>13</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2307.

<sup>14</sup> Scottish Parent Teacher Council. Written submission to the Education, Lifelong Learning and Culture Committee.

“We received the clear message that people want guidance on the educational benefits statement, and ministers clearly understand the need for that. However, I do not think that we have taken a firm view on guidance on the proposal paper [...] early in our thinking on the structure of the Bill, we considered the possibility of issuing statutory guidance on specific sections. In the end, it was decided—sensibly—to have a catch-all provision in section 19, which allows for statutory guidance to be issued in respect of any earlier part of the Bill.”<sup>15</sup>

**35. The Committee supports the inclusion of a proposal paper as part of the consultation process, and considers an educational benefits statement to be an essential part of that. The Committee recommends that the Scottish Government encourage local authorities to include other relevant factors, such as condition of school buildings and transport costs, as part of the overall proposal paper as a matter of good practice.**

**36. The Committee supports the Scottish Government’s intention to introduce statutory guidance on the educational benefits statement and recommends that full consideration be given to extending any such guidance to cover the entire proposal paper document.**

*Relevant consultees*

37. Schedule 2 of the Bill details the relevant consultees for each of the proposals outlined in schedule 1 of the Bill (see paragraph 13). The lists include, among others, pupils, staff, community councils, and Bòrd na Gàidhlig (where Gaelic medium education is affected).

38. Widespread support was expressed both in written and oral evidence for the list of “relevant consultees”, which was felt to be comprehensive and an essential part of ensuring the process was inclusive and transparent.

39. Schedule 2 of the Bill includes, as a relevant consultee, “the pupils at any affected school (in so far as the education authority considers them to be of a suitable age and maturity)”. The Committee pursued with witnesses the issue of how pupils could best be consulted. Professor Neil Kay acknowledged the potential difficulties with this—

“Children in such situations are likely to know only their own school, but we are asking them to second-guess what it would be like to be in a bigger school. It may depend partly on the state of relations between the schools concerned—sometimes relations between schools are quite competitive. I cannot think of any way to approach the issue other than to leave an open question. Essentially, that is what the Bill does—the matter is left to the discretion of the authority. There is no ideal answer. Much depends on how the children and parents handle the situation.”<sup>16</sup>

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<sup>15</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2289.

<sup>16</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2317.

40. Scotland's Commissioner for Children and Young People told the Committee in written evidence—

"I very much welcome that 'pupils at any affected school' are mandatory consultees in relation to all relevant proposals in the Bill (Schedule 2). However, this is then qualified by 'in so far as the education authority considers them to be of a suitable age and maturity'. This is open to unduly restrictive interpretations that may put key provisions of the Bill at risk of being undermined. Instead of the current wording, the Bill should refer to the need to use a range of consultation methods that are appropriate to the age and maturity of different (age) groups of pupils. I believe that this needs to appear on the face of the Bill and be further fleshed out in guidance for education authorities to enable them to carry out as comprehensive a consultation with pupils as possible. Also, pupil councils (where applicable) should be added to the list of relevant consultees."<sup>17</sup>

41. Giving evidence on this issue, HMIE stated—

"We place great importance on talking to pupils, and our approach varies depending on the type of school that is in question. Increasingly, we are saying to education authorities that they should take account of the pupils' voices, and we want to do that in our investigations."<sup>18</sup>

42. The Educational Institute of Scotland (the EIS) said—

"Our practical, daily experience of youngsters in schools, as pupils and students, would lead us to say that consultation with students and pupils would need to be carefully conducted, because they are a relatively vulnerable group. I say that not to deny them their democratic, participatory rights, but with the realisation that the information that is provided to them and the way in which they are engaged in the consultation process would need to be thought out carefully."<sup>19</sup>

43. The Cabinet Secretary commented on consulting pupils, saying—

"If we want our children to be responsible citizens, they have to understand the decisions that are made about them and for them by adults, and they should have an opportunity to have their say. The Bill is different because it allows for pupils' views to be considered for the first time. However, that has to be done in a responsible way [...] perhaps the children's commissioner will be able to advise us about best practice."<sup>20</sup>

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<sup>17</sup> Scotland's Commissioner for Children and Young People. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>18</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 27 May 2009, Col 2419.

<sup>19</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 27 May 2009, Col 2435.

<sup>20</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2454-2455.

**44. The Committee supports the inclusion of a list of relevant consultees but considers that the Scottish Government needs to give further thought to the practical issues of how to maximise engagement with pupils, staff and parents to ensure the most meaningful possible consultation. The Committee supports the suggestion made by the Cabinet Secretary that Scotland's Commissioner for Children and Young People be asked to advise on methods of engagement with pupils.**

*Corrections*

45. Section 5 of the Bill proposes a new duty on education authorities to investigate any allegations of inaccuracy in the proposal paper. Education authorities would be required to consider whether there was an inaccuracy and decide whether to publish a corrected proposal paper; issue a notice to all consultees correcting the inaccuracy; or take no further action. Whatever its decision, the education authority would be required to set out details of the alleged inaccuracy in the consultation report.

46. The Committee also pursued with witnesses the issue of how corrections would be adjudicated. As stated above, the Bill provides that any alleged inaccuracies would be raised with the relevant local authority, which would then seek to ascertain whether there was, in fact, an inaccuracy. The local authority would decide what course of action it wished to take on alleged inaccuracies. There is no provision for an independent adjudicator. However, all details of alleged inaccuracies would be included in the consultation report.

47. A Scottish Government official clarified the purpose of the correction paper and how it would work in practice—

“If a parent turns to their council and alleges that there is an inaccuracy in a proposal paper, the council must respond in a transparent way. It might conclude that the allegation is incorrect and that there is no inaccuracy; it might conclude that there is an inaccuracy, which perhaps requires an amendment to be issued; or it might conclude that there is a serious inaccuracy, that the whole paper needs to be redone and reissued and that the clock needs to be restarted. Whichever route it took would have to be highlighted in the consultation report at the end of the process.”<sup>21</sup>

48. When questioned on whether this was a significant safeguard, the SRSN told the Committee—

“If there were not a referral or call-in process to provide the option of subsequent challenge, it certainly would not be enough. Any member of the school or community may request that the Cabinet Secretary calls in a proposal on the basis that flawed information has been provided. However, the process will probably be self-policing and never get to that stage, because the local authority will ensure that the numbers are right and that

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<sup>21</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2298.

any challenge can be met. If everything works out properly, the call-in option will probably never be used.”<sup>22</sup>

49. Professor Neil Kay supported this view, commenting that he hoped that the Bill would “encourage and incentivise councils to ensure that the information is correct in the first place.”<sup>23</sup>

**50. The Committee recognises that the correction procedures proposed in the Bill, while an important part of the overall consultation process, could involve competing interpretations of data. Overall, however, the Committee is content that the Bill sets out a process for these to be considered transparently.**

**51. The Committee also notes concerns about local authorities being the adjudicators of allegations of inaccuracies, and possible questions of partiality, but is content that the Bill provides that authorities would be required to make public reasons for all decisions made in response to allegations of inaccuracy. The Committee also acknowledges that the call-in procedure would potentially give consultees a further opportunity to highlight relevant issues to the Scottish Government. The Committee is also satisfied with the details on how the process would work in practice as set out by the Scottish Government.**

*Notice and consultation period*

52. Section 6 of the Bill provides that education authorities would be required to give relevant consultees notice of the proposal, which would need to include summary information and details of where to obtain a copy of the proposal paper and how to make written representations. The notice would need to specify the dates of the consultation period, and, if known at the time, details of public meetings to be held on the proposal.

53. The Committee noted concerns raised that a common method of notice used by many schools was pupil post, where letters are issued for children to take home to their parents. This was felt by some not to be the most appropriate way to communicate such information.

54. In response, a Scottish Government official indicated that the Government was aware of these concerns and that the Bill would “require councils to advertise publication of the proposal paper and consultation report.”<sup>24</sup>

55. In relation to methods of notifying parents and whether the Bill should be specific about them, a Scottish Government official told the Committee—

“We could certainly consider doing that, but we are talking about a level of detail that might be better in guidance, which can be changed as

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<sup>22</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Col 2351.

<sup>23</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2313-2314.

<sup>24</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2295.

circumstances change. If such detail was in the Bill, we would have to go back to the primary legislation if we wanted to make changes further down the line. However, I take the point that the issue must be addressed appropriately.”<sup>25</sup>

56. The EIS agreed that it may be helpful to be given a “steer”<sup>26</sup> by the Scottish Government, perhaps in statutory guidance, as to best practice for notification, in order to ensure consistency across the country.

57. HMIE told the Committee that it was currently looking at the most effective ways of notifying pupils and parents of various education provision and events and that it would “report in public later this year on the best methods.”<sup>27</sup>

58. The Bill would also extend the time limit of consultation. Currently, a consultation is required to be “not less than 28 days”, but under the Bill this would be extended to a period of at least six weeks, including at least 30 days during school term-time.

59. A small number of written submissions argued that the initial six week consultation period was too short. Moray Forum, for example, stated—

“With regard to the consultation period, given the range of information that consultees may be required to consider and analyse, the Moray Forum maintains that this should be a 10 week minimum of term time.”<sup>28</sup>

60. Giving evidence on why ministers had decided on a six week consultation period, Scottish Government officials stated—

“We felt that six weeks struck a good balance between not prolonging concerns and uncertainty and extending the current minimum of four weeks—the Bill will increase that timescale by 50 per cent.”<sup>29</sup>

61. The proposed six-week consultation period was, however, broadly supported in evidence to the Committee. A representative of the SPTC told members—

“It is a good length of time, given that it happens during the school term. [...] I agree that a very protracted consultation period, particularly if there is a further six weeks for reflection, will simply generate a huge amount of uncertainty. As long as people are well informed—the Bill includes provisions

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<sup>25</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2295-2296.

<sup>26</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 27 May 2009, Col 2436.

<sup>27</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 27 May 2009, Col 2420.

<sup>28</sup> Moray Forum. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>29</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2288.

to ensure that they are—and there is a public meeting, those safeguards will mean that the six-week period will be good for decision making.”<sup>30</sup>

62. It was noted that, although the consultation period would be at least six weeks long, it would be followed by a three-week period to allow HMIE to make its report, and, following the publication of the consultation report, a further three week period before an authority could make its decision. This additional period of further consideration was welcomed by several witnesses. A representative of the SRSN told the Committee—

“I think that the six-week consultation period is perfectly adequate [...] I have always looked at the period—and I still largely do—as a 12-week period overall. If everything is added together, there are 12 weeks, which is within the national guidelines.”<sup>31</sup>

**63. The Committee notes concerns regarding how consultees will be notified of the various parts of the consultation process, including those surrounding the possible use of pupil post. The Committee notes HMIE’s current research on this and awaits the final report. The Committee recommends that the Scottish Government consider the evidence submitted to the Committee on this issue in order to achieve the most inclusive, transparent and accessible notification process possible.**

**64. The Committee believes, on balance, that the proposed six-week consultation period proposed in the Bill is sufficiently long, given the further periods for consideration built in to the overall process.**

#### *Public meeting*

65. Section 7 of the Bill provides that education authorities would be required to hold a public meeting on a proposal, and could consider more than one proposal at any such meeting. The current regulations do not require education authorities to hold public meetings. Notice of public meetings would need to be given to relevant consultees and HMIE.

66. Scottish Government officials outlined the purpose of the public meeting—

“The meeting should be an engagement between the council that has made proposals and advanced its justification for them and the individuals or community who would be affected. They should go along and be able to quiz the council on the reasons for, and thinking behind, its statements and proposals.”<sup>32</sup>

67. The requirement to hold a public meeting was broadly welcomed in evidence. In its written evidence to the Committee, Consumer Focus Scotland stated—

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<sup>30</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Col 2336.

<sup>31</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Col 2336.

<sup>32</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2295.

“In our research, the public meeting emerged as having key significance in influencing a community’s perception of the credibility of their consultation, and their level of satisfaction in feeling listened to. Consultees in two of the case studies in particular perceived the public meeting as having much importance as an opportunity to present their case, make council officials aware of the strength of their feelings, and possibly influence the course of the consultation and its outcome. We support the requirement to hold a public meeting as part of the consultation process.”<sup>33</sup>

68. Consumer Focus Scotland went on to consider best practice in terms of conducting public meetings—

“In our research, not all public meetings had lived up to the consultees’ expectations. Consultees in one case study described how they felt their meeting had been overly orchestrated by their council. This created the impression amongst consultees that the outcome of the closure had already been decided. Again we would stress that guidance is required to ensure that council officials are aware of best practice in holding public meetings.”<sup>34</sup>

69. A representative from the Association of Scottish Community Councils was one of a number of witnesses to raise the issue of the timing of public meetings—

“I would be keen, for example, for the public meeting to be held early in the process because that would be the first time that many people would hear counter-arguments to any proposals; thereafter, people would want to find out what support there was to help them to access relevant information.”<sup>35</sup>

70. The Cabinet Secretary gave her view on whether guidance would be helpful to assist local authorities in conducting public meetings—

“If guidance is needed, that is fair enough, but best practice should be quite easily digestible. The idea that local authorities have to be told how to run a public meeting and consult properly is perhaps a step too far.”<sup>36</sup>

**71. The Committee supports the proposal of holding a public meeting as part of the consultation process and asks the Scottish Government to note the points raised in relation to public meetings in evidence to the Committee. The Committee also asks the Scottish Government to note the proposal that local authorities be encouraged to hold public meetings as early in the process as is appropriate. The Committee agrees with the Cabinet Secretary that guidance on conducting public meetings is, on balance, not necessary at this stage.**

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<sup>33</sup> Consumer Focus Scotland. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>34</sup> Consumer Focus Scotland. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>35</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Col 2338.

<sup>36</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2455.

72. A specific issue arose in evidence concerning the role of HMIE at the public meeting. Although HMIE would be notified in advance of any public meeting, and would subsequently be sent a summary of discussions, no specific role for HMIE at the public meeting is set out in the Bill and no rationale for notifying them is set out in the Policy Memorandum. A Scottish Government official explained to the Committee—

“I suspect that quite a few HMIE people might decide to go to public meetings and hear for themselves, because any educational aspects that were raised would form part of their assessment. We have not required HMIE to attend, but if it wants to attend and hear at first hand, it can; otherwise it will get from the council later on a summary of the representations that have been made.”<sup>37</sup>

73. When questioned on why it was not a requirement in the Bill for HMIE to attend public meetings, a Scottish Government official told the Committee—

“One of the considerations for not requiring HMIE to be at a public meeting was that if something should happen on the evening of the public meeting that prevented HMIE from being there—if the representative's car broke down or something of that nature—the meeting would have to be cancelled. [...] We discussed some of the practicalities with it—for example, there is a requirement for a public meeting in respect of all consultations, but some will be far more controversial than others and attendance is left to HMIE's judgment.”<sup>38</sup>

74. Officials went on to say that, while this point may be covered in guidance, they wanted to ensure that the “whole process would not come to a halt simply because HMIE was planning to be at the meeting, but could not attend for one reason or another.”<sup>39</sup>

75. When questioned on this issue, HMIE stated that it would consider it desirable to attend most public meetings that would be conducted under the provisions in the Bill, particularly where the issue involved school closure or amalgamation. However, HMIE added that there were other cases on less contentious issues or proposals for which communities had been campaigning, such as a boundary or site changes, where HMIE attendance at the meeting would not be particularly beneficial and not represent the best use of its resources. It concluded as follows—

“We need to be mindful of the cost to the public purse of attending public meetings, but attending them would be desirable, particularly when a

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<sup>37</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2292.

<sup>38</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2292-2293.

<sup>39</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2292-2293.

proposal is likely to arouse strong public interest or different views among stakeholder groups.”<sup>40</sup>

76. HMIE, therefore, said that it was not necessary to place on the face of the Bill an obligation on it to attend such meetings. However, it indicated that, when the Bill had been enacted, it would be likely to outline its intended approach towards attendance at public meetings in a public policy document.

77. The Cabinet Secretary confirmed, when she gave evidence to the Committee, that she did not feel it appropriate to require HMIE to attend all public meetings.<sup>41</sup>

**78. The Committee considers that it would be best practice for HMIE staff to attend all public meetings and that they should make every effort to do so. However, the Committee agrees that making attendance a requirement could potentially lead to delays, should HMIE not be able to attend for any reason. In such circumstances, the Committee considers that supplying HMIE with a summary of the meeting, as provided in the Bill, would be appropriate.**

#### *Involvement of HMIE*

79. Section 8 of the Bill would require HMIE to consider the educational aspects of every education authority proposal to close a school or make other relevant changes to the school estate. Current practice is for HMIE to provide an independent view on closure proposals that require ministerial consent, although this is not a statutory requirement. The education authority would be required to send HMIE copies of the proposal paper when published, together with copies of representations made during the consultation. HMIE would be required to submit a report to the education authority no later than three weeks after the end of the consultation period. During that period, HMIE could also enter the school and make enquiries with anyone else considered appropriate.

80. Views on the involvement of HMIE in the process were mixed in both written and oral evidence to the Committee, particularly among local authorities. Some councils, such as Aberdeen City Council, Aberdeenshire Council and Comhairle nan Eilean Siar, welcomed HMIE’s proposed role. However, several other local authorities expressed concern that the proposal lacked clarity and extended HMIE’s role beyond its area of expertise. Moreover, doubts were expressed that HMIE currently had the required resources.

81. Clackmannanshire Council stated in its written submission—

“We remain concerned about the prominence which HMIE is given in the process described in the Bill. It is impossible but to assume that each and every closure proposal will result in the ‘active’ engagement of HMIE. This risks a significant number of adversarial situations being generated. We do not believe that the Bill would have this as an intention. The role envisaged

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<sup>40</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 27 May 2009, Col 2422.

<sup>41</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2457.

for HMIE may lead to it having an excessive influence on decisions the financial, and other, consequences of which it will not have to address. The extent and character of HMIE involvement should be re-examined.”<sup>42</sup>

82. Glasgow City Council was one of the strongest critics of HMIE involvement, expressing concern in its written evidence that HMIE comments on local authority decision-making before any referral to Scottish Ministers could undermine local democracy and be unhelpful to the overall process. Glasgow City Council also objected to HMIE being the equivalent of a consultee and felt the role outlined for it in the Bill went beyond its capacity, function and expertise.

83. However, giving oral evidence to the Committee, Glasgow City Council indicated that it had altered its view on this issue slightly, stating—

“At the start, our big concern was about the clarity of the role and whether HMIE had the capacity to undertake it. We were certainly not questioning HMIE's ability, and we are delighted to have the organisation in our schools, but we were concerned that that role would take HMIE away from its fundamental role of quality improvement and assurance in our establishments. As time has passed, it appears that HMIE's role would be restricted to the educational benefits aspect. Glasgow City Council has no concerns about a contribution in that area, but we are concerned that there could be a conflict between HMIE's being a consultee and an advisor, or being involved in other areas of the proposal that do not relate solely to educational benefits. As the work has developed and we have consulted colleagues, we are becoming much more comfortable with the proposal.”<sup>43</sup>

84. HMIE told the Committee that its focus would be on the quality of the educational provision and, primarily, on the learners, telling the Committee—

“We are set up to be an independent agency and, as I said a moment ago, our principal concern is for the education of children, young people and adult learners. If we are advocating for anyone, it is for all those learners. We carry out school inspections independently of our relationships with the council and ministers, and we have a good track record of demonstrating our independence in educational matters.”<sup>44</sup>

85. The evidence session held with local authorities also raised concerns about the capacity of HMIE to carry out its functions in the Bill. When asked by the Committee if HMIE currently had sufficient resources and skills to undertake the required level of inquiry on educational benefit, a representative from Aberdeenshire Council responded—

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<sup>42</sup> Clackmannanshire Council. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>43</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 20 May 2009, Col 2396-2397.

<sup>44</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 27 May 2009, Col 2425.

“No. It would need additional capacity to do that if the requirement is—as it will be—Scotland-wide [...] I mean in terms both of numbers and experience.”<sup>45</sup>

86. In oral evidence HMIE, in response to these points, stated that it was “confident”<sup>46</sup> that it had sufficient resources to carry out the functions proposed in the Bill and that it was also content with the proposed timescales.

87. The Committee also received evidence that questioned the role HMIE would play in the ministerial call-in process. Some evidence questioned whether there could be a potential conflict of interest in HMIE having an independent role during the consultation phase and later being asked to give advice to Scottish Ministers during any call-in phase. The EIS argued that it was not appropriate for HMIE to have a role in the call-in process given its prior involvement in the consultation phase.

88. In response to questions from the Committee on these points, HMIE stated that, although guidance on HMIE’s role in the call-in process had not yet been finalised, it did expect to provide such advice to Ministers as would be appropriate. HMIE went on to state that it was working on the basis that this advice would be given on a case-by-case basis, and that it would not perhaps be engaged if the call-in was on a purely procedural matter. It did not consider it having a role in two parts of the process as being a conflict of interest.<sup>47</sup>

89. The Cabinet Secretary sought to clarify HMIE’s role in the call in process—

“When a case is referred, I will not require HMIE to produce another report. I will have access to and use the original report on the case. I will still want the opportunity to contact HMIE to clarify points if there are issues, but I will not embark on the process that exists currently in such last-resort cases. HMIE will have a more up-front, local role rather than always advising and providing new information at the time of call-in. Instead, I will use its original report.”<sup>48</sup>

90. The Cabinet Secretary went on to tell the Committee about her confidence in HMIE’s independence—

“HMIE’s independence is a strength of our education system. HMIE should not be afraid to criticise ministers, the Government, local authorities or anyone else, if it has a concern about education in Scotland. HMIE is Government sponsored, but its ability to be critical must be part of its

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<sup>45</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 20 May 2009, Col 2395.

<sup>46</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 27 May 2009, Col 2422.

<sup>47</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 27 May 2009, Col 2430.

<sup>48</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2460.

function. Members of this Government and the previous one will attest to the number of HMIE reports that are critical of Government, as they should be.”<sup>49</sup>

**91. The Committee notes that concerns have been raised in both written and oral evidence about the role of HMIE in the consultation process. The Committee considers the role of HMIE reporting on the educational aspects of a proposal to a local authority to inform that authority’s decision-making to be a helpful one but asks the Scottish Government to examine the concerns expressed to the Committee.**

**92. The Committee notes the concerns raised in evidence regarding HMIE’s role in the call-in process and welcomes the Cabinet Secretary’s clarification of the role.**

*Consultation report and local authority decision*

93. Sections 9 and 10 of the Bill propose that the education authority would prepare a consultation report, taking into account HMIE’s report and all representations made during the consultation period. The authority would also inform those who made written representations of the publication of the report and make it available on its website and at the affected school or other suitable place near the school. The report would also be made available in alternative formats and languages for anyone who reasonably required it.

94. Section 11 of the Bill provides that an education authority could not proceed to implement a proposal, or make a decision to implement, until after a period of three weeks had elapsed following publication of the consultation report.

95. Scottish Government officials stated that the three weeks between publication of the consultation report and making a decision, “allows people to see the council’s report and to continue to have contact with elected members, who will make the decision.”<sup>50</sup> The Committee notes, however, that this is not specified in the Bill or made clear in its accompanying documents.

96. The Scottish Government’s consultation on its original proposals on this issue suggested this period be 28 days. Local authorities argued that this was too long and a period of between 7 and 14 days would be more appropriate. Scottish Government officials explained to the Committee why a three-week period had been decided upon—

“We engaged quite a lot with stakeholders—with the SRSN and with local authorities, which will have to undertake the work. We were conscious that we had to consider the whole package of time and that we should not create a monstrous process that would increase uncertainty for pupils, parents, staff and authorities, so we balanced the number of weeks here and there. In

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<sup>49</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2463.

<sup>50</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2300.

discussion with stakeholders, three weeks was the number on which we agreed.”<sup>51</sup>

**97. The Committee welcomes the additional three-week period between publication of the consultation report and decision making. However, the Committee notes that the opportunity for stakeholders to have continuing contact with elected members during this period is not made explicit, either in the Bill or in its accompanying documentation.**

### **Special provision for rural schools**

98. Sections 12 to 14 of the Bill would require education authorities to have “special regard” to three factors before proceeding to propose and consult on the closure of a rural school. Authorities would be required to consider—

- any viable alternative
- the likely effect on the community
- the likely effect of different travel arrangements to an alternative school.

99. The Policy Memorandum states that the “special regard” for rural schools establishes a presumption that “no rural school will be proposed for closure (nor even the consultation process commence) unless and until these factors have been fully taken into account”.

100. Broad support was expressed both in written and oral evidence for this proposal. However, some felt that proposals affecting rural schools should not be subject to specific additional factors placing a perceived emphasis on community, rather than educational, impact. Comhairle nan Eilean Siar stated in its written evidence—

“The comhairle, most of whose schools would qualify as “rural schools”, notes with some concern the proposal within the Bill to apply different factors for rural school closure proposals, in effect, moving away from an assessment of educational benefits, to the effect on the local community. While the comhairle, in common with other local authorities, would always examine these factors in any case when considering a proposal for closure or discontinuation of education in a rural area, there is an important point of principle in stating that educational benefit to pupils is, in the case of rural schools, only one factor, and not actually a factor to be given particular weight, in assessing whether a school should be closed [...] this could mean that pupils be retained in an educationally detrimental situation, because of factors not relevant to their education.”<sup>52</sup>

101. In its written evidence, the EIS was also concerned about a special provision for rural schools and said that the three additional factors should apply to all schools—

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<sup>51</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2300-2301.

<sup>52</sup> Comhairle nan Eilean Siar. Written submission to the Education, Lifelong Learning and Culture Committee.

“In many parts of the country a local authority will have responsibility for both rural and non rural schools and it is invidious, to say the least, that from a statutory point of view the local authority may be required to treat the closure of two schools within its area in two different ways. In short, the three matters to which the authority must have regard should apply to all proposed closures and not just to those within a rural area.”<sup>53</sup>

102. In response, Scottish Government officials told the Committee—

“The Bill recognises that local schools are often the focal point of community activity. That is true of all communities, but the loss of schools has a much greater impact, proportionately, in rural areas. It also has an impact in urban areas, but rural communities are often more fragile and have fewer alternative community resources on which to fall back. The school is often the only community asset.”<sup>54</sup>

103. The Committee, however, heard some evidence that suggested that community factors may be equally important in urban settings. The Association of Scottish Community Councils was of the view that, “the three criteria should not be used specifically for rural schools.”<sup>55</sup> The SRSN said that “we have great sympathy for urban communities and do not wish to diminish the community impact of a school closure in an urban area.”<sup>56</sup> Professor Neil Kay said that he had “complete sympathy with the notion that in suburbs, and particularly in inner cities, the idea and role of community that is attached to a school can be critical.”<sup>57</sup>

104. The Committee received a significant amount of evidence that discussed the perceived advantages and disadvantages of small/rural schools compared to larger, urban schools. Whilst acknowledging that such issues are not directly relevant to the provisions of the Bill, the Committee heard no evidence to suggest that small or rural schools were, in themselves, detrimental to the educational experience of pupils at such schools.

105. HMIE noted that it had carried out some research on this issue, which demonstrated that the performance of remote rural and accessible rural schools was very similar to the performance of other schools across the country.

106. On the question of the Bill including three additional factors to which education authorities would have “special regard” in respect of rural schools, the Cabinet explained—

“We decided on balance that we should ensure that particular regard is given to rural areas. Initially, we looked at measures only for rural schools.

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<sup>53</sup> EIS. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>54</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2297.

<sup>55</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Col 2365.

<sup>56</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Col 2358.

<sup>57</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2319.

However [...] we introduced a Bill that improves the situation for everybody. It just so happens that particular regard is taken of rural schools. The purpose of the Bill is to improve things for everybody.”<sup>58</sup>

**107. The Committee accepts that additional factors need to be considered in cases where the closure of rural schools is proposed. The Committee notes the evidence that suggested that the three additional factors to be considered for a proposal affecting a rural school could apply to all schools. The Committee recommends that the Scottish Government give further consideration to this matter.**

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

108. The Bill would replace the current system for referring certain local authority decisions for ministerial consent with a power for ministers to “call in” decisions. Currently, school closure decisions are referred for consent only on grounds of:

- distance to the alternative school
- pupil roll being greater than 80% of capacity
- denominational education being affected (this ground for ministerial consent is being retained).

109. The Bill would require a local authority to notify Scottish Ministers if it decided to implement a school closure following a consultation. Ministers would have six weeks to decide whether to call in a decision and during the first three weeks would be required to take account of any relevant representations. There would be no time limit for the ministerial decision. Ministers would call in a local authority decision on the grounds that either the consultation process had not been adhered to or that the local authority had failed to take account of “material considerations” when reaching its decision.

110. Scottish Government officials explained to the Committee—

“Ministers have made it very clear that even under the current arrangements they cannot retake a council's decision. After all, they can never know all the details that the council has been privy to in reaching its conclusion. At the moment, when referrals are made for ministers' consent in the various categories, ministers principally look at the procedures that have been followed in reaching the final decision. The definition of the call-in categories focuses on the consultation procedures, as set out in the Bill, and the decision-making processes.”<sup>59</sup>

111. Most evidence received by the Committee was not in favour of the current automatic referral system and broadly accepted the call-in process as a compromise between varying degrees of ministerial involvement.

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<sup>58</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2469.

<sup>59</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2302.

112. Professor Neil Kay told the Committee—

“It is to be hoped that having the call-in facility will change behaviour and encourage councils to adopt or move towards best practice. In that respect in particular, it is a good thing.”<sup>60</sup>

113. Most local authorities argued that decisions covered by the Bill were most appropriately taken at a local level and therefore locally elected and accountable local authorities should be responsible for them. The view expressed by Inverclyde Council, in written evidence, was typical—

“In terms of the ministerial referral, we would prefer decisions to be taken locally and feel this would be in keeping with the spirit of the concordat<sup>61</sup>. However if this were not to prove feasible we would support the end of automatic referral but with a ministerial right to intervene if due process had not been adhered to by local authorities.”<sup>62</sup>

114. Concern was expressed in evidence to the Committee about the independence of a call-in procedure. In its written evidence to the Committee the SRSN commented—

“In SRSN’s submission to the consultation on the Bill we called for an independent appeal process to be established. That would still be our preferred option and would bring school closures into line with many other aspects of public life. It still seems strange that you can appeal a decision to disallow an individual child’s placement request but you cannot appeal the complete discontinuation of education in a given area.”<sup>63</sup>

115. The Committee notes that one call-in criterion is the Scottish Government’s decision that a local authority has failed to take “proper account of a material consideration”. However, the Bill and its supporting documentation provide no indication of what would constitute a “material consideration”. When questioned on this, a Scottish Government official told the Committee—

“I suppose that a failure “to take proper account of a material consideration” might cover a situation in which the council’s consultation report fails to refer to or ignores a large body of opinion in the consultation responses. The council needs to explain in its final consultation report how the various

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<sup>60</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2321.

<sup>61</sup> Scottish Government (2007). *Concordat between the Scottish Government and local government*. Available at: <http://www.scotland.gov.uk/Resource/Doc/923/0054147.pdf> [Accessed 4 June 2009]

<sup>62</sup> Inverclyde Council. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>63</sup> Scottish Rural Schools Network. Written submission to the Education, Lifelong Learning and Culture Committee.

elements in the consultation responses have been considered and its conclusions reached.”<sup>64</sup>

116. The Cabinet Secretary sought to clarify further what a “material consideration” might be—

“The problem in defining what would be included is that you would either broaden the number of referrals or specify a tick-box list of what would be called in. A material consideration is factual content that clearly and obviously should have been made available at the start of the process.”<sup>65</sup>

**117. The Committee notes the evidence it received that favoured replacing the current automatic referral system. It also notes that the majority of the evidence accepted the proposed call-in process as an appropriate compromise on the level of Scottish Government involvement in what is, essentially, a locally made and accountable decision.**

**118. However, the Committee does have some concern about a call-in criterion being the Scottish Government’s decision that a local authority has failed to take “proper account of a material consideration”. The Committee acknowledges the comments by the Cabinet Secretary and her officials as to what would constitute a “material consideration”, but believes that the Bill and its supporting documentation lack sufficient clarity on this and it would be helpful to clarify this, either in the Bill or in guidance. The Committee therefore asks the Scottish Government to consider how best to proceed on this issue before Stage 2.**

*Ministerial call-in: timescale*

119. The Committee notes that there is no time limit set in the Bill for the call-in process. Scottish Government officials explained—

“We do not expect many cases to be called in. However, if a case were called in, it would be because ministers had concluded that the process was seriously flawed. There would then be a lot of investigation with the council and others [...] because we do not expect many cases to be called in, and because, if a case were called in, things could be complex if there were claim and counter-claim between the council and the community, we have not set a time limit.”<sup>66</sup>

120. Separately, the Bill provides, in section 15(2)(a) that a local authority would be required to notify the Scottish Government of a decision to implement a closure proposal no later than the end of the next working day after making the decision.

121. The City of Edinburgh Council argued that this was not a practical timescale—

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<sup>64</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2302.

<sup>65</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2474.

<sup>66</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2303.

“On referring closure decisions to the Scottish ministers within one day, that timescale can be tight, for example when key members of staff are off. The worry is that the whole process could be challenged because of a failure to meet the one-day timescale. We ask for a greater amount of time to ensure an adequate response.”<sup>67</sup>

122. Aberdeenshire Council supported this view and suggested that councils should have five working days in which to notify ministers of a closure.<sup>68</sup>

**123. The Committee notes that there is no time limit set for the call-in process and notes the Scottish Government’s explanation for this.**

**124. The Committee notes concerns that the requirement for local authorities to notify the Scottish Government of a decision to implement a closure proposal no later than one working day after the decision being made is too short and asks the Scottish Government to consider extending the period to five working days.**

## **Other issues**

### *Transitional arrangements*

125. In order to clarify the position regarding consultations ongoing when the legislation commences, under schedule 3(3) to the Bill, education authorities would have to suspend any consultation on the school estate that is ongoing and where no final decision has been taken, unless the consultation has included the matters set out in sections 1 to 11 of the Bill. If the Bill’s requirements were not met, the consultation process would fall and the education authority would need to start the process again in accordance with the Bill.

126. In cases where a consultation could proceed, and where it concerns a rural school, the education authority would need to ensure that any documents to be published, such as the consultation report, included an explanation of how the requirement to have special regard to the three additional factors had been met.

127. In all cases where consultations could proceed, they would be subject to the new call-in procedures, rather than the current requirements for automatic ministerial consent in certain circumstances.

128. Scottish Government officials sought to clarify the transitional arrangements—

“In summary, once we get to November, and assuming that the Bill is passed, people can start to consult under the new process. Any decision that is taken after commencement in April will have to reflect the new process—following commencement, a decision can be taken only after consultation has taken place under the new process. Councils will have had a number of months to prepare for that. Prior to the passage of the Bill, they will have had

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<sup>67</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report, 20 May 2009*, Col 2408.

<sup>68</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report, 20 May 2009*, Col 2408.

time to see what is coming. Once the Bill is passed, people can start immediately to use the new requirements.”<sup>69</sup>

129. The City of Edinburgh Council expressed concerns about the transitional arrangements in its written evidence to the Committee—

“Transitional arrangements under schedule 3 indicate that if a council has undertaken statutory consultation on a proposal but not yet made a decision at the time the Bill is enacted, then the Bill would apply retrospectively. At worst this would mean the authority would have to re-conduct the entire consultation process, at best it would introduce a delay into the decision making process leaving affected parties in limbo [...] it is requested that the provisions of the Bill only apply to consultation exercises that are yet to be conducted at the point of enactment, rather than retrospective application.”<sup>70</sup>

130. Scottish Government officials outlined why ministers had chosen the transitional arrangements that are outlined in the Bill—

“We looked at a lot of options and discussed them with representatives of the Association of Directors of Education in Scotland and COSLA. Some of the options that we considered were complicated—indeed, some were completely unworkable. However, all the options that we discussed were designed to give councils good notice of the changes that were coming into play and how on-going consultations or those that commenced close to implementation would be affected. The provisions in the Bill are the result of a lot of discussion and a good measure of agreement on the system being workable. Councils have been able to see in advance what is proposed. Broadly speaking, the new system has been well accepted by COSLA and ADES.”<sup>71</sup>

131. Aberdeenshire Council drew the Committee’s attention to two important dates that it would like to be taken into account when transition arrangements are determined—

“The two critical dates for parents in such situations are 30 April, because of school admissions legislation, and the start of the new school year, which differs from one local authority to another but is usually in mid-August. If Parliament were minded to be helpful to local authorities, on behalf of parents, it would keep those two dates in mind when determining the transitional arrangements. That would be welcome.”<sup>72</sup>

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<sup>69</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report, 6 May 2009*, Col 2304.

<sup>70</sup> The City of Edinburgh Council. Written submission to the Education, Lifelong Learning and Culture Committee.

<sup>71</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report, 6 May 2009*, Col 2304-2305.

<sup>72</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report, 20 May 2009*, Col 2410-2411.

**132. The Committee draws the attention of the Scottish Government to the concerns raised by the City of Edinburgh Council and the comments of Aberdeenshire Council regarding transitional arrangements.**

*Provision of Gaelic-medium education*

133. The Committee received a large number of written submissions on the provision of Gaelic-medium education. The central thrust of most of these submissions was that the Bill should give Scottish Ministers powers to instruct local authorities to designate certain schools as Gaelic-medium schools if a majority of parents at the school had indicated, following consultation, that they were in favour of such a move.

134. Responding to questions on whether ministers had a response to the submissions made to the Committee, Scottish Government officials told the Committee—

“It is fair to say that the proposals were not raised in our consultation last year. Our first sight of them was in the published responses to the committee's call for evidence. The Government is considering those responses. Ministers will discuss them, but we have not had much time thus far fully to consider what has been suggested. The short answer is no.”<sup>73</sup>

135. This issue was discussed at the evidence session with local authorities. The City of Edinburgh Council was of the view that this was not a matter for this Bill, saying—

“There is pressure to increase the number of Gaelic-medium places in Edinburgh, but that issue does not necessarily sit within the Bill. In planning for new places, we might be talking about an extension to an existing facility, and the Bill does not apply to that scenario at all. The Bill is not the vehicle for [that] type of discussion.”<sup>74</sup>

136. However, Comhairle nan Eilean Siar expressed support for the proposals—

“There is a place in the Bill for consideration of the way in which Gaelic is delivered in the system.”<sup>75</sup>

137. The Cabinet Secretary commented on this when giving evidence to the Committee—

“The responsibility and the budget for Gaelic-medium education currently lie with the Minister for Culture, External Affairs and the Constitution. I have already had discussions with him on such issues. I am keen that we make progress, particularly on Gaelic-medium education. Given that the Bill is about consultations in relation to schools, our giving rights to one educational

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<sup>73</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2305.

<sup>74</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 20 May 2009, Col 2384.

<sup>75</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 20 May 2009, Col 2385.

area might result in invitations to broaden the Bill's perspective to include a load of other areas, which is where we must be careful about the purposes for which we use the Bill.”<sup>76</sup>

**138. The Committee notes the evidence submitted to it in respect of Gaelic-medium education on this Bill but recognises that the issue is not a matter for consideration as part of its scrutiny of this Bill. The Committee notes the Scottish Government’s intention to consider further the evidence on this issue.**

*Additional funding for rural schools*

139. The Financial Memorandum to the Bill explains that, currently, rural primary schools with fewer than 70 children receive additional funding—

“Specific rural indicators are incorporated into a number of the calculations which make up the current needs-based distribution formula; in particular the rural settlement pattern indicator is based on the size of the population living in settlements of fewer than 1,000 people. Another indicator provides additional funding in respect of each primary school of fewer than 70 pupils in rural areas.”<sup>77</sup>

140. When questioned on whether this additional funding would remain in place, a Scottish Government official said—

“The Government is reviewing the funding mechanism. We do not know any more than that at the moment. The work is ongoing, and something will come out about that in due course but, unfortunately, not at the right time for the Bill.”<sup>78</sup>

141. A representative from the SRSN expressed concern about the future of this additional funding for rural schools, saying—

“It would be bizarre for the Government to introduce a Bill in support of closure as a last resort, while withdrawing the main supplementary method of funding rural schools.”<sup>79</sup>

142. The Cabinet Secretary said that this issue would be included in the Scottish Government’s joint review (with COSLA) of the local government distribution formula—

“The benefits of a review of grant-aided expenditure will be critical [...] I understand that the joint review group is considering not just grant-aided expenditure but the whole system and that it will make recommendations by the end of October 2009. Any changes will be implemented for the local

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<sup>76</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 3 June 2009, Col 2483.

<sup>77</sup> Schools (Consultation) (Scotland) Bill. Explanatory Notes, paragraph 123.

<sup>78</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 6 May 2009, Col 2291.

<sup>79</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report*, 13 May 2009, Col 2370.

government finance settlement [...] Part of the understanding of that and of certain representations that I have made is that funding for the rural dimension in education be considered as part of the GAE review.”<sup>80</sup>

**143. The Committee notes the concerns that were raised about additional funding for rural primary schools with fewer than 70 pupils and supports the Cabinet Secretary’s view that those concerns should be considered as part of the Scottish Government’s joint review of the local government distribution formula.**

*Scottish Government’s consultation*

144. The Bill’s Policy Memorandum provides information relating to the Scottish Government’s consultation prior to introducing the Bill. The consultation document, *Safeguarding our rural schools and improving school consultation procedures – proposals for changes to legislation*<sup>81</sup>, was published on 1 May 2008 and the consultation period ran until 19 September 2008. 185 written responses were received and the Scottish Government also held ten public meetings and deliberative workshops in 12 locations and an on-line debate on the Rural Gateway website.

145. On 3 March 2009, the Scottish Government published a report summarising the consultation responses, *Research on the consultation safeguarding our rural schools and improving school consultation procedures*.<sup>82</sup>

146. The majority of evidence to the Committee was satisfied with the Scottish Government’s consultation. Fife Council’s comments, which were typical, began its written response by—

“Expressing appreciation for the quality of the consultation carried out by the Scottish Government prior to the introduction of the Bill. It was extensive and thorough, it provided a good analysis and report of the responses and there was evidence that thoughtful consideration had been given to responses including those received from local authorities.”<sup>83</sup>

147. East Dunbartonshire Council noted a problem with the Scottish Government’s consultation in its written submission—

“The consultation carried out by the Scottish Government prior to the introduction of the Bill was issued just prior to the schools’ summer holiday

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<sup>80</sup> Scottish Parliament Education, Lifelong Learning and Culture Committee. *Official Report, 3 June 2009*, Col 2482.

<sup>81</sup> Scottish Government. (2008) *Safeguarding our rural schools and improving school consultation procedures – proposals for changes to legislation*. Available at: <http://www.scotland.gov.uk/Publications/2008/04/25131457/0>

<sup>82</sup> Scottish Government. (2009) *Research on the consultation safeguarding our rural schools and improving school consultation procedures*. Available at: <http://www.scotland.gov.uk/Publications/2009/02/25114932/0>

<sup>83</sup> Fife Council. Written submission to the Education, Lifelong Learning and Culture Committee.

period with a response date of September. This reduced the amount of time available to consult with head teachers and parent bodies.”<sup>84</sup>

**148. The Committee considers the consultation conducted by the Scottish Government to have been appropriate. However, the Committee draws the attention of the Scottish Government to the comments made by East Dunbartonshire Council in terms of the timing of the consultation.**

#### POLICY MEMORANDUM

149. Rule 9.3.3(c) of Standing Orders requires a Policy Memorandum to accompany all Bills when introduced. Amongst other purposes, the Policy Memorandum must set out the policy objectives of the Bill.

150. In its call for evidence, the Committee asked for views on the Policy Memorandum. The majority of submissions that commented on this indicated satisfaction with the Policy Memorandum, noting that it had been helpful in clearly setting out the policy objectives.

**151. The Committee notes the comments received in written and oral evidence that the Policy Memorandum had been helpful in setting out the policy objectives of the Bill.**

#### SUBORDINATE LEGISLATION

152. Rule 9.4A of Standing Orders provides that, where an Executive Bill confers powers to make subordinate legislation, a delegated powers memorandum (DPM) must be provided.

153. The Subordinate Legislation Committee considered the DPM and reported to the Education, Lifelong Learning and Culture Committee on 27 May 2009. The report is attached at Annexe B.

**154. The Committee notes the conclusions of the Subordinate Legislation Committee and is content with the provisions in the Bill regarding delegated legislation.**

#### FINANCIAL MEMORANDUM

155. Standing Orders Rule 9.3.2 requires a Financial Memorandum (FM) to be provided to accompany a Bill when it is introduced. The FM must “set out the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise, best estimates of the timescales over which such costs would be expected to arise, and an indication of the margins of uncertainty in such estimates”.

156. The FM for the Bill is included in the Explanatory Notes. The FM estimates costs of £73,000 per annum for the Scottish Government to account for HMIE’s involvement in the consultation process. This is based on HMIE’s own calculations

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<sup>84</sup> East Dunbartonshire Council. Written submission to the Education, Lifelong Learning and Culture Committee.

that the projected 60 annual consultations (44 additional cases) would each require approximately five days of an inspector's time.

157. The FM also sets out costs of £61,000 per annum for local authorities. It is estimated that the additional provisions relating to the consultation process would cost £58,800. Although the provisions set out in the Bill are mostly new, the FM does not cost some of the requirements – such as publishing the proposal papers – because these are currently provided as good practice. The FM estimates that that the cost of setting out how the special factors apply to rural school proposals would be £2,200.

158. At its meeting on 24 March 2009, the Finance Committee agreed to adopt stage 1 scrutiny of the FM. This means that the Finance Committee invited written comments from affected organisations through its agreed questionnaire but did not take oral evidence or agree a report to submit to this Committee. A copy of the letter received from the Finance Committee, together with a link to the written evidence it received, is attached at Annexe C.

159. Ten responses were submitted to the Finance Committee. The majority of submissions were content with the costs set out in the FM but two issues were raised. Three local authorities (Aberdeenshire Council, Fife Council and Moray Council) argued that the FM did not take sufficient account of the financial benefits of closing schools.

160. Aberdeenshire Council also argued that, in rural areas like its own, the costs associated with the consultation process would be likely to be higher given the greater proportion of rural schools.

161. In its submission to this Committee, COSLA argued that the annual costs of the Bill, as introduced, is most likely to be low, “around the four figure mark”.<sup>85</sup>

**162. The Committee notes the broad acceptance of the estimated costs set out in the Financial Memorandum. The Committee recognises, however, that some local authority areas with a higher proportion of small schools may bring forward a greater number of proposals requiring consultation. It calls, therefore, on the Scottish Government to reflect on whether it needs to give this issue further consideration.**

**163. The Committee also notes the comments of some local authorities that the Financial Memorandum did not take sufficient account of the financial benefits of closing rural schools. However, the Committee believes that these potential savings need not be reflected in the Financial Memorandum as they would not directly arise from it.**

## CONCLUSIONS

**164. The majority of written and oral evidence received by the Committee was broadly supportive of the general principles of the Bill, welcoming the**

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<sup>85</sup> COSLA. Written submission to the Education, Lifelong Learning and Culture Committee.

**strengthening of the consultation process for various school changes, including school closures, and increasing transparency and accountability.**

**165. The Committee notes that there were three main areas of contention within that broad support—**

- **The first of these concerned the role of HMIE, which many felt lacked clarity.**
- **Secondly, with regard to the three additional specific factors that local authorities must consider when making proposals affecting rural schools, many felt that, although such schools did often face particular circumstances and challenges, these three factors could apply to all schools across Scotland.**
- **Finally, whilst the majority of evidence agreed that the current system of automatic referral to Scottish Ministers was no longer appropriate and should be replaced, a clear view emerged that the proposed replacement, the ministerial call-in process, lacked clarity particularly in relation to the definition of a “material consideration”, and could create confusion.**

**166. The Committee asks the Scottish Government to consider these issues and respond to the Committee before the commencement of stage 2 of the Bill.**

**167. Overall, the Committee welcomes the Bill’s proposals and, subject to the provision of clarification of the issues noted above, recommends to the Parliament that the general principles of the Bill be approved.**

#### **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

**168. The Committee is content with the general consultation processes as outlined in the Bill and makes specific comment on particular elements elsewhere in this report. The Committee notes that much of the Bill formalises what is currently considered to be best practice amongst many local authorities.**

**169. Throughout evidence taking, the Committee was made aware of different views regarding cost-benefit analysis methods, which raised concerns about what criteria were being used by local authorities in their decision making. The Committee recommends that the Scottish Government encourages local authorities to include a cost-benefit analysis as part of the proposal paper and gives consideration to issuing guidance to support local authorities in preparing such a cost-benefit analysis.**

**170. The Committee supports the inclusion of a proposal paper as part of the consultation process, and considers an educational benefits statement to be an essential part of that. The Committee recommends that the Scottish Government encourage local authorities to include other relevant factors,**

such as condition of school buildings and transport costs, as part of the overall proposal paper as a matter of good practice.

171. The Committee supports the Scottish Government's intention to introduce statutory guidance on the educational benefits statement and recommends that full consideration be given to extending any such guidance to cover the entire proposal paper document.

172. The Committee supports the inclusion of a list of relevant consultees but considers that the Scottish Government needs to give further thought to the practical issues of how to maximise engagement with pupils, staff and parents to ensure the most meaningful possible consultation. The Committee supports the suggestion made by the Cabinet Secretary that Scotland's Commissioner for Children and Young People be asked to advise on methods of engagement with pupils.

173. The Committee recognises that the correction procedures proposed in the Bill, while an important part of the overall consultation process, could involve competing interpretations of data. Overall, however, the Committee is content that the Bill sets out a process for these to be considered transparently.

174. The Committee also notes concerns about local authorities being the adjudicators of allegations of inaccuracies, and possible questions of partiality, but is content that the Bill provides that authorities would be required to make public reasons for all decisions made in response to allegations of inaccuracy. The Committee also acknowledges that the call-in procedure would potentially give consultees a further opportunity to highlight relevant issues to the Scottish Government. The Committee is also satisfied with the details on how the process would work in practice as set out by the Scottish Government.

175. The Committee notes concerns regarding how consultees will be notified of the various parts of the consultation process, including those surrounding the possible use of pupil post. The Committee notes HMIE's current research on this and awaits the final report. The Committee recommends that the Scottish Government consider the evidence submitted to the Committee on this issue in order to achieve the most inclusive, transparent and accessible notification process possible.

176. The Committee believes, on balance, that the proposed six-week consultation period proposed in the Bill is sufficiently long, given the further periods for consideration built in to the overall process.

177. The Committee supports the proposal of holding a public meeting as part of the consultation process and asks the Scottish Government to note the points raised in relation to public meetings in evidence to the Committee. The Committee also asks the Scottish Government to note the proposal that local authorities be encouraged to hold public meetings as early in the process as is appropriate. The Committee agrees with the

**Cabinet Secretary that guidance on conducting public meetings is, on balance, not necessary at this stage.**

**178. The Committee considers that it would be best practice for HMIE staff to attend all public meetings and that they should make every effort to do so. However, the Committee agrees that making attendance a requirement could potentially lead to delays, should HMIE not be able to attend for any reason. In such circumstances, the Committee considers that supplying HMIE with a summary of the meeting, as provided in the Bill, would be appropriate.**

**179. The Committee notes that concerns have been raised in both written and oral evidence about the role of HMIE in the consultation process. The Committee considers the role of HMIE reporting on the educational aspects of a proposal to a local authority to inform that authority's decision-making to be a helpful one but asks the Scottish Government to examine the concerns expressed to the Committee.**

**180. The Committee notes the concerns raised in evidence regarding HMIE's role in the call-in process and welcomes the Cabinet Secretary's clarification of the role.**

**181. The Committee welcomes the additional three-week period between publication of the consultation report and decision making. However, the Committee notes that the opportunity for stakeholders to have continuing contact with elected members during this period is not made explicit, either in the Bill or in its accompanying documentation.**

**182. The Committee accepts that additional factors need to be considered in cases where the closure of rural schools is proposed. The Committee notes the evidence that suggested that the three additional factors to be considered for a proposal affecting a rural school could apply to all schools and draws this to the attention of the Scottish Government. The Committee recommends that the Scottish Government give further consideration to this matter.**

**183. The Committee notes the evidence it received that favoured replacing the current automatic referral system. It also notes that the majority of the evidence accepted the proposed call-in process as an appropriate compromise on the level of Scottish Government involvement in what is, essentially, a locally made and accountable decision.**

**184. However, the Committee does have some concern about a call-in criterion being the Scottish Government's decision that a local authority has failed to take "proper account of a material consideration". The Committee acknowledges the comments by the Cabinet Secretary and her officials as to what would constitute a "material consideration", but believes that the Bill and its supporting documentation lack sufficient clarity on this and it would be helpful to clarify this, either in the Bill or in guidance. The Committee therefore asks the Scottish Government to consider how best to proceed on this issue before Stage 2.**

185. The Committee notes that there is no time limit set for the call-in process and notes the Scottish Government's explanation for this.

186. The Committee notes concerns that the requirement for local authorities to notify the Scottish Government of a decision to implement a closure proposal no later than one working day after the decision being made is too short and asks the Scottish Government to consider extending the period to five working days.

187. The Committee draws the attention of the Scottish Government to the concerns raised by the City of Edinburgh Council and the comments of Aberdeenshire Council regarding transitional arrangements.

188. The Committee notes the evidence submitted to it in respect of Gaelic-medium education on this Bill but recognises that the issue is not a matter for consideration as part of its scrutiny of this Bill. The Committee notes the Scottish Government's intention to consider further the evidence on this issue.

189. The Committee notes the concerns that were raised about additional funding for rural primary schools with fewer than 70 pupils and supports the Cabinet Secretary's view that those concerns should be considered as part of the Scottish Government's joint review of the local government distribution formula.

190. The Committee considers the consultation conducted by the Scottish Government to have been appropriate. However, the Committee draws the attention of the Scottish Government to the comments made by East Dunbartonshire Council in terms of the timing of the consultation.

191. The Committee notes the comments received in written and oral evidence that the Policy Memorandum had been helpful in setting out the policy objectives of the Bill.

192. The Committee notes the conclusions of the Subordinate Legislation Committee and is content with the provisions in the Bill regarding delegated legislation.

193. The Committee notes the broad acceptance of the estimated costs set out in the Financial Memorandum. The Committee recognises, however, that some local authority areas with a higher proportion of small schools may bring forward a greater number of proposals requiring consultation. It calls, therefore, on the Scottish Government to reflect on whether it needs to give this issue further consideration.

194. The Committee also notes the comments of some local authorities that the Financial Memorandum did not take sufficient account of the financial benefits of closing rural schools. However, the Committee believes that these potential savings need not be reflected in the Financial Memorandum as they would not directly arise from it.

**195. The Committee supports the general principles of the Bill and recommends to the Parliament that they be approved.**

**ANNEXE A: EXTRACTS FROM THE MINUTES OF THE EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE**

**6th Meeting, 2009 (Session 3), Wednesday 25 February 2009**

**Decision on taking business in private:** The Committee agreed to consider its approach to the proposed Schools (Consultation) (Scotland) Bill in private at future meetings.

**7th Meeting, 2009 (Session 3), Wednesday 4 March 2009**

**Schools (Consultation) (Scotland) Bill (in private):** The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

**11th Meeting, 2009 (Session 3), Wednesday 22 April 2009**

**Schools (Consultation) (Scotland) Bill - witness expenses:** The Committee agreed to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.2, any expenses of witnesses on the Bill.

**13th Meeting, 2009 (Session 3), Wednesday 6 May 2009**

**Schools (Consultation) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Colin Reeves, Deputy Director, Schools Division, Lynn Henni, Schools (Consultation) (Scotland) Bill and Educational Options Team Leader, Schools Division, and Johanna Irvine, Principal Legal Officer, Scottish Government Legal Directorate, Scottish Government;

and then from—

Mervyn Benford, Information Officer, National Association for Small Schools and Professor Neil Kay.

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**Schools (Consultation) (Scotland) Bill (in private):** The Committee considered written evidence received from local authorities and agreed to invite a number of local authorities to give oral evidence.

**14th Meeting, 2009 (Session 3), Wednesday 13 May 2009**

**Schools (Consultation) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Donald Gunn MacDonald, Vice President, Scottish Parent Councils Association, Sandy Longmuir, Chair, Scottish Rural Schools Network, Nicola Welsh, National Development Officer, Association of Scottish Community Councils, and Judith Gillespie, Development Manager, Scottish Parent Teacher Council.

**15th Meeting, 2009 (Session 3), Wednesday 20 May 2009**

**Schools (Consultation) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1, in a round-table discussion, from—

Bruce Robertson, Director of Education, Learning and Leisure, Aberdeenshire Council, Lindsay Glasgow, Asset Planning Manager, City of Edinburgh Council, Councillor Angus Campbell, Council Leader, Comhairle nan Eilean Siar, Jim Wilson, Head of Performance and Asset Management, Glasgow City Council, and Moira Niven, Chair of the School Estates Sub-Committee of the Resources Committee, Association of Directors of Education in Scotland.

**16th Meeting, 2009 (Session 3), Wednesday 27 May 2009**

**Schools (Consultation) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Annette Bruton, HM Chief Inspector, and Douglas Cairns, HM Assistant Chief Inspector, Her Majesty's Inspectorate of Education;

and then from—

David Drever, President, and Ken Wimbor, Assistant Secretary, Educational Institute of Scotland.

**17th Meeting, 2009 (Session 3), Wednesday 3 June 2009**

**Decision on taking business in private:** The Committee agreed to consider a draft report on the Schools (Consultation) (Scotland) Bill in private at future meetings.

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**Schools (Consultation) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Fiona Hyslop MSP, Cabinet Secretary for Education and Lifelong Learning, Colin Reeves, Deputy Director, Schools Division, and Lynn Henni, Schools (Consultation) (Scotland) Bill and Educational Options Team Leader, Schools Division, Scottish Government.

**18th Meeting, 2009 (Session 3), Wednesday 10 June 2009**

**Schools (Consultation) (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report. Various changes were agreed to, and the Committee agreed to consider a revised draft at its next meeting.

**19th Meeting, 2009 (Session 3), Wednesday 17 June 2009**

**Schools (Consultation) (Scotland) Bill (in private):** The Committee considered a revised draft Stage 1 report. Subject to a number of minor changes, the report was agreed to.

## **ANNEXE B: SUBORDINATE LEGISLATION COMMITTEE REPORT**

The Committee reports to the lead committee as follows—

### **Introduction**

1. At its meetings on 31 March,<sup>1</sup> 5 May<sup>2</sup>, 12 May<sup>3</sup> and 19 May 2009<sup>4</sup> the Subordinate Legislation Committee considered the delegated powers provisions in the Schools (Consultation) (Scotland) Bill at Stage 1. The Committee submits this report to the Education, Lifelong Learning and Culture Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (DPM).<sup>5</sup>

3. The Committee's correspondence with the Scottish Government is reproduced in the Appendix.

### **Delegated Powers Provisions**

4. The Committee considered each of the three delegated powers provisions in the Bill.

5. The Committee found the proposed power in section 20(2), to modify schedule 1 and 2, to be acceptable in principle, and that it is subject to affirmative procedure. The Committee determined that it did not need to draw the attention of the Parliament to the delegated power in section 20(2).

### **Section 20(1) - Ancillary provisions etc.**

6. The Committee sought clarification as to why specific provision to 'elaborate' on any aspect of the procedure or to make provision as to functions had been sought, i.e. in addition to what might be regarded as a relatively 'standard' power under section 20(1) to make ancillary provision (although itself in slightly wider terms than seen in other Bills). The Committee also asked, specifically, for further explanation as to how, and also in what circumstances, the provision contained in subsections (3) and (4), so far as it relates to the power conferred under section 20(1), might be used.

7. The Committee was of the view, having considered the Government's response, that the provision made at section 20(1), taken also with subsections (3) and (4) does undoubtedly differ to an extent from the approach taken to ancillary powers within other Bills, and the particular drafting approach taken here is not wholly explained. However, the justification provided within the Government's response is sufficient for the Committee's satisfaction, having regard also to the fairly narrow and clearly defined purpose of this Bill, which necessarily acts as a

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<sup>1</sup> [Official Report 31 March](#)

<sup>2</sup> [Official Report 5 May](#)

<sup>3</sup> [Official Report 12 May](#)

<sup>4</sup> [Official Report 19 May](#)

<sup>5</sup> [Delegated Powers Memorandum](#)

restriction on the exercise of any powers under it. It was useful also to have obtained, within the reply, some further examples of how the Scottish Government considered the provisions might be used, and these being consistent with how the Committee anticipated the provisions concerned being operated.

8. In terms of procedure, the Committee concluded that the use of negative procedure for non-textual modification is justified, and that affirmative procedure is justified in the context of textual amendment of an Act.

**9. The Committee finds the Scottish Government's response satisfactory and considers the proposed power under section 20(1), and the related provision contained in subsections (3) and (4) acceptable. The Committee is content with reference to procedure being by negative resolution of the Scottish Parliament unless the instrument amends an Act, in which case affirmative.**

### **Section 22(2) - Commencement and short title**

10. Section 22(2) confers a power on the Scottish Ministers to commence the provisions of the Bill (other than sections 19 to 21, which are to come into force on the day after Royal Assent) on the day that the Scottish Ministers by order appoint. Section 22(3) provides that an order under section 22(2) can appoint different days for different provisions.

11. In addition, section 22(4)(a) provides that an order under section 22(2) can include such transitional, transitory or savings provisions as the Scottish Ministers consider necessary or expedient *in connection with commencement*. It can also make different provision for different purposes (section 22(4)(b)). No procedure is attached to the exercise of this commencement power under section 22.

12. At the evidence session on 12th May, Scottish Government officials were asked a number of questions in relation to the provision contained in section 22(4)(a). This was with a view to ascertaining firstly whether the Scottish Government considered that the provision concerned could be used to amend enactments. And if so, and whether or not there was any intention *actually* to use the provision for such purpose, whether clarification of the position should be provided on the face of the Bill. The Committee considered this should be clarified given that the power was not subject to Parliamentary procedure.

13. Government officials acknowledged that, in theory, a commencement power of the nature provided at section 22 could be used to amend other enactments. However, they stated that there was no intention of using the power for that purpose, and nothing was in contemplation.

14. Reference was made to the transitional and savings provisions which have, already, been included in Schedule 3 to the Bill, none of which transitional or savings provisions amend enactments. It was stated that if there had been any intention or need to amend enactments under a commencement power (as contained in section 22) then the opportunity would have been taken to deal with this in Schedule 3.

15. The Scottish Government officials did not consider that it would be appropriate to make specific provision in the Bill to the effect that it would not be used to amend enactments. They stated that Bills are usually concerned with setting out rights and duties. They argued that it would not be usual to set out, on the face of the Bill, what would effectively amount to a statement of what a particular provision would *not* be used for.

16. The evidence session assisted the Committee in clarifying the Scottish Government's position in relation to section 22(4). The Committee was content with the reassurance provided by officials. The Committee noted in particular that there was no intention to use, and no apparent need to use, the commencement power for the purpose of amending any enactments.

17. That said, while it might not be usual or common to amend primary legislation using a transitional or saving power, it was noted that it would be possible to do so. An amendment of this nature could have significant implications for persons affected by it. The Committee is of the view that should this to be done, as officials indicated is possible, albeit unlikely, then it is at least arguable that such amendment should be subject to parliamentary scrutiny. However, the Committee takes reassurance from remarks made by officials that the power could not be used for wider purposes, such as amending other areas of education legislation, and would need to be sharply focused on the commencement of this Bill and on the provision that is necessary for its commencement.

18. The Committee therefore takes the view, after taking account of the evidence provided by officials, that sufficient reassurance has been obtained as to the Government's position in relation to section 22(4). The Committee was satisfied that comprehensive responses have been provided in relation to the points probed, and which are a matter of record. While acknowledging that these have no absolute, binding effect, within the context of what is a Bill with a narrowly defined purpose, and a provision which is concerned with commencement issues, the Committee considers that the position has been reasonably explained and the Government's position clarified to an extent that the Committee is content.

**19. The Committee finds the further clarification provided by the Scottish Government in relation to the proposed power under section 22 to be satisfactory, such that it is content with the power as set out in that section, and that on the understanding that the power in section 22 to amend enactments is to be construed strictly it is not subject to parliamentary procedure.**

## **APPENDIX**

### **Points raised in letter to Scottish Government**

#### **Section 20(1) - Ancillary provisions etc.**

The Committee asks the Scottish Government why the power under section 20(1) to make ancillary provision makes specific reference to the ability to “elaborate” on any aspect of the procedure or to make provision as to functions, and in particular to provide further explanation as to how and in what circumstances it is considered that the provision contained in subsections (3) and (4), so far as it relates to the power conferred under section 20(1), might be used.

#### **Section 22(2) - Commencement and short title**

The Committee seeks clarification as to the provision contained in section 22(4)(a), with particular reference to what might be contemplated by the phrase ‘in connection with the commencement of this Act’ and for the Scottish Government to explain whether it is considered that such provision may amend other enactments, and if so, why no procedure is justified for such an order given the approach in section 20(6)(b).

### **Response from Scottish Government**

#### **Schools (Consultation) (Scotland) Bill at stage 1**

##### Section 20 (1) - Ancillary provisions etc

The regulation making provision in section 20(1) is confined to matters considered necessary or expedient for the purposes of or in connection with the Bill. Much of the Bill is concerned with establishing a new regime of consultation and decision making processes. The detail of such processes is often left to regulation but in this case, because the Bill is so focused on process, it was considered important that the substantive content of the new processes should be set out on the face of the Bill. Section 20(3) and (4) provide though for regulations to elaborate on any aspect of the processes in the first 17 sections of the Bill, or to include provision as to functions – but only of education authorities or the Scottish Ministers – and only in relation to this Bill. This is in line with the OED meaning of “elaborate” of adding more detail to something already said. These are essentially “future proofing” provisions. The Bill as drafted specifies sufficient detail concerning the new processes as to be self standing and operational without ‘requiring’ the making of regulations. Indeed, there is no immediate intention to make such regulations.

It may be though, either during Parliamentary consideration of the Bill or after commencement (as experience grows of how the new legislation is working in practice), that it is considered appropriate to elaborate on some aspect of the processes, at a level of detail more appropriate to subordinate legislation not least because such provision may require amendment from time to time to allow for changes in practice. Regulations would be likely to place new responsibilities, duties or functions on local authorities or the Scottish Ministers, as to how they are

required to handle or conduct aspects of the processes. The Committee asks how and in what circumstances the provision contained in section 20(3) and (4) might be used. An example was given in the Delegated Powers Memorandum of specifying in greater detail how education authorities should notify consultees of proposals under section 6 of the Bill. Other examples might include making further provision elaborating on the detail of the content of proposal papers or consultation reports under sections 4 or 10, or as to their publication and availability under sections 3 or 9, or as to when or where or how public meetings should be held under section 7.

#### Section 22(2) - Commencement and short title

Because consultation and decision making processes under the existing 1981 Regulations can currently span periods of several months it was considered a priority and matter of some importance that the Bill should signal clearly from the outset how it was intended that local authority consultations that straddled or might otherwise be impacted by the Bill's commencement, should be affected and dealt with. Therefore, although Bills often leave all transitional, transitory and saving provisions to be spelt out in a commencement order, in this case explicit such provisions are set out in Schedule 3. The purpose in so doing is to enable authorities to consider how best to plan and schedule consultations and to enable full Parliamentary engagement in the detail of the provisions. The intention was to ensure that the prospective change in legislation should not result in a period of time during which authorities could in effect not plan and engage in consultations because of uncertainty as to what would happen if the consultation and decision making processes were still under way at the time of the Bill's commencement.

The Committee seeks clarification as to the inclusion also in the Bill of the provision in section 22(4)(a). This is intended to allow for the possibility that as commencement approaches, there may be need to make provision which is additional to the arrangements set out in Schedule 3 in order to ensure that all circumstances which might obtain at the time of commencement are covered. The current 1981 Regulations specify 23 kinds of proposal which must be consulted upon, many of which are only rarely used and so there is little or no experience of what they may in practice entail. If such a rarely-conducted consultation were to be in progress at the time of commencement, that could occasion use of the provision in 22(4)(a), as indeed could some unforeseen aspect of any consultation underway at that time – something which might only become apparent relatively shortly before commencement, and which would warrant being specifically addressed in some form of additional transitional, transitory or saving provision. It is not considered that the 22(4)(a) provision would require direct amendment to the existing 1981 Regulations or other enactments. And it can be noted that the transitional, transitory and saving provision in paragraphs 3 to 6 of schedule 3 do not so amend any enactments.

**ANNEXE C: LETTER FROM THE FINANCE COMMITTEE**

1. The Finance Committee considered its approach to the Financial Memorandum of the above bill and agreed to adopt level 1 scrutiny.

2. This level of scrutiny is applied where there appears to be minimal additional costs as a result of the legislation. Applying this level of scrutiny means that the Committee will not take oral evidence, nor will it produce a report. It will, however, seek written comments from relevant organisations through its agreed questionnaire, and then pass these comments to the lead committee.

3. All submissions can be viewed via this link (53KB pdf):

<http://www.scottish.parliament.uk/s3/committees/finance/financialMemo.htm>

Finance Committee  
28 May 2009

## **ANNEXE D: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE**

### **13<sup>th</sup> Meeting, 2009 (Session 3), Wednesday 6 May 2009**

Written evidence

[Mervyn Benford](#)

Oral evidence

Colin Reeves, Deputy Director, Schools Division, Lynn Henni, Schools (Consultation) (Scotland) Bill and Educational Options Team Leader, and Johanna Irvine, Principal Legal Officer, Scottish Government.

and then from—

Mervyn Benford, Information Officer, National Association for Small Schools and Professor Neil Kay.

### **14<sup>th</sup> Meeting, 2009 (Session 3), Wednesday 13 May 2009**

Written evidence

[Scottish Rural Schools Network](#)  
[Scottish Parent Teacher Council](#)

Oral evidence

Donald Gunn MacDonald, Vice President, Scottish Parent Councils Association, Sandy Longmuir, Chair, Scottish Rural Schools Network, Nicola Welsh, National Development Officer, Association of Scottish Community Councils, and Judith Gillespie, Development Manager, Scottish Parent Teacher Council.

Supplementary written evidence

[Scottish Rural Schools Network](#)  
[Scottish Parent Teacher Council](#)

### **15<sup>th</sup> Meeting, 2009 (Session 3), Wednesday 20 May 2009**

Written evidence

[Aberdeenshire Council](#)  
[City of Edinburgh Council](#)  
[Comhairle nan Eilean Siar](#)  
[Glasgow City Council](#)  
[ADES](#)

Oral evidence

Bruce Robertson, Director of Education, Learning and Leisure, Aberdeenshire Council, Lindsay Glasgow, Asset Planning Manager, City of Edinburgh Council, Councillor Angus Campbell, Council Leader, Comhairle nan Eilean Siar, Jim Wilson, Head of Performance and Asset Management, Glasgow City Council, and Moira Niven, Chair of the School Estates Sub-

*Education, Lifelong Learning and Culture Committee, 7th Report, 2009 (Session 3)*  
— *Annexe D*

Committee of the Resources Committee, Association of Directors of Education in Scotland.

Supplementary written evidence  
[Comhairle nan Eilean Siar](#)

**16<sup>th</sup> Meeting, 2009 (Session 3), Wednesday 27 May 2009**

Written evidence  
[Her Majesty's Inspectorate of Education](#)  
[Educational Institute of Scotland](#)

**Oral evidence**

Annette Bruton, HM Chief Inspector, Douglas Cairns, HM Assistant Chief Inspector, Her Majesty's Inspectorate of Education, David Drever, President, and Ken Wimbor, Assistant Secretary, Educational Institute of Scotland.

**17<sup>th</sup> Meeting, 2009 (Session 3), Wednesday 3 June 2009**

**Oral evidence**

Fiona Hyslop MSP, Cabinet Secretary for Education and Lifelong Learning, Colin Reeves, Deputy Director, Schools Division, and Lynn Henni, Schools (Consultation) (Scotland) Bill and Educational Options Team Leader, Scottish Government.

## **ANNEXE E: OTHER WRITTEN EVIDENCE**

Aberdeen City Council  
Association of Head Teachers and Deputes Scotland  
Association of Teachers and Lecturers Scotland  
Beaton, Murdo  
Bòrd na Gàidhlig  
Boyd Robertson, A G  
Campbell, Allan  
Catholic Education Commission  
Children in Scotland  
Church of Scotland - Church and Society Council  
Clackmannanshire Council  
Comann nam Pàrant  
Consumer Focus Scotland  
COSLA  
Deiseal Ltd  
Drysdale, Sheila  
Dumfries and Galloway Council  
East Dunbartonshire Council  
East Renfrewshire Council  
Educational Institute of Scotland  
Fèisean nan Gàidheal  
Fife Council  
Govan Law Centre  
Inverclyde Council  
Iwase, Hisami  
Langan, Joyce  
Macdonald, Angus John  
Macdonald, Kenna  
Macdonald, Norman  
Macdonald, Stuart  
McDonald, Susan  
Mhoireach, Ceitidh  
Moray Council  
Moray Forum  
Morrison, Alasdair  
Nicholson, Julie  
Nicholson, Sandy  
Scotland's Commissioner for Children and Young People  
Scottish Countryside Alliance  
Scottish Natural Heritage  
Scottish Youth Parliament  
Sime, Dr Julie-Ann  
Skills Development Scotland  
South Lanarkshire Council  
Stewart, Donald William  
Turner, Dr Allan R  
Turner, William J  
West Dunbartonshire Council

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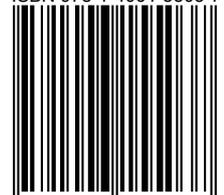
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