EXPLANATORY MEMORANDUM TO

THE DAY CARE AND CHILD MINDING (DISQUALIFICATION) (ENGLAND) (AMENDMENT) REGULATIONS 2007

2007 No. 197

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

2. Description

2.1 These Regulations amend the Day Care and Child Minding (Disqualification) (England) Regulations 2005 (S.I. 2005/2296) (the "2005 Regulations") which set out the categories of persons who are disqualified from registration in England as child minders or providers of day care for children under the age of 8. Persons disqualified under these Regulations may not act as childminders or provide day care. Nor may they be employed in connection with day care provision or be directly concerned in the management of any provision of day care.

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

3.1 None

4. Legislative Background

4.1 The 2005 Regulations apply to applications for registration made under Part XA of the Children Act 1989 and are amended under section 104(4) of, and paragraph 4 of Schedule 9A to, that Act. Part XA of the Children Act was introduced by the Care Standards Act 2000. The legislation required applicants for registration to be suitable to look after children but provided no power of waiver in respect of disqualification that local authorities formerly had. The Child Minding and Day Care (Disqualification) (England) Regulations 2001 therefore limited the automatic disqualification from registration to offences against a child as defined in the Criminal Justice and Court Services Act 2000 and cases where the person's name appeared on the Protection of Children Act List or on the Education Act List (List 99).

4.2 The Education Act 2002 and Children Act 2004 amended Part XA of the Children Act 1989 to provide a power of waiver for those otherwise disqualified from providing child care. The 2005 Regulations which came into force on 3rd October 2005 widened the range of directions, determinations and offences which result in automatic disqualification and made provision for a waiver in regulation 9.

4.3 The Childcare Act 2006 (section 102) further amended paragraph 4 of Schedule 9A to the Children Act 1989 to allow for disqualification on the grounds of health and in circumstances where a caution has been given in relation to the offences set out in the 2005 Regulations.

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 We proposed changes to the 2005 Regulations to align with changes to the Education (Prohibition from Teaching or Working with Children) Regulations 2003 (S.I. 2003/1184) (the "List 99" regulations) which fulfil the commitments in Ruth Kelly's Parliamentary Statement of 19th January 2006[1]. The consultation on the proposals for changes to the 2005 Regulations was completed on 2nd January 2007. The consultation response supported the proposed changes as being an important additional safeguard for children. (The 2005 Regulations were also subject to a full consultation.)

The changes made by these Regulations and set out below are to achieve consistency between the regime under the Education Act 2002 which disqualifies a person from working in education and the 2005 Regulations which (subject to any waiver) disqualify a person from registration as a child minder or day care provider, the result of which is also that they may not be employed by a provider.

7.2 Provisions in the List 99 regulations mean that disqualifications under section 142 of the Education Act 2002 have the effect of disqualifying persons from working with children both in and out of educational establishments. Current amendments to those regulations remove the requirement that the person was working in an educational establishment prior to or at the time of the offence and introduce cautions for existing offences and convictions or cautions for related offences as grounds for disqualification. It is intended, however, that such provisions will not operate retrospectively and so specified offences under the 2005 Regulations are being maintained as a separate ground of disqualification to enable disqualification in circumstances where an offence may have been committed prior to the amended List 99 regulations having applicability.

7.3 These Regulations enable automatic disqualification where a caution (which also includes reprimands and warnings) has been given in respect of an offence by a police officer after a person has admitted that offence. Disqualification in the case of cautions as well as convictions ends the existing anomaly between an offender who is convicted, and one who admits their guilt and receives a caution for the same offence. The police will ensure that those accepting a caution for a specified offence are made fully aware of the implications of doing so. Any caution given prior to these Regulations coming into force would be highlighted in the Enhanced CRB Disclosure and HMCI has the power to refuse registration based on such information as part of their separate suitability judgement even though it would not result in automatic disqualification. Providing for

[1] Ruth Kelly's List 99 Statement to the House in January contained a number of commitments on the operation of barring for the education sector, specifically to:

- introduce regulations to automatically enter on List 99 anyone who is cautioned or convicted for a sexual offence against a child;
- automatically bar individuals for a range of other serious sexual offences against adults.

cautions for specified offences to be a ground for automatic disqualification promotes consistency between the suitability assessment and automatic disqualification.

7.4 In addition to cautions, the circumstances in which a person may be disqualified are expanded by these Regulations to include, in relation to the offences specified in the 2005 Regulations, where a person has been found to have been not guilty of an offence by reason of insanity and where they are found to have done the act charged against them but to have been acting under a disability.

7.7 These Regulations expand the offences for which a person may be disqualified from registration to include attempts; conspiracy or incitement; or aiding, abetting, counselling or procuring the commission of the offences specified for the purposes of the 2005 Regulations.

7.8 These Regulations also provide that offences committed while overseas which involve acts which would, if they had been done within the United Kingdom, lead to an offence requiring disqualification under these Regulations will lead to disqualification under the new regulation 5A. This amendment addresses concerns raised during the consultation that offences committed overseas be added.

7.9 The amendments set out above, in expanding the circumstances and the offences for which a person may be disqualified and in extending disqualification to overseas offences, strengthen the 2005 Regulations and align them with the amended List 99 regulations. They apply after the date of commencement of these Regulations.

7.10 Regulation 5 of the 2005 Regulations applies to serious offences committed against adults for which a person may be disqualified from registration. These Regulations remove with prospective effect the requirement that such an offence must receive a "qualifying sentence" before leading to disqualification. A qualifying sentence is defined in the Criminal Justice and Court Services Act 2000 as one involving detention for 12 months or more or at Her Majesty's pleasure or involving a hospital order under the Mental Health Act 1983 or guardianship order.

7.11 Regulation 5 of the 2005 Regulations is further amended with prospective effect by removing the provision that a disqualification under that regulation lapses once the period set out in the Rehabilitation of Offenders Act 1974 for that conviction has expired. Previously, HMCI remained able to take into account these "spent" convictions in their judgement about a person's suitability. Removing this provision enables a consistent approach between convictions and cautions (to which the Rehabilitation of Offenders Act does not apply) and strengthens the link with the List 99 regulations which are unaffected by the Rehabilitation of Offenders Act.

7.12 The amendment made by the Childcare Act 2006 has enabled the 2005 Regulations to include those persons subject to a direction under section 142(4)(d) of the Education Act 2002 on grounds relating to health. Those deemed as unsuitable to work with children under section 142(4)(a)[2] and (b)[3] of the Education Act 2002 are already

[2] on the grounds that the person is included (otherwise than provisionally) in the list kept under section 1 of the Protection of Children Act 1999 (c. 14) (list of individuals considered unsuitable to work with children),

[3] on the grounds that the person is unsuitable to work with children

covered in the 2005 Regulations (regulations 7 and 9(5)). This addresses the anomaly whereby someone could be deemed unsuitable to work in education establishments because of their health but they would not be disqualified from a childcare position on the same grounds.

8. Impact

8.1 A copy of the Regulatory Impact Assessment which was made for the 2005 Regulations is attached to this memorandum for information.

8.2 This instrument does not increase the scope of those to whom the 2005 Regulations apply. As is the case under the 2005 Regulations persons disqualified under these Regulations may not act as childminders or provide day care. Nor may they be employed in connection with day care provision or be directly concerned in the management of any provision of day care. We have added to the circumstances which disqualify an individual but the childcare provider or employer will still be undertaking the same checks. There will be no increase in the cost of undertaking the checks, or the time taken to do so as a result of these regulations.

9. Contact

9.1 Rachel Taylor at the DfES Tel: 020 7273 5704 or e-mail: rachel.taylor@dfes.gsi.gov.uk can answer any queries regarding the instrument.

Full Regulatory Impact Assessment (RIA) for the proposed Child Minding and Day Care (Disqualification) (England) Regulations 2004

Purpose and intended effect of measure

The proposed new regulations set out the categories of persons who will be disqualified from registration in England as child minders or providers of day care.

Objective

To protect children by clarifying the grounds on which Ofsted can apply a disqualification, thus strengthening their decision-making process; and to re-introduce the power of waiver that was available to local authorities before September 2001. To ensure the right of appeal is in place against new determinations by Ofsted in ascertaining suitability.

Background

Since the introduction of regulation under the Children Act 1989, the risk of children being harmed whist in the care of childminders and in day care settings has been reduced. Local authorities were required to determine that those seeking registration to care for children were 'fit' to do so. There were comprehensive regulations that set out offences and orders which disqualified someone from registration, and local authorities had the power to override those in cases where offences committed had no bearing on someone's suitability to look after children.

Part XA of the Children Act was introduced by the Care Standards Act 2000, which transferred the responsibility for childcare registration from local authorities to Ofsted. The new legislation also requires applicants for registration to be suitable to look after children, but originally omitted the power of waiver in respect of disqualification that local authorities used to have. As this power of waiver was initially omitted from Part XA, the Child Minding and Day Care (Disqualification) (England) Regulations 2001 limited the automatic disqualification of applicants to offences under the Criminal Justice and Court Services Act 2000 and if the applicant's name appears on the Protection of Children Act list or on the Education Act list (List 99). An offence or order which is not included in the 2001 regulations is currently taken into account at the discretion of Ofsted in making the decision about someone's suitability.

The Education Act 2002 and Children Act 2004 amend Part 10A of the Children Act 1989 by reintroducing the power of waiver for those otherwise disqualified from providing child care who have applied to work as an employee. In a case where such a waiver could be considered, Ofsted would decide whether or not the disqualification could be waived but the employer would still need to be satisfied that the applicant was otherwise suitable.

Ofsted's publication entitled 'Early Years the First National Picture' which reports on regulatory activity between [1 September 2001 and 31 March 2003 shows that Ofsted refused to register 220 applicants, less than 1% of the total number of applications received, but there is no information about the number that were refused either on account of offences or orders in the current disqualification regulations, or on account of the wider range of offences and orders from all UK jurisdictions that we are proposing for inclusion in the new regulations .

Risk assessment

Taking into account the importance of ensuring that applicants for registration are suitable, we do not believe that the current regulations provide Ofsted with enough authority if faced with a serious legal challenge against a disqualification decision based on the evidence of offences not included in the regulations. The new power of waiver means that Ofsted will need to consider the risks to children, and to be satisfied that the evidence provided by an applicant is strong enough to prove suitability before they exercise that power. There is no evidence to suggest that the waivers applied by local authorities under Part X of the Children Act were deficient in any way. Indeed such waivers applied to providers still registered when responsibility for regulation transferred to Ofsted in September 2001 are still in place.

Options

These regulations have been proposed in order to address deficiencies in the current arrangements which have come to light since Ofsted took over responsibility for regulating childcare under the Children Act 1989. Maintaining the status quo is also clearly an option, but without the new regulations Ofsted will have to continue to work with what

it considers to be an unsatisfactory legal basis for determining disqualification for registration as a childcare provider. Without the power of waiver Ofsted will be unable to register someone who is considered to be of no danger to children but who otherwise would be disqualified. This would leave an anomaly with those providers whose disqualifications were waived under Part X of the Act.

Costs and benefits

The current disqualification regulations contain a basic list of offences which lead to automatic disqualification together with a complicated formula that indicates when certain offences may no longer lead to disqualification. Ofsted uses its discretion to take other offences into account in assessing the suitability of people to look after children. This means, for example, that someone who has had their own child taken into care because of doubts about their parenting would not automatically be disqualified from being a childminder for someone else's children.

The aim of proposing the introduction of the new disqualification regulations is greater protection for children by ensuring that there is clarity on what offences committed by applicants for registration, or care orders, might indicate that they are not suitable to work with children, so that a disqualification can be applied. This would be accompanied by a provision allowing Ofsted the power of waiver where an applicant can satisfy him that he is suitable despite a conviction for an offence or order against him. The extension of the waiver to employees, through provision in the Children Act 2004, will remove a possible anomaly in which it would be possible for Ofsted to register someone whose disqualification offence was waived but for an employer not be able to appoint with a disqualification offence someone seeking employment in a registered setting. The regulations would also allow applicants the right of appeal if Ofsted refuses to consider using the power of waiver.

Ofsted has indicated that there will be no increase in the cost of undertaking checks or the time taken to do the checks, as offences/orders that do not show up on the enhanced CRB check will be dealt with by self-declaration. There will be no additional costs for the CRB. It will also be made clear that the applicant has an on going obligation to declare offences committed, and it will be an offence not to declare those offences. Applicants who are offenders or who have orders against them that attract a disqualification will need to state in writing why Ofsted should waive that disqualification. Ofsted have no way of calculating how many waivers they might have to consider but given that refusals by Ofsted to register are currently less than 1% of the total, Ofsted does not expect any additional costs beyond existing budgets. We have not identified any additional costs associated with these regulations that would fall on providers.

Business sectors affected

The registered childminding and day care sector. This covers childcare providers in the private, voluntary and public sectors, the majority of which would be self employed childminders (over 70,000 are currently registered) and small businesses operating day care services (there are about 30,000 day care providers).

Equity and fairness

Although widening the range of criminal convictions and care orders that would attract an automatic disqualification from providing day care or childminding, the regulations would provide a clear basis on which decisions would be made. In addition the re-introduction of the power of waiver and the appeals mechanism will ensure that where an applicant who might otherwise be disqualified can show that they pose no risk to children, they can be registered. This would also provide a consistency of approach with those whose disqualifications were waived under Part X by local authorities that continue to be registered under Part XA.

Small firms' impact test

Discussions with representatives of provider organisations whose membership covers the majority of providers in the sector have not identified any specific additional costs, or any significant impact that would be incurred as a result of these proposals.. At this time, with the agreement of the Small Business Service, we do not intend to carry out stage one of the impact test. However should the consultation uncover any hidden costs or unintended consequences of the proposals this position will be reviewed.

Competition assessment

No issues identified.

Enforcement and sanctions

Ofsted does not anticipate any difficulties with the disqualification regulations.

Consultation

We first consulted during 2004 on an earlier version of the regulations but these did not include the power of waiver for employees. The findings from the 2004 consultation showed that 87% of respondents were happy with the approach taken concerning disqualification and the power of waiver for registered providers**.** A further consultation took place between 1 April and 24 June 2005 and findings were similar.

Monitoring and review

We will evaluate the effectiveness of these regulations within the first 24 months of operation by undertaking a review with Ofsted to establish whether they have improved the decision making process. Following this evaluation we will consider a further revision of the regulations if the need for changes is identified.

Summary and recommendation

The Education Act 2002 amended the Children Act 1989 to enable Ofsted to apply the same power of waiver that was available to local authorities prior to September 2001. This amendment made clear the need to replace the existing disqualification regulations with some that would ensure that there is clarity on what offences committed by applicants for registration, or care orders, might indicate that they are not suitable to work with children, so that a disqualification can be applied. Doing nothing or watering down these regulations would not achieve those aims or bring the power of waiver into effect. The Government therefore recommend these regulations 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* ……..**

Date

Beverley Hughes,

Children's Minister, DfES/DWP

Contact point; Russell Ewens, Dave Bell and Paul Oates

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