



# Policy statement: prosecuting unregistered independent schools

## Introduction

1. The Secretary of State for Education is the regulator of independent schools and maintains a register of these institutions. The registration procedure is set out in sections 98 and 99 of the Education and Skills Act 2008 ('ESA 2008'). Once a school is registered, the Secretary of State has a range of regulatory powers available.
2. An independent school is a school that provides full-time education for five or more pupils of compulsory school age, or one or more pupils who are looked after or have a statement of SEN/an Education, Health and Care Plan, and is not a maintained or non-maintained school<sup>1</sup>. It is a criminal offence to operate an independent school which is not registered (section 96 of the ESA 2008).
3. The legal definition of "independent school" in the Education Act 1996 refers to a school that is providing "full-time" education. Schools that provide less than full-time education do not come under the definition. There is no legislative definition of "full-time education", but the independent school registration pack<sup>2</sup> provides useful information on what factors are considered when reaching a view on what this means in practice.
4. The SoS takes the decision on whether to consent to a prosecution of an unregistered independent school. This policy statement sets out the Secretary of State's approach to taking such decisions, although all are dealt with on a case-by-case basis.

## Factors to be considered

5. The Secretary of State's approach to individual cases would depend on the particular circumstances of each case. Consideration includes, but is not limited to:
  - The level of risk to the welfare of children; the greater the risk the swifter the need to investigate and take action, including prosecution of the proprietor. Welfare considerations include not only the safety and physical wellbeing of children, but also whether they are, or at risk of, being exposed to extremism, including conduct which is aimed at undermining the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs.

---

<sup>1</sup> the term "independent school" has the same meaning as in the Education Act 1996. (See sections 168(2) and 92(1) ESA 2008 and sections 2, 4 and 463 of the Education Act 1996.)

<sup>2</sup> [Guidance on registration of independent schools](#)

- The extent to which the proprietor demonstrates an understanding of the regulatory requirements<sup>3</sup> and the need to comply with them, and their engagement with the Department; and
- Whether the Department has concerns about the suitability of the proprietor to be involved in providing education.

## Procedures

6. The Department becomes aware of suspected unregistered schools in a number of ways, such as:
  - Reports from the police;
  - Reports from local authorities;
  - Complaints from members of the public or other schools;
  - Media (TV & newspaper articles/leaflets);
  - Information from Ofsted.
7. For any possible unregistered school, immediate steps will be taken to establish whether the institution is providing full-time education and is operating unlawfully as an independent school.
8. Ofsted may decide to make an unannounced visit to an institution on the basis of information they have received to establish whether the institution is operating as an independent school and the identity of the proprietor. The Department may write to an institution or may refer information direct to Ofsted to decide whether to make an unannounced visit.
9. If Ofsted consider in the course of such a visit that an institution is operating unlawfully and should cease to operate as a school, they will inform the proprietor that it is an offence to operate without registration and take any appropriate steps with the LA to ensure the premises are closed and the children provided for. They will inform the department the same day for follow-up action.
10. Where an institution is identified as operating unlawfully, the Department (Independent Education and Boarding Team) will consider taking the following steps:
  - Confirm to the institution the legal requirement to register as an independent school, setting out the consequences of failing to do so. The institution may also have received the same information from Ofsted;
  - Make clear to the institution that it must not operate as a school in advance of registration being granted and must cease to operate;
  - Point the institution to the guidance on the DfE website on how registration applications can be made;

---

<sup>3</sup> Where an independent school is registered with the Department it will have to comply with certain minimum standards set out in the Education (Independent School Standards) (England) Regulations 2014 (SI 2014/3283), made under section 94 of the Education and Skills Act 2008. Before it can be registered a school will be inspected by Ofsted which will report to the Secretary of State on the extent to which the school is likely to meet the standards. The Secretary of State will decide, taking into account the report from Ofsted and any other relevant information, whether the standards are likely to be met and will enter the school on the register if she is so satisfied.

- Ask the institution to confirm by return that it has ceased to operate as a school and to confirm whether or not it intends to submit a registration application;
  - If the institution continues or continued to operate as a school without registration, including during the registration process, the Secretary of State may exercise her power to pursue the prosecution of the person(s) who the Department considers is conducting/has conducted the unregistered independent school (section 96 ESA 2008).
11. The Secretary of State may take immediate steps to exercise her power to pursue a prosecution if it is considered appropriate to do so given the seriousness of particular circumstances.
12. Which actions will be taken will be determined by the level of risk of harm that the children are under and other factors as set out at paragraph 5.
13. Where we believe that prosecution should be the next step, depending on the circumstances, we may ask Ofsted to consider re-visiting the institution.
14. The department will also consider prosecution in situations where a registered school has been subject to regulatory action that has resulted in the school being taken off the register. This would be on the basis that the earlier regulatory action would have been based on serious failings at the institution.

## Action that might be taken by other agencies in respect of unregistered schools

15. Although the Secretary of State is the regulatory authority in respect of independent schools and has the power to take action for offences under section 96 ESA 2008, other regulatory agencies may also have a role to play. In some cases it might be possible for other agencies to take action to stop an unregistered school from operating or disrupt its operation and DfE will liaise with other agencies as appropriate. For example where there are child protection concerns the Local Authority (child protection services) may have a role to play in respect of individual pupils and their families, or if there are serious fire or health and safety hazards, the fire service or Health and Safety Executive can be asked to inspect. We may also involve the Charity Commission if the setting is a registered charity. The proprietor might also be referred to the Disclosure and Barring Service to consider whether they should be prevented from working with children in the future. Even if action by other agencies has the effect of shutting down the school, it may still be appropriate to prosecute the proprietor under section 96 of the ESA 2008.

## Equality considerations

16. In the exercise of the regulatory powers concerning independent schools the Secretary of State must have due regard to the need to:
- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
  - advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - foster good relations between persons who share a relevant protected characteristic and persons who do not share it<sup>4</sup>.

---

<sup>4</sup> Section 149 of the Equality Act 2010 'the public sector equality duty'.

17. All institutions are treated fairly in the exercise of the regulatory powers. Whether or not a school is operating as an unregistered independent school is an objective assessment. The protected characteristics of pupils at any institution are not relevant when considering whether an institution is operating, or seeking to operate, as an independent school.
18. No child should be subject to potentially unsafe provision, or a potentially lower standard of education than other children in the UK by virtue of their attending an unlawfully operating setting. If decisions on prosecutions were to take into account the protected characteristics of children then this may amount to unlawful discrimination. Conversely, prosecution may advance equality of opportunity for some groups if the result is that pupils access education in regulated settings, which meet the minimum Independent School Standards.
19. Prosecuting unregistered institutions is part of the Secretary of State's function in regulating independent schools. Such action is taken to ensure, that irrespective of individual protected characteristics, pupils and their parents can be confident that as a minimum the Independent School Standards are found in any independent school.

© Crown copyright 2016