

SL(6)444 – The Independent Schools (Prohibition on Participation in Management) (Wales) Regulations 2024

Background and Purpose

The Independent Schools (Prohibition on Participation in Management) (Wales) Regulations 2024 (“these Regulations”) prescribe the grounds on which a direction may be given under section 167A of the Education Act 2002 (“section 167A direction”) prohibiting a person from taking part in the management of an independent school in Wales, or placing a restriction on a person’s ability to do so. The Regulations also make provision about the procedure for giving a section 167A direction, the circumstances in which a section 167A direction may be varied or revoked and provision about appeals in respect of section 167A directions.

Section 167A directions may be given in respect of a person who has been convicted of, been given a caution in respect of, or is subject to a relevant finding in respect of a relevant offence, or has engaged in relevant conduct, if the appropriate authority (the Welsh Ministers) considers that the person is therefore unsuitable to take part in the management of an independent school (regulation 2). Section 167A of the Education Act 2002 provides the “appropriate authority” with the powers to issue a direction. An appropriate authority means a registration authority or such other public authority as may be prescribed. The registration authority is the Welsh Ministers and therefore the appropriate authority for the purposes of the section 167A direction is the Welsh Ministers.

Regulation 2 prescribes the grounds on which a section 167A direction may be given and describes what amounts to a relevant offence, relevant finding, and relevant conduct for this purpose. Regulation 2 also provides that references to convictions and cautions include those that are spent provided there has been an order made excluding the operation of provisions of the Rehabilitation of Offenders Act 1974, which prohibit spent convictions and cautions being used as a ground to exclude a person from any office, profession, occupation or employment.

Before making a section 167A direction, the appropriate authority must give the person an opportunity to make representations as to why the direction should not be given and notice of that opportunity (regulation 3). Regulation 3 makes provision about the giving of the notice and the period within which representations may be made. All reasonable steps must be taken to notify a person in respect of whom a section 167A direction has been made.

The appropriate authority may vary or revoke a direction where a person seeks to have it revoked on one of the grounds set out in regulation 5, or in the absence of variation or revocation being sought, where new information comes to light or where there has been a



material change in circumstances of the person subject to the direction, provided in all cases that the appropriate authority considers it appropriate to vary or revoke (regulation 4).

Under regulation 5, a person subject to a section 167A direction may seek to have it varied or revoked on the grounds that the conviction, caution or finding in question has been quashed, that the conviction or caution in question is spent or becomes protected, or that a period of five years has passed since the finding in question was made. A person subject to a direction on conduct grounds may seek to have it varied or revoked on the grounds that new information has come to light or where there has been a material change in circumstances of the person subject to the direction.

Section 167B(1) of the Education Act 2002 provides for a right of appeal against decisions in respect of section 167A directions. Regulation 6 contains a restriction on the power of the First-tier Tribunal to entertain appeals in relation to section 167A directions which are given on the grounds of convictions. Regulation 7 provides for the First-tier Tribunal's powers on allowing an appeal in relation to a section 167A direction. Where the First-tier Tribunal considers that the decision to give the direction, or the decision not to vary or revoke it, is not appropriate it may order the appropriate authority to vary or revoke the direction.

Regulation 8 sets out the circumstances in which a person subject to a direction under section 142 of the Education Act 2002 immediately before the coming into force of section 167A of the Education Act 2002 will be treated as being subject to a section 167A direction starting with the day the Regulations come into force.

These Regulations come into force on 14 February 2024 and are laid as part of a suite of regulations with the Independent School Standards (Wales) Regulations 2024 and the Independent Schools (Provision of Information) (Wales) Regulations 2024.

Procedure

Negative

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

The following point is identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

The term “the appropriate authority” is used throughout these Regulations, but has not been defined and given a meaning. The meaning given by the definition of “the appropriate



authority" in section 167A(6)(b) of the Education Act 2002 is not implied into these Regulations because the Legislation (Wales) Act 2019 does not contain a provision corresponding to section 11 of the Interpretation Act 1978 (see *Writing Laws for Wales*, 4.12). In addition, the meaning given to the term in the Explanatory Note and in footnote (1) on page 4 will not define "the appropriate authority" for the purposes of these Regulations as they are not an operative part of the instrument. Therefore, the term "the appropriate authority" should have been defined in regulation 1(2) because it is used throughout these Regulations.

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument.

2. Standing Order 21.3 (ii) - that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note the complexity of these Regulations, and the potential difficulty in interpreting and applying them due to their content and the nature of the drafting. As such, we are pleased to note paragraph 62 of the Explanatory Memorandum, which states, "*Guidance will be published for independent schools alongside the Regulations coming into force in early 2024.*"

Welsh Government response

A Welsh Government response is required in relation to reporting point 1.

Legal Advisers

Legislation, Justice and Constitution Committee

23 January 2024



Senedd Cymru
Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
—
Welsh Parliament
Legislation, Justice and Constitution Committee