

2023 No. (W.)

EDUCATION, WALES

**The Independent Schools
(Prohibition on Participation in
Management) (Wales) Regulations
2023**

EXPLANATORY NOTE

(This note is not part of the Regulations)

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 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.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations. A copy can be obtained from Welsh Government, Cathays Park, Cardiff, CF10 3NQ and is published on www.gov.wales.

Consultation Draft

2023 No. (W.)

EDUCATION, WALES

**The Independent Schools
(Prohibition on Participation in
Management) (Wales) Regulations
2023**

Made

Laid before Senedd Cymru

Coming into force

XXX

The Welsh Ministers make the following Regulations in exercise of the powers conferred by sections 167A, 167B(2) and 210(7) of the Education Act 2002(1) and section 171(1) and (2) of the Education and Inspections Act 2006(2).

Title, commencement and interpretation

1.—(1) The title of these Regulations is the Independent Schools (Prohibition on Participation in Management) (Wales) Regulations 2023 and they come into force on XXX.

(2) In these Regulations—

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- (1) 2002 c. 32. Sections 167A and 167B were inserted into the Education Act 2002 by section 169 of the Education and Inspections Act 2006. Section 167A was amended by paragraphs 13, 22(a) and (b) of Schedule 1(1) and by Schedule 2 to the Education and Skills Act 2008 (c. 25). Section 167B was amended by paragraphs 192 and 196 of Schedule 3 to the Transfer of Tribunal Functions Order 2008 (S.I. 2008/2833). Section 210(7) was amended by section 21(3) of the Learner Travel (Wales) Measure 2008 (nawm 2). There are other amending instruments but none is relevant to these regulations. For the meaning of “appropriate authority” see Section 167A(6)(b). For the meaning of “registration authority” see Section 171. For the meaning of “prescribed” and “regulations” see section 212(1). The functions of the National Assembly for Wales were transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (c. 32).
- (2) 2006 c. 40. Section 171 was amended by article 13(1) and (2)(f) of the Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012 (S.I. 2012/3006) and paragraphs 37 and 40(2) of Schedule 1 to the Education and Skills Act 2008 (c. 25).

“the 2002 Act” (“*Deddf 2002*”) means the Education Act 2002;

“the 2006 Act” (“*Deddf 2006*”) means the Education and Inspections Act 2006;

“caution” (“*rhybuddiad*”) has the meaning given by section 8A(2) of the Rehabilitation of Offenders Act 1974(1);

and

“section 167A direction” (“*cyfarwyddyd adran 167A*”) means a direction given under section 167A of the 2002 Act.

Prescribed grounds for a section 167A direction

2.—(1) The prescribed grounds on which a section 167A direction may be given in respect of a person are 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 is relevant if it is relevant to a person’s suitability to take part in the management of an independent school.

(3) References in paragraph (1) to a conviction include references to—

- (a) a conviction of an offence falling within section 308(3)(a) of the Sentencing Code(2), and
- (b) a conviction of a service offence within the meaning of the Armed Forces Act 2006(3) including anything that under section 376(1)

(1) 1974 c. 53. Section 8A was inserted by section 49 of, and paragraphs 1 and 3 of Schedule 10 to, the Criminal Justice and Immigration Act 2008 (c. 4). Subsection (2) of section 8A was amended by sections 135 and 141 of, and paragraphs 1 and 2 of Schedule 24 and paragraphs 1 and 8 of Schedule 25 to, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (c. 10) and section 119 of and paragraphs 1 and 2(b) of Schedule 11 to, the Police, Crime, Sentencing and Courts Act 2022 (c.32).

(2) Sentencing Act 2020 c. 17

(3) 2006 c. 52. For the meaning of “service offence” see section 50(2). Section 50(2) was amended by section 30 of and paragraph 3 of Schedule 4 to the Armed Forces Act 2011 (c.8) and section 76 of and paragraphs 4 and 5 of Schedule 14 to the Criminal Justice and Courts Act 2015 (c.2).

and (2) of that Act is to be treated as a conviction.

(4) For the purposes of paragraph (1) a person is subject to a “relevant finding” in respect of a relevant offence if—

- (a) the person has been found not guilty of the offence by reason of insanity,
- (b) the person has been found to be under a disability and to have done the act charged against them in respect of the offence, or
- (c) under the law in force in a country outside the United Kingdom a court has made a finding equivalent to that described in sub-paragraph (a) or (b).

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

- (a) is aimed at undermining the fundamental values of democracy and support for participation in the democratic process, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs,
- (b) has been found to be in breach of professional standards by a professional body, or
- (c) is so inappropriate that, in the opinion of the appropriate authority, it makes a person unsuitable to take part in the management of an independent school.

(6) Subject to sections 4 and 8A of and Schedule 2 to the Rehabilitation of Offenders Act 1974⁽¹⁾ and to any orders made under those provisions, references in paragraph (1) to a conviction or caution include references to a conviction or caution that is spent (within the meaning of the Rehabilitation of Offenders Act 1974).

(7) For the purposes of paragraph (1) a person (P) has been convicted of an offence, or been given a caution in respect of an offence, if P has been convicted or been given a caution in respect of an offence—

- (a) in any part of the United Kingdom, or
- (b) under the law in force in a country outside the United Kingdom.

(8) For the purposes of paragraph (7) P commits an offence under the law in force in a country outside the

(1) Schedule 2 was inserted by section 49 of, and paragraphs 1 and 6 of Schedule 10 to, the Criminal Justice and Immigration Act 2008 (c. 4). Schedule 2 was amended by sections 119 and 193 of and paragraph 1 and 3 of Schedule 11 to the Police, Crime and Sentencing Courts Act 2022 (c.32) and sections 135 and 141 of, and paragraphs 1 and 3 of Schedule 24 to, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (c. 10)

United Kingdom if P commits an act that is punishable under the law in force in that country however that act is described in that law.

Procedure for giving a section 167A direction

3.—(1) Before giving a section 167A direction in respect of a person the appropriate authority must give the person the opportunity to make representations as to why the appropriate authority should not give the direction.

(2) The appropriate authority must give the person notice that the person may make such representations.

(3) The appropriate authority must give the notice under paragraph (2) by sending it to the person by post.

(4) A person to whom notice is given under paragraph (2) may make representations in writing within the period of two months starting with the day on which the notice was sent.

(5) If—

(a) a person to whom notice is given under paragraph (2) asks to make representations after the period mentioned in paragraph (4) has expired, and

(b) the appropriate authority is satisfied that there were good reasons why the person failed to make representations in time,

the appropriate authority may allow a further period of time that the appropriate authority considers reasonable for the person to make representations.

(6) Paragraphs (1), (2) and (3) do not apply where the appropriate authority does not know and cannot reasonably ascertain the whereabouts of the person concerned.

(7) If a section 167A direction is given in respect of a person the appropriate authority must take all reasonable steps to notify the person of that fact.

Cases in which the appropriate authority may vary or revoke a section 167A direction

4. The prescribed cases in which the appropriate authority may vary or revoke a section 167A direction are where—

(a) the person in respect of whom the direction was given has sought to have it varied or revoked on one of the grounds set out in regulation 5(1),

(b) the appropriate authority is in possession of information relevant to the decision to give the earlier direction which the appropriate authority did not have at the time that the decision was made, or

- (c) the appropriate authority is in possession of evidence of a material change of circumstances of the person in respect of whom the direction was given, occurring since the direction was given,

and the appropriate authority considers that it is appropriate to vary or revoke the direction.

Grounds on which variation or revocation of a section 167A direction may be sought

5.—(1) The prescribed grounds on which a person subject to a section 167A direction may seek to have it varied or revoked are that—

- (a) a conviction, caution or finding on the grounds of which the direction was given has been quashed,
- (b) a conviction or caution on the grounds of which the direction was given has, since the giving of the direction, become spent within the meaning of the Rehabilitation of Offenders Act 1974,
- (c) a conviction or caution on the grounds of which the direction was given has, since the giving of the direction, become a protected conviction or protected caution within the meaning of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975(1),
- (d) in the case of a direction given on the grounds of a relevant finding, at least five years have passed since the finding was made,
- (e) the person in respect of whom the direction was given is able to provide information relevant to the decision to give the earlier direction which the appropriate authority did not have at the time that the decision was made, or
- (f) the person in respect of whom the direction was given is able to provide evidence of a material change of circumstances occurring since the direction was given.

(2) For the purposes of paragraph (1)(e) and (f), a person may not seek to have a section 167A direction varied or revoked insofar as the person's case is inconsistent with the person having been convicted of, or cautioned in respect of, an offence.

(1) S.I. 1975/1023, amended by S.I. 2020/1373; there are other amending instruments, but none is relevant to these Regulations. "Protected caution" and "protected conviction" are defined in article 2A, which was inserted by articles 2 and 4 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (S.I. 2013/1198).

(3) For the purposes of this regulation a section 167A direction is given on the grounds of a conviction, caution, finding or conduct if the ground in regulation 2(1) is met by virtue of the conviction, caution, finding or conduct (as the case may be).

Appeals: restriction on First-tier Tribunal’s power to entertain appeal

6.—(1) This regulation applies in relation to a section 167A direction which is given on the grounds of a conviction for an offence.

(2) The First-tier Tribunal may not entertain an appeal under section 167B(1) of the 2002 Act against the decision to give the direction, or not to vary or revoke the direction, insofar as the appellant’s case is inconsistent with the appellant having been convicted of an offence.

(3) For the purposes of paragraph (1) a section 167A direction is given on the grounds of a conviction for an offence if the ground in regulation 2(1) is met by virtue of a conviction for the offence.

Appeals: First-tier Tribunal’s powers

7.—(1) This regulation applies where—

- (a) an appeal has been made to the First-tier Tribunal under section 167B(1) of the 2002 Act in respect of a decision to give a section 167A direction, or a decision not to vary or revoke a section 167A direction, and
- (b) the First-tier Tribunal considers that the decision is not appropriate.

(2) The First-tier Tribunal may order the appropriate authority to vary or revoke the direction.

(3) Unless the parties to an appeal agree otherwise, the First-tier Tribunal, in exercising its powers under this regulation, must not consider—

- (a) any information relevant to the decision to give a direction, or not to vary or revoke a direction, which the appropriate authority did not have at the time the decision was made;
- (b) any evidence of a material change of circumstances of the person concerned occurring since the decision to give a direction or not to vary or revoke a direction was made.

Directions given under section 142 of the 2002 Act

8.—(1) The prescribed grounds for the purposes of section 171(1)(a) of the 2006 Act on which a direction

under section 142 of the 2002 Act (prohibition from teaching, etc.)(1) was given in respect of the person are grounds relating to the person's misconduct.

(2) The prescribed condition which must be satisfied in respect of the person (for the purposes of section 171(1)(b) of the 2006 Act) is that, as a result of the direction given under section 142 of the 2002 Act, the person may not take part in the management of an independent school.

(3) Starting with XXX persons who fall within section 171(1) of the 2006 Act are to be treated as if the direction given under section 142 of the 2002 Act were a direction given by the appropriate authority under section 167A of the 2002 Act for the purpose of any enactment.

Name

Minister for Education and Welsh Language, one of the Welsh Ministers

Date

Consultation Draft

(1) Section 142 was repealed in part by section 63(2) of, and Schedule 10 to, the Safeguarding Vulnerable Groups Act 2006 on 12 October 2009. Article 4 of the Safeguarding Vulnerable Groups Act 2006 (Commencement No 6, Transitional Provisions and Savings) Order 2009 saves the operation of section 142 in relation to directions to prohibit persons from participating in the management of an independent school on grounds of misconduct.