



Department  
for Education

# **Independent Educational Institutions – Material Change**

**Schools Bill Factsheet**

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# Schools Bill Factsheet: Independent Educational Institutions – Material Change

## What is the government’s policy objective?

The government’s aim is that all children of compulsory school age receive a safe and broad education. Changes to the material change regime will allow us to better ensure that it is clear what schools are registered to do and enable proportionate action if they operate outside their registration without authorisation. This will help ensure schools are safe and can be inspected appropriately.

## What does this measure do?

This measure will improve the material change regime by making it clear when a school is required to apply for a material change, ensuring the Department for Education (‘the Department’) has suitable discretion to approve and reject material change requests based on the interests of children and whether relevant standards will be met after the change and allowing proportionate action to be taken if a school operates outside its approved registration.

A school currently needs to apply to make a material change in its registration where it wishes to change its proprietor, address, age range, capacity, whether it is single sex for boys or girls or co-educational or whether it has boarders. This measure will confirm that these changes still require approval (which would not all be the case if the current provisions in the 2008 Act were enacted without change). The measure also clarifies the circumstances under which ‘special schools’ (schools specially organised to make special educational provision for students with special educational needs) are required to apply for a material change (where a school becomes or ceases to be a special school and where a special school changes the type or types of needs the school is specially organised to meet). This addresses an issue with the current regime that includes an unworkable requirement that any school needs to apply for a material change when any pupil with a special educational need is admitted.

This measure adjusts the discretion that the government has to approve or reject a material change. For example, the government will be able to approve a material change where it is in the best interest of children’s education even if the school will not immediately meet all relevant independent school standards following the change (although there must a reasonable expectation that the standards will be met in future). This may help struggling schools seeking to reorganise in a manner that is likely to facilitate future improvement. The government will also be able to reject material change applications for new proprietors when it is evident that they do not meet a fit and proper person test.

The measure will also allow the government more options for action against schools that make an unauthorised material change so that proportionate action can be taken. For example, if a school exceeds its registered capacity, the only option currently open to the government is to de-register the school, requiring all current pupils to find new school places. This measure will enable the government to impose a relevant restriction prohibiting new admissions in these circumstances. This will bring the school back to its registered capacity over time as pupils leave and without there being a disproportionate impact on current pupils.

Together, the different parts of this measure will create a material change regime that is clear, proportionate and enforceable. This will provide parents with greater assurance that schools are safe and suitable, operating within their registration and inspected accordingly.

## **Why is legislation needed?**

Sections 101 to 105 of the Education and Skills Act 2008 ("the 2008 Act") contain a regime that requires the prior approval of the Secretary of State for "material changes" made in relation to independent educational institutions. However, not all of these provisions have been brought fully into force. As a consequence, "material changes" are still dealt with under the regime in section 162 of the Education Act 2002. The regime in section 162 of the Education Act 2002 provides that a greater number of things are "material changes", in relation to all independent educational institutions, than those covered by the 2008 Act. In broad terms most of the things under the 2002 Act that constitute a "material change" are not "material changes" under the 2008 Act, unless they relate to a "special institution", that is an independent educational institution that is specially organised to make special educational provision for students with special educational needs.

Currently, the 2008 Act provides that where a material change is made without the prior approval of the Secretary of State ("unapproved material change"), the only remedy available to the government is to remove the institution from the register of independent educational institutions. The practical effect of such a decision is that the school would close, requiring pupils to secure alternative places and this step may be disproportionate to the nature of the authorised change. Therefore, amendments to legislation are proposed to provide an alternative remedy for an unapproved material change, namely the imposition on the proprietor of an institution of a "relevant restriction" (in broad terms a restriction on how an institution operates).

In some scenarios, it is appropriate for the government to commission an inspection of an independent educational institution, before approving a requested material change. A report from such an inspection may be necessary in order for the government to reach a conclusion on whether or not the independent educational institution standards are likely to be met at the institution, following the material change. The government needs to reach a conclusion about this in order to determine an application for material change

approval. The current legislation does not expressly cater for such inspections to be carried out by an independent inspectorate, under arrangements made with the government, and therefore, an amendment is being made to the 2008 Act to provide an express statutory basis for independent inspectorates to carry out ‘material change’ inspections of independent educational institutions.

The government consulted on proposals to amend the legislation relating to material changes and those proposals received broad support.

## **What is the effect of the legislation?**

Section 101 of the 2008 Act will redefine what constitutes a “material change”, so that any one of the following is a “material change” for the purposes of the 2008 Act, and irrespective of whether an institution is a special institution:

- a change of proprietor
- a change of address
- a change in the age range of pupils
- a change in the maximum number of students
- a change in whether the institution is for male or female students or both
- a change in whether the institution provides accommodation for students

This reflects the position under section 162 of the Education Act 2002. In addition, it will also be a material change if an institution becomes (or ceases to be) specially organised to make special educational provision for students with special educational needs and in the case of an institution specially organised to make special educational provision for students with special educational needs, a change to the type or types of special educational needs (as prescribed in regulations made under section 98(2)(a) of the 2008 Act) for which it makes special educational provision. As the regime under the 2002 Act operates, in relation to England, it is a material change simply to admit (or cease to admit) students with special educational needs. The definitions of “special educational provision” and “special educational needs” are to be found in section 20 of the Children and Families Act 2014 (because of section 162(2) and (3) of the 2008 Act and section 83(7) of the Children and Families Act 2014).

The changes to the legislation will also give the government discretion to refuse an application for material change, even if it appears the relevant standards are likely to be met after the change is made (for example, where a proprietor fails to meet a new fit and proper person test), and to agree to material change, even if it appears the relevant standards are not likely to be met (for example, reducing the age range of pupils as that will reduce the overall size of the institution), subject to certain conditions being met, after the change is made.

In addition, the proposals will grant the government a power to impose a relevant restriction where there is an unapproved material change.

## How will this work in practice?

The existing regime for material change, has a considerably narrower scope in terms of what constitutes a material change, particularly in relation to special educational needs. The current system, where admitting only one or a few pupils with SEN is a material change, is completely unworkable. Under the new proposals, the policy position will be much clearer and will fall in line with the legislation in that it will focus on whether institutions are categorising themselves as being specifically organised for pupils with a given type (or types) of SEN.

Revisions to the material change system are necessary to ensure that the government has appropriate discretion in allowing schools to expand or change their characteristics, while still maintaining adequate control as regulator. The proposed changes to legislation would allow for more proportionate management of material changes. For instance, they would expand enforcement options where an institution makes an unauthorised material change, allowing for a restriction to be imposed on its operations. Currently, de-registration is the only option and is often not proportionate. In addition, they would create more flexibility in how material change applications can be assessed. We originally proposed only to create more flexibility for ministers to reject applications for material changes. We, in addition, now intend to create flexibility to approve applications where this would be of benefit to the education of children and we expect the school to meet the standards in future, along with giving powers permitting ministers to reject applications to change a proprietor where they are satisfied that a proprietor is not fit and proper (and this requirement for the proprietor to be fit and proper will also apply to newly registering schools).

Statutory guidance will provide further details on the process to be followed when applying for a material change and will set out the criteria as to what constitutes a material change under the new regime.

## Key questions and answers

### Why is it important that a school operates within the terms of its registration?

Before schools are registered, they are subject to a pre-opening inspection that tests whether they are likely to meet the independent school standards following inspection. This allows parents, local authorities and others to have confidence that the school provides a suitable broad education and is safe if operating within its registration.

Material changes may affect a school's ability to meet relevant standards. For example, an unsuitable new proprietor could create safeguarding risks, the school may not be prepared to provide a suitable education to new year-groups and increasing capacity

could create health and safety risks. The government, therefore, needs to be able to do appropriate due diligence before approving such changes (which can include inspection).

A school operating outside its approved registration may not be able to provide a suitable broad education or be safe.

### **Why is there a need for regulatory reform?**

There are many institutions that cater mainly for children with Education and Health Care (EHC) plans which are not labelled as special schools and many that do not cater mainly for children with EHC plans that are labelled as special schools.

The proposed measures will clarify the circumstances under which schools will be registered as specially organised to cater for children with special educational needs and the types of needs they are organised to meet. This will provide greater transparency to parents, commissioners and inspectorates.

The measures will bring regulation of independent schools that are specially organised to cater for children with special educational needs into line with other requirements, e.g. the SEN Code of Practice (although this is only a requirement for those schools registered under s41 of the Children and Families Act 2014).

### **How will the Department use enforcement powers to take action against unauthorised material change?**

The government will update its independent schools regulatory and enforcement action policy to cover the use of this power. As now, enforcement action will be taken in a manner that is proportionate, targeted, consistent and transparent.

This measure will enable the government to take lower-level enforcement action in relation to material change than it can at present (where de-registration is the only available measure).

## Part 2: Additional detail on Delegated Powers

There are four regulation-making powers associated with these measures:

- [Applications for approval of material change and for initial registration: power to prescribe types of special educational need](#)
- [Applications for approval for material change: power to prescribe information](#)
- [Amendments allowing for the imposition of relevant restrictions](#)
- [Independent educational institution standards](#)

### **Applications for approval of material change and for initial registration: power to prescribe types of special educational need**

#### **What does this delegated power do?**

Section 98(2) and (3) of the Education & Skills Act 2008 (“the Act”) provide regulation-making powers to prescribe the content of applications for the registration of independent educational institutions. They include a duty for regulations to require an applicant, in the case of a special institution, to specify the type or types of special educational needs for which the institution is specially organised to make special educational provision. An amendment is made to section 98 to make it clear that regulations can require in such cases the applicant to supply information about the type or types of special education needs according to how these are categorised in regulations.

#### **How does the government intend to use this power?**

The regulations will be a means to give greater clarity to proprietors because it will be more transparent to them what information they need to provide when applying to register a special school. In addition, because of how the Bill defines what constitutes a material change where a special school changes the type or types of special educational needs it caters for. That is to say because the Bill defines those types of special education needs in terms of how they are set out in the regulations, regulations will also be able to give clarity, to proprietors, commissioners and inspectorates, about what constitutes a material change here.

The Department intends to reflect in regulations how the SEN Code of Practice categorise special educational needs.

In the Department’s view, what information an application should contain is the sort of technical, administrative matter that is commonly dealt with by means of a delegated power, rather than on the face of an Act of Parliament.



The amendment constitutes a slight extension to pre-existing delegated powers, to clarify what is permitted under them, and will enable greater certainty to be provided to applicants about precisely what information they need to provide.

## **Applications for approval for material change: power to prescribe information**

### **What does this delegated power do?**

Some changes (“material changes”) in how a registered independent educational institution operates, including where there is a change of proprietor, will require the prior approval of the Secretary of State.

An application needs to be made for that approval. These powers enable the Secretary of State to be able to make regulations as to the form applications for material change approval must take, and what information they must contain.

### **How does the government intend to use this power?**

Applications for material change approval are not subject to any statutory requirements (save that they need to be in writing and made by a proprietor or proposed proprietor where the proprietor is changing). The power enables requirements to be imposed on applicants as to the contents of applications and the method for making them. This will improve the efficiency of the administration and consideration of material change applications including enabling improved administrative processes and minimising delays caused by missing information.

In the Department’s view, the form which applications need to take and what information they should contain, are the sort of technical, administrative matters that are commonly dealt with by means of a delegated power.

## **Amendments allowing for the imposition of relevant restrictions**

### **What does this delegated power do?**

The Bill makes various amendments to the material change regime in the 2008 Act, a regime that requires the prior approval of the Secretary of State before certain changes are made in how an independent educational institution operates or where it has a change of proprietor.

Section 105 of that Act already provides the Secretary of State with a power to de-register an institution where there is an unapproved material change. Additional powers would enable the Secretary of State to impose a “relevant restriction” where there has been an unapproved material change. In broad terms, a relevant restriction is a restriction imposed on the proprietor of an independent educational institution, restricting how the institution may operate (see section 117 of the 2008 Act). It would be an offence for a proprietor to breach a relevant restriction imposed under the new power.

### **How does the government intend to use this power?**

Mechanisms need to be in place to enforce the material change regime, to allow for the Secretary of State (as the regulator of independent educational institutions in England) to take action in appropriate cases where there are unapproved material changes. For example, to require proprietors to correct unapproved material changes where there are connected breaches of the independent educational institution standards under section 94 of the 2008 Act. Otherwise, the regime will fall into disrepute.

Currently, under section 105, the Secretary of State is limited to de-registering an institution, which would require its closure (since it is a criminal offence to conduct an unregistered independent educational institution). That is likely to be a disproportionate response in many cases. Therefore, the new power to impose a relevant restriction is proposed to enable the Secretary of State to respond to unapproved material changes more appropriately.

Other administrative decisions made by the Secretary of State under the 2008 Act are not subject to a Parliamentary procedure, such as under the current power to de-register in section 105 and the powers to de-register or impose relevant restrictions under sections 115 and 116. In addition, because of other amendments contained within the new powers, proprietors affected by a suspended registration or a stop boarding requirement will be able to appeal against them to the First-tier Tribunal.

It is the Department’s view that the power is not a legislative power but rather administrative in nature because it is a power to make decisions in respect of individual institutions.

## Independent Educational Institution Standards

### What does this delegated power do?

Under section 94 of the 2008 Act, the Secretary of State is required to make standards, by regulations, for the purposes of Chapter 1 of Part 4 of that Act. These are standards that the proprietors of independent educational institutions are required to comply with and if they do not, then they face the possibility of regulatory or enforcement action under sections 114 to 116 of the 2008 Act.

A number of amendments are made to the regulation-making powers in section 94 of the 2008 Act:

- a) an amendment to section 94(1)(c) so that standards may be made relating to the attendance of students at independent educational institutions;
- b) the insertion of a new subsection which expands on the power to make standards relating to the suitability of proprietors of independent educational institutions. In particular, with this new provision, standards will be able to be made which require that an individual proprietor, or an individual who has the general management and control of a proprietor body or is legally responsible and accountable for such a body, must be a person who is, in the opinion of the Secretary of State, a fit and proper person to be involved in the running of an independent educational institution; and
- c) a new subsection is inserted which will permit standards to be made by reference to whether the proprietor of an independent educational institution must have regard to guidance issued, or a document published, by the Secretary of State from time to time.

### How does the government intend to use this power?

The Bill will insert a new section into the Education Act 1996 which would require proprietors of schools to produce attendance policies. Amendments (a) and (c) referenced above confirm that the Secretary of State has the power to replicate similar obligations into the independent school standards to those proposed regarding attendance.

This regulation-making power will also ensure that requirements in the new section of the Education Act 1996 are enforceable against proprietors of independent educational institutions. The Secretary of State has power to take action against breaches of these standards under sections 114 to 116 of the 2008 Act.

Amendment (c) will also confirm that standards can be made requiring proprietors to have regard to other guidance, and documents published, by the Secretary of State. There is, for example, the obligation to make arrangements to safeguard and promote the welfare of children, to have regard to guidance issued by the Secretary of State.

Amendment (b) is an extension of the existing power to make provision about the suitability of proprietors. In particular, it allows for a discretion to be conferred on the Secretary of State to decide whether someone is fit and proper to participate in the management of an independent educational institution.

## **Will there be any further consultation on this issue?**

There are no plans for further consultation

## **Key questions and answers**

### **Will it make it harder for proprietors to apply for a material change?**

No, with regulations in place it should be clearer to a proprietor what information they need to provide when submitting an application for a material change (or applying to register an independent school). It should also make processes more efficient, as if a proprietor provides all of the correct information in the first instance, the application can be processed more efficiently, thereby preventing the need to go back to a proprietor to request information that was perhaps missed within the initial application.



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