

SCRUTINY COMMITTEE REVIEW GROUP

SEVENTH SCRUTINY REVIEW

The Judicial Review of the Call-In Notice

regarding the

Closure of Abernyte Primary School

(Report No. 22/108)

1 Introduction

- 1.1 On 2 May 2019 the Council's Lifelong Learning Committee resolved by majority decision to close Abernyte Primary School. Scottish Ministers required to be notified of this decision, which intimation was given on 27 May 2019. On 16th July 2019 Scottish Ministers informed the Executive Director of Education & Children's Services that this decision by the Lifelong Learning Committee was being called in, in terms of section 17(2) of the Schools (Consultation) (Scotland) Act 2010. Unless this Call-in Notice was subsequently withdrawn or reduced by a court order, the Committee's decision to close Abernyte Primary School required to be reviewed by the School Closure Review Panel.
- 1.2 On 7 August 2019 the decision was taken to challenge the Call-In Notice by a petition in the Court of Session for judicial review and this action proceeded. This is the legal remedy available to a person wishing to challenge the action of a public body where there is no statutory right of appeal. The closure decision was not reviewed by the School Closure Review Panel pending the outcome of the judicial review. The Scottish Government defended the action, and the case was heard by Lady Wise in February 2020. The Council's challenge was not upheld, in terms of a judgement issued by Lady Wise on 7th May 2020.
- 1.3 In view of the judgement, the Call-In Notice remained in force and the decision of the Lifelong Learning Committee was reviewed by the Schools Closure Review panel which determined not to uphold the Committee's decision. Abernyte Primary School has not closed. Perth & Kinross Council, as education authority, cannot revisit the closure decision within a period of 5 years.
- 1.4 The Council incurred external legal costs in raising the action. It was also held liable for the legal expenses of the Scottish Government in its defence of the action. As the Council is permitted to reclaim VAT, the total net costs incurred in raising the judicial review amounted to £96,838. The Executive Officer Team (EOT) was comprised of the Chief Executive, (formerly) the Depute Chief Executive, the Executive Directors, the Head of Finance and the Head of Legal & Governance Service. Prior to the commencement of the action, it had been agreed by the EOT that the cost of the litigation would be met from a central

Corporate Budget, which is to say, from Reserves. It transpired that there was an underspend within the Education & Children's Service from which the expenditure could be met. It was therefore unnecessary to fund this from an Education and Children's Service budget and nor was it necessary for the cost to be covered from Reserves.

- 1.5 A report providing an overview of the decisions taken relating to the proposal to close Abernyste Primary School, the rationale for the Judicial Review action and the outcome of the School Closure Review Panel was prepared. This report, which was considered at a meeting of the Lifelong Learning Committee on 26 August, contained the Convenor's recommendation for the matter to be referred to the Scrutiny Committee for a review. It was further considered at the meeting of the Scrutiny Committee on 9 September 2020.
- 1.6 During the summer of 2020 a letter was sent by 6 members of the Lifelong Learning Committee, to Councillor Shiers, Convenor of Lifelong Learning Committee. In this letter they were critical of the decision which had been taken to pursue the judicial review of the Call-In Notice and of the expense incurred as the result of that decision. The Convenor of Lifelong Learning considered that the issues raised were most appropriately taken forward by the Scrutiny Committee to whom she referred the matter in August 2020.

2 Terms of Reference

Scope To consider the process followed, consultations and decisions made from receipt of the call-in letter from Scottish Ministers to the decision to seek permission to proceed with a judicial review.

Timescale: Primarily, the period from 16 July 2019, namely, the receipt of the Call-In Notice from Scottish Ministers to 07 August 2019, the decision to proceed with a judicial review.

But also considering such further information thereafter relating to the prospects for the case, up to the date of the commencement of the hearing.

3 Scrutiny Review Group: Membership, Meetings & Agreed Procedure

- 3.1 As convenor of Scrutiny Committee, Councillor McCole selected four councillors whom she wished to assist her as members of the Scrutiny Review Group. These were: Councillor Andrew Parrott, Vice-Convenor, Scrutiny Committee, Councillor Ian Massie, Councillor Frank Smith and Councillor David Illingworth.
- 3.2 The work undertaken by the Review Group was intended to follow the procedure approved by the Council in 2017 for a Light Scrutiny Review. The Guidance Toolkit for Scrutiny Reviews indicates that a Light Scrutiny Review typically

comprises two or three meetings. As this Review extended to seven meetings, and included hearing from 3 officers and 2 elected members, in sessions totalling approximately 3 hours, it may be viewed as a relatively comprehensive form of a Light Review.

- 3.3 The Scrutiny Review Group met between January and March 2022. At the second meeting Councillor McCole intimated that she was unable to continue as a member of the Review Group for an unrelated personal reason. It was agreed that Councillor Parrott would succeed her as the acting convenor for the remaining meetings.
- 3.4 At the first meeting of the Review Group members discussed and agreed the terms of reference as set out in paragraph 2 above.
- 3.5 Having regard to the information available, principally the above-mentioned report to Lifelong Learning and Scrutiny Committees of August and September 2020, the Review group identified 3 officers and 2 elected members whom they believed may have knowledge relevant to the work of the review. These persons were asked to, and agreed to attend the third, fourth and fifth meetings. The limited involvement of a 4th officer became known during a later meeting. As she was unable to attend at short notice she provided a written account to avoid further delaying the Review. The accounts which were given were considered and evaluated at the fifth and sixth meetings. The Review Group heard accounts from: (i) the Head of Legal & Governance Service, (ii) a CDS Legal Manager, (iii) the Executive Director of Education & Children's Service, (iv) Councillor Caroline Shiers, Convenor, Lifelong Learning Committee, (v) Councillor Murray Lyle, Leader of the Administration.

4 Legislative Context

(i) Local Government (Scotland) Act 1973

Local authorities are authorised in terms of section 56 of the 1973 act to approve arrangements for the discharge of Council functions. It is essential for Councils to have these arrangements, which are referred to as either a Scheme of Delegation or a Scheme of Administration. These schemes set out the functions, remits and powers of the Council, its Committees, Sub-Committees, its Directors, Chief Officers, and statutory officers.

In the Scheme of Administration approved by Perth and Kinross Council, amongst the matters referred to its Lifelong Learning Committee are:

The exercising of functions of the education authority, in terms of the Education (Scotland) Act 1980 and all related subordinate legislation.

In the same Scheme of Administration, the authorisation given to the Head of Legal and Governance Service includes authority:

To institute, defend, appear in any legal proceedings or any inquiry held by or on behalf of any minister or public body under any enactment (including, for the avoidance of doubt, proceedings before any statutory tribunal, board, or authority).

(ii) Schools (Consultation) (Scotland) Act 2010

In terms of this legislation Scottish Ministers can only call-in the education authority's decision in limited circumstances. The act states this may happen if it appears to the Scottish Ministers that the education authority may have failed:

- (a) In a significant regard, to comply with the requirements imposed on it by (or under) this Act so far as they are relevant in relation to the closure proposal, or
- (b) To take proper account of a material consideration relevant to its decision to implement the proposal.

5 Findings

1. The decision to commence judicial review proceedings is delegated to the Head of Legal and Governance Services in the Council's Scheme of Administration.
2. The Head of Legal and Governance Services has the remit and responsibility for legal matters and for other Council functions which comprise the Legal & Governance Service. She has a management team which includes two Legal Managers. The Head of Legal & Governance Services reports to the Chief Operating Officer. She is also the Council's Monitoring Officer, in terms of section 5 of the Local Government and Housing Act 1989. In her capacity as Monitoring Officer, she has direct access to the Chief Executive, Directors and other members of the Executive Officer Team. As Head of Legal & Governance Service, she has direct knowledge of the most important areas of work within her Service. Responsibility for most legal transactions of the Service and other legal matters is delegated, in turn, through her management team. The closure of Abernyte Primary School and the associated legal considerations arising before, during and after the decision to challenge the Call-In Notice issued on behalf of Scottish Ministers was a case of which the Head of Legal & Governance Service was aware. She was always supported by the Legal Manager with primary responsibility for legal services to the Education and Children's Service, who had more detailed knowledge of the matter.

3. There is no statutory right of appeal against the Call-in Notice and a judicial review was therefore the only mechanism for bringing the matter before a court.
4. The Head of Legal & Governance Service raises or defends legal proceedings having regard to the merits of a case and the interests of Perth & Kinross Council. She does not have regard to the interests of the Administration nor to other party-political considerations.
5. In Scotland, councillors are responsible for determining matters of Council policy and Council officers are responsible for determining operational matters. This is an established position which is acknowledged in the December 2021 edition of the Councillors' Code of Conduct issued by the Standards Commission. Officers are appointed because of their professional qualifications, and experience and suitability for the posts.
6. An assessment of the legal merits of a case is an operational matter for which the Head of Legal & Governance Service is responsible. Legal advice given to the Council and to officers of the Council is again an operational matter.
7. Following receipt of the Call-in Notice, the issues arising were discussed by the Executive Director of Education & Children's Service and Legal Manager between 16th and 18th July 2019. The options which were identified were (a) to take no action and allow the closure decision of the Lifelong Learning Committee to be referred to the School Closure Review Panel, knowing there was a right of appeal in respect of an error in law, or (b) to challenge the Notice by a petition for judicial review in the Court of Session, in respect of any error of law. The grounds for challenging the validity of the Call-In Notice, however, would have been different to the grounds of appeal against a decision of the School Closure Review Panel.
8. A meeting of the EOT was held on 16 July 2019 at which the Executive Director of Education and Children's Service informed the meeting that the Call-In Notice had been received. This meeting was attended by the Chief Executive, the Depute Chief Executive, the Head of Legal & Governance Service, the Head of Finance, the Depute Director of Communities, and the Director of Education & Children's Service.
9. On 16th July 2019 the Convenor of Lifelong Learning Committee was informed that the Call-In Notice had been received. It was agreed to issue a press release that day which would acknowledge receipt of the Notice and incorporate a short statement from the Convenor.

10. On 19th July 2019 the Leader of Administration and Convenor of Lifelong Learning Committee were informed that an Opinion from Counsel would be instructed.
11. The Executive Director of Education and Children's Service held a weekly meeting of her Senior Management Team on 18 July 2019 when she informed the meeting that the Call-In Notice had been received.
12. On or around 18 July 2019 it was agreed by the Executive Director of Education and Children's Service and the CDS Legal Manager to seek advice from external solicitors, thereafter from senior counsel. It was subsequently decided to seek additional information from the Scottish Government
13. The Director of Education & Children's Service was on annual leave from 20th July until 5th August 2019 but she continued to be available for this case while on leave. Responsibility for the Service during her annual leave was held by the Depute Director. During this annual leave period and in relation to the Call-In Notice and Judicial Review, the role which the Depute Director undertook was one of sharing communications and updates. She did not participate in the decision-making role.
14. Judicial review cases are heard in the Court of Session. Only counsel who are members of the Faculty of Advocates and solicitor-advocates have the right to appear in this court. It is therefore necessary for counsel to be instructed on the authority's behalf. The instructing solicitor has the choice of instructing junior counsel or senior counsel (Queen's Counsel). Senior counsel are advocates who have been recognised for their experience and their expertise in their areas of practice. Senior counsel are more likely to be instructed in cases of complexity, in cases of importance, or both.
15. Most legal practices in the public and private sector not regularly engaging in Court of Session litigation will instruct a firm of solicitors which does. Such firms can offer advice on the case including on the selection of counsel. They will normally be engaged to undertake the various procedural steps associate with Court of Session litigation.
16. In relation to the judicial review of the Call-In Notice of Abernyste Primary School, Brodies LLP were instructed to act on the Council's behalf. This is a legal firm of high repute and with an experience in public law matters and litigation.
17. CDS Legal Services accepted the recommendation from Brodies LLP to instruct James Mure QC, initially for his advice on the case and,

subsequently, to represent the council in the judicial review. James Mure QC is experienced in this area of public and administrative law. He is a highly regarded member of the Scottish Bar. He has acted both for and against the Scottish Government. He has also previously acted for this Council and he was successful in those unrelated cases.

18. The closure of a school by a Council, acting as educational authority, is regulated by legislation and it is the subject of Scottish Government guidance to which Councils must have regard.
19. Officers within the Education & Children's Service have a high degree of experience of the school closure process. This has, in part, resulted from the implementation of the Council's School Estate strategy approved in 2015 and from their experience of other school closures.
20. The approach taken by this Council in a previous school closure has been used as an exemplar case study by the Scottish Government. The ECS Business Manager responsible for progressing school closures has considerable experience of the process and has been recognised for her stringent, assiduous, and thorough approach. She has been approached by other Council's for her advice and assistance. It is an area in which the Council's record is strong.
21. Prior to the drafting and submission of the report to the Lifelong Learning Committee on 22 May 2019, the Education & Children's Service had commissioned the services of Chris Webb for his advice and assistance in relation to the consultations and wider processes undertaken. Chris Webb is a recognised expert in this area with previous experience working in local authorities and government agencies. He contributed to the drafting of the Scottish Government's Guidance on the school closure process. Chris Webb made no criticisms and did not recommend any different approach to that which was proposed and ongoing.
22. The opinion of the Executive Director of Education & Children's Service, shared by her Business Manager, was that the consultations and other processes undertaken, leading to the report recommending the school closure, were not different to previous school closure cases, for which no Call-in-Notice had been issued.
23. The receipt of the Call-in Notice caused surprise within the Education & Children's Service and CDS Legal Service and to the Convenor of Lifelong Learning Committee. This was primarily because of the thoroughness of the approach believed to have been taken and the similarity with past practice in which no Call-In Notice had been issued.

24. The issues arising from the Call-in Notice were of significance to the Council. These issues were recognised as being of wider importance to education authorities across Scotland. The case accordingly had a significance which extended beyond the Council.
25. From an early stage after receipt of the Notice the Head of Legal & Governance Service and Legal Manager were concerned that the Scottish Ministers may have erred in law having regard to the terms of that Notice. An error of law occurs where the person responsible for the decision has had regard to an irrelevant consideration; has failed to take account of a relevant consideration; has misdirected themselves; and/or has acted in an unreasonable way and to a significant extent. This initial assessment was made from an examination of the reasons given in the Call-In Notice.
26. The terms of the Call-In Notice were carefully considered, by officers in both Education and Children's Service and Legal Services. Those officers were concerned about all sections of the letter. In particular, with regard to the limitations of the reasons which had been given, possible procedural irregularities, the possibility that the wrong legal test had been applied, and of a failure to properly consider and understand the information which had been forwarded together with the intimation of the resolution of the Lifelong Learning Committee. The robustness of the financial information regarding potential refurbishment costs was confirmed.
27. There had been no previous challenge to a Call-In Notice on these grounds in Scotland before. The level of discretion held by Scottish Ministers in issuing a Call-In Notice was uncertain at this time.
28. In determining whether to raise a legal action, the Head of Legal & Governance Service has regard to the legal merits of the case and to wider factors, including the financial risks, the significance of the case, and the risks and benefits of raising an action and of not raising an action.
29. Professional knowledge and experience, any other available information, including advice from external solicitors and from counsel, are all factors which may be drawn upon in assessing the legal merits of a case. This assessment is an operational matter.
30. Such a risk assessment does not end when a decision is taken to commence a court action. It is an ongoing assessment which is continuously re-visited as the case progresses. In a judicial review, the key stages to be considered are: the advice of counsel and other external legal advisers where applicable; whether the respondent defends the action; the

grounds on which the action is defended, in terms of the Answers they lodge and then subsequently adjust; whether the Court allows the case to proceed at the 'sifting stage' (*In this process the judge looks at the judicial review petition to determine whether, in their judgement, the action is of sufficient merit to proceed*); such further information as may become available during the progress of the case, including any further advice from counsel.

31. When appearing in any court a solicitor or an advocate is acting as an officer of that court. This means they have certain professional duties to the court. This includes a duty not to engage in or continue with the litigation where they consider that it has, or no longer has a realistic prospect of success.
32. In the progress of the judicial review of the call-in Notice in relation to Abernyte Primary School, the petition was permitted to proceed by the sift process. The judge can ask to be addressed by those instructed prior to determining the matter but that did not happen in this case. The further developments of the case after the decision taken to proceed on 7 August 2019 added to, rather than diminished the confidence of the Head of Legal & Governance Service and the Legal Manager in their assessment of the merits of the case.
33. On 5th August 2019 the Executive Director of Education and Children's Service attended a convenors' meeting together with Councillor Shiers and the vice-convenors Councillors, John Duff and Willie Wilson. The receipt of the Call-in Notice was already known by this time. They were advised that additional information had been sought from the Scottish Government and that a judicial review action was being considered. The Convenor of Lifelong Learning had been on leave from 20th July until 5th August 2019.
34. A further meeting or meetings took place on 5th August and possibly 6th August with the leader of Administration, Councillor Murray Lyle and Councillor Shiers during which the possibility of raising a judicial review challenge of the Call-in Notice was further discussed.
35. The Scottish Government provided redacted copies of the representations they had received on or around 5th August 2019. There was nothing provided by the Scottish Government to answer the concerns in relation to the Call-in Notice. On 7th August 2019, with the knowledge of the Director of Education and Children's Service, the Head of Legal and Governance Service determined to raise an action of judicial review challenging the Scottish Ministers Call-in Notice of the Lifelong Learning Committee's decision to close Abernyte Primary School.

36. The grounds of the judicial review were that the Scottish Ministers' Call-In Notice erred in law, and/or that they had acted unreasonably, and/or that they had exceeded their powers, and/or that they had failed to provide adequate and lawful reasons for their decision. The challenge included overarching complaints of procedural unfairness and inadequate reasons. Examples of these complaints were that the Call-in Notice took account of representations made directly to Ministers without the Council being given sight of them and therefore not being given an opportunity to provide further information, clarification, or comment; and that the financial information had been provided by a quantity surveyor and categorised in the consultation report. If Ministers were dissatisfied with this they could have clarified and, in any event, the consultation report had clearly stated that the condition, suitability of the building and financial savings were not material factors in the closure proposal.
37. Press releases in relation to the matter were issued on 16 July and 29 August 2019. The July press release acknowledged that the Call-in Notice had been received. The subsequent press release in August disclosed that the council was to challenge the Call-in Notice in terms of a judicial review. As a matter of course, press releases are issued to the companies responsible for publishing the Courier, the Perthshire Advertiser and Radio Tay.
38. The purpose of the meetings with the Convenor, Vice-Convenors and Leader of Administration was to inform them of the situation, actions taken at that stage, the options being considered and to allow them to give their views on the situation.
39. In relation to the emerging proposal to raise judicial proceedings against Scottish Ministers, the Leader of Administration sought and received assurance that (a) officers were satisfied that they had complied with the process for a school closure; (b) the matter had been scrutinised by CDS Legal Services; (c) external legal advice had been obtained.
40. The Leader of Administration and the Convenor of Lifelong Learning Committee recognised that the decision to raise judicial review proceeding was an operational matter but having regard to of the information provided, they were content with the decision.

6 Conclusions

- 6.1 Having regard to the Terms of Reference, the Scrutiny Review Group agreed that their remit concerned the process and governance associated with the decision to commence a judicial review proceedings. The Scrutiny Review Group did not revisit the decision which had been taken by the Lifelong learning

Committee to close Abernyte Primary School. The Scrutiny Review Group asked for and received accounts from officers and from two elected members regarding their considerations, knowledge and actions before and after the decision taken to commence legal proceedings. It was not part of the Review to assess the legal advice of the Head of Legal and Governance Service nor of the other legal professionals acting on the Council's behalf.

- 6.2 The Scrutiny Review Group acknowledge that it is the Head of Legal and Governance Service who is responsible for decisions to raise or defend legal proceedings. The Scrutiny Review Group accept that this is a decision which should be taken in the interests of the Council as a whole, free from party political considerations. It follows that neither a council committee nor councillors should be asked to approve such a decision. It is an operational matter, and it is dependent upon the professional judgement of the Head of Legal and Governance Service.
- 6.3 Legal proceedings are entered in to by the Council on a routine and regular basis. It is only a small minority of cases which are controversial, of a high profile, or which carry significant associated financial or reputational risks. In such cases it is appropriate that there is appropriate engagement with elected members.
- 6.4 In relation to the decision to challenge the legality of the Abernyte Call-In Notice by a judicial review, the Leader of Administration, the Convenor and Vice-Convenors were all informed of the situation and the emerging proposal to raise the legal proceedings and they were able to question officers and to give their views.
- 6.5 Officers in both Education and Children's Service and CDS Legal Service believed that the process and procedure which had been adopted prior to the decision of the Lifelong Learning Committee in May 2019 complied with legislation and Scottish Government Guidance. They believed it was consistent with past practice. The Service was experienced in promoting school closures and a high level of knowledge and experience was held within the Service. External advice had been sought from an acknowledged expert which had provided the Service with independent assurance and validation. Prior to the petition being lodged CDS obtained advice and assistance from an external legal firm and from senior counsel.
- 6.6 All of the officers and members who attended the meeting of the Scrutiny Review Group to explain their respective roles gave an assurance that they had recognised the significance of raising the judicial review and that the matter 'had not been approached lightly. They appreciated that the case would be given close attention, that there were issues raised which were of wider interest than Perth and Kinross Council alone and that there was a financial risk associated with the decision.

- 6.7 Those who spoke to the Scrutiny Review Group stated that having regard to the information available to them at the time, they would not have acted differently. The court's judgement in this case, however, would affect the assessment made in a future case.
- 6.8 The Scrutiny Review Group accepted that the costs associated with the legal proceedings followed from the decision to pursue the judicial review and the outcome of the case. They noted that these costs would have been met from a central corporate budget, most likely reserves, but that they were actually met from a year end underspend in the Service. The Scrutiny Review Group accepted this position. All witnesses had referred to their awareness of the potential for costs being incurred and that this had been a factor they had considered.
- 6.9 The members of the Scrutiny Review Group were satisfied with the accounts and explanations given for the actions taken leading up to, and the decision to petition for judicial review of the Scottish Ministers' Call-in Notice in relation to Abernyste Primary School.

The Scrutiny Review Group wish to record their gratitude to the three officers and two elected members for their assistance to the review by attending meetings at relatively short notice, providing full accounts for their actions and for answering all the questions they were asked.

April 2022

Background papers

- (i) Scrutiny Toolkit, approved following a review by Scrutiny Committee autumn/winter 2019.
- (ii) Call-In Notice dated 16th July 2019.
- (iii) Press Releases: 16th July and 29th August 2019.
- (iv) Opinion of Lady Wise in the Petition of Perth and Kinross Council dated 7th May 2020.
- (v) Report to the Lifelong Learning Committee, 26th August, and the Scrutiny Committee, 9th September 2020.
- (vi) Written submission by J. Pepper, February 2020.