Secondary Legislation Scrutiny Committee
House of Lords
London
SW1A 0PW
Email: seclegscrutiny@parliament.uk

Joint Committee on Statutory Instruments
Palace of Westminster
London
Email: patricksj@parliament.uk
boothl@parliament.uk
jcsi@parliament.uk

28 July 2014

Dear Sir/Madam,

The Independent Educational Provision in England (Prohibition on Participation in Management) Regulations 2014

We write to draw the attention of the Committees to these regulations, intended to be laid by the Department for Education over the summer recess for implementation on 1 September 2014.

Draft regulations were subject to consultation between 7 February 2014 and 10 April 2014. As at the date of writing, revised regulations have yet to been laid before Parliament and we therefore attach a copy of the draft regulations the subject of the consultation. Our understanding of the Government’s response to the consultation, published on 22 July, is that the final form of the regulations will be little changed from the consultation draft.

The Independent Schools Council responded to the consultation with a number of criticisms about the drafting of the regulations and we wish to draw these to your attention. A copy of our consultation response is attached, although we summarise below our chief concern which we believe is within your remit.

Section 128 of the Education and Skills Act 2008 reads as follows:

“128 Prohibition on participation in management

(1) The appropriate authority may direct that a person—
(a) may not take part in the management of an independent educational institution;
(b) may take part in the management of such an institution only in circumstances specified in the direction;
(c) may take part in the management of such an institution only if conditions specified in the direction are satisfied.

(2) A direction under this section may be given in respect of a person only on one or more prescribed grounds connected with the suitability of persons to take part in the management of an independent educational institution.”

Section 128(2) therefore requires there to be “prescribed grounds connected with the suitability of persons to take part in the management” of an independent school before a direction may be given.

The proposed regulations purport to define the ‘prescribed grounds’. The drafting which we objected to in our consultation response is highlighted in the extract below:

“Prescribed grounds for a section 128 direction

2.—(1) The prescribed ground on which a section 128 direction may be given in respect of a person is that—

(a) the person—

(i) has been convicted of a relevant offence;
(ii) has been given a caution in respect of a relevant offence;
(iii) is subject to a relevant finding in respect of a relevant offence; or
(iv) has engaged in relevant conduct; and

(b) because of that conviction, caution, finding or conduct, the appropriate authority considers that the person is unsuitable to take part in the management of an independent school.

(2) For the purposes of paragraph (1), an offence will be relevant if it is relevant to a person’s suitability to take part in the management of an independent school.

(3) ...

(4) ...

(5) For the purposes of paragraph (1), conduct will be relevant if it is—

(a) 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;

(b) conduct which has been found to be in breach of professional standards by a professional body; or
(c) **conduct which is so egregious that, in the opinion of the appropriate authority, it makes a person unsuitable to take part in the management of an independent school.**”

The grounds on which a person can be made subject to a section 128 direction can therefore be understood to comprise two elements: an objective finding (paragraph 2(1)(a)) and a subjective opinion (paragraph 2(1)(b)). Our concern is that the drafting of each of paragraphs 2(2) and 2(5)(c) eliminates the objectivity: in the former case, because it involves a circular definition of what is ‘relevant’; in the latter case, because it relies upon the opinion of the appropriate authority (in practice, the Secretary of State).

Our consultation response went in further detail and, in particular, referred to the Statutory Instrument Practice Manual which requires particularity in drafting implementing regulations: “delegated legislation itself should be detailed, specific and self-explanatory and should not depend on the exercise of ministerial or departmental discretion unless provision to that effect is expressly contained in the enabling Statute”.

The draft regulations, however, create a fully subjective framework for decision-making by the Secretary of State: a person can be made subject to a section 128 direction because the Secretary of State considers them to be unsuitable. This does not meet the requirement for particularity in specifying ‘prescribed grounds’: it is neither detailed, specific nor self-explanatory and instead relies upon ministerial discretion.

Our consultation response did not just criticise the draft regulations but sought to suggest ways in which they could be improved. We drew the DfE’s attention to related disqualification powers in primary legislation which provide a more transparent basis for determining fitness/suitability.

For example, the Company Directors Disqualification Act 1986 empowers a court to make a disqualification order against a person where it is satisfied that his conduct in relation to the company makes him unfit to be concerned in the management of a company (section 8(2)). Notably, it is a court which makes this determination, not the Secretary of State. What is more, the court is directed to have regard to specific matters in reaching this determination (section 9(1) and Schedule 1). The matters are set out with clarity and objectivity.

Taking a similar approach for section 128 powers, one could envisage the following safeguards:

- Incorporating a reference to “investigative material” and “the public interest” (cf: section 8(1) CDDA), eg: “if it appears to the appropriate authority from investigative material that it is expedient in the public interest that a section 128 direction be given in respect of a person…”

- Linking the powers to failings under the regulations under which independent schools operate, the Education (Independent School Standards) (England) Regulations 2010 and, in particular, those currently incorporated in the spiritual, moral, social and cultural development of pupils (cf: Part 1 Schedule 1 CDDA), eg: “the extent of the person’s responsibility for any failure by an independent school to comply with [specify the relevant provisions of the Independent School Standards]…” This linkage would at least create an objective basis for the appropriate authority’s decision.
Our suggestions do not appear to have been considered by the DfE in its response to the consultation.

If the Committee requires any further information, please do not hesitate to contact the writer.

Yours faithfully,

Matthew Burgess
General Secretary, Independent Schools Council