

Explanatory Memorandum to the Education Workforce Council (Interim Suspension Orders) (Additional Functions) (Wales) Order 2021.

This Explanatory Memorandum has been prepared by the Schools Effectiveness Division of the Education Directorate and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister/Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Education Workforce Council (Interim Suspension Orders) (Additional Functions) (Wales) Order 2021.

I am satisfied that the benefits justify the likely costs.

Kirsty Williams MS
Minister for Education
23 February 2021

PART 1

1. Description

1.1 The Education Workforce Council (“the Council”) was continued in existence by the Education (Wales) Act 2014 (“the 2014 Act”)¹. It was formerly known as the General Teaching Council for Wales (“GTCW”). It came into being on 1 April 2015.

1.2 The Council is the independent regulator in Wales for:

- school teachers;
- school learning support workers;
- further education teachers (lecturers);
- further education learning support workers;
- work based learning practitioners;
- qualified youth workers; and
- qualified youth support workers.

1.3 The Council is required to maintain a register (“the Register”) under section 9 of the 2014 Act and to allow the public access to that Register under regulation 14 of the Education Workforce Council (Main Functions) (Wales) Regulations 2015². The Register lists everyone registered with the Council at that point in time in the categories listed above (“Registered Persons”), and is available to the public via the Council’s website³.

1.4 Under section 26 of the 2014 Act, the Council must carry out such investigations as it thinks appropriate where it is alleged that a Registered Person is guilty of unacceptable professional conduct, professional incompetence or it is alleged the Person has been convicted of a relevant offence⁴

1.5 After carrying out such an investigation, the Council will decide what action to take. The Council may impose a disciplinary order on a Registered Person following an investigation and disciplinary hearing conducted by them in accordance with the disciplinary provisions in sections 26 to 32 of the 2014 Act and Part 5 of the 2015 Regulations.

1.6 A “disciplinary order” is defined in section 27(2) of the 2014 Act as:

- a reprimand,
- a conditional registration order,
- a suspension order, or
- a prohibition order.

¹ 2014 anaw 5.

² SI No.2015/140 (W.8).

³ <https://www.myewc.wales/en/member-of-public/qualified-teacher/list>

⁴ “Relevant Offence” means a criminal offence, unless that offence has no material relevance to an individual’s fitness to be a Registered Person (Please see section 27(1) of the Education Wales) Act 2014).

1.7 The Council's functions under the 2014 Act do not allow it to suspend a Registered Person pending the outcome of an investigation and disciplinary hearing. This is the case even if the nature of the allegations made against the Registered Person are credible, serious, and raise significant safeguarding concerns.

1.8 This Order confers additional functions on the Council so that it may:

- impose an interim suspension order ("ISO") on a Registered Person where the investigative and disciplinary process has not been completed, and the Council believes it is necessary in the public interest;
- review an ISO following a request to do so by a former Registered Person;
- keep an ISO under review at such intervals as it considers appropriate, whether or not a former Registered Person requests a review; and
- revoke an ISO following a review requested by a former Registered Person, or at any time prior to making a decision on whether or not to impose a disciplinary order.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

2.1 This Order addresses recommendation 21 of the Children, Young People and Education Committee in their Report on the Teachers' Professional Learning and Education Inquiry, namely the "... *remit of the Education Workforce Council should be extended to provide it with power to suspend teachers in appropriate circumstances*"⁵. However, this Order enables the Council to impose ISOs on all categories of Registered Persons, not only school teachers.

2.2 The Council has the power under article 18 of this Order to set its own rules of procedure relating to decisions to impose, review, extend and revoke ISOs.

3. Legislative background

3.1 Section 5 of the 2014 Act gives the Welsh Ministers an order making power to confer or impose on the Council such additional functions as they consider appropriate.

3.2 Section 13 of the 2014 Act allows the Welsh Ministers to make, by regulations, such further provision about the register and registration as they consider necessary or expedient.

3.3 Section 46 of the 2014 Act allows the Welsh Ministers to make, by order, such incidental, consequential, supplemental, transitional, transitory or saving

⁵ Available at: <https://senedd.wales/laid%20documents/cr-ld11338/cr-ld11338-e.pdf>

provision as they consider appropriate for the purposes of, or in connection with, giving full effect to any provision made by or under this Act.

3.4 Section 47 of the 2014 Act enables the Welsh Ministers to make such incidental, consequential, supplemental, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the 2014 Act.

3.5 Section 39 of the Legislation (Wales) Act 2019 (“the 2019 Act”) provides that where the Welsh Ministers have a power or duty to make subordinate legislation in the form of regulations, rules or an order made by statutory instrument, they may exercise the power or duty by making the subordinate legislation in any other of those forms by statutory instrument.

3.6 Section 40 of the 2019 Act, which relates to combining subordinate legislation subject to different Senedd procedures, has been applied in this Order.

3.7 This Order is made under the affirmative resolution procedure.

4. Purpose and intended effect of the legislation

4.1 The purpose of this Order is to add to the functions of the Council so that it may make ISOs against Registered Persons. This enables the Council to suspend the registration of a Registered Person from the public Register as an interim measure, prior to the outcome of an investigation and disciplinary hearing. The maximum initial period for which an ISO may have effect is 18 months. However, in such cases where, for example, a person is charged with a criminal offence, where it may take longer than 18 months for the criminal justice system to conclude the case, the Council can apply to the High Court for an extension to an ISO beyond 18 months. This will contribute to the transparency of the process, and provides an additional safeguard as it ensures there is independent scrutiny by the Court in lengthy cases.

4.2 The Order also gives the Council the power to review, extend and revoke ISOs, and for the person to whom the ISO relates (“the former Registered Person”) to request that the ISO be reviewed.

4.3 The intended effect of this Order is to ensure certain individuals may not use “Registered Person” status to demonstrate their suitability for educational employment pending the outcome of the Council’s investigation and disciplinary process. This is because, whenever an ISO is imposed, the former Registered Person:

- is unable to work in any role which requires registration with the Council;
- is unable to identify themselves as a “Registered Person”; and
- will not appear on the Register as a “Registered Person”.

The ISO Process

4.4 An ISO may be imposed only if the Council believes it is in the public interest to do so. This means the Council will consider imposing an ISO where a Registered Person is the subject of a referral in which serious allegations are made that raise significant safeguarding concerns. Allegations of serious sexual misconduct, or serious physical, emotional, and/or mental harm, would always be viewed as raising significant safeguarding concerns. Similarly, if the police informed the Council that they were carrying out a serious criminal investigation which raised a safeguarding concern, this too would be regarded as significant. An ISO is not a “disciplinary order”, but instead a temporary measure to be taken pending an investigation and a disciplinary hearing. The maximum period for which an ISO may have effect, without an application to the High Court for an extension, is 18 months. The decision to impose an ISO would not involve a final determination of facts relating to the allegations in the case. It would be separate from the decision to impose a final disciplinary order. Therefore, the imposition of an ISO does not necessarily mean a disciplinary order will subsequently be imposed by the Council.

4.5 The Council will also consider the credibility of the referral before considering whether to impose an ISO. Where a referral is made by the police or the Disclosure and Barring Service, that referral - and the allegations made within it - would likely be deemed sufficiently credible to allow imposition of an ISO to be considered. Whereas if a referral comes from another source, such as an employer or member of the public, the Council would make further enquiries as part of their consideration of the credibility of that referral. For example, the Council would contact the police for advice as to whether they consider there to be an “urgent pressing social need” (see para 4.34) for the Council to take action.

4.6 Whenever the Council are considering the imposition of an ISO, a notice of intention to make the ISO must be sent to the Registered Person. The notice must give the Registered Person at least 10 working days’ notice of the ISO hearing before an independent panel.

4.7 The ISO hearing will be held in private, unless the Registered Person requests a public hearing.

4.8 The Registered Person will have the right to appear and make oral representations at the ISO hearing at which their case is considered, and make written representations prior to and at that hearing. They also have the right to be accompanied and to be represented at the hearing by one or more persons (for example, a union representative or solicitor), and to make prior written representations to the panel if they do not attend the hearing.

4.9 An ISO must contain the following information:

- the decision of the Council;
- the date on which the ISO is made; and

- the date on which the ISO takes effect. (Usually the ISO will take effect on the date on which notice is served on the Registered Person, except where the Council decides otherwise).

4.10 Notice of the making of the ISO must be served within 3 working days of the date of the decision on:

- the person against whom it was made (“the former Registered Person”),
- the former Registered Person’s present or last employers; and
- any teaching agencies with which the former Registered Person is registered.

4.11 The notice of the making of the ISO must contain the following information:

- the text of the ISO;
- a description of the effect of the ISO;
- the Council’s reasons for making the ISO; and
- an explanation of the former Registered Person’s right to request the Council convene a hearing to review the ISO.

Former Registered person’s right to appeal against an order to the High Court

4.12 The former Registered Person may appeal against the ISO to the High Court. An appeal must be made within the period of 28 days beginning from the date on which notice of the ISO is served. In respect of such an appeal, the High Court may:

- revoke the ISO;
- vary the period for which the ISO is to have effect; or
- make no change to the ISO.

The decision of the High Court is final and may not be appealed.

Former Registered Person’s right to request a review of the ISO

4.13 As explained above, the Council must tell the former Registered Person, within 3 working days of the decision to impose the ISO, of their right to request the Council convene a hearing to review the ISO.

4.14 A former Registered Person may request the Council review an ISO within the first 6 months of the ISO’s imposition, or from the date of the High Court’s decision if the ISO has been appealed, and thereafter at 6-monthly intervals. The former Registered Person may request the Council review an ISO at any time if new evidence becomes available that is relevant to the case or there is a material change of circumstances since the ISO was made.

4.15 An application for review of an ISO must be made in writing and explain the reasons why the former Registered Person is seeking to have the ISO

reviewed. The application must be accompanied by every document the former Registered Person is relying on in support of their application.

4.16 Whenever a request for a review is received, the Council must convene a hearing to consider the case not later than 6 months from the date the ISO was made, or the High Court's decision if the ISO has been appealed, or the last review if the ISO has already been reviewed. If the former Registered Person has requested a review because new evidence has become available or there has been a material change of circumstances, the Council must convene a hearing within 10 working days of receipt of that request. The review hearing will be held in private, unless the former Registered Person requests a public hearing.

4.17 The former Registered Person will have the right to appear and make oral representations at the review hearing at which their case is considered, and make written representations prior to and at that hearing. They also have the right to be accompanied and to be represented at the hearing by one or more persons (for example, a union representative or solicitor), and to make prior written representations to the panel if they do not attend the hearing.

4.18 The Council must notify the former Registered Person in writing of the outcome of the review within 3 working days of the panel's determination, and give their reasons for that determination.

Review of an ISO by the Council

4.19 The Council is required to keep an ISO under review at such intervals as it considers appropriate, and in accordance with its rules of procedure. This review will take place whether or not a former Registered Person exercises their right to request a review.

4.20 The schedule for this review is set by the independent panel when it initially imposes the ISO. Usually this will be at intervals of 6 months unless the Council is notified of a change in circumstances, in which case the review may take place earlier than originally planned.

4.21 At this review there is not a hearing and the former Registered Person will not be asked to make representations.

Extension of ISOs by the High Court

4.22 If the Council considers an ISO should be extended beyond 18 months it must apply to the High Court. On an application, the High Court may:

- revoke the ISO;
- extend, or further extend, the ISO for up to 12 months; or
- make no change to the ISO or to the period for which the ISO is to have effect.

Revocation of an ISO by the Council

4.23 The Council may revoke an ISO if it:

- determines there is no case to answer prior to the start of the Council's own investigations, which are part of its disciplinary functions under section 26 of the 2014 Act; or
- discontinues an investigation into the alleged conduct that resulted in the imposition of an ISO, because there is no case to answer or on some other basis; or
- makes a decision as to whether or not to impose a disciplinary order; or
- carries out a review to consider a request by a former Registered Person, and that review determines the ISO should be revoked.

4.24 An ISO will cease automatically when the term for which it is imposed comes to an end. (The maximum term for which an ISO may have effect, without an application to the High Court for an extension, is 18 months).

Use of the Council's rules of procedure

4.25 The Council has the power to set its own rules of procedure relating to decisions to impose, review, extend or revoke ISOs.

4.26 For example, article 3 of this Order gives the Council the power to make ISOs if it considers it "necessary in the public interest" to do so. However, it is the rules of procedure that explain what is meant by the "public interest" test, and how it will be applied in practice when the Council is considering whether to make an ISO.

4.27 Rules of procedure may only deal with matters that are not provided for in the Order. For example, as article 4 of the proposed Order requires a Registered Person to be given not less than 10 working days' notice of the Council's intention to impose an ISO on them, rules of procedure may not change this requirement.

4.28 The Council must consult on these rules of procedure before they are made or amended, and are obliged to publish them on its website and provide copies on request to any person who requests them.

Reasons for bringing forward this Order

Safeguarding concerns

4.29 Under section 26 of the 2014 Act, the Council must carry out such investigations as it thinks appropriate where it is alleged that a Registered Person is guilty of unacceptable professional conduct, professional incompetence or it is alleged the Person has been convicted of a relevant offence. [After carrying out an investigation the Council must decide what further action to take in respect of the case. Where the Council holds a hearing or the person consents to the case being determined without a hearing, the

Council may determine that there is no case to answer or that the person is guilty of unacceptable professional conduct, serious professional incompetence or has been convicted of a relevant offence. Where the Council determines that a person is guilty of unacceptable professional conduct or serious professional incompetence, or has been convicted of a relevant offence, the Council may make a disciplinary order in relation to the person. Not all disciplinary orders lead to removal from the Register.]

4.30 A Registered Person's name must remain on the Register at all times prior to the completion of the investigative and disciplinary process by the Council. The Register is open to the public, and may be accessed online. This means that while the police are investigating a serious, credible allegation that raises significant safeguarding concerns against a Registered Person, that person remains on the Register.

4.31 This is a serious failing, as it allows an individual to continue to have the status of a "Registered Person" for possibly many months, no matter how serious and credible the allegations against them.

4.32 Whereas, if the Council had ISO powers it could suspend the name of that individual from the Register pending the outcome of police investigations and its own investigation and disciplinary process.

The Common Law Police Disclosure Scheme

4.33 In 2013, the Home Office reviewed the nature of information provided by police forces to regulatory bodies. Historically, police forces would notify the General Teaching Council for Wales (now the Education Workforce Council) when a school teacher had been arrested for, or charged with, a criminal offence.

4.34 The 2013 review changed the requirements surrounding provision of such information by police forces, and replaced it with the Common Law Police Disclosure scheme (CLPD)⁶. Under the CLPD, the information which may be provided by the police is not limited to where there has been an arrest or criminal charge. However, a referral to a regulatory body will only be made where there is an 'urgent pressing social need' to address.

4.35 Without the ability to take immediate action upon receipt of an allegation by way of an ISO, the Council is concerned that the police may not be notifying it of some of the most serious allegations made against its registrants that involve significant safeguarding concerns.

4.36 If the Council had ISO powers and could take swift action, the police may be more likely to refer serious allegations concerning Registered Persons to it under the CLPD.

⁶ Available at: <https://www.app.college.police.uk/wp-content/uploads/2016/08/NPCC-2017-Common-Law-Police-Disclosures-CLPD---Provisions-to-supersede-the-Notifiable-Occupations-Scheme-NOS.pdf>

4.37 However, some Welsh police forces have indicated that giving the Council ISO powers would not mean all serious allegations relating to Registered Persons are automatically referred to it, because decisions to refer are made on a case-by-case basis. Therefore, we cannot be certain that giving the Council ISO powers would result in more referrals under the CLPD; that decision would be for the police to make and would be taken on a case by case basis.

Limitations of other methods by which children are protected

4.38 While there are various existing methods by which children and vulnerable adults are protected from individuals who may cause them harm, these methods may not entirely address safeguarding concerns.

The Disclosure and Barring Service

4.39 The Disclosure and Barring Service (DBS) was established in 2012 and carries out the functions previously undertaken by the Criminal Records Bureau and the Independent Safeguarding Authority.

4.40 The DBS disclosure team carries out criminal record checks that result in DBS certificates being issued to individuals. Employers can then ask to see the certificates to ensure that they are recruiting suitable people to their organisation.

4.41 Once the DBS has information that an individual poses a safeguarding risk to children or vulnerable adults, it will consider placing that individual on either the children's barred list, the adults' barred list, or both. Once on the appropriate barred list a Registered Person will be automatically ineligible to work in any of the seven registered professions with the Council.

4.42 However, the experience of the Council is that an individual is not usually placed on a barred list until there has been a conviction, which means that during a criminal investigation, the protection offered by the DBS may not fully address the safeguarding risks.

Employer's duty to supply information to the Council

4.43 Section 36 of the 2014 Act and Schedule 5 to the 2015 Regulations set out the information that must be provided by an employer to the Council.

4.44 When an employer chooses to dismiss a Registered Person because of serious allegations, they are required to inform the Council. However, finding out about serious allegations against a Registered Person upon their dismissal does not address the risk of the Registered Person seeking alternative employment during any period of suspension.

Police bail conditions

4.45 If an accused person is to be released on bail, there may or may not be conditions attached to help protect children and vulnerable people.

4.46 Even where there are conditions, these conditions will not always deter an individual seeking work privately in order to gain access to children. In doing so, they could use their Registered Person status to prove that they are suitable.

Statutory duties and related guidance

4.47 Local authorities, the governing bodies of maintained schools and Further Education institutions have a duty under section 175 of the Education Act 2002⁷ to exercise their functions in a way that takes into account the need to safeguard and promote the welfare of children. When doing so, they must have regard to the statutory guidance “Keeping learners safe - the role of local authorities, governing bodies and proprietors of independent schools under the Education Act 2002”⁸. This means the guidance must be taken into account, and any decision to depart from it must be justified.

4.48 Amongst other matters, this guidance deals with the organisational and management arrangements that need to be put in place to safeguard children in the education service. It also sets out the safeguarding duties and responsibilities shared by all staff who work in an education setting when responding to safeguarding concerns in accordance with the All Wales Child Protection Procedures.

4.49 While this guidance does much to safeguard children, it does not address the issue of an individual using their Registered Person status to prove their suitability.

5. Consultation

5.50 A consultation document was issued on 07 September 2020, with a response date of 04 December 2020. An Addendum to the consultation subsequently drew attention to a revised version of the draft Order. To give time for consideration of the changes, the consultation period was extended to 11 December 2020.

5.51 67 consultation responses were received. Two of these were blank and did not reply to any of the questions. Responses included eight from schools or colleges, four from youth work organisations, four from local government bodies and eight from trade union organisations.

5.52 60 respondees agreed with the proposal to give the Council ISO powers and five disagreed. One anonymous respondee disagreed on the grounds that an ISO could damage an innocent person’s career. Another felt that the Council

⁷ 2002 c. 32.

⁸ Available here: <https://gov.wales/keeping-learners-safe>

should have fewer powers not more. Three trade unions disagreed with the proposal.

5.53 The Welsh Government carefully considered the responses to the consultation and noted that a significant majority of the responses received were in favour of the Council having ISO powers. In recognising the views of those who did not agree with the proposal, the Welsh Government acknowledged the concerns in particular of some trade unions around the risks of ISO powers being used inappropriately and also the impact an ISO could have on a Registered Person. However, the Welsh Government takes the view that these risks and concerns can be mitigated and significantly reduced through strong working links between the Council and trade unions, and therefore do not constitute a convincing argument against them.

5.54 As a result of the consultation, the Welsh Government has amended the Order in the following areas:

- Continuity of membership of review panels;
- When and by whom Orders should be reviewed;
- The timing and regularity of reviews; and
- Representation and the right to be accompanied.

5.55 The details of a number of helpful suggestions relating to processes and procedures have been anonymised, where requested, and shared with the Council so that they can be taken into account in terms of its rules of procedure.

PART 2 – REGULATORY IMPACT ASSESSMENT

Introduction

This Regulatory Impact Assessment (RIA) has been developed to consider the regulatory implications of giving the Education Workforce Council (“the Council”) the additional functions of imposing, reviewing and revoking interim suspension orders (“ISOs”).

6. Options

This RIA reviews two options:

- I. Do nothing; i.e. do not legislate to give the Council ISO powers.
- II. Bring forward this Order to enable the Council to impose, review, extend and revoke ISOs.

7. Costs benefits analysis

Option 1 – do nothing

7.1 In this option, the Council is not given ISO powers. Instead, the status quo is retained, so the Council would be unable to remove the name of a Registered Person from the Register pending completion of the investigation and disciplinary process.

Safeguarding “loophole” not addressed

7.2 If the Council is not given ISO powers, an individual would continue to have the status of a “Registered Person” during the investigative and disciplinary process. This is the case even if very serious allegations were made against that individual, and they had been suspended or dismissed by their employer.

7.3 The safeguarding risk whereby an individual could use their status as a “Registered Person” to prove their suitability would not be addressed. This is a significant risk, and a substantial failing of option 1.

The Council may be less likely to get information from the police under the Common Law Police Disclosure scheme (CLPD)

7.4 The police may be less likely to refer serious allegations concerning Registered Persons to the Council under the CLPD, as the Council would continue to be unable to take immediate action to address safeguarding concerns by removing that Person from the Register.

7.5 However, feedback from the Welsh police suggests the decision to refer serious allegations are made on a case by case basis. Therefore, we cannot be certain that giving the Council ISO powers would result in more referrals under the CLPD; that decision would be for the police to make and would be taken on a case by case basis.

7.6 As a result, this risk is not as significant as the safeguarding risk identified above.

Costs of Option 1

7.7 There are no monetary costs for option 1. However, not addressing the risk of the safeguarding “loophole” described above may come at a broader ‘cost’ to children and their families.

Benefits of option 1

No detriment to Registered Person

7.8 The main benefit of option 1 is there would be no detrimental impact on Registered Persons; this is particularly important for those individuals who are exonerated following the investigation and disciplinary process.

7.9 This is in contrast to the potentially damaging impact of ISOs on former Registered Persons, which is discussed in option 2 below.

No costs

7.10 If option 1 is chosen, the costs of implementing the ISO and, ISO review processes will not need to be met.

7.11 As the cost of these processes is expected to be modest, this is a minor benefit. (Please see the costs analysis for option 2 for an explanation of these costs).

Conclusion for option 1

7.12 As the non-monetary “cost” of not giving the Council the power to make ISOs substantially outweighs the benefits, option 1 is not the preferred option even though this option does not have a monetary cost.

Option 2 *Bring forward this Order to enable the Council to impose, review, extend and revoke interim suspension orders*

7.13 Under this option, the Council is given the power to suspend Registered Persons from the Register on a temporary basis, provided the Council believes it to be in the public interest to do so.

Detriment to Registered Person

7.14 The main risk of option 2 is the potential impact on Registered Persons who have had serious allegations made against them, particularly for those individuals who are exonerated following the completion of the investigation and disciplinary process.

7.15 The most serious potential impacts of an ISO on a former Registered Person are set out below.

a. Loss of professional and personal reputation.

7.16 Whilst suspension may be viewed as an emergency measure that is protective rather than punitive, it may damage the professional and personal reputation of a Registered Person even if they are later cleared of all wrongdoing. Recent case law supports this view, finding that suspension is not a “neutral act” if it is the start of an “inevitable” disciplinary process.⁹

7.17 However, if the police or Crown Prosecution Service decide there is no case to answer or the Registered Person is found not guilty at trial, any remaining damage to their professional or personal reputation is just as likely to have been caused by the police investigation, trial and media coverage as by the imposition of an ISO.

⁹ City of London Corporation v McDonnell (UKEAT/0196/17/JOJ).

b. Impact on employment – suspension.

7.18 The effect of temporarily suspending a Registered Person from the Register is that their employer would be obliged to take some action immediately, if they had not already taken such action. The most likely response would be to suspend the Person from their position; it is possible the Person could be dismissed but this seems less likely at this stage.

School teachers and school learning support workers

7.19 In some cases, the governing body may agree for the former Registered Person to be given other duties but remain working at the school in a non-teaching or non-teaching support capacity. As the Council would only consider using its ISO powers in the most serious of cases, it is unlikely that the employer would want the individual to continue in their usual role while investigations are ongoing. (If the individual is placed on the Disclosure and Barring Service barred list – which usually would be the case - the employer will not have the option of keeping the individual in their usual role.)

7.20 In the case of a former Registered Person who is a teacher employed at a school pursuant to the School Teachers' Pay and Conditions, such Persons would continue to be paid whilst suspended. This is due to regulations 16 and 28 of the Staffing of Maintained Schools (Wales) Regulations 2006¹⁰ ("the 2006 Regulations").

7.21 In all other cases where the School Teachers' Pay and Conditions do not apply (for example, school learning support workers) whether that Person continues to be paid during the period of suspension is determined by the terms and conditions of employment negotiated with their employer. While suspension would suspend the Person's ability to practise their profession and could potentially last many months, provided that Person is employed under a contract of employment they will often continue to be paid in full during their suspension.

7.22 The impact is harder on supply staff, as they are often self-employed rather than employed under a contract of employment and find work via an agency. Therefore, suspension from the Register means they will not receive an income in the same way as those who are employed under a contract of employment to work in a school. This may have an economic impact on their families as well as on the Registered Person themselves.

7.23 However, given that imposing an ISO will only be considered in the most serious of cases, it is likely that a former Registered Person who works on a "supply" basis would be barred from their usual work pending the outcome of a police investigation by the Disclosure and Barring Service. Therefore, the Person would be placed in the same predicament regarding their finances whether or not an ISO is made.

¹⁰ SI No. 2006/873 (W. 81).

Further education teachers, qualified youth workers, work-based learning practitioners, further education learning support workers and youth support workers

7.24 Our understanding is the impact of suspension on the above persons is similar to those who are employed to work in schools, but are not employed pursuant to School Teachers Pay and Conditions.

7.25 This means where the above persons are employed under a contract of employment, whether they will continue to be paid during the period of suspension is determined by their terms and conditions of employment. It is often the case that persons with a contract of employment continue to be paid in full during their suspension.

7.26 Again, the impact is harder on supply staff and their families as they will usually not have a contract of employment and so will not receive an income during their suspension. As with supply staff working in schools, it is likely that such persons would be placed in the same predicament regarding their finances whether or not an ISO is made.

c. Impact on employment – dismissal

School teachers and school learning support workers

7.27 In the most serious cases, dismissal may be considered. However, the 2006 Regulations require the governing body to convene a staff disciplinary committee in order to determine whether a member of the school staff should be dismissed. In such cases the governing body would need to be satisfied that the evidence justified such a step.

7.28 The member of staff has the right to appeal the decision to dismiss to a staff appeals committee, and if they remain unhappy they may pursue a claim for unfair dismissal against the governing body in an Employment Tribunal. The evidence against the former Registered Person would need to be very strong indeed for dismissal to be considered, as employers would not wish to dismiss and then later have to fight an unfair dismissal claim where a person is later exonerated - and perhaps be required to make a large pay out compensating for loss of earnings and reputation et cetera.

Further education teachers, qualified youth workers, work-based learning practitioners, further education learning support workers and youth support workers

7.29 Our understanding is most of the above persons will be employed by organisations that have their own internal disciplinary and appeals procedures in place. In these instances, these procedures will need to be followed before a former Registered Person is dismissed.

7.30 All the above categories of Registered Persons, whether or not their former employer has a disciplinary and appeals process, may pursue a claim for unfair dismissal against their former employer in an Employment Tribunal.

7.31 As with school staff, the evidence in support of dismissal would need to be very strong indeed, as employers would not wish to dismiss and then be required to make a large pay out if the Registered Person is later exonerated.

d. Impact on health and well-being

7.32 The impact on the health and well-being of a former Registered Person who has serious allegations made against them - but who is later exonerated - cannot be underestimated. It is also possible that the mental health and well-being of the families of Registered Persons may suffer.

7.33 However, an ISO is just one of several possible measures which may be taken - such as being barred by the Disclosure and Barring Service or being charged with serious criminal offences - and it is the wrongful allegations rather than the imposition of the ISO which is the main cause of the distress.

Costs of option 2

Cost of the ISO & ISO review process.

7.34 The cost of the ISO & ISO review process is believed to be relatively modest.

7.35 Currently, the fee for registration with the Council as stipulated in the Education Workforce Council (Registration Fees) Regulations 2017 is £46 per annum for all registrants. Welsh Government subsidises this fee so that the amounts paid by registrants is £45 a year for schoolteachers, FE teachers, qualified youth workers and work-based learning practitioners; and £15 a year for school learning support workers, FE learning support workers and youth support workers. The Council has advised that it will not need to seek an increase in the fee payable by its registrants in order to finance the imposition, review, extension and revocation of ISOs.

No transitional costs

7.36 There are no transitional costs associated with this proposal. This is because members of the independent panels which impose ISOs, and members of independent review panels, will be drawn from the existing “pool” of individuals who have already been selected as potential members of the Council’s investigation and disciplinary committees.

7.37 The work surrounding the drafting of the Council’s rules of procedure on the imposition, review and revocation of ISOs would be covered within the Council’s existing team. The position is the same for any guidance the Council may wish to issue on the ISO process. No additional staff would be required.

Cost of imposing an ISO

7.38 The Council received 15 referrals in the last 3 years that made very serious allegations against Registered Persons, and would have posed sufficient safeguarding risks to merit the Council considering the imposition of ISOs. Of these referrals, 10 came from the police and 5 from employers. This

is an average of 5 relevant referrals a year. Even if referrals to the Council double as a result of having ISO powers, we would be looking at an average of 10 relevant referrals a year.

7.39 There is a cost to the employer (school or college) if a Registered Person continues to be paid in full during their suspension and the employer also has to recruit cover for the duration of the suspension. However, this would be the case whether or not an ISO was made.

Uncontested ISOs

7.40 The reason why the Council does not anticipate a need to increase fees to support its ISO powers is mainly because it expects 80-90% of ISO cases to proceed with little or no engagement from the Registered Person.

7.41 Of the remaining 10-20%, the Council anticipates that while these Registered Persons may respond or engage with the ISO process, less than 5% of cases will result in a contested hearing.

7.42 Therefore, we expect at least 95% of those persons who are told that the Council are considering imposing an ISO on them would not contest it at a hearing - probably because they admitted the allegations. This means a full hearing before an independent panel would not be needed in the great majority of cases, although the panel would still need to be convened and a short hearing held to confirm the imposition of the ISO.

7.43 Current referral rates suggest there would be 4 or perhaps 5 uncontested ISOs per year; given the low numbers of past referrals, it may be that there are no contested ISOs in a particular year if the expected rate of uncontested ISOs is at least 95%. Even if referral numbers double we are looking at no more than 9 or possibly 10 uncontested referrals a year, so the additional work caused by the uncontested ISO making process would be minimal.

7.44 While the exact cost of an uncontested ISO hearing is difficult to quantify, the Council is content it would equate to only a small amount of staff time, which would be covered within the existing Council team. No additional staff would be required.

Contested ISOs

7.45 If a Registered Person contests the ISO and requests a hearing, unlike normal disciplinary hearings that cost an average of £20,000 each, the Council has advised that contested ISO hearings would probably only cost around £2,500. This is because these hearings will not test the evidence of witnesses, and it is the calling of witnesses to "full" disciplinary hearings that often costs the most money and adds to the hearing's length.

7.46 As there have been 15 referrals to the Council in 3 years, making an average of 5 a year, if less than 5% of cases are fully contested this would mean at most 1 contested hearing a year if referral numbers stay the same; in some years there may be no contested hearings at all.

7.47 Referral numbers would need to increase eight-fold to 40 a year for there to be 2 contested cases a year. Even if this happens, the expected cost of contested ISO hearings is expected to be only £5,000 per annum.

7.48 As the number of contested cases is currently estimated to be less than one a year, the number of instances that are likely to result in an appeal to the High Court will be even fewer. This is especially the case given that the High Court is unlikely to revoke an ISO whilst an investigation is ongoing. In light of the likely number of instances, the Council has advised that it will not need to seek an increase in the fee payable by its registrants in order to finance this element of the process.

Review at the request of a former Registered Person

7.49 Once an ISO is made, the former Registered Person may request the Council review it. The first request may be made within 6 months of the imposition of the ISO, or of the High Court's decision if there is an appeal, and thereafter at intervals of 6 months. The Council's best estimate is that there will be 1- 2 review hearings a year, which will cost the same as an ISO hearing. This would make the cost of review hearings no more than £5000 per annum.

The Council to keep an ISO under review

7.50 The Council is required to keep an ISO under review at appropriate intervals. This requirement is additional to a former Registered Person's right to request a review hearing.

7.51 These reviews by the Council will not take the form of a hearing. The former Registered Person will not be asked to make representations.

7.52 The independent panel will set the schedule for these reviews at the same time the ISO is imposed. This schedule will usually require a review to be held every 6 months, although a review may take place sooner if appropriate (for example, if new evidence comes to light that the allegations made against the former Registered Person are false).

7.53 ISOs may not have effect for longer than 18 months without an application to the High Court for an extension. The current average number of relevant referrals is 5 a year. Even supposing all ISOs last the maximum 18 month period, if referral numbers stay the same the Council would have no more than 7 or 8 ISOs to be kept under review at any one time. A doubling of referral numbers would mean the Council has no more than 15 ISOs to keep under review.

7.54 A formal justice impact assessment is not required for this secondary legislation. However, the Welsh Government has notified the Lord Chief Justice's Department of the following draft provisions:

- A right for a former registered person to appeal to the High Court against the imposition of an ISO; and
- A requirement for the Council to make an application to the High Court if

they wish to extend an ISO beyond 18 months.

7.55 Our current estimate is that approximately 1-2 ISOs per annum will be contested at a Council hearing. It is more difficult to assess how many applications for extension would be required as this will largely occur where there are delays in the criminal justice system. However, as ISOs are only expected to be imposed in very serious cases, we expect the overall numbers of ISOs to be low and we therefore assess the impact on the court to be minimal.

7.56 As the Council will review a typical ISO twice a year, there would be no more than 14-16 review meetings every year if referral numbers were to stay the same. If referral numbers doubled, there would be no more than 30 meetings a year.

7.57 As with the cost of uncontested ISOs, the exact cost of review by the Council is difficult to quantify. However, the Council is content it would equate to only a small amount of staff time. The Council anticipates that the extra work connected with keeping ISOs under review would be covered by the existing Council team, so there would be no additional costs.

Costs - conclusion

7.58 As all the monetary costs relating to the imposition and review of ISOs are modest, and the Council does not expect to seek to raise the registration fee for Registered Persons as a result, the cost of the ISO and ISO review process is viewed as a minor consideration in this costs-benefits analysis.

“Cost” to the former Registered Person

7.59 As explained in the “Option 2” paragraphs above, there is an impact on a former Registered Person whenever an ISO is imposed. Their families may suffer too. There is potential for this impact to be most damaging for a former Registered Person who is later exonerated on completion of the investigation and disciplinary process.

7.60 While the impact on former Registered Persons will come at a “cost” to those individuals – and perhaps also their families - we do not believe it is sufficient to outweigh the benefit of addressing the safeguarding “loophole” described in the “Benefits of option 2” section below.

7.61 Should the former Registered Person decide to appeal an ISO to the High Court they would have to bear the costs. However, they would be able to make representations to the High Court for an order for costs to be made against the Council if they were successful.

Benefits of option 2

Safeguarding “loophole” addressed

7.62 If the Council is given ISO powers, an individual who has very serious allegations made against them would not continue to have the status of a

“Registered Person” while the investigative and disciplinary process is being carried out.

7.63 As noted above, there are expected to be an average of 5 referrals made to the Council each year. Under this option, the safeguarding risk whereby those individuals could use their status as a “Registered Person” to prove their suitability would be addressed. This is a very significant benefit of option 2.

The Council may be more likely to get information from the police under the CLPD scheme

7.64 As explained in the “Risks” paragraphs of option 1 above, it is not certain that more referrals from the police would result from the Council getting ISO powers.

7.65 Therefore, this benefit is not as substantial as the safeguarding benefit identified above.

Conclusion for option 2

7.66 The monetary cost of the ISO & ISO review process is modest, and an increase in the Council’s registration fees is not expected.

7.67 Whilst the “cost” of the detrimental impact of an ISO on a Registered Person is acknowledged, in our view it does not outweigh the substantial benefit of addressing the safeguarding “loophole” described in the “Benefits of option 2” paragraphs above.

7.68 As the Council will only use their ISO powers in the most serious of cases - and where they believe to be in the public interest - option 2 is the preferred option.

8. Consultation

8.1 As a result of the public consultation, this RIA has been changed in order to include the impact of the following additional safeguards to the ISO process:

- a. A right of appeal for a former Registered Person to the High Court; and
- b. A requirement that the Council make an application to the High Court for any extension of an ISO beyond 18 months.

9. Competition Assessment

<i>The competition filter test</i>	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector categorised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

9.1 The filter test shows that it is not likely that this Order will have any detrimental effect on competition; therefore, we do not consider it necessary to undertake a detailed competition assessment for this Order since it will not affect the business sector in any significant way.

10. Post implementation review

10.1 The Welsh Government will work with the Council to monitor the use of ISO powers following the coming into force date of this Order.