EXPLANATORY MEMORANDUM TO THE

CHILD MINDING AND DAY CARE (DISCLOSURE FUNCTIONS) (ENGLAND) REGULATIONS 2004

2004 N0. 3136

1. This explanatory memorandum has been prepared by the Department for Education and Skills and is laid before the Parliament by Command of Her Majesty.

2. Description

2.1 The regulations give Ofsted the power to disclose information held on their systems to parents, child care organisations, agencies involved in child protection and other Government departments.

3. Matters of special interest to the Joint Committee on Statutory Instruments:

3.1 None.

4. Legislative Background

4.1 Part XA of the Children Act 1989, introduced by the Care Standards Act 2000, transferred the responsibility for child care registration from local authorities to Ofsted. Under the Act day care providers and child minders are required to operate using the national standards for under 8s day care and childminding.

4.2 Ofsted has previously only been able to provide very limited information on any complaints about a child care provider, and has been criticised because the results of complaints investigations cannot be shared adequately with parents who have complained. A complainant might know for example that the complaint had been investigated and action taken but not know precisely what the action was. In addition, local Children's Information Services, which provide information to parents on local child care provision in each local authority area, depend on Ofsted to supply information on childcare providers from their database, and there is doubt about the legal basis for this information exchange. Ofsted has had clear legal advice that any disclosure which is not supported by legal powers could be challenged as unlawful.

4.3 Ofsted currently uses a voluntary disclosure process which allows for limited information about a complaint that they have dealt with to be made available to parents where the provider has given their consent. The regulations strengthen the legal basis on which Ofsted can share relevant information where the provider has not given their consent.

5. Extent

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 The Minister for Children, Margaret Hodge has made the following statement regarding Human Rights:

In my view the provisions of the Child Minding and Day Care (Disclosure Functions) (England) Regulations are compatible with the Convention rights.

7. Policy background

7.1 The policy intent is to provide a greater degree of protection for children and appropriate information for parents by ensuring that Ofsted have a firm legal basis for the circumstances in which they can share information about providers with parents and other third parties, including local authorities, other child care organisations, organisations involved in child protection and other government departments.

7.2 We consulted over a 12 week period, with organisations and individuals that have an interest in the day care and child minding. 135 responses were received on the issue of disclosure of information. This included 49 from local authority early years development and childcare partnerships and 58 from individual child minders or day care providers. 83% of respondents were supportive of these regulations.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 There will be minimal impact on the public sector. Ofsted already has protocols with local authorities, other government departments and child protection agencies for the exchange of information. The regulations provide a firmer legal basis for this exchange activity.

9. Contact

9.1 Dave Bell at the Department of Education and Skills (tel: 0207 273 5686 or e-mail: david.bell@dfes.gsi.gov.uk) can answer any queries regarding the instrument.

Regulatory Impact Assessment (RIA) for the Child Minding and Day Care (Disclosure Functions) (England) Regulations 2004

Purpose and intended effect of measures

The new regulations will give Ofsted the power to disclose information held on their systems to parents, childcare organisations, agencies involved in child protection and other Government departments.

Objective

To protect children by providing a firm legal basis for the sharing of information, including the outcome of any investigation of complaints by Ofsted.

Background

Ofsted has previously only been able to provide very limited information on any complaints about a child care provider, and has been criticised because the results of complaints investigations cannot be shared adequately with parents who have complained. A complainant might know for example that the complaint had been investigated and action taken but not know precisely what the action was. In addition, local Children's Information Services, which provide information to parents on local child care provision in each local authority area, depend on Ofsted to supply information on childcare providers from their database, and there is doubt about the legal basis for this information exchange. Ofsted has had clear legal advice that any disclosure which is not supported by legal powers could be challenged as unlawful. New regulations are therefore required to clarify the circumstances in which Ofsted can share the information they collect about providers with parents and other third parties, including local authorities, other childcare organisations, organisations involved in child protection and other government departments.

Ofsted's latest annual report 'Early Years: protection through regulation' published on 31 August 2004, indicates that Ofsted investigated 6,250 complaints during the year April 2003 to March 2004, of which only 449 (7%) resulted in any kind of enforcement action. The number of complaints should be set in the context of the total number of childcare providers (118,000) who look after nearly two million children.

Risk assessment

The regulations clarify the grounds upon which information about childcare providers can be shared with third parties. Although Ofsted may pass on particular pieces of information in the interests of protecting children, without clear regulations the way is open for legal challenges under data protection legislation. Although there have been no legal challenges to date, and consequently the risks of expensive litigation may be judged as insignificant,

the Government believes that in this complex area of data protection it is important to address this risk.

Options

These regulations have been proposed in order to address concerns about the current arrangements which have come to light since Ofsted took over, in 2001, responsibility for regulating childcare under the Children Act 1989. Maintaining the status quo is clearly an option, relying on guidance and protocols, but without new regulations Ofsted would have to continue to work with what it considers to be an unsatisfactory legal basis for providing information to third parties, with the consequent risks outlined above.

The Government has also considered whether to extend the disclosure function to the extent that Ofsted would have a specific duty to provide a written report of any investigation it carries out to relevant parents. As Ofsted at present do not routinely make such a written report, having to do so would add significant costs to the discharge of Ofsted's regulatory functions. A report of this kind would not add anything to what will be able to be disclosed under the regulations and the Government believes that the benefits of introducing such a measure would be disproportionate to the costs.

Benefits

The main benefit of these regulations is that they set a clear legal framework which allows Ofsted to pass on information that a concerned parent should have or to another agency that is involved in the protection of children. The regulations will help parents by setting out the circumstances in which Ofsted can report back the results of complaints investigations which they have carried out, and share complaints information, where a contractual relationship exists with a childcare provider. Following a formal request Ofsted will be able to pass on information about the setting itself, any conditions attached to the registration, information about the quality of provision and information about any enforcement action taken. In addition the regulations will allow Ofsted to pass on relevant information about a childcare provider to local authorities, fostering and adoption agencies and to other government departments.

There are safeguards built into the regulations which will ensure that disclosure is not inappropriate. For example, Ofsted will need to satisfy itself that the interests of a child, or children generally, would be served by the disclosure of information, and would not be obliged to disclose information if the costs of doing so were disproportionate or the information was readily available from elsewhere.

Costs

Ofsted has calculated that the cost of implementing the new regulations, including changes to their operational systems, can be absorbed within existing budgets. Information received prior to consultation on the draft

regulations, and the results of the consultation itself, suggest that as these regulations only provide Ofsted with the legal basis for sharing information they are very unlikely to impose additional costs on providers.

Business sectors affected

The registered childminding and day care sector covers childcare providers in the private, voluntary and public sectors, the majority of whom would be self employed childminders (over 84,000 are currently registered) and small businesses operating day care services (there are over 34,000 day care providers). Sustainability in the sector is an issue, with many childcare providers operating on very low or non-existent profit margins, particularly childminders and voluntary sector day care providers. Some day care providers form part of larger companies, for example chains of day nurseries, where economies of scale have created greater viability.

Equity and fairness

The regulations will enable Ofsted to be more transparent in its dealings with parents and agencies. Parents should have access to information which enables them to make judgements about the care so that they can be assured that their children's needs are being met and a childcare provider will normally have nothing to hide. The regulations make clear that Ofsted will only pass on information if the interests of children are served.

Unintended consequences

Access to greater information about action that Ofsted may have taken in relation to a provider could result in a civil action being brought against Ofsted or an individual or body. The regulations allow for Ofsted to withhold information where it appears that it may be used for such an action.

Small Firms' Impact Test

Discussions with representatives of provider organisations whose membership covers the majority of small firms in the sector have not identified any specific additional costs that would be incurred because of these regulations. There is therefore nothing to prevent these regulations coming into effect as soon as possible. The Small Business Service "Guidance on Implementation Periods" allows for the recommended 12 week implementation period to be circumvented in circumstances where regulations do not have an adverse impact on business.

Competition Assessment

No competition issues identified other than the point raised under "unintended consequences" above.

Enforcement and sanctions

None.

Consultation

Consultation over a 12 week period, with organisations and individuals that have an interest in the day care and childminding sectors, have informed the preparation of this final regulatory impact assessment.

Monitoring and review

The Government will evaluate the effectiveness of these regulations within the first 24 months of operation. This evaluation will be undertaken with Ofsted, and will include statistical analysis of complaints made to Ofsted and a review of a sample of inspection reports. Following this evaluation, the Government will consider a further revision of the regulations if the need for changes is identified.

Summary and Recommendation

The key issue in developing the Government's policy in this area was to ensure that Ofsted has a clear legal basis for passing information to parents and other agencies. These regulations will provide Ofsted with the legal framework they seek and will have the effect of providing greater transparency for parents. Doing nothing or watering down these regulations would not achieve those aims and may in some circumstances prevent Ofsted from passing on to others information that raises doubts about a provider's ability to care for children. The Government therefore recommends that these regulations are brought into force for the reasons outlined in this RIA.

Declaration

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed *Margaret Hodge***……..**

Date 29 November 2004

Margaret Hodge,

Children's Minister, DfES

Contact point: Dave Bell and Paul Oates

Standards and Legislation Team
Sure Start Unit, DfES.
020 7273 5741