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Llywodraeth Cymru
Welsh Government

Welsh Government
Consultation – summary of response

The proposed Education Workforce Council (Interim Suspension Orders) (Additional Functions) (Wales) Order 2021

Date of issue: 23 February 2021

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Proposed Education Workforce Council (Interim Suspension Orders) (Additional Functions) (Wales) Order 2021

Overview

This document summarises the responses received to a Welsh Government consultation on proposals to give the Education Workforce Council the power to suspend a registrant from the Register of Education Practitioners in Wales as an interim measure, and sets out the Welsh Government's response to the views and comments received.

Action required

None

Further information

Enquiries about this document should be directed to:

Schools Effectiveness Division
Education Directorate
Welsh Government

e-mail: SMED2@gov.wales
Tel: 0300 060 4400



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This document can be accessed from the Welsh Government's website at gov.wales/consultations

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Contents

Summary	Page 3
Summary of consultation responses	Page 4
Welsh Government response	Page 10
Next steps	Page 12
Annexes	Page 13

Summary

This document summarises the responses received to a Welsh Government consultation on proposals to give the Education Workforce Council (“the Council”) the power to suspend a registrant from the Register of Education Practitioners in Wales (“the Register”) as an interim measure, and sets out the Welsh Government’s response to the views and comments received.

The consultation document was issued on 07 September 2020, with a response date of 04 December 2020.

The proposed Order would give the Council the power to make interim suspension orders (ISOs). An ISO would allow the Council to:

- suspend a registrant from the Register as an interim measure pending an investigation and disciplinary hearing; and
- review and revoke the imposition of ISOs.

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.

The revised draft Order inserts 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.

Information about the Council and its work may be accessed here:

<https://www.ewc.wales/site/index.php/en/14-english/about.html>

Summary of Consultation Responses

67 responses were received to the consultation. 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. 31 respondents asked for their response to remain anonymous. A list of respondents is attached at Annex A.

A summary of the responses to each question is given below.

Question 1 – Do you agree with our proposals to give the Council ISO powers?

60 respondents agreed with the proposal to give the Council ISO powers and five disagreed. Of the responses that agree, the majority of comments on this question are very supportive of the Council having these powers and that ISOs will provide an important safeguarding protection. Some, however, seek assurance in terms of transparency and procedures. There was also a general theme in the comments supporting that ISOs should only be used as an emergency measure in very serious cases.

Of the five that disagreed with the proposal, one anonymous respondent disagreed on the grounds that an ISO could damage an innocent person's career. Another believes that the Council should have fewer powers not more. Three trade unions disagree with the proposal:

Unison states that the "EWC suggest that their proposals mirror that of other Regulators. This is not the case as they have omitted to include the option of interim practice conditions in their procedure. This is a crucial element to any interim process as it provides an option for risk management that does not have the devastating impact of a suspension (probable immediate job loss due to fundamental breach of employment contract). In effectively discounting this potential option this process is more likely to be successfully challenged, including under Human Rights legislation".

NASUWT "maintains that such a power is unnecessary and disproportionate. Their view is that a "suspension would have a significant negative impact on the individual's mental health, as such a suspension would be public, unlike a normal suspension from work by an employer. Furthermore, the suspension would also adversely impact on the relationship between an employee and their employer. The NASUWT therefore cannot agree with the Council being given this power".

NAHT agrees that the "proposed power would provide an additional safeguard". However, they also feel that "it is unclear why the current safeguarding arrangements are not sufficiently robust without the interim suspension order and caution must be taken in suspending registrants on an

allegation alone". They also raise some concerns about how the new powers will be implemented, including:

- *"the definition of a 'serious case', and it is imperative that the EWC does not simply suspend a registrant as a precautionary act for investigation";*
- *"time should be afforded to consider the registrants comments as to the allegations and ultimately whether suspension can be avoided";*
- *"we would not want the order to be used in such a way that could affect the registrant's right to a fair hearing";*
- *"we recognise that there are exceptional circumstances where an ISO may be warranted, however it is vital that this power is not used on a routine basis and we request close monitoring of its application to ensure that it is only being used as an 'emergency measure'".*

Question 2 – Do you agree with the 'public interest' test and further considerations that the Council will apply when considering whether to make ISOs?

57 respondees agreed with this proposal, four disagreed, three neither agreed nor disagreed and three did not respond. Two anonymous respondees disagree in line with the reasons given for disagreeing with Question 1. Two trade unions disagree in line with the reasons given for disagreeing with Question 1.

Comments from respondees in agreement with this question generally agree with the 'public interest' test. As with Q1, there was a general theme in the comments supporting this proposal that ISOs should only be used as an emergency measure in very serious cases. Some respondees comment on the wording used in the consultation document but none suggested changes to the draft order.

Question 3 – Do you agree with the proposed procedure for making ISOs?

39 respondees agreed with this proposal, seventeen disagreed, seven neither agreed nor disagreed and four did not respond.

Many respondees commented on Questions 3 and 4 together. The main issue for those that disagree is that the process described would enable an individual subject to an ISO to immediately request a review. Most of those disagreeing feel that a review after six months is sufficient. However, some trade unions feel that individuals should be able to request a review whenever new information is available. Some respondees felt that there may be benefits to having continuity of membership between the panels instigating the ISO and conducting a review. In their response, the Council suggested changes to Article 12 of the draft Order which address these issues.

Question 4 – Do you agree with our proposals to give former Registered Persons the right to request a review of an ISO that has been imposed on them?

38 respondees agreed with this proposal, seventeen disagreed, eight neither agreed nor disagreed and four did not respond.

Comments as above (see Question 3).

Question 5 – Do you agree with our proposals for the Council to keep ISOs under review?

38 respondees agreed with this proposal, seventeen disagreed, eight neither agreed nor disagreed and four did not respond.

Most of the comments around this question allude to the potential difficulty of having the same panel that instigated an ISO conduct these reviews. Many feel that this is a function that could be carried out by an officer of the Council. The Council's preference under the rules of procedure would be for a duly authorised officer of the Council, in accordance with the timescales set by the Committee, to have the responsibility to re-assess whether or not the reasons for imposing the ISO remain, or have changed. Any change would trigger a review by a Committee to which the registered person would be able to make representations. A number of respondees are supportive of this approach.

Question 6 – Do you agree with our proposals on when ISOs would be revoked by the Council?

35 respondees agreed with this proposal, eighteen disagreed, ten neither agreed nor disagreed and four did not respond.

The responses to this question largely fall into those that were received before the Addendum to the Order was published and those received after. Of those that disagreed and have commented, with the exception of two anonymous respondees who do not agree in line with their overall view that the Council should not have these powers, the concerns raised were about the possibility of criminal investigations taking longer than 18 months and the need for independent scrutiny and challenge, which appear to have been addressed by the Addendum.

The Children's Commissioner for Wales notes *"that the Regulatory Impact Assessment does not account for the costs of appeal and application to the High Court or the Justice Impact on the High Court, as outlined in the Addendum. This should be revisited to ensure that the costs are fully considered"*.

Question 7 – Do you agree with our proposals for the use of the Council’s rules of procedure on decisions to impose ISOs, on the review of ISOs at the request of former Registered Persons, and on the Council keeping ISOs under review?

56 respondees agreed with this proposal, three disagreed, four neither agreed nor disagreed and four did not respond.

Two anonymous respondees do not agree in line with their overall view that the Council should have these powers. One trade union disagreed and commented that it would be much safer if these matters were included in the Regulations. They also commented that they were *“not satisfied that the Council, when carrying out consultations on its rules, gives sufficient weight and consideration to responses from trade unions”*. Almost all other comments were in support of the proposal, although one other trade union commented that there should be *“a robust and independent review process to scrutinise the process of a body such as Council making its own rules of procedures”*.

Question 8 – Are you content with the proposed Order at Annex A?

36 respondees agreed with this proposal, 21 disagreed, five neither agreed nor disagreed and five did not respond.

Of the 21 respondees who disagreed with this question, the vast majority do so in relation to Article 12, which relates to the review process. Others comment on elements of the consultation document wording rather than the wording of the Order. Three respondees disagree in line with their general disagreement with the Council being given these powers.

Question 9 – Do you agree with our analysis of the potential impact of ISOs on Registered Persons?

52 respondees agreed with this proposal, four disagreed, six neither agreed nor disagreed and five did not respond.

There is general agreement on the impact of ISOs on registered persons. However, one trade union disagrees and believes that the impact has been understated. The Children’s Commissioner for Wales notes that the *“Integrated Impact Assessment notes the concerns to the health and wellbeing to the former registrant and their families”* and suggests *“discussion with relevant unions about the best way to ensure that former registrants have an active offer of preventative mental health support in this situation”*.

Question 10 – Do you agree with our analysis of the monetary cost of giving the Council the power to impose, review and revoke ISOs?

47 respondees agreed with this proposal, three disagreed, twelve neither agreed nor disagreed and five did not respond.

The majority of respondees agreed that the analysis of monetary costs is correct based on the low numbers of cases expected. One trade union disagrees on the grounds that they feel that the numbers of cases have been underestimated.

Question 11 – Do you agree with the conclusion of our costs benefit analysis that option 2, in which the Council is given the power to impose, review and revoke ISOs, is the preferred option?

50 respondees agreed with this proposal, four disagreed, eight neither agreed nor disagreed and five did not respond.

The four respondees that disagreed with this question all do so in line with their wider disagreement with the Council having these powers. The only comments specific to the options laid in the Regulatory Impact Assessment are in favour of option 2.

Question 12 – We would like to know your views on the effects that our proposals to give the Council powers to impose, review and revoke ISOs would have on the Welsh language, specifically on:

- i) opportunities for people to use Welsh**
- ii) treating the Welsh language no less favourably than the English language.**

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

None of the comments received in response to this question specifically refer to either positive or negative effects in relation to the Welsh language.

There was strong support expressed for ISO proceedings to be conducted in the registered person's language of choice, for bilingual representation and for translators to be available when required. However, one respondee comments that *"it may be a challenge to undertake an entire investigation in Welsh and that this in turn could have an impact on the investigation timetable and therefore the period removed from the register. If this was the case, there would potentially be a risk that the option of having an investigation in Welsh would not be given and would therefore result in Welsh not being of equal status"*.

Question 13 – Please also explain how you believe the proposed policy to give the Council powers to impose, review and revoke ISOs could be formulated or changed so as to have:

- i) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language**
- ii) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.**

As with the responses to question 12, there was strong support expressed in the replies to this question for ISO proceedings to be conducted in the registered person's language of choice, for bilingual representation and for translators to be available when required.

Question 14 – We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

The majority of responses to this question reiterated points or comments already made. However, there were additional points raised in terms of publicising the changes to registered persons and the wider public.

Welsh Government Response

The Welsh Government has carefully considered the responses to the consultation and notes that a significant majority of the responses received are in favour of the Council having ISO powers.

In recognising the views of those who do not agree with the proposal, the Welsh Government acknowledges 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. The Welsh Government's view, which is largely echoed by the majority of the responses to the consultation, is that providing the Council with ISO powers will provide an important additional safeguarding measure.

In considering the suggestion that the option of interim practice conditions be included in the Order, the Welsh Government takes the view that there is insufficient evidence to include them at this stage. However, we will keep this under review and would not rule out introducing them in the future should the evidence become available that they would be useful or necessary.

The Welsh Government has also noted concerns raised via the consultation in relation to a number of other areas, including:

- 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.

In response to these concerns and the comments and suggestions received, the Welsh Government has made the following changes to the wording of the draft Order:

- Article 4(2)(a) - change of wording from 'charge' to 'allegations';
- Article 8(3) - change of 'employer/agent' to 'employers/agents';
- Article 10 to include a right of appeal to the High Court (as previously highlighted in the Addendum);
- Article 12 changed to prevent the Council having to convene a hearing more frequently than every 6 months unless there is evidence provided by the Registered Person that there were material changes in circumstance;
- Article 14 changed to make it clearer that the Registered Person has the right to be accompanied at a hearing by another person for support;
- Article 17 adds a requirement for the Council to apply to the High Court for any extension to an ISO beyond 18 months (as previously highlighted in the Addendum);
- Article 20(2) to include the expression 'unless the contrary is shown' (in relation to service of documents); and

- The Order has been re-ordered at Articles 12-16 to make it clearer.

Two further suggested changes to the draft Order were considered but have not been accepted:

- Suggested change to Article 3(5) based on the view that if a Registered Person is subject to an ISO and removed from the Register this would raise questions about the Council's jurisdiction to continue its investigation. The Welsh Government has not taken this suggestion forward on the grounds that Article 3(4) says the Council must remove the person's name from the Register, but it is a suspension not a permanent removal, and if the order is revoked the person can be registered again without an application; and
- Article 8 – "should the Notice also include the requirement to reference the date of review or, if this comes at a later date to the issuing of the ISO, should this be mentioned?" The Welsh Government does not believe this suggestion requires a change as Article 8 already states that the notice must include an explanation of the person's right to request that the Council convene a panel to review the order in accordance with Article 12. These dates will change and will not automatically be at 6 monthly intervals because there is the right of the person to request a review, and also the overarching duty of the Council to keep the order under review.

The Welsh Government would like to acknowledge and thank all respondees to the consultation. The details of these suggestions have been anonymised where requested and shared with the Council so that they can be taken into account in terms of their rules of procedure.

Next Steps

The Welsh Government intends to lay the final draft Order before the Senedd before 23 February 2021.

The Senedd is scheduled to debate the final draft Order on 16 March 2021.

If agreed by the Senedd, the new powers will come into force on 01 April 2021.

List of Respondees

Association of School and College Leaders
Beth Williams
Boy's and Girl's Clubs of Wales
Children's Commissioner for Wales
Clybiau Plant Cymru Kids Clubs
Colegau Cymru
Education Training Standards Wales
Education Workforce Council
Equal Education Recruitment (E-equal Recruitment Ltd)
Estyn
General Teaching Council for Scotland
GMB Wales & South West Regions
Gwynfor Jackson
HEFCW
Marc Bowen
Monmouthshire County Council
Mrs A Brennan
NAHT
NASUWT
National Education Union Cymru
National Training Federation Wales
New Directions Education Ltd
Peter Owen, PBW Consultancy
Qualifications Wales
Social Care Wales
Steve Powell
Susan Davies
UCAC
Unison Cymru
Vale of Glamorgan Council
Wales Principle Youth Officer Group
Welsh Independent Schools Council
Ysgol Merilyn
Anonymous x 31