



School Closure Review Panels

DECISION AND REASONS

by

THE SCHOOL CLOSURE REVIEW PANEL

PANEL MEMBERS: PATRICIA QUIGLEY (CHAIR), CHARLES BESTWICK; HELEN MCGHEE

with reference to

HIGHLAND COUNCIL'S DECISION TO CLOSE DUNVEGAN PRIMARY SCHOOL AND NURSERY CLASS, STRUAN PRIMARY SCHOOL AND NURSERY CLASS, KNOCKBRECK PRIMARY SCHOOL AND NURSERY CLASS AND EDINBANE PRIMARY SCHOOL AND NURSERY CLASS

**DECISION FOLLOWING REVIEW BY THE SCHOOL CLOSURE REVIEW PANEL
IN TERMS OF SECTION 17B and 17C OF THE SCHOOLS (CONSULTATION) (SCOTLAND) ACT
2010**

29 June 2015

Decision

1. Following a thorough review of the information contained in all of the documents received from the Scottish Ministers, together with additional information provided by Stakeholders and additional submissions in the form of a letter from Highland Council to the Panel Convener, dated 12 June 2015, and having looked at the totality of what has been considered by Highland Council, the Panel has concluded that Highland Council has not fulfilled its obligations under the 2010 Act. This consideration is detailed below. Accordingly, the School Closure Review Panel refuses to consent to Highland Council's proposal, in accordance with section 17C(1)(a) of the 2010 Act.

Background

2. I refer to the Scottish Government's letter of 1 May 2015, informing the Director of Care and Learning of Highland Council of the Scottish Ministers' decision to call-in, under both sections 17(2)(a) and 17(2)(b) of the Schools (Consultation) (Scotland) Act 2010 ("the 2010 Act") Highland Council's decision to close Dunvegan Primary School and Nursery Class, Struan Primary School and Nursery Class, Knockbreck Primary School and Nursery Class and Edinbane Primary School and Nursery Class.
3. I also refer to the letter, also dated 1 May 2015, by the Scottish Government to the Convener of the School Closure Review Panels, as required under section 17A(2) of the 2010 Act, in order for him to constitute a School Closure Review Panel to review the proposal and reach a decision in terms of sections 17B and 17C of the 2010 Act.
4. The Convener of the School Closure Review Panels constituted a School Closure Review Panel (Patricia Quigley, Chair, Charles Bestwick, Panel Member and Helen McGhee, Panel Member) to review Highland Council's proposal under section 17B(1) of the 2010 Act. The Panel was convened on 7 May 2015 and Highland Council were notified by the Convener on the same date that a Panel had been constituted to conduct the necessary Review of Highland Council's decision.
5. The Panel must notify Highland Council of its decision within the period of 8 weeks, beginning with the day on which the Panel is constituted, all in terms of section 17C(5) of the 2010 Act

(or, if necessary, a further 8 weeks). That date is Thursday 2 July 2015 and, accordingly, this decision by the Panel is within the statutory timescales.

6. The Panel was supplied with the following documents from the Scottish Ministers:
 - i. Highland Council's proposal paper
 - ii. Highland Council's Consultation Report with Appendices 1-11
 - iii. Representations received from Stakeholders
 - iv. Further information requested and response from Education Scotland
 - v. Further information requested and response from Highland Council
 - vi. Correspondence regarding Section 70 Complaint with regard to Edinbane Nursery
 - vii. The Scottish Government's letter to Highland Council calling in the decision, dated 1 May 2015
 - viii. A letter dated 12 June 2015 to the Panel Convener from Highland Council's Director of Care and Learning and Chair of Highland Council's Education Children and Adult Services Committee in the form of further observations to help inform the Panel's decision.

The 2010 Act and its application at the relevant time and date

7. In undertaking its task, the Panel considered the legal position with regard to whether the Panel's decision should be predicated on the 2010 Act as fully amended and also whether Highland Council's decision of 12 March 2015 should have taken into account the 2010 Act as fully amended. Having carried out this task by studying the legislation, it was evident that the Panel's role was to review the decision reached by Highland Council in light of the legislation in force at the relevant time. The changes made to the 2010 Act by the Children and Young People (Scotland) Act 2014 came into force in a number of tranches, with the majority of provisions, including the rural schools provisions, coming into force on 1 August 2014. Article 5 of the Children and Young People (Scotland) Act 2014 (Commencement No.2, Transitional and Transitory Provisions) Order 2014 makes it clear that the amendments made to the 2010 Act by section 80 of the 2014 Act (special provision for rural school closure proposals) do not apply in any case where an education authority has published a proposal paper before 1 August 2014 in relation to a rural school closure proposal.
8. In the case before this Panel, Highland Council's proposal was made prior to 1 August 2014. It is thus clear to the Panel that Highland Council was not obliged to comply with the new rural schools provisions. The Panel has kept this in mind in coming to its decision as to whether or not Highland Council has fulfilled its obligations under the 2010 Act. The Panel has had regard to the law which pertained at the time the proposal was made and has specifically ignored sections 11A, 12A and 13 which sections were not in force at the relevant time. The Panel has proceeded upon the assumption that it was not Highland Council's duty to comply with these sections.

Guidance

9. In conducting its review the Panel has had due regard to the Statutory Guidance on the 2010 Act.

Statutory Task

10. It has been the task of this Panel to review Highland Council's decision to determine whether Highland Council has complied with the statutory requirements imposed on it by (or under) the 2010 Act, so far as they are relevant in relation to the closure proposals in terms of sections 17(B)(1)(a) and (b) of the 2010 Act.
11. It is clear from Scottish Government's letter to Highland Council dated 1 May 2015 that it was the view of the Scottish Ministers that Highland Council may have failed in a significant regard to comply with the requirements imposed on it by (or under) the 2010 Act, so far as they are relevant in relation to the closure proposal (in terms of section 17(2)(a) of the 2010 Act) and

also that it may have failed to consider (or take proper account of) a material consideration relevant to its decision to implement the proposal (in terms of section 17(2)(b) of the 2010 Act).

Grounds for call-in

12. The call-in decision was taken on 1 May 2015 and the Scottish Government wrote to Highland Council on that date setting out the grounds that would be considered by the Panel in reviewing the proposal and reaching a decision in terms of sections 17B and 17C of the 2010 Act. There were three main areas of concern.
13. Firstly, the Scottish Ministers had concerns about Highland Council's roll projections for the proposed new Dunvegan Primary School. It appeared to be the case that Highland Council had started informal consultations with parents from Edinbane, Knockbreck and Struan with regard to dual zoning or other alternatives which could provide families with other options. There was therefore some uncertainty with regard to the accuracy of the roll projections at the proposed new school, given Highland Council's ongoing consideration into potential amendments to the existing catchment areas. The Scottish Ministers had concerns that there was a possibility of the new Dunvegan Primary School not having at least three classes. Given that the projected educational benefits set out in the Highland Council's Educational Benefits Statement placed heavy reliance on the new Dunvegan Primary School having at least three classes, the Scottish Ministers were concerned that the projected educational benefits might not be achieved. There was further concern, under section 12 of the 2010 Act, that Highland Council might not have considered fully the viable alternatives to closure available to it. Ministers were concerned that Highland Council may have only considered options that would deliver a school of 3 classes or more for all the pupils in the area and that this might not necessarily be the only option that would result in educational benefit.
14. Secondly, it was not clear to the Scottish Ministers that Highland Council had given special regard to the factors (the rural factors) set out in section 12(3) of the 2010 Act, in so far as they related to the closure of three nursery classes at Edinbane, Knockbreck and Struan. In particular, there was concern that the proposal could place a significant travel burden on both families and pre-school age children in the Edinbane, Knockbreck and Struan catchment areas and involve potential disruption of access to provision of early education and childcare in one or more of the locations irrespective of the closure of the school.
15. Thirdly, the Scottish Ministers had concerns that the Council may have under-estimated travel times to the proposed new Dunvegan Primary School for some pupils and, in any event, the evidence with regard to travel times in the proposal paper was insufficiently detailed. This suggested to the Scottish Ministers that Highland Council may have failed to consider a material consideration relevant to its proposal, which would be a failure under section 17(2)(b) of the 2010 Act.
16. The Panel has reviewed the school closure decision in line with section 17B(1) of the 2010 Act, by consideration of (i) whether Highland Council has failed in a significant regard to comply with the requirements imposed on it by (or under) the 2010 Act so far as they are relevant in relation to the proposal; and (ii) whether Highland Council has failed to take proper account of a material consideration relevant to its decision to implement the proposal.

Review

17. In terms of section 17C(1) of the 2010 Act, following its review of the closure proposal, the Panel may refuse to consent to the proposal, refuse to consent to the proposal and remit it to the education authority for a fresh decision as to implementation, grant consent subject to conditions or grant consent unconditionally. The Panel is mindful that, in terms of section 17C(4), it may refuse to consent to the proposal under subsection (1)(a) or (b) of section 17C of the 2010 Act only if the Panel finds either or both of the following:
 - (a) That the education authority has failed in a significant regard to comply with the requirements imposed on it by (or under) the 2010 Act so far as they are relevant in relation to the proposal,

(b) That the authority has failed to take proper account of a material consideration relevant to its decision to implement the proposal.

18. The Panel has reviewed the matters in relation to the three main areas outlined in the Scottish Government's call-in letter to Highland Council, dated 1 May 2015.

Roll Projections, Catchment Areas and Viable Alternatives to Closure

19. Highland Council's decision of 12 March 2015 included a fourth proposal which was completely absent from both the Proposal Paper and the Consultation Report. That fourth proposal was to initiate a new consultation to consider dual zoning for any family who may wish to consider attending Carbost or MacDiarmid Primary Schools. It seems to the Panel that there was no mention of dual zoning in the original Consultation Report nor was there mention of the possibility that parents might elect to have their children attend Carbost or MacDiarmid Primary Schools rather than the proposed new amalgamated community Primary School on a new site in the village of Dunvegan.

20. Indeed, it is clear from the Caledonian Economics Report of 12 May 2014 (prepared on the instruction of Highland Council) that the only proposal for the future education of children at the existing Dunvegan, Struan, Knockbreck and Edinbane Primary Schools was to be in the proposed new amalgamated community Primary School on a new site in the village of Dunvegan. It is clear from the Caledonian Economics report that an Options Shortlist was drawn up and a filtering process carried out "to identify those options which appeared to be most reasonable and viable and which showed the greatest potential to deliver educational benefits and to enhance the overall quality and standard of the school estate".

21. Two short listing tests were applied to thirteen different options (Options A-M). Table 7-1 on pages 28 and 29 of the Report showed the results when the two tests were applied to all the options. The Caledonian Economics Report found that "from the above analysis it is clear that Idea M (the option to build a new school around Dunvegan, to close Knockbreck and merge with Dunvegan, to close Edinbane and Struan and merge all or part of the catchments with Dunvegan and the remainder of the catchments with either MacDiarmid or Carbost respectively) is the most reasonable and viable option and the one therefore which merits being explored further".

22. The Panel is concerned that the Report contained very little analysis and no balancing exercise setting out the advantages and disadvantages of the various alternatives. The Panel makes this point particularly in light of the fact that some of the alternatives were in fact found by Caledonian Economics to provide educational benefits. It does seem to the Panel that the other alternatives were sifted out by Caledonian Economics at an early stage and were not explored further. The only option examined in detail was the idea of a new school in Dunvegan. The Panel notes that the options I (to close Edinbane and merge with Dunvegan), option J (to close Edinbane and merge with MacDiarmid) option K (to close Edinbane and merge with Dunvegan, perhaps the Eastern part of its catchment going to MacDiarmid) were all options found by Caledonian Economics could provide educational benefits. However, they were not found to merit being explored further.

23. In its letter dated 12 June 2015 to the Convener of the School Closure Review Panel, Highland Council has drawn the Panel's attention to section 7 of the Options Appraisal Report (Appendix 1B to the Final Report). According to Highland Council, a wide range of alternatives were considered and evaluated on the basis of clearly defined criteria. Highland Council has stated in its letter that "each of the identified alternatives would be considered viable in one sense or another". According to Highland Council, these were properly evaluated and the one delivering the greatest educational benefit was the one that was proposed.

24. The Panel finds that the two tests applied to the options / alternatives ruled out those which did not deliver a school with at least three classes. That does concern the Panel, given the acknowledgement by Frank Newell (of Caledonian Economics) at the Public Meeting at Dunvegan Community Hall on 16 June 2014 that there was no clinical data to show that three classes were better for pupils. According to Mr. Newell, there was only a "general consensus

of opinion". Mr. Newell said at that meeting "If you are looking for data then we don't have clinical data. We have the opinion of the people in whose trust you put your children in every day of their school life. We have the opinions of the professionals in each of the areas where we have worked, who are the most experienced professionals in that area, and while it is not scientific study one would have thought the opinion of the Head Teachers in an area, and generally across Scotland, would be regarded as a very important opinion and one which carries some weight".

25. It would appear that the reason for using the three class test was that it was believed that significant educational benefits were believed to accrue when a school reaches this level, as explained in sections 9 and 10 of the Caledonian Economics report. A Workshop was held in Portree in February 2014 to obtain a professional view on the educational advantages that might be delivered by a new build school in line with Idea M above compared to the existing configuration. It would appear that the primary conclusion of the workshop was that the suggested new school could reasonably be expected to deliver a wide range of very valuable long term educational benefits to pupils on a stable and sustainable basis and that, therefore, this should be considered the "preferred option". The Panel has noted that all Primary School Head Teachers in the Portree High School ASG were invited to participate in the workshop. However, according to paragraph 9.2 of the Caledonian Economics report, some of these Primary School Head Teachers were not available for a variety of reasons. Unfortunately, the report does not give any further detail here. However, what is clear is that only five Head Teachers volunteered to take part. According to the Report, this "represented a very significant body of professional wisdom and knowledge with experience of working in many schools of a range of sizes across Skye, the Highlands and Overseas". In the view of the Panel, five out of a possible thirteen Primary School Head Teachers does not even give what could be considered a representative view of Primary School Head Teachers in the area. In the Panel's view, the opinions of five Head Teachers, no matter how genuinely held, should not form the main basis of the whole proposal to close four rural Primary Schools which may fall short of the desired three class ideal. The Panel does not accept that the wide range of possible viable alternatives to closure were properly evaluated at all.
26. It seems to the Panel that the decision on which of the thirteen options showed the greatest potential to deliver educational benefits was made at the outset such that only one proposal / option was put out for public consultation. In a sense, views were being sought between the maintenance of the status quo and the proposed amalgamated new build school in Dunvegan. This is clear from the surveys carried out by Highland Council in carrying out a review of education provision and seeking views on a range of ideas intended to improve the schools in North West Skye. This is at Appendix 1B(iii) of the Consultation Report where it is clear that views were sought on two ideas only. The first was Idea A which was to maintain Dunvegan, Edinbane, Knockbreck and Struan Primary Schools to existing standards in their current locations and Idea B which was to merge Dunvegan, Edinbane, Knockbreck and Struan to establish a new build school in Dunvegan.
27. It is thus clear to the Panel that Highland Council did not have special regard to other viable alternatives to the closure proposal. At Response 41 in the Consultation Report, Highland Council indicated that the option of merging the whole of the catchment area of Struan with that of Carbost Primary was one of those considered by Caledonian Economics as part of the option appraisal and original Proposal Paper. In the view of the Panel, there is an element of disingenuity about this statement. Whilst this option did appear as Option C in the options shortlist, it was immediately sifted out as it would not meet the three - class ideal.
28. Section 12(2) of the 2010 Act was in force at the date of Highland Council's proposal. This placed upon Highland Council a duty to have special regard to the factors mentioned in section 12(3) of the 2010 Act. It is the Panel's view that section 12(2) of the 2010 Act uses the word "special" for a particular purpose. If the word "special" is to have its ordinary meaning, it must mean that the education authority in question must have more than a fleeting consideration of any viable alternative to the closure proposal. According to the Oxford English Dictionary, "special" means "better, greater or otherwise different from what is usual". It seems to the Panel that it must have been the intention of the Scottish Parliament to expect an education authority (or organisation instructed by the education authority) to do more than merely list all the viable

alternatives to the closure proposal and then rule them out at the outset on the grounds that they do not meet the requirements of certain tests. In particular, the Panel has concerns that, in this case, the initial filtering process which was carried out to develop a shortlist of options for consideration was done to avoid the commitment of time, energy and resources to exploring all the options in detail. This is stated at section 7.2 of the Caledonian Economics Report to be the basis on which the options appearing to be most reasonable and viable was drawn up. Whilst the Panel has some sympathy with the view that some of the options may not have merited a great deal of consideration, it is clear that there were several options in the Options Shortlist which were stated to provide educational benefits. It is therefore the decision of the Panel that Highland Council did not have special regard to any viable alternative to the closure proposal and, accordingly, was in breach of section 12(2) of the 2010 Act.

29. There is a further reason why the Panel considers that Highland Council was in breach of section 12(2) of the 2010 Act. This concern arises from the various factors which were considered by the Head Teachers in the workshop which was held in Portree in February 2014. These factors numbered twenty-eight and were in three groups. These were firstly "in the classroom", secondly "beyond the classroom", and thirdly "beyond the school". The results of the Qualitative Assessment of the options are set out in section 10 of the Caledonian Economics Report. According to the summary at section 10.5 of the Report, the workshop gave the twenty-eight factors and the three groups of factors equal consideration and treated them as being of equal importance. However, the Summary in section 10.5 is that "it would be natural to look first to the "in the classroom" and "beyond the classroom" factors to provide an indication as to which of the ideas should be the preferred option". This statement is then followed in the next section (10.6) by the statement that "the primary conclusion of the workshop is that the suggested new school could reasonably be expected to deliver a wide range of very valuable long term educational benefits to pupils on a stable and sustainable basis and therefore that this should be considered the "preferred option"".
30. It is the Panel's decision that the "Beyond the School" factors were not really considered appropriately and in fact were dismissed with no explanation. These factors were community identity, interaction with the community, travel distance, time, risk and impact on the community, community use of facilities, wraparound care and planned housing development. It is clear from figure 10-3 in the Caledonian Economics Report that participants in the workshop felt that the new school would be slightly worse than the existing arrangements on three factors. These were community identity, interaction with the community and travel distance, time, risk and impact on the community.
31. According to section 12(2) of the 2010 Act, an education authority must have special regard also to the factors mentioned in subsection 3(b) and (c). These factors are the likely effect on the local community in consequence of the proposal (if implemented) and the likely effect caused by any different travelling arrangements that may be required in consequence of the proposal (if implemented). These factors were the very factors which were found by the participants in the workshop would have a negative effect on the local community were the new school to go ahead. It is the Panel's decision that the "Beyond the School" factors were in effect disregarded in determining which of the ideas should be the preferred option. Once again, the Panel is of the view that Highland Council did not have special regard to the rural factors set out in section 12(3) of the 2010 Act. As the duty to consider these rural factors is mandatory in terms of the legislation, the Panel finds that Highland Council has failed in a significant regard to comply with requirements imposed on it by (or under) the 2010 Act so far as they are relevant in relation to the proposal.
32. The Panel finds that these failures are significant and strike at the heart of the whole consultation process. As such, the Panel is of the view that the failures are of such significance that they cannot be resolved through the imposition of conditions or by remitting the proposal to Highland Council for a fresh decision as to implementation.
33. Finally, the Panel finds it a matter of some regret that Highland Council have only recently started informal consultation with parents with regard to dual zoning or other alternatives to provide parents of Edinbane, Knockbreck and Struan possible choice with regard to which school their children may attend. In a response to a query from Scottish Government, Highland

Council have stated that discussions are at an early stage and have considered eligibility in both the shorter-term (current pupils and siblings only) as well as longer-term options. Subject to the outcome of these discussions, Highland Council have stated that they would anticipate providing free transport to pupils whose parents elected to send their children to the applicable school other than Dunvegan. It would appear that discussions are at an early stage and no deadline for conclusion has yet been set.

34. The Panel finds it regrettable that Highland Council has already agreed to discontinue all education provision at the existing Dunvegan, Struan, Knockbreck and Edinbane Primary schools whilst these informal discussions are at such an early stage. It does suggest to the Panel that children and families were not consulted on an important issue involving the future of the childrens' education until after Highland Council made their final decision. Moreover, it seems to the Panel that, until the new consultation to consider dual zoning has been finalised and the views of families known, it is not possible to know the likely effect on the local community in consequence of the closure proposal (if implemented). This factor is one of the factors for rural closure proposals which an education authority must have special regard to in terms of section 12(3)(b) of the 2010 Act.
35. It seems to the Panel that, until this latest consultation on dual zoning or other alternatives has been concluded, it cannot be known how many pupils from the three smaller primary schools will move elsewhere. It follows that it cannot be known that the level of placing requests anticipated would not affect the long term viability of the proposal. The Panel acknowledges that Tables 2, 3, 4 and 5 of Appendix 8 of the consultation report illustrate the effect on current projections if 25%, 50%, 75% or, indeed, 100% of pupils from the catchment areas of the three smaller schools opted for education elsewhere. It is clear from Highland Council's observations in the letter of 12 June 2015 that Highland Council's clear view is that the scenario, under which 100% of pupils from the catchment areas of the three smaller schools would move elsewhere is both extreme and unlikely. However, the Panel remains of the view that, until the results of informal consultation in respect of dual zoning are known, there will still remain some doubt as to whether the school roll at the new Dunvegan Primary School will be able to sustain three classes. The Panel wishes to make this observation although it is not crucial to its decision on the main issue which is that Highland Council has not had special regard to any viable alternative to the closure proposal.
36. On the same issue, Highland Council received a formal proposal from Edinbane Community Company, on 13 January 2015, to take over the ownership of Edinbane Primary School including responsibility for refurbishing it with Highland Council continuing to provide an education service. Highland Council has explained that this community proposal was then submitted to and considered by the Council's ECAS Committee on 14 January 2015. According to Highland Council, it was made clear, at that Committee, by the Director of Care and Learning that the community proposal, with ongoing education provision at Edinbane, did not deliver the educational benefits outlined in the Council's proposal.
37. However, it seems to the Panel that the Edinbane community proposal could never deliver exactly the same educational benefits outlined in the Council's proposal to build a brand new amalgamated Primary School. That would appear to state the obvious. However, it seems to the Panel that such an alternative was not considered in any detail by the Council in order to establish whether it would be a viable alternative to closure of Edinbane Primary School and nursery class.
38. The Panel also notes that Highland Council has responded to Edinbane Community Company offering the opportunity for further discussion on community use of the school land and buildings and that, to date, the Company has not taken up the opportunity for further discussion. However, it appears to the Panel that, in assessing the likely effect on the local community in consequence of its proposal, Highland Council was under an obligation to have special regard to both the sustainability of the community and the availability of the school's premises and its other facilities for use by the community, in terms of section 12(2), (3) and (4) of the 2010 Act. It does not appear to the Panel that Highland Council has had special regard to these matters prior to coming to its decision. Once again, the Panel considers this to be a breach of the Council's obligations in terms of section 12 of the 2010 Act.

39. For all of the reasons outlined above, the Panel finds that Highland Council has failed in a significant regard to comply with the requirements imposed on it by (or under) the 2010 Act so far as they are relevant in relation to the proposal. It does appear to the Panel that consultation in the fullest sense has not taken place yet a final decision has been made. The issues raised above are all significant issues for the purposes of making a decision to implement a closure proposal in terms of the 2010 Act.

Nursery Closures

40. On the second point of call-in, the Scottish Government's call-in letter of 1 May 2015 pointed to the view of Scottish Ministers that there was very little reference to the proposed closure of the nursery classes in Highland Council's proposal paper or in its consultation report. It is noteworthy that the proposal paper, consultation report and indeed Highland Council's decision of 12 March 2015 make reference to Dunvegan Primary School, Struan Primary School, Knockbreck Primary School and Edinbane Primary School but do not make specific reference to the closure of Edinbane nursery class, Knockbreck nursery class and Struan nursery class. In a response by Highland Council to Scottish Government as to where in the proposal document or consultation report was there reference to the closure of Edinbane nursery class, Knockbreck nursery class and Struan nursery class, the Council indicated that "the introduction to the proposal paper sets out the proposals to discontinue education provision at Dunvegan, Struan, Knockbreck and Edinbane". Highland Council made the point that, "in line with the 2010 Act, nursery classes are part of educational provision and are included within the definition of such". It is the view of the Panel that there would appear to be something of a lack of transparency here. It is the Panel's view that there should be clarity in the proposal paper as to what is being proposed. It should not require members of the public to engage in a study of paragraph 1 of schedule 1 of the 2010 Act to find out that a proposal to discontinue education provision at Dunvegan, Struan, Knockbreck and Edinbane will necessarily include any relevant nursery classes.
41. Highland Council has made the point that paragraph 3.2 and 5.2 of the proposal paper make specific reference to the fact that Edinbane and Struan nurseries are mothballed pending the outcome of the SSER Review for the Portree ASG. Reference is made by Highland Council to a letter from Scottish Government to Highland Council of 21 March 2014 in relation to a complaint to the Scottish Ministers made under section 70 of the Education (Scotland) Act 1980 concerning Edinbane nursery. Highland Council make the point that this letter demonstrates that Scottish Ministers were aware that the consultation included Edinbane nursery.
42. The Panel notes that paragraph 3.2 of the proposal paper makes it clear that, if the proposal in the proposal paper is agreed, the mothballing of the pre-school class at Edinbane Primary will continue "until the new school comes into operation". That does suggest to the Panel that the proposal did not make at all clear that the intention was to close the nursery class at Edinbane Primary. Moreover, the letter from Scottish Government to Highland Council of 21 March 2014 expressed concern that the nursery had been mothballed for a lengthy period from August 2012 until March 2014. The letter also made it clear that the Scottish Ministers expected Highland Council to take a decision as to whether to re-open the nursery or to comply with the terms of the 2010 Act by consulting on a closure proposal in relation to the nursery without further delay. Given the fact that Highland Council had been put on notice with regard to the mothballing of Edinbane nursery for such a lengthy period, the Panel would have expected the proposal paper and consultation paper to have included much more detail on nursery class provision at the various primary schools, particularly in light of its understanding, from the documents before it, that there were children who would attend Edinbane nursery if it were to re-open.
43. The Panel notes that, whilst there are specific references to the new amalgamated pre-school provision at paragraphs 6.5, 6.8 and 9.5, the proposal paper does not specifically refer to the closure of the nursery classes at Edinbane, Knockbreck and Struan. Indeed, paragraph 3.2 of the proposal paper specifically states that, if the proposal in the proposal paper is agreed, the mothballing of the pre-school class at Edinbane Primary will continue until the new school comes into operation. According to the proposal paper, the proposed changes, if approved, will take place within three years. That does suggest to the Panel that the proposal paper

indicated that Edinbane Primary would continue to be mothballed but not actually closed. Highland Council have indicated that Issue and Response 4 in the final report and Issue and Response 19 specifically address the closure of nursery classes and that this highlights that stakeholders were aware of and raised questions on the subject of pre-school provision as part of the consultation. Issue 4 concerned the possibility that parents of children at Knockbreck nursery would have to take their pre-school children on long journeys to Dunvegan to access pre-school education. The costs in both time and money would fall to the parents and, in effect, pre-school pupils in Waternish would be denied pre-school education. With regard to Struan nursery, the issue raised was that the Council did not fund or provide transport for nursery children. Accordingly, the children of lower-income parents would not be able to afford to access nursery education at all. In response, Highland Council stated that "Councils are neither funded nor required to provide transport to early learning and childcare". Highland Council also stated "that the provision of transport for nursery age children will be a financial burden upon parents from the three smaller communities". Highland Council also responded to the effect that the Council had recently begun consulting parents across the Highlands to gauge whether local early learning and childcare arrangements meet their needs. The Council stated that the feasibility of alternative local provision could be considered as part of the current consultation on enhanced early years provision.

44. Issue number 19 made the point that Highland Council had already started to implement their proposals, for example by effectively closing Edinbane Nursery despite demand being at its highest level for several years. In response, Highland Council stated that Edinbane Nursery was originally mothballed when the nursery roll fell to zero and stated that, since then, the mothballing has continued pending the outcome of the current consultation exercise.
45. It is clear to the Panel that real consultation on the closure of the nursery classes has not taken place. Various issues may have been raised by Stakeholders with regard to the closure of nursery classes but the whole question of the closure of nursery classes was not properly highlighted in the Proposal Paper and the Consultation Report. Moreover, there is an obligation on Highland Council, in terms of section 12(2) of the 2010 Act to have special regard to the factors mentioned in section 12(3). One of these factors is the likely effect caused by any different travelling arrangements that may be required in consequence of the proposal (if implemented). Highland Council has made it clear in the Consultation Report that the provision of transport for nursery age children "will be a financial burden upon parents from the three smaller communities". It seems to the Panel that the children of lower income parents from the three smaller communities may not be able to afford to access the benefits of pre-school education and may be unable to access nursery education at all. It appears to the Panel that such a possibility may have some influence on whether young families move into Edinbane, Struan and Knockbreck and whether these small communities will continue to thrive.
46. The final paragraph of section 10.6 of the Report by Caledonian Economics suggests that the status quo arrangement is not without its advantages and the report stresses the importance for Highland Council to consider any negative impacts and to seek to put in place plans to minimise and mitigate, as far as possible, any negative impacts of a new merged school. The Report highlights that one of these is the potential loss of focus and identity in the communities concerned and possibly less interaction between the school and the individual communities. The Report concludes that this may be especially significant in the case of Struan where the community uses the school building for a range of activities and suggests that it might be appropriate to explore whether an arrangement could be reached whereby the building (or part thereof) might be transferred to community ownership.
47. In summary, the Panel is of the view that Highland Council has not conducted an explicitly recognisable consultation with regard to nursery closures. In particular, the Council has not had special regard to the factors (the rural factors) set out in section 12(3) of the 2010 Act. It seems to the Panel that the closure of the three nursery classes was not given the necessary prominence in both the Proposal Paper and the Consultation Report. The requirement to have special regard to "the rural factors" is mandatory in terms of section 12(2) of the 2010 Act. The use of the word "special" suggests to the Panel that the regard must be serious and considered. That must be the intention behind the legislation.

48. The Panel considers that Highland Council has failed in a significant regard to comply with the requirements imposed on it by (or under) the 2010 Act so far as they are relevant in relation to the proposal. Specifically, these requirements are set out in section 12(2) and (3) and relate to the factors for rural closure proposals. The Panel finds that the failure is a significant one which goes to the core of whether or not there has been a genuine consultation with the public. In this respect, the Panel has had regard to the Court of Session case of **Comhairle nan Eilean Siar v the Scottish Ministers [2013] CSIH 6** and the reference, at paragraph 55 of that judgment, to the importance of ensuring that “the rigorous consultation procedure set out in the 2010 Act is not elided in any way, yet pays due respect to the primacy of the local education authority’s role”. In this case, the Panel finds that, whilst it acknowledges the primacy of Highland Council’s role as the local education authority, the rigorous consultation procedure demanded by the 2010 Act has been elided for all of the reasons set out above.

Travelling Time for Pupils

49. On the third point of call-in, Highland Council was asked whether the travel times for pupils from Edinbane, Knockbreck and Struan to Dunvegan at Appendix 4 to the Consultation Report were realistic times which would be achieved in all weather conditions. In response to Scottish Government, Highland Council have clarified that the timings were provided by the current local transport contractors used by Highland Council to provide school transport in the area at the present time. The Council is confident that these times represent typical travel times on the routes as they have been provided by those who travel them on a daily basis in all weather conditions. The Council does recognise that weather can have a bearing on travel routes to schools. The issue of winter disruption to travel is addressed in Responses 2 and 5 of the Consultation Report. Highland Council has now also clarified, in their letter to the Panel Convener of 12 June 2015, that the 30 minute travel time referred to in the call-in letter is not part of Highland Council’s Transport Policy but is an indicator used as part of the assessment process for reviews of the school estate. The Council has also responded that the context of that indicator makes clear that, given the Council’s geography, the 30 minute maximum travel time is not always possible. The Council states that there are many examples across Highland where travel times are greater than 30 minutes due to the location of many schools.
50. The Panel acknowledges the various concerns of parents in the representations with regard to the importance of ensuring that individual pupil travel times should be sufficiently detailed and should not be excessive for the pupils involved. The Panel has also noted that many of the representations raise issues such as single-track roads, winter weather conditions, and what is appropriate for children who may be as young as 4 years of age. However, the Panel is of the view that all of these matters could probably be addressed by the imposition of clear conditions. However, in light of the fact that the Panel has already found that Highland Council has failed in a significant regard to comply with the requirements imposed on it by (or under) the 2010 Act so far as they are relevant in relation to the proposal, all as detailed above, the Panel does not consider it necessary to set out conditions at this stage.

Conclusion

51. **For the reasons indicated above, the Panel has concluded that Highland Council has not fulfilled its obligations under the 2010 Act. In particular, the Panel has concluded that it has failed in a significant regard to comply with the requirements imposed on it by (or under) the 2010 Act so far as they are relevant in relation to the proposal. Accordingly, the School Closure Review Panel refuses consent in accordance with section 17C(1)(a) of the 2010 Act.**



Patricia S. Quigley
Chair