EXPLANATORY MEMORANDUM TO

THE CHILDREN (SECURE ACCOMMODATION) AMENDMENT (ENGLAND) REGULATIONS 2012

2012 No. 3134

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

2. Purpose of the instrument

2.1 This instrument provides for the amendment of regulation 6 of the Children (Secure Accommodation) Regulations 1991.

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

3.1 None

4. Legislative Context

4.1 Section 25(1) of the Children Act 1989 ("the 1989 Act") enables local authorities to place a child who is being looked after by a local authority in secure accommodation where it appears that the following criteria are met:

(a) that -

(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds he is likely to suffer significant harm; or

(b) that if he is kept in any other description of accommodation he is likely to injury himself or other persons.

These criteria are known as "the welfare test". An application must be made by a local authority to the court who must determine whether the welfare test is satisfied.

4.2.1 The Children (Secure Accommodation) Regulations 1991 ("the 1991 Regulations") make provision regarding the use of secure accommodation in relation to certain categories of children. In particular, Regulation 6(2) of the 1991 Regulations contain modified criteria which may be applied by local authorities in relation to the placing in secure accommodation of the following categories of children:

(a) children detained under section 38(6) of the Police and Criminal Evidence Act 1984("PACE") ("detained children"); and

(b) children remanded to local authority accommodation under section 91(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (remands of children to local authority accommodation) but only if-

(i) the child is charged with or has been convicted of a violent or sexual

offence, or of an offence punishable in the case of an adult with imprisonment for a term of 14 years or more, or

(ii) the child has a recent history of absconding while remanded to local authority accommodation, and is charged with or has been convicted of an imprisonable offence alleged or found to have been committed while he was so remanded.

4.2.2 These Regulations amend Regulation 6 of the 1991 Regulations and are made in connection with changes to the remand framework for children introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPOA").

4.2.3 The new remand framework for young people introduced by LASPOA simplifies previous arrangements for remand by removing complexities of age and gender in the previous remand framework, and by introducing a consistent approach for all under 18s who are remanded. In future, as a result of LASPOA, children who are remanded to youth detention accommodation will be treated as looked after by their designated local authority (section 104(1) LASPOA). Youth detention accommodation comprises a secure children's home, a secure training centre, a young offender institution, and accommodation specified by order under section 107(1)(e) of the Powers of Criminal Courts (Sentencing) Act 2000 (section 102 LASPOA).

4.2.4 This remand framework is intended to reduce the use of secure remand for children. It introduces new conditions which, taken together, form a higher threshold for remands to youth detention accommodation. The Act sets a strong steer away from using custody for remanded children and provides for higher threshold criteria for determining which 12 to 17 year olds require remand to youth detention accommodation. Under LASPOA, courts can only remand a child to youth detention accommodation if one of two stringent sets of conditions described in sections 98 or 99 are met.

4.2.5 Under section 98 LASPOA, a child must:

- meet the age condition, i.e. that they are aged at least 12;
- the offence condition i.e. that they have been charged with a violent or sexual offence or one that if committed by an adult is punishable with imprisonment of 14 years or more;
- the necessity condition i.e. that the court is of the opinion that after considering all the options for remanding the child, including remand in local authority (non-secure) accommodation, only remanding the child in youth detention accommodation would be adequate for the protection of the public from death or serious personal injury occasioned by further offences committed by that child or to prevent the commission by the child of imprisonable offences; and
- the legal representation condition i.e. the child must be legally represented or not represented for specified reasons that are set out in section 98 (6) (a) (b) or (c).

4.2.6 Section 99 of LASPOA sets out a second set of conditions that the court might apply in order to determine whether a child should be remanded to youth detention accommodation. These focus on the child's history of behaviour whilst on remand. The first history condition under which a child may be remanded is if:

(a) the child has a recent history of absconding while subject to a custodial remand, and

(b) the offence(s), is alleged to be, or has been found to have been, committed whilst the child was remanded to local authority accommodation or youth detention accommodation.

4.2.7 The second history condition is that the offence or offences, together with any other imprisonable offences of which the child has been convicted in any proceedings, amount or would, if the child were convicted of that offence or those offences, amount to a recent history of committing imprisonable offences while on bail or subject to a custodial remand.

4.2.8 The necessity condition, the realistic prospect of custody test and the legal representation condition outlined above must also apply in addition to these "history conditions".

4.2.9 Sections 98 and 99 of LASPOA, therefore, incorporate a detailed set of threshold criteria that need to be fulfilled before it is possible to remand a child aged 12-17 in youth detention accommodation.

4.2.10 These Regulations change the categories of children who are subject to the modified criteria contained in Regulation 6(2) of the 1991 Regulations so as to provide for consistency with the approach to secure remand taken by LASPOA.

4.2.11 *Children remanded to local authority accommodation*: Regulation 6(1)(b) of the 1991 Regulations is omitted, so that the modified criteria will no longer apply in relation to children (aged 10 to 17) who have been remanded to local authority accommodation and who have been charged with offences as set out at paragraph 4.2.1 above. Instead, such a child can only be placed by a local authority in secure accommodation in accordance with the welfare test in section 25 of the 1989 Act.

4.2.12 *Children detained under section 38(6) PACE:* A child who is detained by the police under section 38(6) of PACE and who is aged 12 to 16 must be moved to local authority accommodation unless this is impracticable or there is no secure accommodation available and local authority accommodation would be inadequate to protect the public from serious harm. Where no secure accommodation is available and the serious harm criteria are met, the child can be kept in police detention.

4.2.13 Where the detained child is aged 10 or 11, the police must move the child to local authority accommodation unless this is impracticable (for example, in extreme weather conditions).

4.2.14 Regulation 6(1)(a) of the 1991 Regulations is amended in relation to detained children under section 38(6) of PACE so that the modified criteria will only apply to children aged 12 to 16. This means that a child who is aged 12 to 16 who has been detained by

the police and then moved to local authority accommodation can (as was previously the case) be placed by that local authority in secure accommodation in accordance with the modified criteria. However, a child aged 10 or 11 who has been detained by the police under section 38(6) of PACE and been moved to local authority accommodation, can only be placed by that local authority in secure accommodation where the criteria laid down in the welfare test in section 25(1) of the 1989 Act have been met.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The proposal to create a single remand framework for youth which would result in all remanded children being looked after was included in the Green Paper issued by the Ministry of Justice *Breaking the Cycle: effective punishment, rehabilitation and sentencing of offenders*. Responses to the consultation on the Green Paper indicated that there was broad stakeholder support for this measure. LASPOA received royal assent on 1 May 2012 and introduced a new framework for remanding children charged with or convicted of a criminal offence or subject to extradition proceedings. Details regarding the criteria for remand to youth detention accommodation which was introduced by LASPOA are set out in section 4 above.

7.2 Regulation 6 of the 1991 Regulations has been reviewed for a number of reasons. Firstly, to ensure that the approach to the use of secure accommodation by local authority is aligned with the rigorous approach to secure remand introduced by LASPOA. Secondly, leaving the 1991 Regulations unchanged could have resulted in the undermining of the strong ethos underpinning the LASPOA remand framework, which provides a strong steer away from using youth detention accommodation for remanded children.

7.3 Local authorities will need to apply the more rigorous welfare test in relation to children (age 10 to 17) who are remanded to local authority who have been charged with or convicted of specified offences (as set out in section 4.2.1 above). The welfare test provides for different and potentially more rigorous criteria to the modified criteria laid down in regulation 6(2) of the 1991 Regulations.

7.4 These Regulations will make no change in relation children aged 12 to 16 who have been detained under section 38(6) PACE and transferred to local authority accommodation. Given the relatively short duration of detention under PACE, the conditions provided for by Regulation 6 of the 1991 Regulations are sufficient in circumstances where a local authority may need to securely detain a 12-16 year old transferred to their care by the police.

7.5 In relation to children aged 10 or 11 who have been detained under section 38(6) PACE the position has been changed by these Regulations so that the welfare test, rather than the modified criteria must be applied by a local authority seeking to place such a child in secure accommodation. We have established as part of our consultation that Regulation 6 has not been used for the purpose of placing such a child in secure accommodation for at least three years, possibly longer. In the very rare event that a local authority assessed that there to be a need to place such a child in secure accommodation then the local authority would have to be satisfied that the welfare test is met. This approach has also been taken in relation to children aged 10 or 11 who have been remanded by the courts to local authority accommodation as set out in paragraph 7.6 above. We consider the welfare test to be the appropriate test given the overall policy regarding the gravity of detaining very young children and of limiting detention to case where there is genuinely no other appropriate alternative.

8. Consultation outcome

8.1 We held two consultation events attended by stakeholders from the Association of Chief Police Officers, local authority children's services, local authority youth offending services, managers of secure children's homes, the Secure Accommodation Network and the Youth Justice Board. We also received thirteen responses to our online consultation.

8.2 Everyone who took part in the consultation process recognised that, following the introduction of the LASPOA, there was a need to introduce the largely technical changes to the 1991 Regulations introduced by this instrument. There was general support for setting rigorous conditions that must be met before children on remand, or received by local authorities from police detention under PACE, can be securely detained by or on the application of local authorities.

9. Guidance

9.1 We do not plan to introduce guidance for practitioners on the amendments to the 1991 Regulations introduced by this instrument.

9.2 We plan to issue revised guidance in Spring 2013 about the responsibilities of local authorities and other services for looked after children involved with the youth justice system that will take into account the significant changes to the framework for youth remand that are introduced by LASPOA. We will be consulting on draft guidance early in 2013.

10. Impact

10.1 The provision made by this instrument solely impacts on local authority services.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 DfE produces an annual statistical collection with comprehensive data on children looked after in England. This will allow us to monitor the future numbers of children who are remanded to youth detention accommodation and who will be treated as looked after children following the commencement of LASPOA on 3 December 2012. These statistics also include wider information about looked after children in custody.

12.2 The Youth Justice Board also collects information about the numbers and patterns of children on remand.

13. Contact

13.1 Contact **Mark Burrows** at the Department for Education, Tel: 020 7783 8079 or email: mark.burrows@education.gsi.gov.uk with any queries regarding this instrument.