

EXPLANATORY MEMORANDUM TO
THE INDEPENDENT EDUCATIONAL PROVISION IN ENGLAND
(PROHIBITION ON PARTICIPATION IN MANAGEMENT) REGULATIONS
2014

2014 No. 1977

1. This explanatory memorandum has been prepared by the Department for Education (“the Department”) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Regulations, made under section 128 of the Education and Skills Act 2008 (the 2008 Act), prescribe the grounds on which the Secretary of State may give a direction prohibiting a person from taking part in the management of an independent school. They also make provision about the procedure for giving a section 128 direction, the circumstances in which a direction may be varied or revoked, and make provision about appeals against such a direction. Academies (including free schools) are independent schools and as such the Regulations apply to them.

3. Matters of special interest to the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Part 4 of the 2008 Act sets out a new framework for the regulation and inspection of independent schools in England. It replaces the existing framework provided for by the Education Act 2002.

4.2 Section 128 of the 2008 Act gives the Secretary of State power to make directions prohibiting or restricting the participation of unsuitable persons in the management of an independent educational institution. It will be brought fully into force (by way of commencement order) on 1 September 2014, at the same time as these Regulations.

4.3 The Regulations set out the grounds on which a direction may be given. The grounds are that a person has: (1) been convicted of, been given a caution in respect of, or subject to a relevant finding in respect of a relevant offence, or has engaged in relevant conduct, and (2) the Secretary of State considers that, because of the conviction, caution, finding or conduct, the person is unsuitable to take part in the management of an independent school. “Relevant conduct” has been defined to include a breach of professional standards, conduct which is aimed at undermining fundamental British values, or conduct which is so inappropriate that it makes a person unsuitable to take part in the management of a school.

4.4 The Regulations form a component of a larger package affecting independent schools in England. The Department intends to bring many of the other provisions in Part 4 of the 2008 Act (including amended Independent School Standards) into force later in the year.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done?

7.1 The Department are making Regulations under section 128 of the 2008 Act. The Regulations set out the grounds on which a person can be barred from managing an independent school in England.

7.2 The Regulations have the following effects:

- They allow the Secretary of State to bar a person who is convicted of an offence, given a caution for an offence, or is subject to relevant findings in respect of an offence from taking part in the management of an independent school, if the Secretary of State concludes that the conviction, caution, finding or conduct makes the person unsuitable;
- They allow the Secretary of State to specify the circumstances in which, or the conditions which must be satisfied before, someone convicted, given a caution, or subject to a relevant finding in respect of a relevant offence, may take part in the management of an independent school;
- They allow the Secretary of State to bar a person, set out the circumstances in which, or the conditions which must be satisfied before, they may take part in the management of an independent school, if they have engaged in conduct which the Secretary of State finds to be relevant, and concludes it makes them unsuitable to do so; and
- They include an appeal right to the First-tier Tribunal and also set out the grounds on which the Secretary of State may vary and revoke section 128 directions.

Why are we doing it?

7.3 The independent sector is comparatively unregulated and the government believes that this should continue to be the case. However this system of relatively light touch regulation means there is a greater danger that unsuitable individuals will be able to secure management posts or become a

proprietor of an independent school.

- 7.4 Generally speaking independent schools are extremely capable of managing themselves and their staffing affairs. Independent schools do not generally employ inappropriate people and, as and when inappropriate behaviours are identified, the school itself will have the required procedures to deal with any issues. However there are instances where cases are so serious it is necessary for the Secretary of State to intervene.
- 7.5 The Secretary of State can check the suitability of a prospective proprietor of an independent school when it is first registered, or, when the proprietor of a registered school changes, and refuse to register the school or to approve the change. However, he is more restricted in taking action where an existing proprietor, or a person involved in managing a school, is found to be unsuitable. It is the issue of existing proprietors and managers where we believe additional intervention powers are necessary.
- 7.6 The Secretary of State currently has a similar power in section 142 of the Education Act 2002 to make a direction prohibiting a person from taking part in the management of an independent school (this section will be repealed when section 128 is brought into force). However, the Department has found the section 142 power to be ineffective in tackling some forms of conduct which may make a person unsuitable for a management role in an independent school (in particular, extremist conduct and professional misconduct). The Regulations are intended to enable the Department to tackle these issues more effectively. The Department is clear that where it becomes aware of a serious safeguarding issue, extremist behaviour or other serious inappropriate conduct it has a duty to act and, where it is necessary and proportionate, to bar the person who is responsible.
- 7.7 In these serious instances the Department cannot rely on the schools' internal processes and market forces to stop such people from taking part in the management of schools. The market in some instances is not currently working effectively- in some cases parents send their children to unsuitable schools, or schools in which unsuitable staff are employed. So the Department cannot rely on the market to automatically ensure that unsuitable people are not in management positions in independent schools. Even in cases where parents might be expected to act and move their children (in such numbers that ultimately the school is forced to close), the instances we are talking about barring an individual will be so serious that the risk to children's safety and education whilst waiting for the market to resolve the issue is unacceptable. There may also be cases where a school is dealing with a matter itself but because of the seriousness of the conduct it is appropriate for the Secretary of State to intervene immediately. There is also the danger that without a bar an unsuitable person could simply move on to another school.

8. Consultation outcome

- 8.1 The Department ran a 9 week public consultation from 7th February to 10th April. The consultation generated only 20 responses. The consultation was

open to the public and the Department emailed independent schools and independent school representative bodies directly on the day we launched the consultation to make them aware.

8.2 Of the key questions asked 61% of respondents agreed additional powers were required, 61% agreed the additional powers will address the issues we set out in terms of misconduct and extremism and 72% agreed a conduct ground is needed.

8.3 The Department has made two major changes to the Regulations as a result of the consultation.

➤ The Department noted respondents' concerns with regards to the narrow nature of the grounds for variation and revocation. The Regulations have been amended so individuals who have been given a direction based on a conviction or caution will be able to seek a variation or revocation on the same basis as those given a direction based on a conduct ground.

➤ The Department noted respondents' concerns regarding the use of the term 'so egregious' in the conduct grounds 2 (5) (c) and consequently the Regulations have been amended to read 'so inappropriate'. Part of the dictionary definition of egregious is 'outstandingly bad; shocking' and a key element of the root of the word is something that stands out from the ordinary. We are confident changing this to 'so inappropriate' will retain this sense whilst providing greater clarity as to what the term means.

8.4 The consultation and consultation response document can be found at:

<https://www.gov.uk/government/consultations/management-of-independent-schools-proposed-regulations>

9. Guidance

9.1 The Regulations will not have an impact on the vast majority of independent schools and as such the Department will not be issuing any guidance. The Department will write to all independent schools in August explaining the Regulations have been laid and will commence on the 1st September. As and when the Secretary of State commences section 128 direction action against an individual, the Department will ensure the direction process and appeal process are clearly explained to the individual in question.

10. Impact

10.1 The impact on business, charities or voluntary bodies is minimal.

10.2 The impact on the public sector is minimal.

10.3 The Impact Assessment is attached (Annex A) and will be published alongside the Explanatory Memorandum on the OPSI website.

10.4 The IA demonstrates the impact on the vast majority of independent schools will be minimal. Relatively low familiarisation costs will be the only impact for the vast majority of independent schools. The IA sets out a range of potential recruitment costs that would apply to schools that choose to recruit a replacement for a person who is barred.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 The Department have not taken any action to minimise the impact of the requirements on firms employing up to 20 people. There are 2,417 independent schools in England. Of these, 1,802 (74.6 percent) are small and medium enterprises (SMEs) that hire fewer than 50 FTE employees.

11.3 The basis for the final decision on what action to take to assist small business is as follows. The Department believe that quality of education and safeguarding is a basic fundamental of the education system and, as such, it matters regardless of the size of the school concerned. Given the serious nature of the issues that these Regulations address, the Department believe that small and micro independent schools should not be exempted from them. The Department also believe that it would be inappropriate to award a partial exemption to small and medium schools, to grant them an extended transition period, or to make compliance voluntary. The impact on the vast majority of small schools (indeed all schools) will be minimal and in most instances limited to very low level familiarisations costs (set out in the IA).

12. Monitoring & review

12.1 The success criteria for the Regulations will ultimately be reflected in the Secretary of State's ability to bar unsuitable people from management positions in independent schools. The Department do not put a target on the use of the barring power as in an ideal world the Secretary of State would not be required to exercise the power at all. The Regulations and their effectiveness will be kept under review, with a formal review scheduled in September 2017.

13. Contact

13.1 Michael Bell at the Department for Education Tel: 01325735779 or email: michael.bell@education.gsi.gov.uk can answer any queries regarding the instrument.