EXPLANATORY MEMORANDUM TO

THE SCHOOL GOVERNANCE (CONSTITUTION AND FEDERATIONS) (ENGLAND) (AMENDMENT) REGULATIONS 2017

2017 No. 487

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 amend regulations on the constitution of governing bodies of maintained schools in England to include a power for them to remove elected governors. This brings elected governors into line with every other category of governor for which there are already powers of removal . These regulations also make changes to correct defective drafting, comply with legislative practice, clarify the scope of a regulation and insert a consequential amendment.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 As part of this instrument, we are addressing comments the Joint Committee on Statutory Instruments made in their Fifth Report of Session 2012-2013 on 4 July 2012, and their Twenty-third Report of Session 2015–16 on 21 April 2016. Accordingly, we are: (a) removing a redundant provision used to decide the number of foundation governors in certain schools which required them to be rounded up or down to the nearest whole number; (b) clarifying that there is a sequential order of preference of the categories from which appointed parent governors are appointed; and (c) removing a reporting duty on governors and prospective governors to inform the clerk to the governing body if he or she is or has become disqualified, which will now be set out as an expectation in statutory guidance.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The School Governance (Constitution) England Regulations 2012 ("the Constitution Regulations 2012") set out the arrangements for the constitution of governing bodies of maintained schools. The School Governance (Federations) (England) Regulations 2012 ("the Federation Regulations 2012") set out the arrangements that apply to maintained schools in a federation, including matters relating to their establishment, dissolution and constitution.

4.2 Regulations 2(2), (5), (6)(b), 3(2) and (5) amend the Constitution Regulations 2012 and Federations Regulations 2012 further to the Department's commitment to rectify defective drafting and comply with proper legislative practice (paragraphs 7 and 8 of the Fifth Report of Session 2012-13 and paragraph 3 of the Twenty-Third Report of Session 2015-16 of the Joint Committee on Statutory Instruments).

4.3 Regulation 2(3) and (4) amends the Constitution Regulations 2012 to include a power and procedure for governing bodies to remove elected governors.

4.4 Regulation 3(3) amends the Federation Regulations 2012 to clarify the process by which decisions can be made to apply for an Academy order for a federated school in accordance with section 3(6) of the Academies Act 2010, and that that process is an alternative to majority voting needed under s. 3(1) of the Academies Act 2010.

4.5 Regulation 3(4) amends the Federations Regulations 2012 to substitute the description of parent governors with a reference to "the parent governors". The term "parent governor" is defined in regulation 14 of the Federation Regulations 2012 (as recently amended by the School Governance (Constitution and Federations) (England) (Amendment) Regulations 2016).

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is England.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 Regulation 2(3) and (4) introduces a power and procedure to remove elected governors. Currently governing bodies can suspend any governor who acts, for example, in a way that is inconsistent with the ethos or with the religious character of the school, and who has brought, or is likely to bring the school, or governing body, or the office of governor into disrepute. Governing bodies or other appointing bodies currently also have the power to remove a governor from office – unless they are an elected parent or staff governor, where there is currently no power for anyone to remove them, even for serious misconduct or where there have been repeated grounds for suspension.

7.2 The change we are making in these Regulations mean that for all categories of governor there is now a body with the power to remove them from office. We think this is an important last resort to ensure governing bodies can function effectively, focusing on their core strategic functions and reducing time wasted in prolonged disputes. We will amend statutory guidance to reflect this change, making clear the exceptional circumstances in which we expect the power to be used, and an expectation that governing bodies put in place an appeal process for elected governors who feel they have been unfairly removed.

7.3 Following the consultation, we have also inserted a provision into the Regulations disqualifying an elected governor from serving on a governing body for five years after they have been removed from office.

Consolidation

7.4 At this stage, we do not intend to publish consolidated versions of the Regulations.

8. Consultation outcome

8.1 The disproportionate disruption to a small number of governing bodies and headteachers that can result from an unsuitable elected parent governor was brought to the attention of the Department by members of its Advisory Group on Governance (AGOG). The Department subsequently developed proposals for removal and held a targeted consultation with the members of AGOG for a period of six weeks from 12 January to 28 February 2017. AGOG includes representatives of the Catholic Church (Catholic Education Service), the Church of England, the National Governors Association (NGA), the National Association of Headteachers (NAHT), the Association of School and College Leaders (ASCL), the Association of Directors of Children's Services (ADCS), the Institute of Chartered Secretaries and Administrators, the National Co-ordinators of Governor Services (NCOGS), and Ofsted.

8.2 In total 12 substantive responses were received from members of AGOG as well as from three local authorities (Hampshire, Lancashire and Northumberland) via the National Co-ordinators of Governor Services (NCOGS).

8.3 Consultation responses showed that the AGOG organisations and their members were overwhelmingly in favour of giving governing bodies the power to remove an elected governor. A number of responses suggested safeguards to prevent abuse of the power, including a clear appeals process for a removed elected governor. On the question of whether to disqualify a removed elected governor, opinion was more divided. Five respondents supported a disqualification that prevented anyone removed as an elected governor from serving as a governor in any school in the future. One of these said that the ban should be indefinite. However, one said that a ban from all schools would be disproportionate. Three others suggested a fixed-term of ineligibility. On the third question, the majority of responses (9) agreed that it would be sufficient to set out clear expectations on use of the power in guidance rather than regulations. However, they felt strongly that the guidance should be clear about the exceptional nature of the power and provide examples of what constituted the reasons for removal.

8.4 The Department for Education intends to make a report of the consultation responses available to members of the AGOG.

9. Guidance

9.1 An explanation of these legislative changes and guidance on the exercise of the power to remove elected governors will be added at the earliest opportunity to statutory guidance on the constitution of governing bodies and to the Governance Handbook (which provides guidance to governors, clerks and head teachers on the roles, functions and legal duties of governing bodies).

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the private or voluntary sectors is foreseen.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 We will monitor the operation of these Regulations through regular meetings with the relevant representative bodies: the NGA, the NCOGS and through the termly discussions with the AGOG.

13. Contact

13.1 Nick Parry at the Department for Education email: Nick.Parry@education.gov.uk can answer any queries regarding the instrument.