



Department  
for Education

# **Independent Educational Institutions – Investigatory powers**

**Schools Bill Factsheet**

**May 2022**

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## **Schools Bill Factsheet: Independent Educational Institutions – Investigatory powers**

These measures help Ofsted and the Department for Education ensure that children attend safe settings by better enabling them to investigate and act against unregistered schools or any other schools which may have committed an offence under the Education and Skills Act 2008 (“the 2008 Act”). There are several existing criminal offences that a person or proprietor may commit in relation to an independent educational institution (“an independent school”) under the 2008 Act. It is a criminal offence under section 96 of the 2008 Act to conduct an ‘an independent school’ unless it is registered. It is also a criminal offence for a proprietor of a registered independent school to breach a “relevant restriction”<sup>1</sup>.

A separate proposal in the Schools Bill is to permit the Secretary of State to temporarily suspend an independent school’s registration and for it to be an offence to provide education at an independent school under those circumstances.

The Department is proposing to strengthen the powers available to identify and investigate suspected criminal offences in relation to independent schools under the 2008 Act (including the new offence of providing education at a setting whose registration is temporarily suspended) and make it easier to bring prosecutions against those responsible for conducting these settings, which expose children to safeguarding related risks and risks in relation to the poor quality and suitability of the education they may be receiving.

These measures also facilitate improved joint working between school inspectorates by enabling Ofsted to share information with approved independent inspectorates and creating more flexibility in the arrangements through which the Department can ask Ofsted to help monitor approved independent inspectorates.

### **What is the Government’s policy objective?**

The policy objective is that all children should receive a safe and suitable education. To support this objective, it is a legal obligation for settings operating as independent schools to be registered with the Secretary of State and for proprietors to comply with any relevant restriction imposed. Registration allows the Department for Education to subject independent schools to regular inspection and determine schools’ performance

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<sup>1</sup> As defined by section 117 of the 2008 Act, a “relevant restriction” is a requirement that a proprietor of a registered independent school take one or more of the following steps by a specified time or times - (a) cease to use any part of the institutions premises for all or specified purposes, (b) close any part of its operation; (c) cease to admit any new students at all or of specified descriptions. Relevant restrictions may be imposed under one of three circumstances (see sections 118, 121 and 127 of the 2008 Act).

against the independent school standards. This system provides assurance that the children attending independent schools are safe, are being supervised by suitable adults and that the education they receive provides the learning children need to thrive.

Unregistered independent schools do not provide this assurance and may pose a safeguarding risk. Those conducting unregistered schools are committing a criminal offence and may be subject to without notice inspections and – if evidence is found – prosecution. This work supports the Government’s efforts to close all identified unregistered schools so that the children attending these instead attend a regulated, registered setting.

Relevant restrictions serve to ensure pupils at registered independent schools receive a minimum standard of safeguarding and education. They can be imposed in circumstances where the Secretary of State has taken enforcement action, after an independent school has failed to comply with one or more standards or where the court has made an order after it appeared a student was suffering or likely to suffer significant harm; or a proprietor has unsuccessfully appealed against a decision to de-register their school.<sup>2</sup> Schools under relevant restriction are subject to regular inspection both to assess their performance and ensure that the terms of the restriction are being adhered to.

The Department also wants to ensure that school inspectorates can work effectively together to support the Department’s regulation of independent schools.

## **Why is legislation needed?**

Legislation is needed to strengthen the powers available to inspectors investigating a suspected criminal offence in relation to an unregistered or registered independent schools. These changes will better enable prosecutions to be brought against those responsible.

The 2008 Act permits inspectors to “enter and inspect” a suspected unregistered independent school and “inspect and take copies of any records or other documents found”. The Government’s experience is that these powers are too limited to allow effective investigations of some settings which are operating unlawfully; it is too easy for those committing a criminal offence to prevent the discovery of evidence of this and so avoid prosecution. A stronger, more intrusive investigation regime is needed to allow inspections of suspected unregistered independent schools or breaches of relevant

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<sup>2</sup> Under section 127 of the 2008 Act, a proprietor may be prosecuted for breaching a relevant restriction imposed by the courts after that proprietor unsuccessfully appealed a decision under section 124, 125 or 126 of the 2008 Act.

restrictions to proceed and find evidence of wrong-doing, and those responsible to be identified and prosecuted where this is appropriate.

The need for greater powers to inspect suspected unregistered institutions was identified by the Independent Inquiry into Child Sexual Abuse in its Report *Child protection in religious organisations and settings* published in September 2021.

The changes will also allow school inspectorates to share information to help them better support the Department in regulating independent schools and ensure that the Department for Education can ask Ofsted to help it monitor other independent inspectorates in a proportionate manner.

## **What is the effect of the legislation?**

These measures will permit inspectors to act in a more intrusive fashion during an inspection of a suspected *unregistered* independent school (and during inspections of *registered* schools believed to be acting unlawfully). These changes will, under certain circumstances, make it easier for inspectors to enter a setting and allow a more thorough inspection to take place; for example, rather than being permitted to “inspect and take copies of” documents found inspectors will be able to “search” for evidence and “seize” (take-away) what is found.

The overall effect is that inspectors may be able to access and review nearly all evidence which is available in an educational setting which is believed to be operating unlawfully and therefore make more accurate assessments of whether one of the criminal offences in the 2008 Act is being committed. It will no longer be possible to avoid detection of this by, for example, locking documents in cupboards or not responding to inspector’s requests for entry to the building.

It is currently an offence (under section 97(4) of the 2008 Act) to obstruct a person conducting an inspection into a suspected offence of conducting an unregistered independent school. In future, a person may also be prosecuted for obstructing an investigation into a suspected criminal offence of breaching a relevant restriction or providing education whilst registration is suspended.

New criminal offences will also be created. It will be an offence to not provide, on request, information or assistance to inspectors during inspections of suspected criminal offences in relation to independent schools. This supports the Department for Education’s objective of allowing freer access to the evidence available during an inspection.

These enhanced investigatory powers will not apply to inspections of registered independent schools against the Independent School Standards, where the question is one of a school’s performance. These powers will apply only in cases where it is suspected a criminal offence is being committed.

## How will this work in practice?

Provided that Her Majesty's Chief Inspector ("HMCI") "has reasonable cause to believe" that a criminal offence is being committed in relation to an independent school she may already conduct an inspection without notice. The purpose of this inspection is to gather evidence to first determine whether an offence is being committed and, if so, support any necessary regulatory action up to and including prosecution of those responsible.

Since 2016, using the powers already granted to HMCI for this purpose, HMCI has carried out 540 in-person inspections against settings believed to be operating as an unregistered independent school. Broadly speaking these powers allow inspectors to "enter and inspect" premises and "inspect and take copies of any records or other documents" found. 114 of these settings have been found to be operating unlawfully and 101 of these settings have amended their provision to no longer operate in breach of the 2008 Act.<sup>3</sup>

In a small number of cases, these powers currently available to HMCI have been insufficient to facilitate an inspection. We have found that in a tiny minority of cases those conducting settings believed to be operating unlawfully and putting children at risk are able to easily prevent detection of this and so avoid regulatory action. The more intrusive powers proposed here will be used in these circumstances where, because of the attitude and behaviour of those subject to inspection, it is not otherwise possible to gather evidence of potential criminal behaviour.

Separate measures included in these proposals will apply in circumstances where it has not been able to enter a setting with the consent of those present (i.e. where inspectors' ability to "enter and inspect" a setting has been denied). In these circumstances it will be permitted for HMCI to request a warrant from a Justice of the Peace authorising their entry. In more extreme cases, where reasonable force is needed to facilitate entry (for example, if a door is to be forced), a warrant authorising a police constable's attendance may be applied for.

As part of these measures new obligations are to be placed on those present during an inspection, with the risk of prosecution for new criminal offences if those requirements are not complied with. At present it is an offence to "obstruct" inspectors conducting an inspection into a suspected unregistered independent school. The Department is proposing to expand this offence to apply to all investigations against suspected criminal offences in relation to independent schools (including suspected breaches of relevant restrictions and/or providing education whilst suspended).

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<sup>3</sup> Figures accurate up to 31 August 2021 and provided by Ofsted here: [Unregistered schools management information - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/unregistered-schools-management-information)

We have also found however that there is a large amount of activity which, while not obstructive, prevents the effective gathering of evidence by HMCI; it is not, for example, “obstructive” merely to walk away from inspectors who have asked a question. To address this problem, we are proposing to introduce four new criminal offences of: intentionally failing or refusing to provide information in interview, failing to provide assistance, failing to provide documents or failing to provide information stored in any electronic format, without reasonable excuse. These new offences, which are concomitant on the more intrusive inspection powers being proposed, will make clearer both inspectors right to access (nearly) all evidence in a setting and the obligations on those present during investigations of suspected criminal offences.

Taken together the measures in this proposal will allow HMCI freer access to (nearly) all evidence of suspected unlawfulness by independent schools in all cases. They will address the identified problem that, at present, it is too easy for those committing these offences to avoid detection of this and so avoid prosecution for the safeguarding risk they cause.

## **Key questions and answers**

### **How many unregistered schools are there in England?**

Those conducting an unregistered independent school are committing a criminal offence. These individuals do not generally advertise their presence to the Department for Education. It is not therefore possible to accurately estimate the number of unregistered schools in England, nor the number of children attending these settings.

Between 1 January 2016 and 31 August 2021, 114 settings subject to inspection were identified as operating as an unregistered independent school. Joint work between the Department for Education and Ofsted has led to 101 of these settings changing their provision to no longer operate unlawfully, in breach of the 2008 Act.<sup>4</sup> There has been six successful prosecutions against those conducting an unregistered independent school.

In the vast majority of cases those subject to inspection on suspicion of committing a criminal offence in relation to an independent school comply with inspectors and provide all the information asked of them; these powers are intended to target the small minority who actively seek to disrupt and hinder the inspection.

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<sup>4</sup> Figures accurate up to 31 August 2021 and provided by Ofsted here: [Unregistered schools management information - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/94422/unregistered_schools_management_information_-_gov.uk.pdf)

## Why is it important that schools are registered?

Registered schools are subject to regular inspection. Schools which meet the Standards are ensuring that their pupils, for instance, receive a broad education which assists all children to acquire speaking, listening, literacy and numeracy skills and are taught by staff who have been subject to DBS checks in a building which is safe. Unregistered schools are not under these obligations and so may not be safe and may not teach a broad education. Registered schools which consistently fail to meet the Standards and do not, for example, ensure that their staff are suitable can face regulatory action up to and including de-registration (effectively closure) under section 116 of the 2008 Act.

This regime provides assurance to the Secretary of State, parents and children with regards to the performance of independent schools.

## Will these measures target some groups more than others?

There is no evidence that particular groups or communities are more likely to be inspected on suspicion of committing a criminal offence in relation to an independent school. Between 1 January 2016 to 31 August 2021<sup>5</sup> there were 412 in-person inspections. Just over one-fifth of these inspections were of settings recorded as teaching children of a specific faith (91 inspections/22%).

There is therefore little evidence that *inspections* of suspected criminal offences committed in relation to independent schools are more likely to target particular communities over others.

Further, only 6% of the settings which, following an inspection, have been found to be in breach of the 2008 Act and issued a warning notice were classed as a “religious institution”. It appears that there is no discernible pattern with regards to whether particular groups or communities are more likely to conduct an unregistered school. Increasing DfE’s ability to investigate and prosecute those responsible will not have a disproportionate impact on any one group.

## Do other public bodies have these powers?

Yes. The enhanced powers the Department is proposing to grant HMCI to investigate suspected criminal offences committed in relation to independent schools are very similar in scope to those granted to other non-police Government inspectorates. For example, inspectors working for the Health and Safety Executive (under the Health and Safety at

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<sup>5</sup> Figures published by Ofsted and accurate up to 31 August 2021  
<https://www.gov.uk/government/statistical-data-sets/unregistered-schools-management-information>

Work Act 1974) and the Environment Agency (under the Environment Act 1995) possess many of the powers which we propose via these changes.



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