



SUNDAY POLICIES

Report by Chief Executive

PURPOSE OF REPORT

To submit for consideration the Comhairle's current policies on Sunday working and related matters, to ascertain whether the Comhairle wishes to change or review some or all of these policies and, if so, to suggest the remit and methodology for the review.

COMPETENCE

- 1.1 There are no legal, financial or other constraints to the recommendations being implemented; the subject matter of the Report does, however, give rise to a number of legal implications; these are set out in paragraphs 5.1 – 5.4 of the Report.

SUMMARY

- 2.1 The Comhairle last considered its current policies on Sunday working, and the Comhairle's position on ferry services to and from Lewis and Harris on 30 March 2006. The Comhairle has generally adopted a practice of consideration of the extent and operation of its Sunday policies once within each Council term. The Comhairle has also received, at both Member and Officer level, numerous representations both favouring a change to current policies, particularly in relation to the operation of Ionad Spors Leodhais (ISL) and urging the Comhairle to adhere to its current policies. It is, therefore, an opportune time for the Comhairle to consider the extent and operation of these policies.
- 2.2 The Report seeks to address the following matters –
- (a) the Comhairle's current policies, and their basis;
 - (b) legal issues; and
 - (c) the terms of any review of the policies.

RECOMMENDATIONS

- 3.1 **It is recommended that –**
- (a) **no change be made to the current general policy of the Comhairle, as set out in paragraphs 4.1(1) and 4.2 of this Report, in relation to the employment of the Comhairle's staff to work on Sundays; and**
 - (b) **consideration be given as to whether the Comhairle's policy should be amended in relation to the provision of sports and leisure facilities in Lewis and Harris on Sundays.**

BACKGROUND

- 4.1 The Comhairle's current policies, agreed in March 2006, can be summarised as follows -
- (1) the current policy (from 1988) of the Comhairle in relation to employment of its staff to work on Sundays not be amended except to reflect any decisions of the Comhairle to make exceptions to that general policy to take account of local custom and practice;
 - (2) no change be made to the Comhairle's policy regarding Sunday work by its Contractors;
 - (3) the Comhairle request Caledonian MacBrayne Ltd. not to proceed with its decision to commence sailings on the Sound of Harris on Sundays; and
 - (4) the Comhairle reaffirm its position with regard to Sunday transport, in and from Lewis and Harris.
- 4.2 The policy referred to in paragraph (1) above states that the Comhairle not employ its staff to work on Sundays except in circumstances of emergency, legal obligation or essential maintenance of plant associated with the Comhairle's properties, and that in view of the potentially damaging insurance and legal risk implications, except in circumstances of emergency or legal obligation, the Comhairle should not allow its facilities to be used on Sunday where to do so would involve the Comhairle in additional expenditure for that purpose.
- 4.3 This policy has allowed, since June 1998, the opening of the Swimming Pool, Games facilities and Cafeteria at Sgoil Lionacleit on Sunday afternoons; a similar situation pertains elsewhere in Benbecula, South Uist and Barra, taking account of local custom and practice.
- 4.4 Since adoption of the current policies, and their reaffirmation in March 2006, the Comhairle has received numerous representations, principally on those aspects of the policy relating to ferry services from Lewis and Harris, and regarding the operation of ISL. The vast majority of correspondence has related to the opening of ISL, and to the provision of Sunday ferry services on the Stornoway – Ullapool route. Correspondence has been received from those advocating the opening of ISL on Sundays, and those opposed to any such change to the Comhairle's policies.
- 4.5 The Comhairle has also received a small number of representations from members of the public questioning the legal and policy basis for the Comhairle's current policy, and indicating that, in the opinion of the correspondents, the Comhairle's current position is legally challengeable. The Comhairle has also received notice of a referral to the Scottish Public Services Ombudsman regarding the issue.

LEGAL ASPECTS

- 5.1 The first question to be addressed is whether the Comhairle may legitimately have a policy at all in this area. General Scots Law is to the effect that where a Statutory Body such as the Comhairle is entitled to exercise a discretion, it is lawful to have a policy or policies which will be applied, generally, to the area in which discretion is to be exercised. It is not, however, lawful to have a policy if it is not justified in fact, is not properly related to the discretion being exercised, or is in any way unreasonable or irrational. It follows, therefore, that the Comhairle should have a sound factual basis for deciding in favour of a particular policy.
- 5.2 The Comhairle obtained an Opinion of Counsel in 2003 from Mr. Roy Martin QC in relation to its policy of imposing a prohibition of Sunday operation of Civic Government Licences in Lewis. Counsel's Opinion made a number of points which can legitimately be applied to other policy choices which the Comhairle faces and, in particular, made the following observations –
- (a) in order to justify a condition which might be imposed, or a policy which might be adopted, the Comhairle must have a factual basis for so doing, must not take into account irrelevant considerations, and must not act unreasonably or irrationally;
 - (b) the Comhairle could legitimately consider the existing characteristics of the amenity of the locality in question, and how that amenity might be affected by any activity, or policy;
 - (c) the Comhairle should not act so as to preserve any particular habit or religious observance in the locality, which might be observed only by a proportion of the community; it is not, therefore, possible for the Comhairle to promote or prohibit a particular activity or policy in order to promote or preserve a particular religious observance or tradition; and
 - (d) the Comhairle may, however, legitimately take into account the effect on the amenity of the locality in question if any activity were to be permitted on Sunday.
- 5.3 The Human Rights Act 1998 is also of relevance; Article 9 of the European Convention of Human Rights (ECHR) provides for the right to freedom of thought, conscience and religion. It is submitted that the Comhairle could only be seen to be in breach of this provision if the Comhairle could reasonably be said to be seeking to impose a particular religious observance upon members of the community who were of different or no religious belief.
- 5.4 It is, therefore, clear that in considering matters of policy, the Comhairle should only take into account matters within its general competence, in particular the custom and practice within, and amenity of, localities within its area, and must not seek to promote any particular religious observance or practice in forming its policies. For example, the Comhairle was unsuccessful in the case of its Bye-law regulating the use of Lochmaddy Pier in 1990, since the Sheriff Principal found, on the evidence, that the purpose of the Bye-Law prohibiting use of Lochmaddy Pier on Sundays was based upon a policy of Sunday observance and not on any considerations relating to the operation of the Pier. The proposed Bye-Law was, therefore, in breach of the duty of a Harbour Authority to keep open the Pier in terms of the Harbour Authority's statutory duties.

- 5.5 It is fair to conclude that the Comhairle's current policies reflect a view that local traditions, amenity, and custom and practice should be taken into account in determining the operation of the policy, and the provision of Comhairle facilities in particular localities. The legal aspects of this report, set out in paragraphs 5.1 – 5.4 above, confirm that the Comhairle is legitimately entitled to consider such factors in assessing the content and operation of its policies. The Chief Executive and Head of Executive Office recently attended a consultation with Mr. Roy Martin QC who confirmed the terms of the advice given previously to the Comhairle, as set out in paragraph 5.2 above.

ECONOMIC ASPECTS

- 6.1 No formal work has been carried out on the effect of the current policies on Sunday working, either by the Comhairle or Western Isles Enterprise and, accordingly, the evidence on either side of the debate is inevitably somewhat anecdotal, and in many ways contradictory. For example, some participants in the tourism sector would argue that Sunday opening of facilities and Sunday transport would allow increased tourism activity and spend, whereas others would argue that greater activity on Sunday would detract from a key feature of the area.
- 6.2 In general, it is felt that in the absence of any formal assessment, Sunday working or opening of facilities, would have a neutral, or at best marginal, impact on the overall performance of the local economy, the key sector of which is the public sector, which traditionally closes on weekends. Moving to a seven day operation would probably allow the current, limited, supply of money circulating in the Islands' economy to be spread over seven days rather than six, with consequently little economic benefit, and possibly disbenefits due to increased overheads. Accordingly, it is submitted that it cannot be ascertained conclusively whether there would be benefits to the economy of the Western Isles by the opening of public facilities on Sundays, or by the provision of Sunday transport.

AREAS FOR REVIEW

- 7.1 It is submitted that, if the Comhairle is minded to instigate a review of some or all of its Sunday policies, the principal policies are as follows –

(a) **Sunday working of Comhairle employees and contractors**

Subject to the conclusions of the discussion at paragraph 7.1(b), it is recommended in this Report that the policy that the Comhairle does not employ its staff to work on Sundays except in circumstances of emergency, legal obligation or essential maintenance be only amended to reflect the Comhairle's decisions in relation to local custom and practice.

This would allow, for example, Comhairle staff to work on Sundays, if such was the wish of the Comhairle, taking into account the views of a particular locality or community.

(b) **Operation of Comhairle facilities on Sundays**

As noted above, other than residential care facilities and other essential functions, such as road gritting, the Comhairle does not generally operate its public facilities on Sundays. There are a number of exceptions to this policy, for example, in relation to street cleaning and the occasional use of public buildings to accommodate religious services. The main exceptions, again as noted below, have been to permit the operation of leisure facilities in Benbecula, South Uist and Barra.

(c) **Operation of Sports Facilities**

Lionacleit and Barra Sport Centres currently open for 3 and 2 hours respectively each Sunday at a cost of £5k per Centre per annum. Contracted staff are given the opportunity to work on Sundays with relief staff utilised to complete the rota as required. To date, there have been no recorded difficulties recruiting staff to work on a Sunday.

The costs of operating ISL for additional hours on Sundays should not be considered in the same context as Lionacleit or Barra. The population within one hour's travel time to Stornoway is greater than the population reach for Uist and Barra, and is comparable with a small rural town rather than sparsely populated island provision.

In a small town mainland context opening a Sports Centre on a Sunday would expect to attract more customers than other days of the week. It is not possible, given the historical traditions of Lewis, to give accurate advice on the anticipated number of people who would use the Sports Centre on Sundays. If the income generated was more than approximately £18k per annum to allow for the cost of the utilities, the Centre would run at a profit. If it was less, it would run at a loss. If the pool attracted 100 young people plus 50 adults and bookings were made of 50% of the available games hall and squash court time, an income of £25k would be generated.

The Chief Executive has received a significant number of representations both for and against the opening of ISL on Sundays, covering a range of arguments, from public health, community and personal convenience, way of life and, in a few cases, religious, arguments. Those in favour of the opening of ISL on Sunday have also commenced an "online" petition which, it is believed at the time of writing, has attracted over 500 "signatures".

Previous consultation with members of staff at ISL has indicated that the majority of staff are not willing to work on Sundays.

(d) **Sunday Transport**

There has been much speculation in media sources over the last year that Caledonian MacBrayne intend to change their current practice, and operate Sunday ferry services to and from Lewis and/or Tarbert, Harris. Caledonian MacBrayne has always made it clear that any such change would necessitate consultation with the Comhairle, and the Company's current position is that it will await evaluation of the effects of Road Equivalent Tariff (RET) before resolving whether to commence any consultation on the provision of Sunday ferry services.

Given that it is at least possible that this issue will come before the Comhairle in the foreseeable future, as part of a consultation exercise, it is not recommended that the Comhairle re-consider its policy on the provision of Sunday ferry services to and from Lewis and Harris, at this time.

CONSULTATION

- 8.1 Should the Comhairle wish to review its general policies, or specific policies on the provision of sport and leisure facilities, consideration can also be given to the means of consulting the community. It is not the general practice of Government at any level to use referenda for consultative purposes, other than for matters of significant constitutional importance and, for this reason, it is not recommended that the Comhairle seek views by way of a referendum on the matter. The matter is already to some extent in the public domain, through the local media and, as noted above, the Chief Executive has already received a number of representations regarding the issue. Means of consultation could include the seeking of comments from members of the public by way of the Comhairle website or by a dedicated system for the receipt of written comments. If applicable, the Chief Executive will consult with Members and Officer colleagues regarding the best means of publication of any review process, and the means by which members of the public could submit representations.

CONCLUSION

- 9.1 It is recognised that the issues referred to in this Report, and the policies which the Comhairle has had in place for many years, are of great significance to many Members, Officers and residents of the Western Isles, and represent, to the outside world, one of the differences of Island life from life elsewhere in Scotland and the UK. This Report attempts to set out in some detail, and the author apologises for the length of the report, the principal policy considerations on the matter.
- 9.2 The conclusion of the Report is that the Comhairle's general policies on Sunday working of employees need little, if any, amendment, and the principal issue relates to whether there is a view amongst Members that the Comhairle's policies on the operation of specific facilities should be reviewed further. If the answer to that question is in the affirmative, Members may wish to consider whether the Comhairle should engage in a consultation exercise on the matter.