Department for Education

# Regulating Independent Educational Institutions

## Government consultation response

**May 2022**

# Contents

# Introduction

The Secretary of State for Education is responsible for registering and regulating independent education institutions (independent schools) in England, and his functions here are carried out by the Department for Education. The relevant powers are contained within the Education and Skills Act 2008[1] (ESA 2008), although there are also provisions elsewhere which are particularly relevant to one of the proposals consulted on. The department's guidance on the registration of independent schools is published at:

https://www.gov.uk/government/publications/independent-school-registration

The department has also published a policy statement on its regulatory and enforcement role. The annex to that document contains a description of the legal framework for those functions. The statement can be found at:

https://www.gov.uk/government/publications/regulating-independent-schools

The department believes that by and large, the existing system works well in allowing registration only for those establishments likely to meet the independent educational institution standards, and for registered schools which at any point do not meet the standards, securing improvement in an appropriate timeframe.

However, it has also been apparent for some time that in several areas, improvements could be made if a legislative opportunity was to arise. The department has therefore consulted on three proposals for amendments to ESA 2008 to address the need for those improvements.

A copy of the consultation document can be found here.

This consultation response sets out next steps although the timescale for any legislative action depends on when a legislative opportunity arises.

[1] http://www.legislation.gov.uk/ukpga/2008/25/contents

# Summary of responses received and the government's response

The department consulted on a number of related proposals for legislation which would affect independent schools and also some education settings which are neither state-funded nor currently registered with the department as independent schools, although they are attended full-time by children of compulsory school age. This includes some settings serving some faith groups as well as a large number of other settings. These proposals aim to help ensure requirements are consistent for all settings that children of compulsory school age attend full time during the school day (which prevents them securing an education elsewhere).

The consultation was first published on 14th February 2020 but was suspended on 7th May 2020 due to the Covid-19 pandemic. It was relaunched on 13th October 2020 and closed on 27th November 2020.

A commitment to consult on the first proposal was included in a statement by the then Parliamentary Under-Secretary of State for the School System, Lord Agnew, in March 2018.

In summary, the proposals were:

- Expanding on the categories of full-time institutions that will be regulated in the same way that independent schools are currently regulated and defining what is "full-time".

- Changing the basis for how some appeals against de-registration enforcement action are be determined by the court under the Education and Skills Act 2008.

- Revision of the system for making changes to the registered details of independent educational institutions.

CooperGibson Research (CGR) were commissioned to code and analyse the consultation responses to 18 open-ended questions, to provide a summary of key messages and highlight emergent themes. This report provides the findings of this analysis.

Key findings from the responses to each section of the consultation are reported below. However, it should be borne in mind that statistics reflect the proportion of respondents that commented on individual questions, and response rates to different questions varied.

A total of 532 responses were received. The majority of responses were from individual perspectives (87%) rather than organisational representatives (12%)[2]. Three out of ten respondents (30%) stated that they were responding in their capacity as a parent/carer. A range of organisation types were represented including independent educational institutions and organisations representing the independent school sector, other organisations concerned with education, faith groups and local authority representatives.

The analysis of consultation responses shows clear, broad support for all three proposals.

Following consideration of responses to this consultation, the department intends to take forward the following proposals when a suitable legislative opportunity arises:

- Expanding on the categories of full-time institutions that will be regulated in the same way that independent schools are currently regulated and defining what is "full-time" based on the factors currently included in the department's registration guidance.

- Changing the basis for how some appeals against de-registration enforcement action, under the Education and Skills Act 2008, are be determined by the court. In particular, requiring appeals against some de-registration decisions to be heard on a 'judicial review' basis only, where a school has failed to meet the standards at three consecutive inspections within a 6-year period, having been required to provide an action plan after the first two inspections and allowed to make representations before an enforcement decision is made after the third.

- Revision of the system for making changes to the registered details of independent educational institutions, including creating more flexibility to approve and reject material changes under certain circumstances where approval or rejection is beneficial to the education and wellbeing of persons attending or likely to attend the institution and the independent educational institution standards are likely to be met in the future.

In addition to the proposals contained within this consultation, we have also considered how further improvements can be made to the enforcement regime related to independent educational institutions.

We intend to create a power for the Secretary of State to suspend registration of an independent educational institution for a set period, where there are serious safeguarding

[2] Three did not respond to this question.

failings which pose a risk of harm to students. The period of suspension may be extended in certain circumstances where the risk of harm remains. The main impact of the power would be to enable rapid action against independent educational institutions where we find serious safeguarding failings. It may also provide an alternative to seeking an emergency closure order under section 120 of the Education and Skills Act 2008 (ESA 2008) providing some failing educational institutions with an opportunity to address failings before permanent closure is sought. It is proposed that suspension will be enforceable by the creation of a new criminal offence that, in effect, makes the proprietor responsible if the institution continues to carry out those activities that registration permits. This new offence would be a summary offence and punishable by up to six months imprisonment and/or an unlimited fine.

We will take forward these proposals alongside other proposals to improve the ability of Ofsted to investigate, and therefore support prosecutions of, illegal unregistered full-time settings something which was a commitment in the Government's 2019 Integrated Communities Action Plan. We also acknowledge the Independent Inquiry into Child Sexual Abuse (IICSA) made a formal recommendation on the registration requirement and on Ofsted powers in the report from the Religious Organisations strand of the Inquiry, published in September 2021, that legislation should be taken forward. The measures that we are taking forward also reflect consideration of IICSA's residential schools' investigation report which noted that "there are also weaknesses in systems of enforcement in respect of schools which fail to meet requisite standards, including safeguarding". We believe the planned powers will enable a timely and proportionate response where a school has serious safeguarding issues.

# Main findings from the consultation


**Summary**

- There was strong support for widening the registration requirement for full-time settings, regardless of the subject matter taught (91%, n=459).
- The proposal to base threshold hours on attendance was also largely supported (66%, n=280).
- The majority of respondents supported the proposal to move to judicial review compared to a full-merits review (82%, n=358).
- The majority of respondents agreed with the changes proposed for approval of material changes relating to provisions for pupils with SEN (75%, n=152).
- The majority of respondents also agreed that the Secretary of State should be able to impose a relevant restriction for an unapproved material change (81%, n=223).


## Proposal 1: Widening the registration requirement

Overall, there was strong support for widening the registration requirement for full-time settings (91% of 459 responding to this question), regardless of the subject matter taught. The main reasons were:

- respondents thought settings ought to be regulated, primarily to ensure a broad and balanced education was provided (with concerns expressed about a narrow religious education potentially being provided in place of this),
- and that children's rights to such an education were protected,
- and to close loopholes, which create space for registration avoidance, and would help alleviate concerns around the safeguarding of children's welfare, protection and rights.

A small number considered such a change was not needed, for example, because it would be an infringement of civil rights.

The need for appropriate definitions was broadly supported, primarily in order to mitigate system abuse by settings that sought to operate outside of any definition of registration requirements through exploiting loopholes. For example, there were concerns that full-time threshold hours set at 18 hours attendance would be easily circumvented, with around one-third of respondents commenting that there should either be no threshold hours, or all settings should be regulated to mitigate such moves. If threshold hours were to be set, the majority of respondents proposed a lower number of hours in order to capture more settings.

The proposal to base consideration of whether a setting should register on attendance, rather than on hours of education provided, was also largely supported, again in order to mitigate potential abuse. Most respondents disagreed that registration should only be required if the provision takes place at least partially in usual school hours. This was largely owing to usual school hours being insufficient to cover the significant hours that settings might provide outside of these and, again, concerns over system abuse. However, those opposing this viewpoint cited, for example, parental choice as the key determinant in terms of children attending other provision outside of school hours.

Views varied on the types of setting that might be excluded from registration, with most respondents to this question commenting that none should, for example, for safeguarding reasons. There was also broad support for secondary legislation to make changes to key definitions, largely on the basis of mitigating system abuse, but with some qualifying their agreement with caveats around adequate consultation and scrutiny.

## Proposal 2: Changing how some appeals against de-registration are determined

The majority of respondents supported the proposal to move to have some de-registration appeals being decided on the same basis as an application for judicial review would be, as opposed to being decided on the full merits at the time of the appeal hearing. Reasons for this were primarily to address cycles of improvement and deterioration and mitigate the potential exploitation of loopholes. Those who disagreed with the proposal did so largely on the grounds of fairness to the proprietor in putting forward their case.

The proposal was that these alternative appeal arrangements could only be applied where a school had shown failings at three consecutive inspections. There was broad support for the proposal to use three inspection cycles, to determine whether the independent educational institution was found not to be meeting one or more of the independent educational institution standards. Although, some added the caveat that there should be fewer if required in the case of children's rights and safeguarding being compromised. This reason reflected the views of those who disagreed with the three inspections proposal: that the priority must always be children's rights and welfare over a specific number.

The consultation asked whether the alternative appeal arrangements should apply where particular standards were failed. Most respondents agreed that the power to specify in regulations the particular standards used in applying the criteria, should be unconfined. Those that disagreed did so from a standpoint of objectivity, clarity and scrutiny. Most respondents also agreed that written representations should be sufficient, while others considered that the proprietor had rights to fuller representation.

## Proposal 3: Revision of the basis for consideration and approval of materials changes to independent educational institutions

The majority of respondents agreed with the changes proposed for approval of material changes relating to provisions for pupils with SEN. However, some commented on the implications of this in terms of, for example, the categorisation of needs, and some had concerns over these children's needs being adequately met.

The majority of respondents also agreed that the Secretary of State should be able to impose a relevant restriction for an unapproved material change. Similarly, most agreed 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 institution or proprietor, even if relevant standards are likely to be met by the institution after the change is made. While additional comments were fewer in response to these questions, where there was agreement, this was mostly on the grounds of ensuring children's rights and welfare. Those that disagreed primarily commented that such proposals were not justified or needed additional evidence to support their justification.

## Published equalities log, UNCRC assessment, and family test

Where respondents did comment on the conclusions set out in the published equalities log, preliminary UNCRC assessment and family test document, there was broad support for these, with the positives, for example, children's rights, outweighing on balance any negatives.

# Question by Question Analysis

## Proposal 1: Widening the registration requirement

This theme involved eight consultation questions. It sought respondents' views on matters including the extent of regulation and registration of settings, threshold hours and associated definitions of key terms.

The basic proposal was to expand on and more clearly define what full-time institutions are to fall under the regulatory scheme in Chapter 1 of Part 4 of ESA 2008.

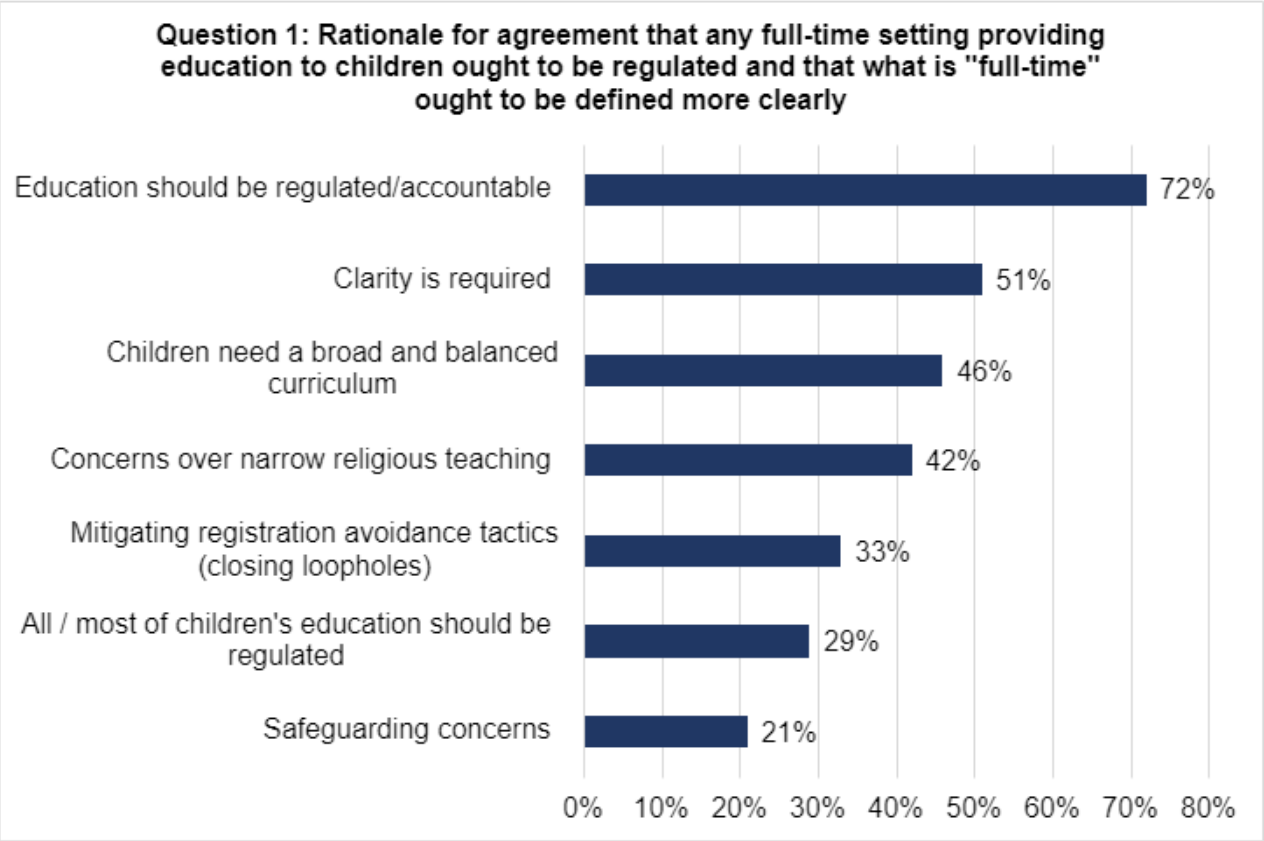
The set of changes proposed in the consultation would define the scope of the settings to be covered in terms of the key criteria of numbers of children (though that would not be a change from the current position related to independent schools, five or more children of compulsory school age or one or more children of compulsory school age with an EHCP or who is looked-after etc.) and hours of attendance. The latter to address the issue of what constitutes 'full-time'. Proposal 1 would also address the issue of the nature of the education provided, in order to overcome the problem relating to the registration requirement being linked to the definition of a school, which is in turn tied to the provision of primary and secondary education. It would also make provision for omitting settings which might otherwise be caught by the basic definition, but public policy dictates should not be included.

## Q1. 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?

The majority of respondents who responded to this question (91%, n=459) agreed with this proposal. Relatively few disagreed (6%, n=32) and very few were unclear 3%, n=13).

Respondents who agreed with the proposal said this is because full time education should be regulated and schools held accountable (72%), and to ensure a broad and balanced education was provided (46%). This was frequently combined with comments in which concern was expressed about narrow religious teaching (42%) which was seen to run counter to such a broad entitlement. Further, 87% of respondents agreed that any setting providing full-time education, irrespective of subject matter, should be required to register.

**Figure 1: Rationale for agreement to Question 1**




Source Regulating IEI consultation (base 341)

Analysis of the free-text responses identified some common messages. The main reasons cited for **agreement** with regulation were (Figure 1):

- Nearly three-quarters of respondents suggested that **education should be regulated and schools accountable** (72%, n=247). This mostly centred on full-time provision or where it accounted for a significant proportion of a child's education. However, some comments also related to extension of this to part-time provision, for example on the basis of equality of safeguarding arrangements in keeping children safe. Additional comments commonly related to regulation ensuring educational provision was of an appropriate nature and high standard.

- Just over half of respondents (51%, n=175) identified that **clarity of key definitions is required** in order to achieve overall system clarity.

- Nearly half of respondents stated that children needed, and were entitled to, **a broad and balanced curriculum** (46%, n=157) that would prepare them for their future life. This was frequently combined with comments in which concern was

expressed about narrow religious teaching (42%, n=144) which was seen to run counter to such a broad entitlement. However, refer to the sample breakdown for details since the sample profile may have skewed responses.

- Concern was also expressed about how the current system allowed for **registration avoidance tactics** and that, in order to ensure children's access to safe and broad educational provision, steps should be taken to **close loopholes**, such as abuse of prescribed threshold hours. Such concerns regarding registration avoidance were, in some comments, also related to safeguarding concerns around children's welfare, protection and rights.

A few comments were made in relation to **disagreement** with the proposal. The main reasons were:

- There was no perceived need for change of approach (n=6) or that such revisions were perceived to constitute an infringement of civil liberties or the independent operation of institutions (n=4).

- Concern that Education Other Than at School (EOTAS) provision might be included in such regulation arrangements. The common view was that as these were already overseen by local authorities, inclusion in registration might compromise the nature of this provision (n=5).

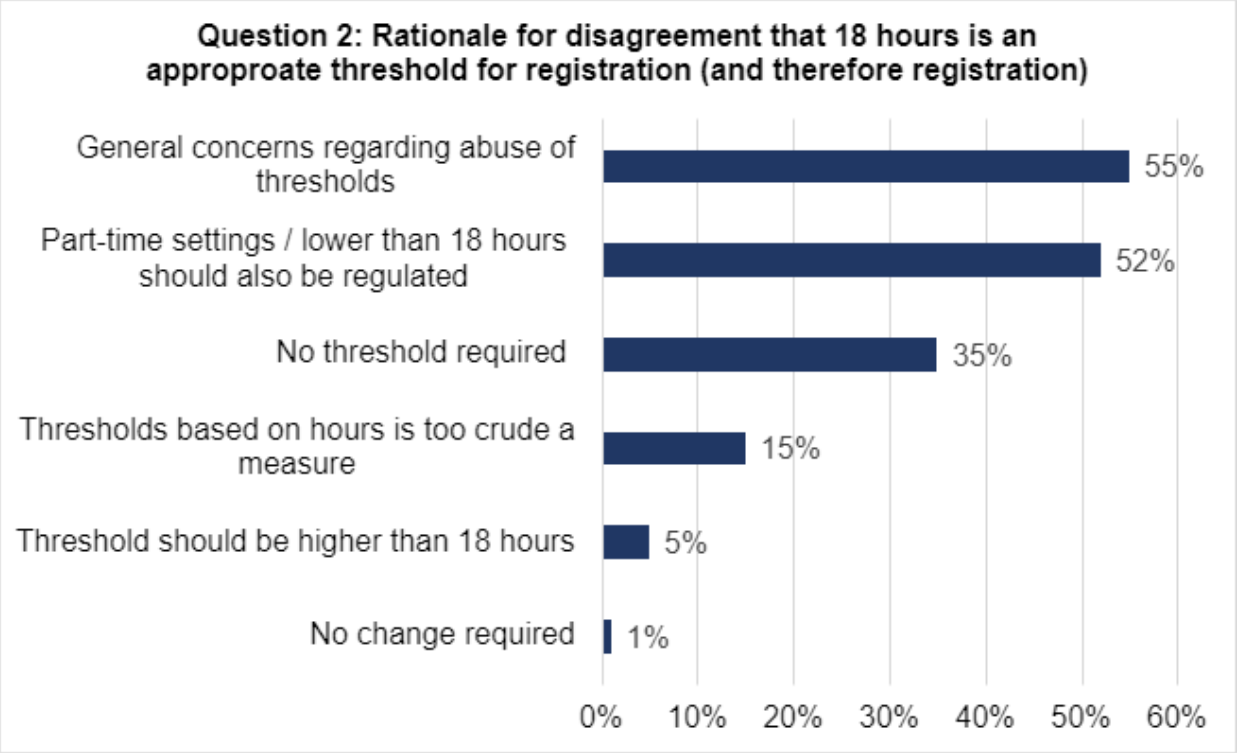
There was also some disagreement with the use of the word 'any' in the question posed on the basis that some settings should not be included within such a regulatory framework (n=4).

One comment took a broad view that the proposals ought to be focusing more explicitly on every child receiving a high-quality education, with all children registered with local authorities in order for their education provision to be captured.

## Q2. 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?

The majority of the 497 respondents to this question disagreed that the suggested 18 hours was appropriate (82%, n=410). A much smaller proportion agreed (13%, n=67), while 4% of responses were unclear (n=20).

**Figure 2: Rationale for disagreement to Question 2**




Source Regulating IEI consultation (base 372)

Figure 2 presents the main reasons cited for **disagreement** with regulation.

Primarily, respondents felt that organisations would **abuse set threshold hours** (55%, n=205) in order to avoid registration and that children's educational provision would, as a consequence, continue to fall outside of regulation. Many commented that organisations would deliberately seek to operate just below any such 18-hour threshold (e.g., 17.5 hours), or that two organisations might offer a small number of hours each but combine so that, in effect, full-time provision might still be achieved. Regulation that was robust enough to counter such loophole-seeking was consequently considered to be necessary.

Views on threshold hours varied but the main emphasis in comments on these was that they should help address **potential avoidance**. Many commented (or recommended specific hours to the same effect), that the threshold should be lower than 18 hours in order to capture more settings, or that part-time provision ought also to be captured (52%, n=194). Over one-third of respondents (35%, n=132) considered that either no threshold was required or that all settings should be regulated in order to mitigate potential abuse. Some considered thresholds based on hours to be too crude a measure (15%, n=55).

However, regulation of part time settings formed no part of the proposals, which are about bringing into regulation those settings that operate full time during the school day, so that attendance at such a setting prevents the child from attending a registered independent or state funded school.

A small proportion considered that the threshold should be greater than 18 hours (5%, n=19). Some of these respondents added that this was because they considered 18 hours did not represent a normal full-time week for children (i.e., compared to state schools where provision was regulated).

Of the 13% of respondents who **agreed** (n=67) with the proposal, very few gave additional reasons for this. Of those that did (n=9), the main reasons were that as in Question 1, EOTAS provision should be excluded from such hours (n=4) and that it depended on the number of hours children attended/accessed provision (n=3). A few considered that religious instruction should not be included in these hours (n=2).

Question 2 asked respondents who disagreed with 18 hours for suggestions for the number of hours that should be used if a specific threshold was deemed appropriate. Table 2 summarises the 239 responses. The majority fell below the 18 hours proposed for full-time education in the consultation. Most were clustered between 5 and 8 hours (n=161). However, it should be noted that the 106 responses for 7 hours were likely from affiliates of the same organisation which recommended a threshold of 6-8 hours and were accordingly calculated as a mean of 7 hours (for consistency in analysis). Excluding the responses that stated zero (i.e., no threshold), the mean is 9 hours (8.8 rounded) and the median is 7 hours. Overall, these lower thresholds support the findings for Question 2 that respondents considered 18 hours too high.

**Table 1: Number of hours that should be used as a specified threshold (Question 2)**

| Suggested threshold | Number | Suggested threshold | Number |
|---|---|---|---|
| Zero (no threshold) | 14 | 12 hours | 7 |
| 1 hour | 3 | 15 hours | 9 |
| 2 hours | 3 | 16 hours | 1 |
| 4 hours | 8 | 18 hours | 2 |
| 5 hours | 15 | 20 hours | 2 |
| 6 hours | 25 | 24 hours | 3 |
| 7 hours | 106 | 25 hours | 5 |
| 8 hours | 15 | 27 hours | 2 |
| 9 hours | 2 | 30 hours | 6 |
| 10 hours | 11 | | |

Source Regulating IEI consultation (base 239)

## Q3. 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)?

The majority of the 427 respondents to this question agreed that any hour's threshold should be linked to attendance (66%, n=280). A smaller proportion disagreed (20%, n=85), while 15% of responses were unclear (n=62).

In terms of those who **agreed** with the proposal, as with Question 2, the majority (78%, n=57) of free-text comments (base of 78), centred on mitigating potential abuse of the system. For example, there were concerns around:

- Potential loopholes in tuition definitions, for example, how settings might exclude 'self-study' or 'play' but which would still form part of their provision; and the scope of other definitions and their potential interpretation, such as, 'attendance', 'tuition' and 'education'.

- Similar to above, the potential use of physical attendance alongside online attendance or completion of set work away from the setting to avoid thresholds.

- Potential loopholes whereby pupils are moved between settings to avoid an attendance threshold (e.g., that attendance would therefore need to relate to the hours a setting is open for potential attendance by a child, rather than a child's actual attendance).

- Potential misreporting of attendance data by settings to obfuscate and avoid registration.

- Elective home education being used as a 'cover' for parents sending children to unregistered tuition centres where they receive full-time education.

- The nature and quality of the tuition provided and its aims being of most importance rather than merely attendance (e.g., to counter religious tuition that was limited in scope).

Just under a half of respondents made comments reflecting their view that hours should be linked to attendance in preference to tuition time (46%, n=36). Examples of the reasons for this included the potential impact of the wider environment on children, not just the instructional element.

An emphasis on attendance was also seen by some (n=12) as important because it might impact adversely on attendance at another setting (such as, one that would provide a broad and balanced education).

Of the one-fifth of respondents who **disagreed** with the proposal, several gave additional comments:

- Any hour's threshold should relate to time spent on tuition rather than attendance (n=25).
- There should be no minimum hours (n=10)
- Operating hours is the preferred threshold determinant (n=6), reinforcing the earlier statement about mitigating potential abuse of what might constitute 'attendance' or attendance across more than one setting.
- No change was required (n=3).

Additional responses related to the need to consider online provision (n=2).

One respondent identified difficulties when other agencies were involved (e.g., those supporting pupils with special educational needs and disability (SEND)), where involvement with a variety of agencies can impact attendance.

Similarly, a comment was made that an attendance threshold would reduce the ability of settings to provide therapeutic support and enrichment activities that meet the needs of pupils receiving EOTAS.

Additional individual responses made points around:

- Greater threshold hours than 18 (e.g., 25) needed for the threshold to be linked to attendance, otherwise it should link to tuition.
- Children may not attend settings as an unintended consequence and become 'under the radar' as a result.
- Home education groups concerned that attendance in their contexts might include social time as well as tuition/education and that this would be included in attendance calculations.
- The definition of 'education' needed to be more clearly defined in order for ramifications of 'any' in the question to be assessed.

## Q4. Do you think that registration should only be required if the provision takes place at least partially in usual school hours?

The majority of the 444 respondents to this question disagreed that registration should only be required if the provision takes place at least partially in usual school hours (70%, n=313). A smaller proportion agreed (21%, n=92), while 9% of responses were unclear (n=39).

In terms of the rationale for **disagreement**, analysis of the free-text responses (n=199) identified some common messages. The majority of these (82%, n=164) related to usual school hours being insufficient as a measure to capture the range of settings that might offer significant provision outside of these. There was an emphasis in comments on any proposed change being sufficiently broad to ensure registration and regulation where it was needed. This linked to responses that referred to the need for adequate safeguarding (17%, n=33).

In many cases (35%, n=70), responses included comments that the proposal might create opportunities for system abuse with settings exploiting loopholes.

With respect to settings competing with traditional school hours, some comments related similarly to ensuring settings offering most or all of a child's education were captured.

This linked to a comment from another organisation where the key point was to establish that children were receiving a high-quality education and who the provider of this was.

In terms of those who **agreed** with the proposal (n=18), they did so from a standpoint that, as with those who disagreed, the proposal should mean that it should not stop children attending mainstream/other provision (n=7) or provide settings with loophole advantages (n=11).

Additional comments were such that the intention should not be to capture genuinely supplemental education and/or place unnecessary burdens on these due to registration.

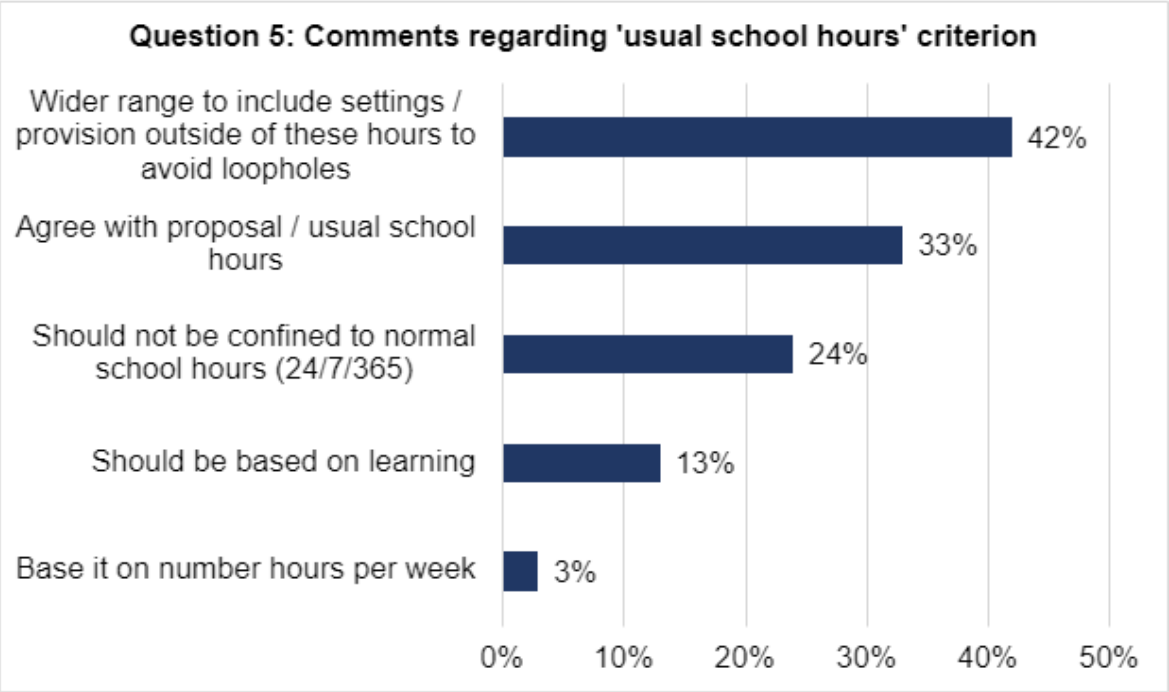
## Q5. If a 'usual school hours' criterion were to be used, what hours do you think should be defined as being 'usual school hours' – as proposed above or a different set of times?

The proposal is to treat 'usual school hours' as being 9am to 3pm, Monday to Friday.

As shown in Figure 3, the majority of the 356 responses to this question did not consider that the 9am to 3pm proposal was adequate as a criterion, with only a third agreeing. The reasons for this largely reflected responses to previous questions about system abuse as

tuition might be provided outside of these prescribed hours and settings might seek avoidance by adjusting their hours.

**Figure 3: Comments in response to Question 5**




Source Regulating IEI consultation (base 356)

Many of the responses that **agreed** with the 9am to 3pm hours also added caveats that this should not allow for organisations to avoid registration and regulation.

Consequently, a wider range of hours were suggested in many cases, whether to include breakfast clubs and after-school clubs or to encompass other provision that might fall outside of 'usual school hours'. For some, education could happen at any time and so there was a perceived need for hours to be unconfined.

Weekly hours were suggested by some as more appropriate, for example to take account of such extended provision, while some saw it as important in order to include weekend provision. Some commented that prescribed times were less relevant than an emphasis on learning which could happen at any time.

A small number of comments expressed concern that weekend provision might be included which would be restrictive and problematic.

One comment agreed with the hours but on the premise that all 18 hours should be located within these usual school hours.

## Q6. 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?

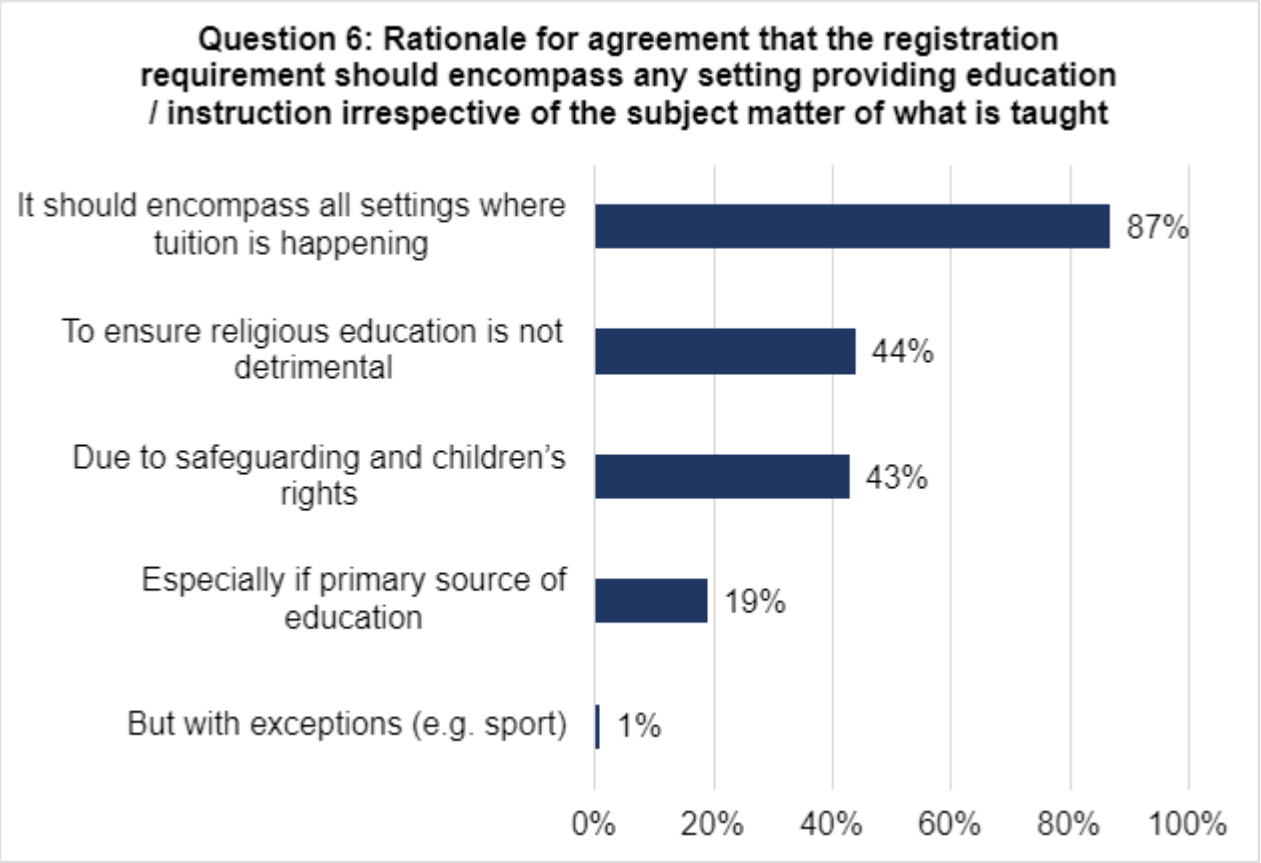
The majority of the 493 respondents to this question agreed with this proposal (87%, n=431). A much small proportion disagreed (9%, n=43), while 4% of responses were unclear (n=19).

As Figure 4 shows, of the 233 free text responses, the great majority (87%, n=203) commented that all settings which were providing full-time tuition or which were the main source of tuition, should be registered and regulated. This relates to the 19% of respondents (n=45) who saw this as especially the case if it was their primary source of tuition. Such a move was seen by some to be positive in terms of mitigating system abuse.

Similar proportions identified safeguarding and/or children's rights (43%, n=100) and ensuring religious education was not detrimental, as reasons for their agreement (44% n=103), with the last of these frequently combined with comments around the need for a broad and balanced curriculum offer.

However, some agreed in principle but identified potential issues which in some cases were similar to those that disagreed with the proposal. Several extended the parameters of their reply to include part-time settings while a very small number referred to home schooling also.

**Figure 4: Rationale for agreement to Question 6.**




Source Regulating IEI consultation (base 233)

A very small proportion agreed but identified exceptions, such as, sports tuition and religious instruction (n=2).

There were some concerns expressed about what might be identified as a setting within such definitions and that unintended consequences in terms of the scope of such definitions needed to be guarded against, for example, implications for:

- Elective home education.
- Children receiving EOTAS as part of an Education, Health and Care Plan (EHCP).
- Settings at which parents were present.
- Sports tuition.
- Infringement of parental rights.

A few commented on the adverse implications of such regulation for settings, such as, the perception that it would result in closure for a number of settings, particularly those unregistered settings which may fail for not meeting standards, for instance standards linked to teaching about protected characteristics or RSE.

Whilst we accept the concerns expressed, it remains our intention not to capture those settings which are clearly part-time, or otherwise not providing all, or substantially all of a child's education. This is because we do not believe the current regulatory framework for independent schools is suitable to register part-time settings. Therefore, any proposal to regulate part-time settings would need to be considered separately alongside wider questions about the regulatory framework. This consultation response therefore confirms our overall approach, to legislate to widen the registration requirement to bring into scope all those settings that provide education to children of compulsory school age and which operate full time and at least partially during the usual school day.

## Q7. 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?

Of those who commented (base of n=370), the majority of respondents considered that no settings should be excluded from registration requirements (69%, n=257). This relates to previous questions where substantial proportions of respondents were in favour of increased registration and regulation, for example, for safeguarding reasons or to mitigate against religious instruction which was considered potentially detrimental.

In providing exclusions, comments were made that these carried with them for potential system abuse with the creation of loopholes. Expressly excluding certain settings may provide loopholes (e.g. by recategorising the setting) for those settings that wish to remain unregistered.

Others considered that certain categories should be excluded. The overall emphasis in their comments was that such settings should be excluded where their provision was supplementary to children's main education. Where these typically fell outside of school hours, such as at weekends and school holidays, some views were expressed that they did not adversely affect children's rights of access to a broad and balanced education.

Typically, there was more of an emphasis on weekends and holidays in this respect than out of school hours more generally (i.e., after-school hours). However, some comments identified that these would still need to fall under some type of jurisdiction, largely in terms of safeguarding and health and safety, such as, for sports tuition.

There was however, what might be seen as a lack of equality in the interpretation of which single subjects were deserving of exclusion from registration. In some responses, concerns were expressed about religious instruction being potentially excluded from registration (largely due to concerns over potential indoctrination) although it is a single subject. By contrast, there was greater acceptance that exclusion could apply to other single-subject tuition (e.g., in sports, language and music) as these did not carry the same perceived threat.

In addition, there were comments that typical out of school activities would likely be below hours thresholds (e.g., extra-curricular sports), and so excluded accordingly. However, one comment raised concerns that these might be attended for a substantial number of hours and so ought not to be subject to hours limitations.

## Q8. 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?

The majority of the 436 respondents to this question agreed with this proposal (80%, n=347). A much smaller proportion disagreed (15%, n=64), while 6% of responses were unclear (n=25).

Where additional comments on **agreement** were offered (base n=273), these largely fell into three themes.

- Mitigation of system abuse by settings that would, in respondents' views, purposefully look for loopholes through which they could circumvent registration (n=225). Secondary legislation would afford the opportunity to close such loopholes.
- The need for flexibility to keep up to date (n=139), which was closely aligned with the following point.
- Flexibility needing to support legislative or regulatory changes (n=118) to ensure that, for example, children's rights were protected in a timely fashion.

Other comments referenced the need for statutory consultation and, chiefly, parliamentary scrutiny to their stated, if changes to subsequent definitions were to be made by secondary legislation.

Where **disagreement** was expressed, the most common concern was about the changes that might be made outside of primary legislation (n=18). This was typically related to its potential misuse, views that the primary legislation should be sufficiently robust not to require this, or that proffered secondary amendments should be subject to consultation and scrutiny.

Similarly, some concerns were expressed about it meaning too much power for the Secretary of State and/or the need for parliamentary scrutiny (n=4).

In addition, concerns were expressed about such legislation applying to home education (n=3). An additional individual comment that disagreed, focused on problems for settings such as potential confusion being created, bureaucracy and increased burdens.

As shown below, the majority of free text comments (base n=105) on definitions that needed flexibility referenced, ‘full-time’ and ‘part-time’ (87%, n=91) and ‘Independent educational institution’ (77%, n=81). However, these were likely from those from members/affiliates of the same organisation.

**Table 2: Suggested definitions which should be included within powers to make subsequent changes to definitions through secondary legislation? (Question 8)**

| Definitions | Number | Per cent |
|---|---|---|
| Full-time and part-time | 91 | 87% |
| Independent educational institution | 81 | 77% |
| School hours / normal school hours | 15 | 14% |
| Type of institution | 10 | 10% |
| Hours of attendance | 8 | 8% |
| Operating in holiday periods / weekends | 7 | 7% |
| Educational setting | 7 | 7% |
| Attendance | 6 | 6% |
| Excluded settings | 5 | 5% |
| Timings, locations, and logistics | 4 | 4% |

Source Regulating IEI consultation (base 105)

## Government response

Taking forward the proposal will ensure that settings which provide, or could be expected to provide, all, or a majority of a child’s education are captured by the regulatory regime, be that: in broadness of curriculum; or where the curriculum is narrow and the provision is delivered in a manner that precludes attendance at other settings.

By agreeing to take forward this proposal, the link between the definition of an independent educational institution and the definition of a school would be dispensed with. This is because the department does not intend to regulate institutions that do not provide education at all. Simply, by outlining that education (as some form of knowledge imparted through teaching or instruction) is provided at the institution, and not specifying further something about the nature or extent of the education, the link between the definition of an independent educational institution and the definition of a school is dispensed with. This measure will require a number of settings which pupils attend full time to register, and as a consequence, would be subject to the same regulatory regime as independent schools are currently subject to. Provided they comply with the regulatory regime, the proposals do not prevent the operation of settings serving people of particular faith groups making full time provision for children (such as Yeshiva’s providing a

religious education to people with ultra-orthodox Jewish faith) or indeed any non-religious settings that operate on the same basis. The proposals would bring them under regulation so that we can ensure children attending receive a broad education and that the settings comply with safeguarding requirements. However, under the regulatory regime, failure to comply with the standards could have consequences on the operation of a setting, such is the case for already registered settings.

Regarding the use of 18 hours as the only definition of full time, having regard to the responses to the consultation on this point, in particular that of Ofsted drawn from their experience in investigating unregistered schools which expressed significant concerns, that settings will set their hours just under the threshold to avoid registration, we think we should use a more nuanced definition of full time. Having considered this and other consultation responses, the Government has decided not to proceed with the proposal to adopt a specific number of hours of attendance or education at a setting as a criteria for requiring registration. Instead we propose to adopt an approach which draws from part of the current registration guidance on Independent School Registration. The existing guidance states that we would consider an institution to be providing full-time education if it is intended to provide, or does provide, all, or substantially all, of a child's education taking into account:

a) the number of hours per week that is provided - including breaks and independent study time;

b) the number of weeks in the academic term/year the education is provided; and

c) the time of day it is provided.

This approach has worked well in the prosecution cases that have been brought to date, and the way it is framed avoids the problem of schools avoiding registration by setting their operating hours at, for example, 17.5 hours per week. We therefore intend to incorporate factors based on this approach in the definition of a full-time setting.

The majority of respondents disagreed that a school should only be required to register if their provision takes place at least partially in school hours as it was seen as an insufficient measure to capture the range of settings that might offer significant provision outside of these. This, however, misunderstands the nature of the proposition. Our proposal is to capture those settings that preclude a child from attending school, and not to capture those settings that provide education or training "out of hours". Consequently, we have decided that the factors set out (e.g. the time of day the setting is open) should allow that registration is only required where at least some of the provision we are seeking to capture normally takes place during usual school hours.

In response to the proposition that 'usual school hours' should mean Monday to Friday, 9am to 3pm. Some respondents made the argument for not stipulating in legislation what

usual school hours are make it harder for a setting to circumvent registration by claiming to operate outside any definition of usual school hours.

Other respondents proposed a wider interpretation of Monday to Friday, 8am-4pm which is consistent with considering time spent in attendance and capture a range of other activities provided by many education settings, including breakfast clubs, and post-school activity clubs that are part of a setting's provision where the setting is also responsible for providing a child's main education. It is also time that should be taken into consideration of whether it prevents a child from receiving education elsewhere. In taking forward this part of the proposal, we would consider Monday to Friday, 8am-4pm to be 'usual school hours' as part of determining whether settings are providing education on a full-time basis.

We will also ensure that certain settings are excluded from the registration requirement. We think it remains important to ensure that certain settings, such as holiday clubs and outward-bound centres, are not caught by new requirements as they provide specialist curricula and could not be expected to meet the full range of the independent school standards.

A number of respondents suggested that elective home education and settings exclusively offering EOTAS provision should be excluded. Comments on the former included the need for home education groups to be excluded and that their inclusion within regulation would likely mean such groups would otherwise need to cease operation. Similarly, there were some comments advocating the exclusion of settings where parents/carers were present. We do not intend to exclude these settings at this stage as allowing them to take the characteristics of a school and remain unregistered could, by itself, lead to system abuse. Such settings can continue to operate without registration where they provide education for limited hours or outside the school day.

In summary, we will take the proposal forward for implementation by:

- Widening the registration requirements by amending the provisions of the Education and Skills Act 2008 that set out which independent educational institutions are required to be registered
- Retaining the existing criteria that settings only have to register if they are providing full time education for 5 or more children of compulsory school age (or for 1 child if the child has an EHCP or is looked after etc)
- Requiring all settings to register that provide all, or a majority, of a child's education for at least some of the time during usual school hours (to be considered as Monday-Friday 8am to 4pm)
- Stipulating in any legislation that in determining whether education is full-time, the factors referred to above from our guidance should be taken into account;
- Excluding certain settings from the requirement to register, such as holiday clubs

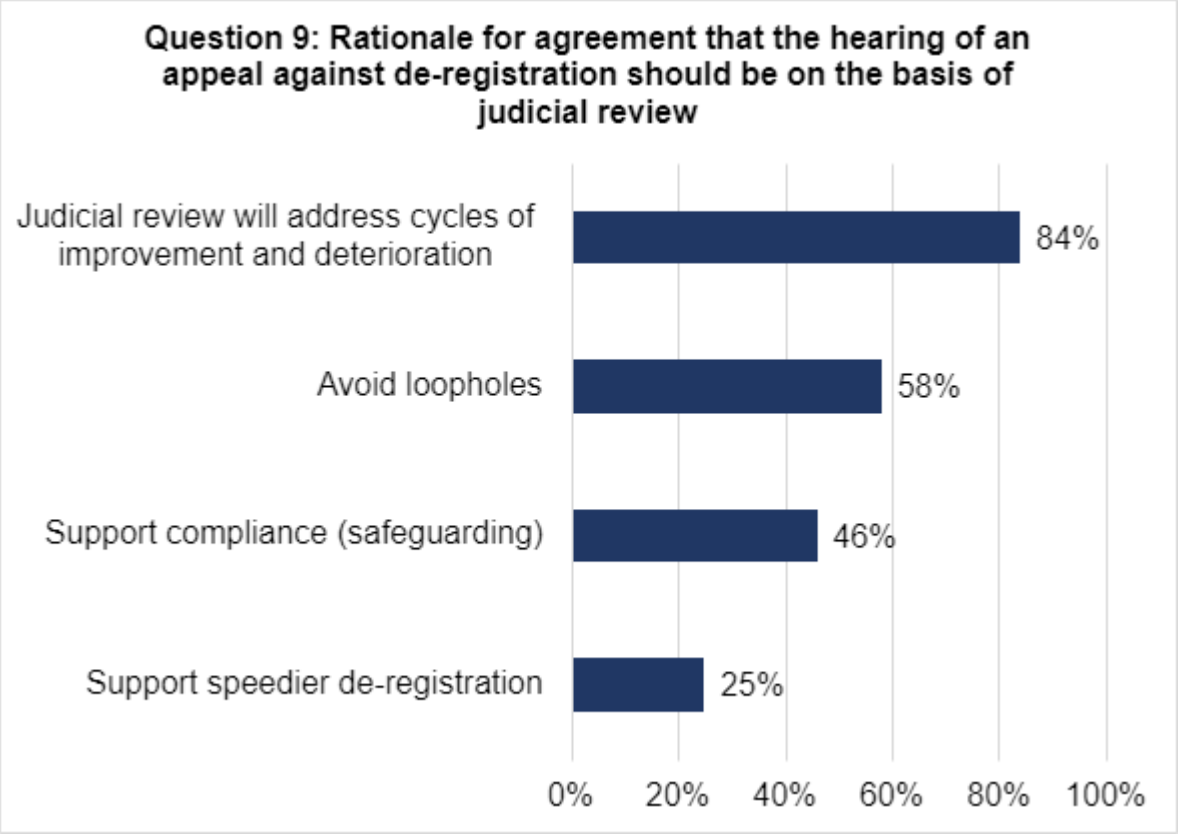
## Proposal 2: Changing how some appeals against de-registration are determined

This theme involved six consultation questions which sought respondents' views on a move to deciding appeals against de-registration on the basis of judicial review principles rather than by way of a full-merits review, including questions about the types of standards that would need to have been breached for an appeal to be determined on this basis , and about whether it would be sufficient to protect a proprietor's rights to simply have a pre-condition about the Secretary of State having first sought representations before deciding to de-register.

### Q9. 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?

The majority of respondents answering this question agreed with this proposal (82%, n=358). Relatively few disagreed (14%, n=61), while 4% (n=18) of responses were unclear.

**Figure 5: Rationale for agreement to Question 9**




Source Regulating IEI consultation (base 204)

Figure 5 presents the main reasons cited for **agreement**. Most comments focused around addressing the cycle of improvement and deterioration, avoidance of loopholes and ensuring compliance with standards.

- **Approaching appeals on the basis of judicial review principles will address cycles of improvement and deterioration** and/or will be more effective in triggering de-registration when required (84%, n=171).

- Similarly, judicial review principles were viewed as preferable in these circumstances because respondents felt it should be able to differentiate between settings that are not performing well (but improving) to those which may intentionally seek to avoid regulation action.

- The unwillingness and intentionality stated above is representative also of concerns about perceived **exploitation of loopholes** and 'game-playing' where settings make sufficient improvements without the intention of sustaining them (58%, n=119). Comments also reflected perceptions that appeals on the basis of judicial review principles would support speedier de-registration where required (25%, n=51).

- Appeals on the basis of judicial review principles were seen as potentially **supporting compliance** with standards (46%, n=94) in that there would be a perceived 'strong incentive for schools wishing to stay on the register to maintain the improvements they make.'

It was also suggested that all appeals against relevant restriction decisions and de-registration decisions should be on the basis of judicial review principles (i.e., not just those in specified circumstances). The main reason given was that the department makes use of relevant restriction more often than de-registration and having two different bases for appeals may lead to confusion.

Of the 14% of respondents (n=61) who **disagreed** with the proposal in this question, several gave additional reasons for this.

- Respondents commented that in the interests of fairness, full-merits reviews should be made available, or comments were made to the effect that full-merits reviews were preferred, for reasons not stated (n=17). Fairness was also a factor in a comment made regarding the perceived inequality with the proposed system change which could mean potential closure for independent schools facing challenges but endeavouring to improve and so called 'stuck schools' in the state system. Similarly, system inequalities were levelled at full merits reviews being allowed as part of Care Quality Commission arrangements.

- A similar proportion did not feel that there was sufficient evidence presented in the consultation document for the change to be considered a proportionate response (n=14).

- Some expressed concern about a perceived reduction in schools' power to appeal (n=12) while others commented on perceived deficiencies in the consideration of evidence presented. These included consideration of improvements in the time between the enforcement notice issue and the date of appeal hearing, as well as the consideration of practice at the school supporting Ofsted's judgement that it is in breach of the independent school standards.

- Some others were concerned that it might not take sufficient account of the time needed to secure school improvement (n=5).

- Other comments identified a potential consequence of such a change being reduced school places which would not aid the school system overall (n=7) and that school closure would become too easy (n=6) with schools that have 'genuinely improved' being de-registered when this would not have happened under the previous system.

## Q10. 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?

The majority of respondents to this question (base n=361) agreed with the proposal (72%, n=261) with typical short comments added that this was 'fair' and 'reasonable', while 21% (n=75) disagreed and 7% (n=25) were unclear.

More than one quarter of respondents who **agreed,** offered additional comments (base n=74) and the majority of these referred to this needing to be flexible in that, in serious circumstances, fewer would be needed in order to bring into effect measures such as closure, if required, in order to protect children's rights and/or address safeguarding concerns (n=48). There is no need to adjust the proposal here as additional powers within the existing regulatory system allow, in cases of serious safeguarding failings, for an emergency application for an order under section 120 of ESA 2008 to the magistrates' court imposing either a relevant restriction or the removal of a school from the register.

Such responses were similarly aligned to the need for inspections to be timely so as to protect children within a timeframe that was not protracted in order to mitigate negative impact on children (n=21).

A small number qualified their agreement with statements to the effect that such a proposal would enable standards to be met (n=8). A similarly small number considered

that, as part of any such proposal, inspections should typically be unannounced and/or random in order to mitigate against preparation that might give an unrepresentative picture of provision (n=10).

Of those that **disagreed** (base n=61), the majority did so linked to, or on the basis of, putting children's interests first in that: 23 considered the number of inspections should be fewer than three if, for example, an organisation is failing children; 16 considered that it should be fewer if there were serious failings; and 10 that this was not sufficiently robust an approach if there were such failings.

Relatively few considered the number of inspections should be higher (n=3), as many as required for improvement to be achieved (n=3) or due to the impact on families, only if the situation cannot be remedied otherwise (n=4).

A small number of comments did not agree with judicial review per se (n=3), or that change was needed (n=4), while 7 commented that there was insufficient rationale for the proposal in the consultation document. Two commented that fewer than three inspections were needed due to cost.

Some comments, primarily from organisations, identified process concerns and recommendations:

- The possibility that different inspections will find different failings and the implications of this.
- Three inspections could potentially take place within a very short space of time (18 months) giving insufficient time for improvements to be genuinely embedded within a school or for changes of leadership to have an impact.
- A potential negative effect on improving school standards as schools may feel that they have "two inspections" before needing to demonstrate sustained improvements.
- Modification to "three standard/full inspections" as a clarification of how inspections are counted as schools will usually undergo monitoring inspections at regular intervals once they have been placed into category three or four.

## Q11. 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 Education and Skills Act 2008? If the latter, which categories?

The majority of respondents to this question (base n=291) agreed with the proposal (69% n=202), while 16% (n=47) disagreed and 14% (n=42) were unclear [NB rounded percentages may not add to 100].

Of those that **agreed** and provided additional comments, around half did so from the viewpoint that the criteria should be unconfined as this would be in children's best interests, with some stating that it would mitigate loophole exploitation.

Similarly, nine commented that it would ensure safeguarding and/or health and safety standards to be maintained.

Nine respondents commented that standards should just be well-defined in either case to avoid system abuse.

Of those that **disagreed** and provided additional comments (base n=32), the majority (n=22) reinforced the need for the criteria to be confined to a set of standards. Reasons for this included:

- Mitigating potential ambiguity and/or misuse of unconfined standards.
- Mitigating subjectivity, as unconfined rests decision for closure with inspector rather than a challengeable guideline:
- Ensuring scrutiny, so that only a limited set of standards exists in primary legislation and may only be changed with parliamentary scrutiny.

Several respondents provided examples of which standards should be listed in legislation. Comparatively, a few comments considered specifying a reduced set of particular standards to be problematic as it would create a hierarchy of standards and might lead to an overall decline in standards.

Nine considered there was insufficient rationale for the standards to be unconfined or that there needed to be more detail on the proposed subset of standards being considered. The example of 'quality of education' was seen as too subjective a judgement for inspection by one. One commented that it should only apply to publicly funded schools, while another commented that such a proposal was unlawful under the European Court of Human Rights due to lack of proper scrutiny.

## Q12. 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)?

Where an appeal met the criteria for being heard under the basis of judicial review principles, it would only apply if the Secretary of State had first warned the proprietor of the school and given the proprietor an opportunity to make written representations as to why the Secretary of State should not take a decision to remove the school from the register. If this was not done, any subsequent appeal against de-registration would be heard by the First Tier Tribunal on the normal full merits basis The majority of respondents to this question agreed with the proposal (73%, n=253). Relatively few disagreed (17% n=60), while 9% (n=32) of responses were unclear. Further comments were limited.

Those in **agreement** did so with the view that written submissions were sufficient, the main reasons cited for agreement (base n=26) were that:

- Children's rights must be protected and/or prioritised over the proprietor's rights (n=21).
- It was important to mitigate against any unnecessary delay in the process (n=9).

However, whilst agreeing, some respondents highlighted caveats to their responses. These included comments on:

- Providing the proprietor with full guidance as to what such a written submission should include, and advice that they may benefit from third party support up to and including legal counsel.
- Robust procedures for the consideration of submissions so these are reviewed, reflected upon and acted upon in a reasonable, appropriate, fair and transparent way, including additional fact-finding where appropriate.
- Opportunities for meeting with community representatives and timely written communication.

Of the 17% (n=60) who **disagreed**, the main reasons against the proposal were that schools/proprietors should be given additional rights beyond a written representation (n=15) and similarly, that face-to-face representation should be allowed (n=8).

Individual respondents also highlighted additional opportunities to protect proprietor rights, such as:

- An internal appeal mechanism prior to formal appeal through the judicial channel.
- An ability to highlight concerns to an independent monitoring body.

- The right to appeal directly to the First Tier Tribunal.

In disagreeing, some respondents did so in the context of making points around caveats or process recommendations:

- Should pre-decision processes be at pupils' expense (e.g., lengthening the process), these ought not to be permitted (n=7).
- Inspection/unannounced visits should be included (n=4).
- The appeals process should suffice without the need for pre-decision requirements (n=3).

We believe that allowing written representations gives sufficient protection to proprietors to make their case.

## Q13. Do you think there is any possible different way in which appeals should be determined against deregistration, which would achieve the same policy aim?

The majority of respondents (base n=213) stated no or that they were 'not aware of any', in response to this question (70% n=149), while 6% (n=13) stated yes and 13% (n=27) were unclear. Four per cent (n=8) stated no change to the existing arrangements was required.

Small numbers made additional comments that:

- Settings should be de-registered if not complying (n=8).
- There should be no de-registration (n=2).
- An external independent body could manage appeals, for example, where 'the school disputes a finding over a particular independent school standard' (n=4).
- A tribunal could be used, without judicial review costs (n=3).
- Other suggestions (made by one respondent each) included use of local appeals panels, direct appeals to DfE, more unannounced inspections, and HMI overseeing the appeals process. In addition, points were made that:
- Any process should not disadvantage children's education and safeguarding (by causing delays).

We do not believe these other suggestions would achieve the respondents' aim to provide additional fairness for the proprietor

## Q14. Do you have any further comments on the general issue of appeal rights in relation to enforcement decisions?

The majority of respondents to this question (base n=63) made comments that centred on protecting and prioritising children's rights (n=37), while, related to this point, 19 commented that there should either be no opportunity to abuse or delay processes (n=11) or indeed, closures (n=8).

A small number commented that there was an insufficient rationale for the proposed changes (n=5), while others commented that all schools should follow the same rules (n=6). Smaller numbers commented on additional appeal rights, such as to the DfE directly, should a standard be inspected incorrectly (in a setting's view), or the opportunity to appeal to the European Court of Human Rights.

A small number of additional individual comments related to concerns about the objectivity of the inspection system and how settings might fall foul of this, while one commented on legislative concerns.

### Government response

Currently action to close failing independent schools can be slow to take effect, and difficult to achieve where institutions show periods of improvement (but still fail to meet the standards). This is not acceptable, particularly where institutions have long-term failings, including on safeguarding. Changing the basis of how some appeals against enforcement action are heard by a tribunal is required to ensure effective action can be taken against schools where there are long-term failings but where schools make temporary improvements but then revert to continue to fail children.

Based on consultation responses, agreeing the proposal would address cycles of deterioration and improvement and we are, therefore, taking forward the proposal to change the basis for how some appeals against decisions to de-register, under ESA 2008, are determined by the court.

Considering it is reasonable, and that other, more rapid solutions are available in cases of serious safeguarding concerns, the proposal for changing the basis on which some appeals against deregistration are determined will be on the basis of three prior inspections within a 6-year period, reporting failings against the standards, which we believe is fair and sufficient. Those who disagreed with the proposal did so on the basis that fewer inspections should be required where serious failings were identified. We do not think this is necessary and existing enforcement powers (with existing appeal rights) will remain available for schools with significant failings after fewer inspections.

It is right to consider the safeguarding concerns put forward regarding the number of inspections, but we feel there is no action necessary because powers under S.120 of the ESA 2008 allow us to act quickly in emergency cases. In addition, we are also proposing

a power to suspend registration for schools where there is a risk of harm to a child, and we believe this is a more appropriate tool where serious safeguarding problems occur.

The power to specify in regulations the standards used in applying the criteria, should be unconfined. We agree that it is in the best interests of safeguarding and educating children to avoid placing bias or weight to one set of standards over another. Therefore, this measure will be taken forward without specifying specific standards must be failed for it to apply.

In conclusion, we are proceeding with the proposal to change the basis for how some appeals against deregistration are determined by the court. So, appeals against decisions to de-register should be determined on a judicial review bases in cases where:

- There have been three prior inspections at which failings have been found against any of the independent school standards within a 6-year period;
- Action plans have been required following the first two inspections; and
- Proprietors have been given the opportunity to make written representations before the decision to de-register is made.

## Proposal 3: Revision of the basis for consideration and approval of material changes to independent educational institutions

This theme involved asking three questions which sought respondents' views on material change proposals specifically relating to children with Special Educational Needs, to the powers afforded to the Secretary of State in determining applications for material change approval and for acting on unapproved material changes.

### Q15. Do you agree with the changes proposed for approval of material changes relating to provisions for pupils with SEN?

Three-quarters of those responding to this question agreed with the proposal (75%, n=152). Relatively few disagreed (7%, n=15), while 17% (n=35) of responses were unclear.

Whilst only a small number commented more widely in response to this question, the main reason cited for **agreement** to proposed changes for approval of material changes related to protection of pupils with SEND, and/or having special provisions made for this cohort (n=8).

Those in **disagreement** with the proposed changes expressed concerns about the change of focus from independent school to institution and the implications this might have (n=2), or that Education, Health and Care Plans (EHCPs) should be included as well as pupils with SEND (n=2).

However, there were several fuller responses which provided additional insights into the issues the proposed changes might mean in terms of implementation. These responses are summarised under the following three broad themes:

1. SEND categories of need.
2. Meeting the needs of pupils with SEND.
3. Meeting local and national needs.

### SEND categories of need

The use of SEND categories was seen as potentially problematic for a number of reasons. One comment stated that pupils with SEND frequently have more than one type of need or disability and diagnosis – making it 'impossible' for schools to stay within their registered category, giving rise for the need for guidance on:

- How schools should determine when the need to register or amend their registration would be triggered on account of a change in the needs of the pupil cohort.
- How registration would interact with the duty on schools under the Equality Act (s.85) not to discriminate in their admissions against pupils on the basis of disabilities.
- How first tier SEN tribunals would be affected, that is, whether a tribunal would be able to order a place at an institution which was not registered as being organised for the type of disability presenting.

Other related comments centred on the perceived risk of having a set list of categories from which a category might be missed. This, it was considered, may lead to creating unintentional gaps if categories are not sufficiently broad in their definition to include new categories as developments occur. Allied to this was a comment that there is no proposal to include potential amendments to the list through secondary legislation and that leaving this to primary legislation would be 'cumbersome and cause delay'.

### Meeting the needs of pupils with SEND

There were a number of concerns expressed regarding meeting the needs of pupils with SEND and it ceasing to be a proposal to have to apply for material change approval to

admit one or more pupils who have an EHCP. Comments related to independent schools:

- Not needing to follow the SEND Code of Practice.
- Having the knowledge, expertise or capacity to assess and meet needs.
- Having access to local specialist resources and services; having experience of working with health and social care professionals likely to contribute to an EHCP.
- Being able to establish a separate specialist unit catering specifically for pupils with SEND.
- Concern over bureaucracy for independent education settings and the need to strike a balance between protecting the needs of pupils with SEND and respecting the independence of school providers.

The Code is statutory guidance, so a “have regard to” duty. Independent special schools on the s41 list (a group of independent schools that have voluntarily applied and been approved by SoS under s41 of Children and Families Act 2014) must have regard to the Code in the same way as Academies and other providers. Much of the Code is aimed at LAs and their partners; the chapter aimed at schools will have a good deal of positive material on the way schools respond to pupils with additional needs, but this is good practice which any school can usefully draw on.

The second and third bullets above are equally points that can be made about maintained mainstream schools. The school may well need to draw on wider networks of support, for example through the relevant LA’s Local Offer of SEND services and provision. We would not expect a local authority to refuse to assist or advise simply because the school asking for support was independent. LAs have a statutory responsibility for the special educational needs of all children and young people in their area.

### Meeting local and national needs

A few comments related to this theme:

- The need for flexibility in the system around material change requests in light of exceptional circumstances, for example responding to needs for care in the locality.
- The role of local authorities and their receiving from the DfE advance notice/forming part of a consultation strategy due to the complexity in needs of accessing the provision.

- A recommendation that the DfE should play a monitoring role enabling it to audit the number of requests and changes made to allow for better planning and support to be delivered to settings with children with SEND in attendance.

The first bullet has been seen in Academies, where LAs and schools have made arrangements to put in place additional SEND provision without the significant change process keeping pace. The general advice we give is for the school organisation team to be pragmatic: the significant change process is necessary, but it shouldn't hold up necessary provision being made. Regarding the second and third bullets, we are aware of the need for more effective and long-term strategic planning of SEND provision generally.

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

Of those that responded to this question (base n=275), the majority of respondents agreed (81%, n=223) with the proposal. Relatively few disagreed (14%, n=39), while 5% (n=13) of responses were unclear.

Relatively few respondents who **agreed** provided additional comments (base n=19). Of those that did, most commented on the importance of this proposal for protecting children's rights and safeguarding (n=6) and to be able to impose relevant and proportionate restrictions (n=5). Currently, our only option is to de-register a school, where there has been an unapproved material change.

The need to consider the implications of non-compliance were identified in a few cases, with one respondent stating:

> If a tiered response (no action, relevant restrictions, de-registration) is going to be introduced then the Department should publish guidance outlining the principles they would apply when determining an appropriate response. The guidance is important to ensure consistency of approach so that if an appeal is lodged the tribunal will be able to review the decision relative to the available guidance. – *Organisation, Faith or other group connected with schools or settings*

One respondent commented that the Secretary of State should have similar powers as those in place for state schools.

Relatively few respondents who **disagreed** provided additional comments (base n=19). The majority of these stated that such a proposal was not justified in terms of rationale or

evidence presented and was seen by some to be potentially too punitive (n=15). Other concerns expressed were that:

- There could be adverse effects on children's schooling, for example, in not permitting the material change (n=7).
- The restrictions might be used too lightly (n=3).
- The change was not needed unless there were safeguarding issues (n=2).
- The DfE already possesses adequate powers (n=2).
- It meant to much political power (n=2) and was better managed at the school or parent/carer level (n=1).
- A contextualised rather than one-size fits all approach was needed (n=1).

We believe the proposal is justified on the basis that our existing powers to address unapproved material changes are confined to de-registration, which we do not believe would constitute a proportionate response in many cases. Therefore, we need an alternative mechanism whereby we are able to take action, other than deregistration, against unapproved material changes in appropriate circumstances.

## 17. 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?

The majority of respondents to this question agreed with the proposal (71%, n=202). Around one-quarter disagreed (23%, n=66), while 6% (n=18) of responses were unclear.

This question received minimal further commentary beyond agreement or disagreement. Those who did respond more fully suggested in terms of their **agreement** with the proposal that:

- Such evidence may be directly relevant, for example, regarding a breach of restrictions or non-compliance with the Independent School Standards (n=9).
- It would combat potential system abuse/loopholes (n=8).

Comments in some cases acknowledged the need for such provision in the case of safeguarding concerns, such as, the conduct of proprietors or members of the proprietary body.

Several others **agreed with caveats** (i.e., respondents agreed subject to):

- Children's rights not being adversely affected; safeguarding (n=6).
- Evidence used being transparent and non-discriminatory (n=4).
- An appeals process, for example, judicial (n=4).
- Parliamentary scrutiny (n=2).

Of the small number who **disagreed** with the proposal, their rationale included:

- That the change to grant this approval is not justified due to a lack of examples or information in the consultation document (n=25). For example, clear links to the Independent School Standards needed to be made and clarification of statements included, such as, what 'other evidence about the school or proprietor' means.
- That such a change would result in too much power for an individual (n=8).
- That such a change could leave the proprietor open to discrimination (n=3) and that there need to be adequate safeguards (such as, first tier tribunals) against this as penalties may be used too readily.

However, as with those who agreed to the proposal, there was also a caveat expressed in some comments – that in stating their disagreement, there needed to be no detriment to children – relating to safeguarding concerns (n=5). This aligns with a comment that stated there needs to be parameters for such refusals such as health and safety and extremism:

Other comments largely centred on transparency, fairness and justification:

- Material change decisions should be based on full knowledge of what is required of proprietors.
- That concerns should be as a consequence of inspection and not meeting standards as opposed to pre-emptive judgements.
- That further explanation is needed as the proposed change seems unsupported and lacking evidence (for example, to help considerations such as on what grounds a first tier tribunal would consider the appeal).

## Government response

For ease of response, the proposal as consulted on, 'Revision of the basis for consideration and approval of materials changes to independent schools', has been separated into two parts: those related to SEN Provision; and those related to Secretary of State Powers.

Related to SEND

There were two elements to the proposal which related to SEN provision:

- To make it a material change to organise an institution to cater specifically for pupils with special educational needs of one or more defined categories (which would be specified in regulations), or to cease to do so. It would also be a material change to add to or subtract from serving those defined categories in the organisation of the setting;
- It would no longer be a material change (as it currently is under the Education Act 2002) to simply admit or cease to admit, one or more pupils with SEN.

Some responses revealed concerns over SEND categories, since children with SEND frequently have more than one type of need or disability and diagnosis. This could present challenges for schools to stay within their registered category. Respondents said guidance would need to accompany this proposal if taken forward, to provide support and clarity to schools on how to determine when changes to registration were needed, how it would interact with S.85 of the Equality Act 2010 not to discriminate in admissions against pupils on the basis of disabilities, and how first tier SEN tribunals would be affected in that, could a tribunal order a place at a school which was not registered as being organised for the type of disability presenting. Also, these concerns are not unique to independent schools which offer SEN provision, and so we will also consider how this is currently addressed for state-maintained schools. For clarity, the proposed measures would not prevent any school from admitting pupils with multiple SEN and/or with SEN other than those for which the setting has been specifically organised. Schools would still be required to meet their Equality Act duties in relation to admissions and the First Tier Tribunal would still be able to order an EHC plan made a suitable placement in line with current practice.

The proposal set out that it should no longer constitute a material change to admit or cease to admit one or more pupils with any form of SEN. Under this current requirement, it is probable that many or indeed most independent schools are catering for one or more children with SEN already and so therefore operating outside of their registration details. Some respondents felt an approach that better secures appropriate provision and meets the specific needs for those with SEND would be to adapt this material change requirement, so that it is a material change to admit, or cease to admit, one or more pupils with an EHC plan. We do not believe such a proposal is workable and responsibility should remain with commissioners to ensure that placements can make appropriate provision to meet a child's need.

We will further consider this area within the forthcoming SEND Review, which will consult on tightening the regulatory requirements on independent special schools (which are overwhelmingly state-funded) so that they have to meet standards comparable to those expected of state-maintained provision.

If we are unable to change how schools organise themselves to cater for specific categories of SEN, there is a risk of significant deficiencies in provision.

In conclusion, we intend to take forward the proposal to make it a material change to organise an institution to cater specifically for pupils with SEN or to cease doing so and to specify the category or categories of special needs that the school caters for, and that this replaces the existing requirement, so that it is no longer a material change to admit, or cease to admit, one or more pupils with SEN.

Related to Secretary of State Powers

There were similarly two elements to this part of the proposal:

- To give a more flexible way of dealing with unapproved material changes. It was proposed that a relevant restriction could be imposed if an unapproved material change is made;
- To make it possible for approval of a material change to be refused even if relevant standards are likely to be met after the change is made (for example, on the basis of other evidence about the school or proprietor).

Without changes to how we approve material changes we are unable to take proportionate action in response to unapproved material changes. Currently, our only option is to de-register schools. Implementing the changes would allow us to impose a relevant restriction for schools operating with unapproved material changes.

Legislation currently requires the approval of all material changes if the relevant standards are likely to be met. In principle this is fine but there are instances where the Department may become aware of additional information or intelligence that may be relevant to the school leadership's ability to sustain performance or implement necessary improvements. For example, in relation to a proposal to change proprietors, where we have additional information that raises significant concerns about a proposed individual. Taking forward this part of the proposal would allow the Secretary of State greater discretion to take such information into account to refuse material change applications where the new proprietor does not meet the fit and proper person test. This test should also apply when new schools are registered.

Whilst most respondents agreed 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, around a quarter disagreed. Rationale provided for disagreement indicated this was because of the lack of examples given that meant it was not clear what 'other evidence about the school or proprietor' means. To help clarify this point, we asked as a matter of principle whether it should be possible to give the Secretary of State a wider discretion to grant consent or not. It will only be evidence that is relevant and related to the change in registration that should be taken into consideration

Legislation also currently requires that we must reject a material change if it appears to the Secretary of State that, following the material change, relevant independent educational institution standards are not likely to continue to be met. Once again, in general this is fine but there are circumstances where it would be helpful to approve the change. For example, if there is a school that is trying to improve and the change will help it do so, but it may still be some time before the standards are met. If the change is likely to be beneficial overall to the education of students, even if the Secretary of State is not satisfied that the change is likely to result in the independent educational institution standards being met immediately, then it should be possible for the Secretary of State to approve the change. However, such discretion should not extend to allow material changes to be approved at independent education institutions where the Secretary of State cannot conclude that the standards are likely to be met at some point in the future, for example where a proprietor states that they do not intend to try and meet certain standards.

We are taking forward the proposals as follows:

- Giving the Secretary of State power to impose a relevant restriction where there is an unapproved material change;
- Allowing the Secretary of State to refuse approval for a material change, even if it appears that the relevant standards are likely to be met after the change is made.
- Allowing the Secretary of State to agree to a material change, even if it appears that the relevant standards are not likely to be met after the change is made but where relevant standards are likely to be met in the future.

We will also progress proposals to give the Secretary of State power to:

- Make amendments to the definition of material change
- Allow for inspection by an independent inspectorate on applications for approval for material change

## Q18: Do you have any comments on the conclusions set out in the published equalities log, UNCRC assessment and family test document?

The majority of respondents did not complete or stated ‘no’ in response to this question. Of those who commented (base n=96), just under half (n=44) stated that they agreed with the conclusions, compared to 19 who disagreed; 9 were unclear.

Of the coded responses, key messages that were favourable towards the conclusions related to:

- The need to prioritise the rights and needs of children, for example, to a broad and balanced education rather than perceived narrow religious education (n=36) and that all settings should abide by the same rules in children's interests (n=6).

- The balance of positives in favour of taking forward the proposals outweighs the negatives (n=22).

Conversely, key messages that were unfavourable towards the conclusions related to:

- Potential adverse effects on pupils, not just those from a faith background (n=4).

- Families should be able to choose where and when their children are educated (n=3), that this may mean some of society's values are rejected but this should be a permissible freedom (n=1), and the effects on children will not necessarily be negative (n=1).

Other points related to:

- The need for proper consultation, such as, with local authorities and settings (n=1).

- That evidence should be presented about home education as it is portrayed negatively (n=1).

- That the conclusions should be represented in inspection criteria (n=1).

- The perception that it was unfairly focused on the people of Jewish faith (n=1) and the need to work with the people of a strictly Orthodox Jewish faith rather than against it (n=1).

- Ofsted losing trust with people from faith groups (n=1).

- Changes may cause more parents to home educate and stretch their capacity (n=2).

We recognise that settings serving people of particular faiths, which provide a substantial component of religious education as part of their curriculum can provide a desirable option for parents of that faith. Such settings do not need to prevent children receiving an education that is broad and safe, as demonstrated by many registered independent schools that meet the current independent school standards while also providing a substantial religious education. We have outlined through the Equalities Impact Assessments, which are published alongside this consultation response, that although certain faith groups, such as people of Charedi Jewish faith, may be disproportionately affected by the proposals, the benefit it brings to children's quality of education, and in providing oversight of safeguarding through the regulated activity is of greater importance. Further details on this are set out in the impact assessments.

## Next steps

Following the publication of this consultation response, the Department will seek to take forward the measures set out above at the next suitable legislative opportunity.

# Annex A: List of organisations that responded to the consultation

- Association of Muslim School UK (AMSUK)
- Ateres High School
- Ateres High School
- Board of Deputies of British Jews
- British Humanist
- CARE (Christian Action Research and Education)
- Chinuch UK
- Christian Concern
- Christian Legal Centre
- Church of England Education Office
- Disability Matters Global
- Family Education Trust
- Harrow Local Authority
- HumanistsUK
- Independent Schools Inspectorate
- Home Education Advisory Service
- Keys Group
- Leicester City Council
- London Borough of Hackney
- Muslim Council of Britain
- Nahamu (www.nahumu.org)
- National Secular Society
- NSPCC
- Our Kids Charity
- Outcomes First Group
- Sandwell LA
- Spectrum Space Education, Training and Consultancy
- The Catholic Education Service.

- The Christian Institute
- The Gateshad Jewish Boarding School
- The Outdoors Group td
- Tiferes High School
- Torah Education Committee

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