

Explanatory Memorandum to the Education Workforce Council (Main Functions) (Wales) (Amendment) Regulations 2024

This Explanatory Memorandum has been prepared by 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's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Education Workforce Council (Main Functions) (Wales) (Amendment) Regulations 2024. I am satisfied that the benefits justify the likely costs.

Jeremy Miles MS
Minister for Education and Welsh Language

25 January 2024

PART 1

Description

1. The Education Workforce Council (Main Functions) (Wales) (Amendment) Regulations 2024 (“the 2024 Regulations”) amend the Education Workforce Council (Main Functions) (Wales) 2015 (“the 2015 Regulations”) governing the membership and procedures of the Investigating Committee and the Fitness to Practise Committee.
2. The amendment provides the Education Workforce Council (“the EWC”) more flexibility to appoint panel members from a wider pool of registered practitioners.
3. In addition, further amendments correct a minor grammatical error in the name of the Fitness to Practise Committee and a mistake in a cross reference in regulation 45(3)(b) of the 2015 Regulations.

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

4. None.

Legislative background

5. The 2024 Regulations are made in exercise of the powers conferred by sections 13(1), 28(1), 36(2), and 37(2) of the Education (Wales) Act 2014¹.

Purpose and intended effect of the legislation

6. Regulation 26 of the 2015 Regulations sets out the membership and procedure requirements of Committees in relation to the EWC’s fitness to practise casework. Specifically, that regulation sets out the membership requirements for both the “Investigating Committee” and the “Fitness to Practice Committee” (“the Committees”).
7. One such requirement is that the Committees must include one registered person member and one lay person member. A registered person member is a person who is registered with the EWC in the same registrant category as the person facing the proceedings and is employed or otherwise engaged as such at the date of their appointment to the Committee. A lay member is a person who is not registered with the EWC and is not a prohibited person². A prohibited person could not be a registered person

¹ 2014 anaw 5.

² A prohibited person means any person who is:

- i) employed, or engaged to provide relevant services within the period of 5 years ending with the date of that person's appointment to the Committee;

member by virtue of the fact that status would prevent them from maintaining their registration.

8. Further to recent amendments to the categories of registration, as contained in the Education Workforce Council (Additional Categories of Registration) (Wales) Order 2023 (“the 2023 Order”) which came into force in May 2023, there are now 11 separate categories of registration, and potentially more in the future:
 - maintained school teacher
 - further education teacher
 - independent school teacher
 - independent special post-16 institution teacher
 - work-based learning practitioner
 - youth worker
 - maintained school learning support worker
 - further education support worker
 - independent school learning support worker
 - independent special post-16 institution learning support worker
 - youth support worker
9. Under the current requirements in regulation 26 of the 2015 Regulations, the EWC often experiences challenges in sourcing members for the Committees. This can cause delays for investigations and hearings, and therefore present increased risks to the wellbeing of those involved in the process.
10. With a larger number of categories, should the legislation remain unchanged, the EWC would need to recruit practitioners from potentially very small pools of registrants to conduct its regulatory work in those categories only. Where the registrant numbers in a group are particularly small, there is more likelihood of familiarity with one another which is likely to result in conflicts of interest. Therefore, it will be significantly challenging for the EWC to recruit members to sit on Committees to consider cases in respect of those categories of registration. This will be a particular problem for some of the smaller new categories of registration where the workforce is small.
11. In addition, it is possible for persons facing investigation and fitness to practise proceedings to be registered in more than one category. With the addition of more registration categories, finding suitable persons for the Committees is predicted to be even more administratively difficult.

(ii) barred from regulated activity relating to children (within the meaning of section 3(2) of the Safeguarding Vulnerable Groups Act 2006);

(iii) subject to a disciplinary order made under the 2014 Act by virtue of which the person is ineligible to register; or

(iv) disqualified from working in a post equivalent to a category of registration;

12. Further, registrants are entitled to request that their hearing is conducted through the medium of Welsh. This compounds the problem as the number of available Committee panel members who are able to work through the medium of Welsh is limited in some sectors.
13. Finally, the Committee roles are voluntary, and practitioners' participation must be supported by line managers and employers to facilitate release time from their usual job. School learning support staff and those in further education may have a particular difficulty in a) being supported to apply for the role, and b) obtaining release time that allows them to commit to sitting as a member. This means the number of practitioners who are able and willing to volunteer as Committee members from some registrant categories is very low.
14. The amendments to the 2015 Regulations to be made by the 2024 Regulations will mean the EWC will have more flexibility to appoint panel members from a wider pool of registered practitioners. The principles of fairness and transparency remain and no person facing fitness to practise proceedings will be disadvantaged by the amendment.

Registered Person member

15. Instead of the Committees requiring '*a registered person from the same category of registration as the registered person who is the subject of the disciplinary proceedings*', it requires a person who fulfils the following criteria:
 - they must be registered with the EWC (but not necessarily in the same category as the person who is subject to the proceedings)³, and
 - they must be employed, or engaged otherwise than under a contract of employment, in one of the posts described in the categories of registration on the date of that registered person member's appointment to the Committee.
16. The EWC decides on whether a person's experience and understanding make them a suitable appointee as a registered member. Whilst not an express statutory requirement, the EWC does in any event consider that matter when making such appointments.
17. All fitness to practise panel members are appointed through an in-depth recruitment process where their behaviours and skills are assessed. Those successfully appointed have a structured induction programme, mentoring and compulsory attendance at annual training. All panel members commit to acting impartially and with integrity.

³ The requirement for registration prevents any person who is ineligible for registration from being a registered person member (a prohibited person).

18. Providing the EWC with greater flexibility in appointing Committee panel members through the 2024 Regulations will allow proceedings to take place without delay.
19. Further to the introduction of the 2024 Regulations, the EWC will also consult on its *Disciplinary procedures and rules*⁴ to ensure they fully reflect the new legislative requirements.
20. This increased flexibility in relation to the registered person member of the Committees will allow proper regulation of all registrant categories to continue, regardless of how many registrant categories there are now or those added in the future.

Change to the name of the Fitness to Practice Committee

21. The 2015 Regulations refer to the “Fitness to Practice Committee” but should refer to instead to the “Fitness to Practise Committee”. The 2024 Regulations are now in keeping with other fitness to practise Committees such as the Social Care Fitness to Practise Committee, by amending the title of the Committee accordingly. This is a minor technical change and has no impact on the work the EWC or the Committees.

Change to Schedule 2 of the 2015 Regulations: Matters to be recorded on the Register

22. Paragraph 21 of Schedule 2 of the 2015 Regulations sets out that the EWC must keep on the Register the “terms of any restriction or particulars of any prohibition for the time being in force in relation to the registered person as the result of a direction given under section 142 of the 2002 Act” – that is the prohibition from teaching section of the Education Act 2002.
23. Section 142 was repealed in the Safeguarding Vulnerable Groups Act 2006 with effect from 12 October 2009 (subject to some transitional provisions). At the same time, Section 167A of the 2002 Act – that is the prohibition on participation in management of independent schools – came into force.
24. Although Section 167A has been in force since 2009 no directions have been made as the necessary regulations have never been made to prescribe the relevant grounds or procedure. The proposed Independent Schools (Prohibition on Participation in Management) Regulations 2023 (“the 2023 Regulations”) will provide these powers. The 2023 Regulations are planned to come into force in early 2024.
25. To give full effect to this provision and enable the EWC to keep an accurate register, the 2015 Regulations are amended to include a reference to Section 167A in the Paragraph 21 of Schedule 2 to the 2015 Regulations.

⁴ [Fitness to practise \(ewc.wales\)](https://www.ewc.wales).

Consultation

26. A full public consultation ran from 11 September to 1 December 2023. 26 individuals and organisations responded during the consultation period with one further response received after the consultation had closed. All responses were carefully considered, and a summary of the issues raised was published on the Welsh Government website in January 2024.
27. There was broad support for with the proposal to amend the requirements for Committees with 68% of respondents in agreement. 65% agreed with the Welsh Government's assessment of the impacts of these changes. Similarly, 84% agreed with the miscellaneous amendment proposed.
28. In terms of impact on the Welsh language, the majority of respondents agreed that there would be no adverse effects as a result of the proposed amendment to the 2015 Regulations. Some commented that more flexibility when appointing panel members should have a positive effect on the Welsh language as there will be a wider pool of Welsh speakers with the correct experience and understanding to choose from.
29. The main concern raised was whether the new arrangements under the 2024 Regulations will maintain the suitability of the registered person panel member.
30. As was the case under the 2015 Regulations, the EWC's processes to appoint suitable panel members are robust. In most cases, relevant experience and knowledge of the sector in which the person facing proceedings works, will be a priority factor. Only in the cases where this is not possible due to a very small pool of registrants will the registered person panel member come from a different sector. All panel members will still have their behaviours and skills assessed through the same rigorous processes and will have to attend compulsory training.

PART 2 – REGULATORY IMPACT ASSESSMENT

31. Part 5 of the 2015 Regulations makes provision in relation to the disciplinary functions of the EWC. Regulation 26 of Part 5 of the 2015 Regulations makes provision in relation to the membership and procedure of the Investigating Committee and the Fitness to Practise Committee established by the EWC. In particular, regulation 26(1) requires the EWC to appoint to each of those Committees a registered person member.
32. The 2024 Regulations amend this provision so that it will no longer be a requirement for the registered person member to be registered in the same category as the registered person who is the subject of the disciplinary proceedings. Instead, the registered person member need only be registered in at least one of the categories of registration.
33. Further miscellaneous amendments have been made to correct a grammatical error, to correct a mistake in a cross reference in regulation 45, and to include a reference to section 167A of the Education Act 2002 (prohibition on participation in management of independent schools) in paragraph 21 of Part 1 of Schedule 2 to the 2015 Regulations.

Options

Option 1: do nothing

34. If the 2015 Regulations are not amended, the Welsh Government's view is that the EWC's fitness to practise casework could be subject to increased delays which would disadvantage individuals subject to those proceedings. Further, learners may be affected by uncertainty of the conclusion to cases which lead to staffing pressures in settings.

Costs and benefits of Option 1

35. There would be no financial costs to Option 1. However, there would be no perceived benefits, and could lead to individuals facing proceedings to be disadvantaged by delays.

Option 2: make the 2024 Regulations

36. Regulation 26 of Part 5 of the 2015 Regulations has increasingly affected the EWC's ability to effectively convene panels. This has been exacerbated each time new categories of registration have been introduced and in particular when the 2023 Order came into force in May 2023.
37. The 2023 Order responded to concerns over safeguarding where individuals in different sectors doing very similar roles were subject to different rules on professional registration. There are now 11 categories of registration and it is likely that there will be more in future. Where the numbers of individuals registered in particular groups are small, the EWC will face increased

administrative difficulty with convening panels, should the Regulations remain unchanged.

38. Furthermore, the miscellaneous amendments are required to bring the 2015 Regulations up to date and correct grammatical errors.

Costs and benefits to Option 2

39. There are no additional financial costs to making the legislation. Staff time to make the legislation can be accommodated within existing resources.
40. The EWC and individuals facing proceedings will benefit from the flexibility provided by the 2024 Regulations.
41. The EWC's fitness to practise casework is a vital part of ensuring the people working with children and young people in education and youth work settings are suitable and capable of doing so. Through robust procedures and ensuring committees are fully staffed and constituted fairly, this will ensure prevention of harm to learners through unfit practitioners.
42. The Welsh Government's view is that the 2024 Regulations will assist the EWC to carry out the fitness to practise case work, in terms of their committee constitution, so that if more registrant groups are mandated in future the issue with recruiting panel members from a limited pool will be mitigated.

Other options and conclusion

43. There are no feasible non-legislative options for addressing these issues.
44. The Welsh Government's view is therefore that this is an important and necessary continuation of the work to extend registration categories.

Competition assessment

45. There are no market implications associated with the making of the 2023 Order. There is no impact from a competition perspective.

Post implementation review

46. The Welsh Government will work with the EWC to monitor the effects of the 2024 Regulations.
47. A full integrated impact assessment has been prepared and was made available during the consultation on the 2024 Regulations. Its findings were that a neutral to positive impact could be expected, in particular for children and young people. There were no negative impacts identified for any protected characteristic grouping. A neutral to positive impact may be expected on use of the Welsh language.

48. The Welsh Government will keep this under review throughout implementation and for the coming years to ensure any negative impacts on particular groups are mitigated.