

# Response ID ANON-WVWA-CNMP-K

Submitted to **Regulating Independent Educational Institutions**

Submitted on **2020-05-07 09:33:10**

## Introduction

### 1 What is your name?

**Name:**

Roger Kiska

### 2 What is your email address?

**Email:**

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### 3 Are you responding as an individual or on behalf of an organisation?

Organisation

### 4 If you are responding on behalf of an organisation, what is your organisation?

**Organisation:**

Christian Legal Centre

### 5 Which of the following best describes the capacity in which you are responding to this consultation?

Faith or other group connected with schools or settings

### 6 Would you like us to keep your responses confidential?

No

## Widening the registration requirement

### 7 Do you agree that any full-time setting providing education to children ought to be regulated and that what is “full-time” ought to be defined more clearly?

**Free text box:**

Given the existing lack of public confidence in Ofsted and in their ability to inspect schools in a uniform and objective manner, coupled with the wholly inadequate appeal mechanism for schools at this time, we would strongly oppose any such effort to extend the inspectorate's authority as government overreach. This lack of public confidence is based on fairly well-publicised negative experiences suffered by many schools ; and as an organisation dedicated to safeguarding Christian education, the Christian Legal Centre is particularly concerned with the lack of religious literacy and heavy-handedness sometimes shown to conservative faith schools.

### 8 Do you think that the department's suggestion of 18 hours is the appropriate threshold for registration (and therefore regulation)? If not, what number of hours should be used or should there be no specified threshold?

**Free text box:**

Our belief is, that pursuant to the many legal obligations owed by the United Kingdom to parents and educators (for e.g. by The Convention on the Rights of the Child, the Human Rights Act 1998, and The Convention Against Discrimination in Education), that the Department should offer a wide margin of appreciation to alternative forms of education without regulation. Over-regulation stifles pluralism and damages academic and educational freedom.

### 9 Do you agree that any hours threshold should be linked to attendance rather than a minimum amount of time spent on tuition (education would have to be provided for at least some of the time attended)?

**Free text box:**

As the Early Sociology of Education (Ed. Kenneth Thompson) correctly posits, we must distinguish between the general functions belonging to government officials and the technical functions which can be intelligently exercised by professionally trained educators. While there may be a small minority of inadequate alternative education providers, regulation in the sense envisioned by the Department would have a much more sweeping and negative impact on the countless good providers. Parents should be trusted in the educational decisions they make for their children, for as the case law of the European Court of Human Rights has frequently quoted, they being the ones who love their children the most should be allowed to make the educational choices for their children. Not only is allowing parental freedom in education good policy, it is a legal obligation.

We believe that the existing guidance, highlighted at paragraph 2.4 of the consultation document is sufficient. As the Department admits, there is currently no statutory or judicial definition of “full-time” [para. 2.5] . It should be for parliament or the courts, therefore, to make any such clarification. For the Department to do so would be ultra vires. The Department also admits that the existing system has worked well [para. 1.3]. Absent compelling evidence, a system that is working well and which is grounded in reasonable policy should not be changed without a concrete need to do. The consultation provides no such pressing or cogent

evidence that change is either necessary or helpful.

**10 Do you think that registration should only be required if the provision takes place at least partially in usual school hours?**

**Free text box:**

Whether the schooling takes place during regular school hours or otherwise is an arbitrary measure. If anything, it would encourage providers who don't want to be regulated to function outside of regular school hours. The main principle that should guide the Department is that parental choice in how families wish to educate their children, and according to which faith, philosophy or morality, is a matter of parental rights. The recent push to impose certain moral norms, and increasingly ideological education in areas covering mature themes, onto children in the name of equality or British Values already ominously foreshadows what any form of further regulation might look like. True pluralism does not mean a government imposition of liberal views, with either an intended or unintended consequence being the undermining of traditional Judaeo-Christian views. It means freedom of educational choice and competing morals, values and views in the public square.

**11 The department's proposal is to treat 'usual school hours' as being 9am to 3pm, Monday to Friday. If a 'usual school hours' criterion were to be used, what hours do you think should be defined as being 'usual school hours' – as proposed above or a different set of times?**

**Free text box:**

See our answer to question 10. The Christian Legal Centre opposes any such form of regulation. Parents want educational freedom, not bureaucracy. They want to raise their children in accordance with their own religious and philosophical convictions, rather than having a government morality imposed on their families. Ofsted needs to get its house in order, including creating a meaningful appeal mechanism for schools, before even considering expanding its regulatory authority.

**12 Do you agree that the registration requirement should encompass any setting providing education and/or instruction to children of the specified age, and operating full time and during the specified hours, irrespective of the subject matter of what is taught?**

**Free text box:**

For a regulation to be valid, it must express its scope within concrete, precise, foreseeable and clear terms. The regulation of any setting, regardless of what is being taught, just because it is done within regular school hours and is full-time fails this standard. In fact, the way the question is premised makes the proposal appear to be a naked power grab. The Department has increased its incursion into educational freedom and parental rights in an exponential manner since introducing the equality agenda. This further incursion suggests that the aim is more about ensuring ideology is being presented rather than ensuring quality or safeguarding.

**13 Which settings do you think should be expressly excluded on the face of any legislation from the scope of the revised registration requirement for independent educational institutions?**

**Free text box:**

Whether true or not, the negative experiences of many independent faith schools suggest either an overt animus or bias against traditional beliefs or a religious illiteracy which is ready to proverbially throw a school's ethos under the bus in order to meet an artificial and poorly codified government mandated morality. The reality is that there are any number of ways of reading the government's requirements regarding equality and RSE, running the gambit from a reading which respects the ability of faith schools to act in accordance with their ethos' to an understanding that gender ideology and sexual orientation should be celebrated and made a mandatory part of the curriculum regardless of the ethos of the education provider or age of the pupils. With many parents in distress about the existing status quo, it strains credulity to extend even further the reach of Ofsted into the day-to-day affairs of independent education.

**14 Do you agree that any revised version of the registration requirement in primary legislation should contain power for subsequent changes to definitions in that version to be made by secondary legislation? If so, which definitions?**

**Free text box:**

The Christian Legal Centre is concerned about the seemingly unfettered discretion the Department is already using in relation to education provision. For example, its RSE Guidance is largely ultra vires to the actual RSE regulations themselves. At times, the Department has even watered down statutory language in a manner that damages parental rights (e.g. referring to parental engagement in its communications on RSE rather than the statutory term 'consultation'). Precisely stated, the Christian Legal Centre is gravely concerned that the Department has been agenda driven in the way it has represented ultra vires recommendations in manner that make them appear to be statutory obligations. Given the lack of parity between the average school and the Department (or the inspectorate for that manner), such an extension of its own authority can appear to be an abuse of trust tantamount to implicitly trying to usurp the role of Parliament in making legislation. We therefore oppose the recommendation set forth in this question.

**Changing how some appeals against de-registration are determined**

**15 Do you agree that in specified circumstances the hearing of an appeal against de-registration should be on the basis of judicial review principles rather than by way of a full merits review?**

**Free text box:**

As the consultation proposal itself admits, the number of schools facing de-registration has increased significantly in recent years. In making this statement, the Department hypothesises that the reason for this, among other possible reasons, is a lack of good school leadership. The reality is that it is just as likely that the increase is in part do to a lack of uniform inspection standards, and that different inspectors are judging schools by their own subjective understanding of what the inspections should entail. As set out in earlier responses, there is a serious lack of clarity with new requirements like RSE. If schools themselves do not have a clear understanding of what is expected of them, while at the same time dealing with potential existential threats to their ethos', then inspectors too have no way of knowing on what grounds they are inspecting schools in relation to some very important elements of educational provision. It is already a fact that the appeal mechanisms available to schools for a poor Ofsted inspection report are wholly inadequate. It is all the more troubling therefore, that the Department would make it even harder for well-meaning schools to keep their doors open for business. Perhaps the Inspectorate needs to turn the mirror onto itself instead of blaming all of the shortcomings of the current regime on independent education providers.

**16 If the way a court is to determine an appeal were to be modified as proposed, do you agree that the criterion relating to inspection cycles should be based on three inspections?**

**Free text box:**

While the Christian Legal Centre welcomes the suggestion that serious decisions about the future of education establishments be based on a greater number of inspections, it nonetheless strongly disagrees with changing the standard from a full merits review to the much more onerous standard of following judicial review principles.

**17 Do you believe that the power to specify in regulations the particular standards used in applying the criteria should be unconfined, or instead be restricted to certain specific standards, or specific groups of the standards as specified in section 94(1) of the 2008 Act? If the latter, which categories?**

**Free text box:**

Not only does the Christian Legal Centre oppose the use of unconfined criteria, it would note that doing so is wholly unlawful. As the European Court of Human Rights has clearly stated, a government action will not be deemed to be prescribed by law where that action is not subject to a clear and precise level of scrutiny: "In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise." Metropolitan Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81, 111.

**18 Do you agree that it is sufficient to give the proprietor an opportunity to make written representations, or do you believe that some further pre-decision requirement should be imposed to adequately protect the proprietor's rights (in addition to the actual appeal process)?**

**Free text box:**

The de-registration of independent educational institutions, particularly faith schools, engages numerous rights including parental rights (Protocol 1, Article 1 ECHR), the rights of the proprietor (Protocol 1, Article 1 ECHR) and the rights of both the provider and parents to be free of any discrimination, direct or indirect, from the inspectorate in relation to the religious beliefs of the school (Article 9+14 ECHR). Given the importance of the rights engaged, coupled with the significant disruption caused to both parents and the providers alike by potential de-registration, schools should be given every opportunity to defend their position, evidence improvement or challenge what they deem to be unfair or inaccurate inspection outcomes.

**19 Do you think there is any possible different way in which appeals should be determined against de-registration, which would achieve the same policy aim?**

**Free text box:**

The Christian Legal Centre is of the position that the existing appeal structure against both de-registration and negative inspection outcomes is wholly deficient. Currently, inspection results can be challenged not on substance, but on procedure alone. Short of that, the school must risk the expense and invest the time into costly judicial reviews. Such an appeal mechanism is almost wholly illusory, and shamefully inadequate given the impact bad inspections have on schools. As the Guardian aptly described in one of its articles critical of Ofsted, it is increasingly true that a headteacher's job is an endless stream of policy changes against a backdrop of constant fear that one disappointing Ofsted inspection could be the end of a career. See:

<https://www.theguardian.com/education/2014/mar/11/heads-poor-ofsted-report-dismissal-shortages>. In short, the Department should be invested in finding more effective appeal mechanisms for schools rather than making it even harder for schools to function. While this is true of bad inspection reports, it is all the more true of de-registration given the seriousness and permanence of any such decision.

**20 Do you have any further comments on the general issue of appeal rights in relation to enforcement decisions?**

**Free text box:**

We refer to our earlier responses reiterating our grave concern over making it even more difficult for independent schools to operate. The proposals made in relation to this consultation pose a genuine existential threat to independent schools.

## **Revision of the basis for consideration and approval of material changes to independent schools**

**21 Do you agree with the changes proposed for approval of material changes relating to provisions for pupils with SEN?**

**Free text box:**

The Christian Legal Centre welcomes the proposal made in paragraph 4.8(b). It also, in theory, has no objection to the proposal set forth in paragraph 4.8(a) given the importance of serving the unique needs of special education. That being said, CLC is concerned about making the process overly bureaucratic for independent education providers. The purpose of oversight is not to strike fear into proprietors that one wrong move, even unintentionally or from lack of foreknowledge, could mean de-registration. An appropriate balance must be struck between ensuring the needs of special education pupils and respecting the independence of school providers.

**22 Do you agree that the Secretary of State should be able to impose a relevant restriction for an unapproved material change?**

**Free text box:**

We believe that material changes are best dealt with at the parent/school level with minimal oversight by the Secretary of State. As the operative term in independent school suggests, such educational providers should be given a wider margin of freedom in how they operate their schools and what changes they need to make in order to best serve their school community (both pupils and parents). Any restrictions should therefore be limited and provide oversight with a light touch rather than providing cumbersome and potentially damaging regulation in a heavy-handed and prohibitive manner.

**23 Do you agree that it should be possible for the Secretary of State to refuse approval for a material change, on the basis of other evidence about the school or proprietor, even if relevant standards are likely to be met by the school after the change is made?**

**Free text box:**

We disagree. Such a proposal seems to be arbitrary, potentially capricious, and contrary to the rule of law. Proprietors and schools should be able to have full foreknowledge of what is required of them. Being able to refuse approval for a material change based on non-statutory grounds is the very definition of arbitrary. A presumption in favour of schools should be made under such circumstances given the reality that a school would not make a material change without proper deliberation and consultation of its governing body and stakeholders. Respecting subsidiarity above oversight should be the governing principle in relation to material changes.

**Other matters**

**24 Do you have any comments on the conclusions set out in the published equalities log, preliminary UNCRC assessment and family test document?**

**Free text box:**

The Christian Legal Centre agrees with the family test, and raises its concerns, that the overly onerous regulation of independent educational providers (either in relation to oversight of proprietors not currently subject to regulation, an overly expansive definition of independent school provision, or higher standards of review for de-registration appeals ) may have the consequence of forcing some parents to home educate where they might otherwise have capacity to do so.

Educational choice is a cornerstone of Protocol 1, Article 2 of the ECHR. Any negative impact on educational freedoms should be viewed with the strictest of scrutiny. In addition, we strongly disagree with the premise of the equalities log that increased regulation will have a net positive effect of those with the protected characteristic of faith or belief. Experience has shown, particularly in relation to the inspection of conservative faith schools, that the opposite is true. Inspectors with little or no religious literacy have all too often projected their own subjective beliefs over those of the faith school when making their findings.