



Department
for Education

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Management of independent schools: proposed regulations

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The Independent Educational Provision in England (Prohibition on Participation in Management) Regulations

This consultation seeks views on proposed regulations that set out the grounds on which persons can be barred from taking part in the management of independent schools.

To Independent schools and independent school associations; schools inspectorates; parents of pupils at independent schools; faith groups; academy and free schools and academy and free school associations

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Enquiries To If your enquiry is related to the policy content of the consultation you can contact the Department on 0370 000 2288

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Contact Details

If your enquiry is related to the DfE e-consultation website or the consultation process in general, you can contact the Ministerial and Public Communications Division by e-mail: consultation.unit@education.gsi.gov.uk or by telephone: 0370 000 2288 or via the Department's '[Contact Us](#)' page.

1 Executive Summary

- 1.1 This consultation involves the Department for Education's proposals to make regulations ("the Regulations") allowing the Secretary of State to bar people from taking part in the management of independent schools, including academies and free schools, in England. The Education and Skills Act 2008 contains powers to make Regulations setting out the grounds on which persons can be barred. The target date for the Regulations to come into force is September 2014, subject to satisfactory completion of regulatory and Parliamentary procedures.
- 1.2 The main objective is to make Regulations under section 128 of the Education and Skills Act 2008. The Regulations will set out the grounds on which persons can be barred from managing an independent school, including academies and free schools in England.

These Regulations form a component of a larger package affecting independent schools in England. We shall be commencing most of the provisions of the Education and Skills Act 2008 relating to independent schools (replacing the framework set out in the Education Act 2002); and revising the Independent School Standards (on which we will also be consulting).

- 1.3 The main provisions in the Regulations are as follows:
- A. they allow the Secretary of State to bar a person who is convicted of a relevant offence, given a caution in respect of a relevant offence or who is subject to a relevant finding in respect of a relevant offence, from taking part in the management of an independent school;
 - B. 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;
 - C. 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 relevant conduct which makes them unsuitable to do so.

2 Background and Context

2.1 The Secretary of State currently possesses powers to bar people from taking part in the management of an independent school, as set out in section 142 (attached as **Annex A**) of the Education Act 2002. The Secretary of State can bar people if he believes they are unsuitable as a consequence of 'misconduct'.

The original intention of section 142 alongside the former List 99 was:

- to protect and safeguard children and young people from contact with unsuitable people, either because the person presents a risk to their safety and welfare, or because that person's behaviour presents an unacceptable example to them;
- to uphold high standards of behaviour expected of members of the teaching profession;
- to protect schools and the education service generally from fraud or deception.

2.2 In safeguarding terms, the Disclosure and Barring Service (DBS) barring and checking arrangements now achieve the first part of the first bullet point above (ie. the protection and safeguarding of children and young people from contact with people who are unsuitable because they present a risk to their safety and welfare), and the Teachers' Standards administered by the National College for Teaching and Leadership and covering independent schools, provide for the second bullet point. But for independent schools we believe there is inadequate provision in current powers for the second part of the first bullet point (ie. the protection and safeguarding of children and young people from contact with people who are unsuitable because their behaviour presents an unacceptable example to them), and for the third bullet point.

2.3 A more effective power is provided in section 128 of the Education and Skills Act 2008. Like section 142, it allows the Secretary of State to direct that a person may not take part in the management of an independent school, at all, or only in specified circumstances, or only subject to conditions. It goes on to say that such a direction can only be given on one or more prescribed grounds connected with a person's suitability to take part in the management of an independent school. It allows the Secretary of State to make regulations setting out the procedure for giving a direction and prescribing the grounds on which it can be made.

- 2.4** The grounds are that a person has been convicted of, given a caution in respect of, or is subject to a finding in respect of, a “relevant offence” that makes them unsuitable; or that a person has engaged in “relevant conduct” that makes them unsuitable.
- 2.5** An offence is “relevant” if it is relevant to a person’s suitability to take part in the management of an independent school – eg. manslaughter would be “relevant”, but probably not a parking offence. This is an objective test. If an offence is “relevant” then a further test needs to be applied, this time a subjective one: does the “relevant” offence mean that the particular person who wishes to take part in the management of an independent school is unsuitable to do so?
- 2.6** Conduct is “relevant” if it falls within one (or more) of three categories, namely extremism, professional misconduct or a catch-all category of “egregious conduct”.
- 2.7** A flow chart setting out how the barring process will work in practice is attached at **Annex B**.
- 2.8** The Department is committed to operating this process in a way that is compliant with its obligations under the Human Rights Act 1998.
- 2.9** **Extremism**

The draft regulations will provide another helpful tool for the Department in its efforts combating extremism. This is because they make provision for the Secretary of State to direct that persons may not be involved in the management of an independent school on the grounds that they have engaged in “relevant conduct” that makes them unsuitable. This would help us to bar those people involved in extremist activity that falls short of the criminal threshold, and may include those who have expressed extremist views. The holding and expression of extremist views is not prohibited by law except where those views constitute incitement to religious or racial hatred or to terrorism.

2.10 The draft Regulations make clear that “relevant conduct” includes conduct which is aimed at undermining the fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs. Under the ISS Regulations independent schools are separately required to encourage respect for these values, and the draft Regulations could help us to take action where there is evidence that individuals involved in the management of an independent school have conducted themselves in a way which is in opposition to those values.

2.11 Egregious Conduct and Professional Misconduct

The Regulations will allow the Secretary of State to bar people who have been found to be in breach of professional standards by a professional body. This will allow the Secretary of State to consider conduct that isn't criminal and may not fall under the current definition of 'misconduct'.

2.12 The Regulations will allow the Secretary of State to bar people whose behaviour is so egregious that in his opinion it makes a person unsuitable to take part in the management of an independent school. As above this will allow the Secretary of State to consider conduct that isn't criminal and may not fall under the current definition of 'misconduct'.

2.13 We are not dealing with large numbers. The power would be a 'back-stop' rather than something in constant use.

3 The Proposals

3.1 The full draft Statutory Instruments can be found at **Annex C**

We have provided commentary on each of the draft regulations below, together with questions where we are seeking your views.

3.2 Prescribed grounds for a section 128 direction (Regulation 2)

Commentary:

A section 128 direction may be given to; persons who have been convicted of a relevant offence, given a caution in respect of a relevant offence, are subject to a relevant finding in respect of a relevant offence, or who have engaged in relevant conduct, which makes them unsuitable to take part in the management of an independent school. The scope of the regulations covers proprietors who take part in the management of an independent school and any other staff taking part in management but not ordinary teachers or ancillary staff. Proprietors who do not take any active part in the management of their school are outside the scope of these regulations.

The regulations will fill a gap that we believe exists with regards to section 142 of the Education Act 2002 that allows barring as a consequence of “misconduct”. “Misconduct” is a vague term and doesn’t cover the original intentions of section 142 and the former List 99. We believe the new regulation will provide a more effective power than what is available currently.

Although the ISS include a standard about the suitability of proprietors and staff, it focuses on the provision of a criminal records check. This together with section 142 does not leave sufficient scope to take action with regards to the relevant conduct we have set out in paragraph 2.6 because there is not always a criminal element or behaviour which could be said to amount to “misconduct”. The new regulations address this issue and will allow the Secretary of State to address relevant conduct that does not breach the threshold of criminality or amount to “misconduct”.

It is not intended to seek out people who might be barred.

We anticipate that barring cases will arise in three main ways:

A- The Department becomes aware, either through school inspection, from information received from local authorities, from information received from whistle-blowers and other sources, that someone involved in the management of a school has said or done something we think renders them unsuitable whether at the school itself or elsewhere.

B- The Department becomes aware, from applications to open a school or through other routes, that a person, usually an intending proprietor, has got convictions which although not leading to a DBS bar, make it undesirable for them to be managing an independent school. These might be fraud-related for example where parents might be at risk in terms of the financial management of the school and its fee income.

C- Similar to (b) above but if there are not convictions as such, an individual may have been struck off a professional register, for example by the Solicitors Disciplinary Tribunal for dishonest behaviour.

Regulation 2(6) reflects the legal position that spent convictions and cautions can be used as a ground for the Secretary of State to give a section 128 direction. This means that a person with a spent conviction or caution can be prevented from taking part in the management of an independent school. This is a technical and complex area of law, but the general rule is that a spent caution or conviction cannot be used as a ground to exclude a person from any office, profession, occupation or employment¹. However, there are exceptions to this general rule under the Rehabilitation of Offenders Act 1975 (Exceptions) Order 1974 and they include participating in the management of an independent school.² This Order has been amended with effect from May 2013³. As a result, in order to fall within the exceptions to the general rule:

(a) a conviction for a “service offence” must be a “recordable service offence”;⁴ and

(b) a spent caution or conviction must not be “protected”.⁵

1 - Section 4 of, and Schedule 2 to, the Rehabilitation of Offenders Act 1974

2 - This Order disapplies the prohibition in section 4 of, and Schedule 2 to, the Rehabilitation of Offenders Act 1974 in relation to work that used to be regulated activity before such activity was amended by the Protection of Freedoms Act 2012- please see article 4 and paragraph 14A of Part 2 of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.

3 - SI 2013/1198 The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013

4 - Article 2(2A) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975

5 - Article 2A of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975

Question 1: Do you agree these additional powers are required to fill the gap that we have discussed above in terms of the current barring process? If not, why not?

Question 2: Do you agree that the additional powers that we are proposing will address the issues we have discussed in terms of “misconduct” and extremism? If not, why not?

Question 3: Do you agree that a “conduct” ground is needed as well as one based on convictions? If not, why not?

Question 4: Do you agree that “relevant conduct” as set out in regulation 2 (5) (a), (b) and (c) is reasonable prescribed grounds to consider a section 128 direction? If not, why not?

Question 5: Do you think “relevant conduct” as set out in regulation 2 (5), (a), (b), and (c) is adequately defined? If not, why not?

Question 6: Do you think that “relevant offences” as set out in regulation 2 (1) (a) (i,ii,iii) and the description at regulation 2 (2) are reasonable prescribed grounds to make a section 128 direction. If not, why not?

Question 7: Do you agree that the Secretary of State is the appropriate person to make directions? If not, why not?

3.3 Procedure for giving a section 128 direction (Regulation 3)

Commentary:

Anyone who the Secretary of State is considering barring must be notified in writing in advance of any direction and given the opportunity to make representations.

Question 8: Do you agree that notifying anyone that is potentially going to be barred in advance, in writing, to allow them the opportunity to make representations is the fairest and simplest way to manage the notification process? If not, why not?

Question 9: When the Secretary of State does not know and cannot reasonably ascertain the whereabouts of a person is it reasonable for the Secretary of State not to have to notify the person in writing and give them opportunity to make representations? If not, why not?

3.4 Cases in which appropriate authority may vary or revoke a section 128 direction (Regulation 4)

Commentary:

A direction can be varied or revoked on request from the person concerned or on the Secretary of State's own initiative if new information comes to light or there is a material change in the circumstances of the person.

Question 10: Do you agree that the Secretary of State should have the opportunity to vary or revoke a direction if new evidence comes to light or there is a material change in circumstances? If not, why not?

Question 11: Do you agree that the person concerned should have the opportunity to request a variation or revocation if new evidence comes to light or there is a material change in circumstances? If not, why not?

3.5 Grounds on which variations or revocation of a section 128 direction may be sought (Regulation 5)

Commentary:

If the person themselves seeks variation or revocation of the direction this can only be if a conviction has been quashed or become spent, five years has elapsed since a caution was given, or the person can supply new information or show a material change in circumstances.

Question 12: Do you think what has been proposed are reasonable grounds to seek a variation or revocation? If not, why not?

3.6 Appeals: restrictions on Tribunals power to entertain appeal (Regulation 6)

Commentary:

The First-tier Tribunal hears appeals against directions or refusals to revoke or vary a direction. However it cannot entertain appeals which seek to show that a conviction which is the ground for the barring direction was wrongful. It can hear an appeal based on a claim that it was inappropriate to issue a direction in relation to that conviction (i.e. that the offence was not serious enough to merit a bar)

3.7 Appeals: Tribunals powers (Regulation 7)

Commentary:

If the Tribunal decides the Secretary of State's decision on a direction or request for revocation or variation is not appropriate, it can order the decision to be reversed. The Tribunal cannot take account of new information or a material change in circumstances arising after the decision was made by the Secretary of State (since the person should have sought revocation or variation on those grounds, rather than appealing).

3.8 Appeals: Background Information

Commentary

Section 129 of the Education and Skills Act 2008 provides for an appeal to the First-tier Tribunal (see section 124(5) against a decision to make, or not to vary or revoke, a direction under section 128). The First-tier Tribunal is divided into seven chambers and it is proposed that appeals under section 129 should be allocated to the Health, Education and Social Care Chamber which is the Chamber that currently deals with appeals in respect of the registration of independent schools. The composition of a panel of the Tribunal is a matter for the Senior President of Tribunals to decide. Panels in the Health, Education and Social Care Chamber usually consist of a tribunal judge and two non-legal members with suitable expertise or experience.

The relevant procedural rules are the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, which are made by the Tribunal Procedure Committee and can be found in their current form at: <http://www.justice.gov.uk/tribunals/rules> .

Rule 2 states that the overriding objective of the Rules is to enable the Tribunal to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the Tribunal wide case management powers in order to achieve these objectives.

Although the Tribunal usually determines an appeal after an oral hearing, an appeal may be determined on the papers if both parties agree and the Tribunal is satisfied that it can determine the issues without a hearing (see rule 23).

Under rule 10, the Tribunal has the power to award costs against a party where it considers that the party has acted unreasonably in bringing, defending or conducting the proceedings.

It is not anticipated that any amendment to the Rules will be required for appeals under section 129 of the Education and Skills Act 2008 except possibly to provide for a three-month time limit for appealing (see rule 20(1) and the Schedule).

Under section 11 of the Tribunals, Courts and Enforcement Act 2007, any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal (Administrative Appeals Chamber).

The Lord Chancellor has the power under section 42 of the 2007 Act to prescribe fees for appeals to the First-tier Tribunal, for example an application fee. Currently, there are no fees for appeals to the Health, Education and Social Care Chamber. Where he is proposing to introduce fees he is required to consult the Senior President of Tribunals. Following this, any such proposal would be subject to secondary legislation that would need to be debated and agreed by both Houses of Parliament before it would take effect.

Question 13: Do you consider that the Health, Education, and Social Care Chamber of the First-tier Tribunal is an appropriate destination for these appeals? (Asked on behalf of the Ministry of Justice)

Question 14: Do you consider that any amendment needs to be made to the Tribunal Procedure (Health, Education, and Social Care Chamber) Rules 2008 for the handling of these appeals? If so, what amendment do you propose? (Asked on behalf of the Tribunal Procedure Committee)

3.9 Directions given under section 142 of the 2002 Act (Regulation 8)

Commentary:

There are provisions to treat s.142 directions as being directions made under s.128.

4 Conclusion

4.1 Question: Do you agree that:

Q15 A) the new regulations will achieve our policy goal of providing additional but proportionate powers for the Secretary of State to protect children from behaviour that could be harmful to them and in particular address extremism concerns with regards to behaviour that is inappropriate but does not meet the threshold with regards to criminality? If not, why not?

Q16 B) the new regulations will achieve our policy goal of providing additional but proportionate powers for the Secretary of State to protect schools and the education service generally from fraud and deception? If not, why not?

Q17 C) the new regulations will achieve our policy goal of providing additional but proportionate powers for the Secretary of State to protect children and independent schools when there is clear evidence that justifies a barring order but such an order may not have been possible under section 142 of the Education Act 2002 because it doesn't amount to 'misconduct'? If not, why not?

Q18 D) the proposed procedure for giving a section 128 direction, seeking to have it varied or revoked and appealing against it is fair and proportionate? If not, why not?

5 Annex A - Section 142 of Education Act 2002

5.1 Please download [Annex A](#) (Section 142) from the department's consultation website.

6 Annex B - Prohibition on Participation in Management - The Direction Process

6.1 Please download [Annex B](#) (Direction Process flow chart) from the department's consultation website.

7 Annex C - Draft Statutory Instruments

7.1 Please download [Annex C](#) (Draft Statutory Instruments) from the department's consultation website.

8 How To Respond

8.1 Consultation responses can be completed online at:
www.education.gov.uk/consultations

by emailing: IndependentSchoolRegs.CONULTATION@education.gsi.gov.uk

or by downloading a response form which should be completed and sent to:

Angela Tunstall
Department for Education
Level 2 -SRG Flexible Resource Unit
Mowden Hall
Staindrop Road
Darlington
DL3 9BG

9 Additional Copies

- 9.1** Additional copies are available electronically and can be downloaded from the Department for Education e-consultation website at:
www.education.gov.uk/consultations

10 Plans for making results public

- 10.1** The results of the consultation and the Department's response will be published on the DfE e-consultation website in late spring 2014.