EXPLANATORY MEMORANDUM TO

THE APPRENTICESHIPS (MISCELLANEOUS PROVISIONS) (AMENDMENT) (NO. 2) (ENGLAND) REGULATIONS 2022

2022 No. 949

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 These Regulations create a new and additional arrangement for an alternative apprenticeship in England to enable prisoners to undertake apprenticeships without the need for an approved apprenticeship agreement with its associated status of being a contract for employment. This will be effective from 30th September 2022.

2.2 Developing prisoner apprenticeships will improve the workplace skills of offenders and enable prisoners to move directly into a job with training upon release. This should reduce re-offending rates and support the reintegration of the offender into society.

2.3 The procedure for free issue of these Regulations has been applied and these Regulations are being issued free of charge to all known recipients of SI 2022/86.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument amends the Apprenticeships (Miscellaneous Provisions) (Amendment) (England) Regulations (SI 2022/86) which were reported by the Committee for defective drafting in its 28th Report of Session 2021-22 on 18 March 2022. The Department is taking this first opportunity to correct the instrument. The error being corrected is the previous inclusion of an unnecessary definition of 'an approved standard' which is already defined in the enabling primary legislation, the Apprenticeships, Skills, Children and Learning Act 2009 ("the Act"). This instrument deletes this definition.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 These Regulations amend the Apprenticeships (Miscellaneous Provisions) Regulations 2017 (SI 2017/1310) ("the 2017 Regulations"), which were made under the powers conferred by sections A1(2), (3)(c) and (4) and (5), A2B(4), A9(1), (5)(d) and (6) and 262(3) of the Act.

6.2 The 2017 Regulations among other things specify the conditions of an approved English apprenticeship, including the circumstances where an alternative English apprenticeship applies. Circumstances where an alternative English apprenticeship applies include scenarios where an apprenticeship agreement is not appropriate.

7. Policy background

What is being done and why?

What did any law do before the changes to be made by this instrument?

7.1 Currently, almost all approved English apprenticeships take place under approved English apprenticeship agreements which, under the Act, must be treated as contracts of service and therefore qualify as contracts of employment. There are already some exceptions to this specified in the regulations which are "alternative English apprenticeships". These are specified for situations where contracts for employment are not appropriate – e.g., for redundant apprentices and for those who are office holders rather than an employee (police officers and ministers of a religious denomination).

7.2 There are currently no legislative barriers that prohibit a prisoner from accessing an apprenticeship programme to do an approved English apprenticeship. If a prisoner was able to perform work under a contract of employment, then from a legal perspective they would be able to access the programme by doing an apprenticeship under an approved English apprenticeship agreement. However, it is longstanding policy of Ministry of Justice (MoJ) that prisoners should not have contracts of employment. This is due to the practical issues and litigation risk that would arise from the conflict between prison rules and both contract law and employment rights. For these reasons, when prisoners currently undertake paid work whilst on Release On Temporary Licence (ROTL) they do so under a Memorandum of Understanding (MoU) made between them, the placement provider and the prison. Under existing apprenticeship legislation, such MoUs would not enable the prisoner to undertake an apprenticeship.

What will it now do?

7.3 We are amending legislation so that prisoners can undertake an apprenticeship under the alternative arrangements so that there is no requirement for an apprenticeship agreement with its associated status of being a contract of employment. The Regulations will provide that the apprenticeship should have a minimum duration of 12 months, in line with wider apprenticeship programme requirements.

7.4 Developing prisoner apprenticeships will enable prisoners upon release to move directly into a job with training. This should reduce re-offending rates, which in turn will reduce cost to the taxpayer through benefit savings, increased tax returns and reduced costs of re-offending. It should support the reintegration of the offender into society through well-paid employment and increase the availability of skilled labour for employers in priority occupations.

7.5 Initially, the programme will be aimed at those prisoners already on RoTL and working for a placement provider. These prisoners have already been risk assessed and are already working with placement providers who are used to dealing with prisoners. This therefore represents both the lowest risk and the highest potential for conversion to an apprenticeship. Depending on the success of the scheme, HM Prisons and Probation Service will consider whether other prisoners should be able to undertake apprenticeships.

7.6 Legislation will limit eligibility to prisoners, inmates in Young Offender Institutions and persons in the youth custody estate, who have been convicted and sentenced. This would include civil detainees (given that like other detainees, they serve sentences and are released into the community) but exclude immigration detainees (given that they are likely to be deported rather than released into the community).

7.7 Specific eligibility criteria in relation to conditions of funding are included within the Apprenticeship Funding Rules. An updated version will be available on 30 September 2022.

7.8 This instrument also corrects a mistake made to the 2017 Regulations by an earlier amending instrument, SI 2022/86. The error arose because of the insertion then of an unnecessary definition of "an approved standard". The Act defines that term, however. This instrument deletes the mistake.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans for consolidation.

10. Consultation outcome

10.1 There was no statutory duty to consult.

10.2 Informal engagement took place with placement providers already working with prisoners in the hospitality and construction sectors, including Greene King and Kier Construction. These placement providers were supportive of this policy and have committed to recruiting prisoners to their apprenticeship programmes when legislation allows. We are now engaging with a wider group of 21 interested organisations to ensure that the appropriate practical arrangements are in place so that apprentices can start when the legislation has been changed. These include risk assessment, administration of the apprenticeship, and the additional support needed from the placement provider for the apprentice (pre and post release). We have also engaged with New Futures Network; the specialist part of Her Majesty's Prison and Probation Service that brokers partnerships between prisons and placement providers.

11. Guidance

11.1 We have issued guidance to placement providers, prison staff and potential apprentices in respect of prisoner apprenticeships. Detailed eligibility criteria are available in the Apprenticeship Funding Rules.

12. Impact

12.1 The impact on business, charities or voluntary bodies is to remove the requirement for an apprenticeship agreement (contract of employment) for prisoners that they wish to work with as apprentices. This will allow relevant businesses to offer apprenticeships to prisoners which they cannot currently.

12.2 Public sector bodies will also be able to offer apprenticeships to prisoners which they cannot currently.

12.3 A full Impact Assessment has not been prepared for this instrument because the direct impact of the SI relates to prisoners rather than placement providers. It is already the case that some apprentices do not require a contract of employment and neither placement providers nor training providers have to engage with the policy i.e., they can choose whether or not to provide apprenticeships to prisoners. Once a prisoner has become an apprentice, they (and their placement provider and training provider) will be subject to all of the existing rules for apprenticeships.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 This policy is anticipated to have a positive impact on small businesses within relevant sectors to support the taking on of prisoner apprentices. Currently these businesses cannot offer apprenticeships to prisoners because of the requirement for an apprenticeship agreement (contract of employment). This change to legislation will enable small businesses that wish to do so, the opportunity to offer apprenticeships to prisoners. This could in turn, help to fill skills gaps, develop the skills of existing workers and help reduce the risk of prisoners re-offending.

14. Monitoring & review

14.1 Initially, we propose to enable 100 new prisoner apprenticeship starts each year. Subject to monitoring the scheme's success, we will increase its availability across the prison estate in England. Identification of suitable prisoners will occur through careers conversations (which already happen within prisons) to identify whether an apprenticeship is the right pathway for the prisoner. If it is, there is likely to be an interview with the potential placement provider with the prison governor also needing to agree. All the necessary risk assessments will also need to be undertaken.

14.2 DfE and MoJ will monitor the number of prisoners starting on apprenticeships; this will include placement providers submitting regular data about their prisoner apprentices to DfE. We will continue to work closely with all stakeholders including prisons, training providers and placement providers to understand any risks and resolve barriers where appropriate.

14.3 The instrument does not include a statutory review clause. We will undertake regular monitoring of the programme to include reporting on numbers of apprenticeship starts, completions, achievements and progression to further employment. We will also look to measure the impact of the programme on reducing re-offending rates and to understand the characteristics of prisoners who are joining the programme. Placement providers will record their apprentice details on the government apprenticeship service (as they already do for other apprentices) and will also report information to MoJ as specified in the Memorandum of Understanding.

15. Contact

15.1 Laura Orritt-Hopkins at the Department for Education email: laura.orritt-hopkins@education.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jonathan Childs, Deputy Director for Apprenticeships Strategy and Funding Policy, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Kit Malthouse MP, Secretary of State at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.