EXPLANATORY MEMORANDUM TO

THE EDUCATION (INDEPENDENT EDUCATIONAL PROVISION IN ENGLAND) (UNSUITABLE PERSONS) REGULATIONS 2009

2009 No.1633

1. This explanatory memorandum has been prepared by the Department for Children, Schools and Families and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of the instrument is to set out the types of work in an independent educational institution ("institution") that, if carried out by a person who is unsuitable to work with children because they are subject to a direction, order or decision, may lead to the removal of the institution from the register of independent schools. The regulations also set out the directions, orders and decisions which indicate a person is unsuitable. It is an offence to operate an institution which is not registered and the proprietor would be liable for prosecution if the institution remained open after having been removed from the register.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Institutions in England must be registered by the Secretary of State; it is an offence to conduct an unregistered institution. At the moment the register is kept under Part 10 of the Education Act 2002 (see section 158), but we are at the beginning of the process of transition from regulation of institutions under Part 10 of that Act to regulation under Part 4 of the Education and Skills Act 2008 ("the 2008 Act").

4.2 The section under which the Regulations are made contains power for the Secretary of State to remove an institution from the register if a person who is unsuitable to work with children or vulnerable adults is working at the institution, or is its proprietor. These Regulations define what is covered by "working" at the institution and which persons are considered unsuitable to work with children.

4.3 Section 119 of the 2008 Act is a replacement for the power contained in section 169 of the Education Act 2002 ("the 2002 Act"), as amended by section 170 of the Education and Inspections Act 2006 (not in force), which allows the Secretary of State to remove from the register an independent educational institution where the proprietor or any person working in the institution is unsuitable. The Regulations come into force on 12th October 2009 because of the link with the implementation of the Safeguarding Vulnerable Groups Act 2006. On that date section 142 of the 2002 Act, referred to in section 169 of the 2002 Act as unamended, is repealed.

4.4 We are making provision under the 2008 Act rather than the 2002 Act because the former contains a power for a proprietor of an institution to appeal to the First-tier Tribunal against a decision of the Secretary of State to remove the institution from the register. The Education and Skills Act 2008 (Commencement No. 4, Commencement No. 3 (Amendment), Transitory and Savings Provisions) Order 2009 makes transitory provisions in respect of the period until the register of independent educational institutions is in place under the 2008 Act (so far as relating to independent schools).

5. Territorial Extent and Application

This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

7.1 These regulations will allow the Secretary of State to remove an institution from the register where an unsuitable person is the proprietor of an institution or is employed by an institution to carry out work of a prescribed kind which is defined in the regulations as:

- Any form of work (whether or not for gain), carried out regularly, which gives the person carrying out the work ("W") the opportunity, in consequence of anything W is permitted or required to do in connection with the work, to have contact with children or vulnerable adults (as defined in the Safeguarding Vulnerable Groups Act 2006);
- Work is carried out regularly if it is carried out on more than two days in any period of 30 days.

7.2 Institutions must carry out pre-employment checks for all staff which would show whether the person is subject to a direction, order or decision so there is no excuse for employing any person who is unsuitable to work with children (or vulnerable adults). In addition no person should act in the capacity of a proprietor if they are unsuitable to do so and proprietors are subject to checks on their suitability which are made by the Secretary of State.

7.2 The power to remove an institution from the register under section 119 will be exercised at the discretion of the Secretary of State. We would not necessarily want to move to deregister an institution that employed an unsuitable person unwittingly and dismissed the person as soon as their unsuitability became known. Where a decision to deregister is made, the school will have the right to make an appeal against deregistration to the First-tier Tribunal under section 124(e) of the Act.

8. Consultation outcome

8.1 As the primary legislation largely reflects the provision contained in section 169 of the Education Act 2002 we carried out a short, informal, targeted consultation with 23 key clients, including inspectorates, the Independent Schools Council (ISC) and its member associations and other organisations that represent independent institutions.

8.2 We received 7 responses all of which supported our proposals.

8.3 In view of the informal nature of the consultation the outcome will not be placed on the Department's web site.

9. Guidance

9.1 Minimal guidance is required. All independent schools in England will receive a copy of the regulations plus a note setting out the implications.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil

10.3 An Impact Assessment has not been prepared for this instrument as it does not impose a burden.

11. Regulating small business

11.1 The legislation applies to small businesses that are independent schools.

11.2 No approach has been taken to minimise the impact of the requirements on firms employing up to 20 people.

11.3 The basis for the approach described at paragraph 11.2 is that there can be no difference in the way in which schools are dealt with if they employ unsuitable persons.

12. Monitoring & review

12.1 Regulations governing independent schools are regularly reviewed every 2 years.

13. Contact

Margaret Pattinson at the Department for Children, Schools and Families (tel: 01325 392172 or e-mail: margaret.pattinson@dcsf.gsi.gov.uk) can answer any queries regarding the instrument.