EXPLANATORY MEMORANDUM TO

THE EDUCATION (NATIONAL CURRICULUM) (MISCELLANEOUS AMENDMENTS) (ENGLAND) ORDER 2015

2015 No. 900

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 these instruments

2.1 The Education (Information) (Miscellaneous Amendments) (England) Regulations 2015, the Education (National Curriculum) (Miscellaneous Amendments) (England) Order 2015, and the Education (National Curriculum) (Specified Purpose) (England) Order 2015 are made pursuant to curriculum provsions in Part 6 of the Education 2002 and information sharing provisions in the Education Act 2002.

2.2. These instruments amend the following: the Education (National Curriculum) (Key Stage 1 Assessment Arrangements) (England) Order 2004, the Education (National Curriculum) (Key Stage 2 Assessment Arrangements) (England) Order 2003, the Education (National Curriculum) (Key Stage 3 Assessment Arrangements) (England) Order 2003, the Education (Pupil Information) (England) Regulations 2005, the Education (School Performance Information) (England) Regulations 2007, the School Information (England) Regulations 2008 and the Education (National Curriculum) (Attainment Targets and Programmes of Study) (England) Order 2013.

2.3 The effect of these amendments is to both: (i) place 'trialling' on a statutory footing from the school year 2015-16 onwards, in relation to key stage 1 and 2 tests; and (ii) replace National Curriculum 'levels' with 'standards' and 'scores', and update the instruments to reflect the requirements of the new National Curriculum. In addition, the Education (National Curriculum) (Specified Purpose) (England) Order 2015 specifies an additional purpose for which National Curriculum assessment arrangements may be made (to extend such arrangements to cover key stage 1 and 2 trialling).

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

3.1 None

4. Legislative Context

4.1 These instruments are made under the following powers: sections 76(2)(b), 87(3)(a) and (c), (6A)(a), (7), (10), (11), (12A) and 210(7) of the Education Act 2002 (c. 32) and sections 29(3) and (5), 408, 537, 537A, 563 and 569(4) and (5) of the Education Act 1996 (c. 56).

4.2 The powers which apply in relation to trialling are: sections 76(2)(b), 87(3)(c), (6A)(a), (7), (10), (11) and (12A) and 210(7) of the Education Act 2002. Section 87 provides for the establishment of the National Curriculum for England by Order. One aspect of the National Curriculum is the arrangements for assessing pupils for specified purposes (assessment arrangements). Such arrangements are specified by the Secretary of State by order under section 87(3)(c). In the case of trialling, these are secured via the Education (National Curriculum)(Miscellaneous Amendments)(England) Order 2015(Miscellaneous Amendments Order), and by specifiying an additional purpose for which such arrangements are made under section 76(2), via the Education (National Curriculum)(Specified Purpose)(England) Order 2015.

4.3 The Miscellaneous Amendments Order is subject to the consultation process in section 87(6A), which requires that before making an order under subsection (3)(c), the Secretary of State shall consult with the Office of Qualifications and Examinations Regulation (Ofqual) and may consult such other persons as she considers appropriate. The consultation requirement applies in relation to the amendments to introduce 'trialling' and remove National Curriculum 'levels'.

4.4 The instruments will come into force on 1st September 2015. The effect of the 'trialling' amendments is twofold. First, they make sample 'trialling' compulsory for: (i) end of key stage 1 pupils (in year 2), sitting National Curriculum tests in English and mathematics;(ii) first year key stage 1 pupils (in year 1) taking the phonics screening check; and (iii) end of key stage 2 pupils (in year 6) sitting National Curriculum tests in English, mathematics and science. Secondly, the Education (National Curriculum) (Specified Purpose) (England) Order 2015 specifies an additional purpose for which National Curriculum assessment arrangements may be made (to extend such arrangements to cover key stage 1 and 2 trialling).

4.5 The powers which apply in relation to removing National Curriculum 'levels' are: sections 87(3)(a) and (c), (6A)(a), (7) and (10) and 210(7) of the Education Act 2002. In the case of removing National Curriculum 'levels', this is achieved via the Miscellaneous Amendments Order and the Education (Information) (Miscellaneous Amendments) (England) Regulations 2015. The effect of the amendments is fourfold: (i) they remove the requirement to measure National Curriculum attainment by reference to 'levels' from September 2015 onwards, and instead measure such attainment by reference to 'standards' and 'scores'; (ii) they update the requirements around National Curriculum assessment arrangements and school and pupil information so that they reflect the requirements of the new National Curriculum; (iii) similarly, they replace references to "P level" with "P Scale" to reflect the new terminology used in the "P Scale Document"

(which measures the attainment of pupils with special educational needs); and (iv) they simplify the teacher assessment arrangements at key stage 3 and apply those arrangements to all the National Curriculum foundation subjects.

5. Territorial Extent and Application

5.1 These instruments apply to England.

6. European Convention on Human Rights

As the instruments are subject to the negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1 The Government has removed national curriculum levels for pupils in Key Stages 1, 2 and 3. Following a recommendation by the National Curriculum Review Expert Panel, levels will be reported for the last time in summer 2015 for pupils in Year 2 (end of Key Stage 1) and Year 6 (end of Key Stage 2).

7.2 Levels had been in place since the introduction of Key Stage 1 and Key Stage 2 assessment in 1991 and 1995 respectively. Levels were also linked to Key Stage 3 SATs (Standard Assessment Tests) after they were introduced in 1997, although these were scrapped in 2009. Levels were initially introduced using single numbers, but over time sub-levels were created to further define a pupil's attainment (e.g. Level 4a, Level 4b and Level 4c).

7.3 Levels have been removed because there was a lack of precision in reporting; different interpretations of levels by different teachers and schools; they did not clearly explain what a child's ability was; and they led to an over-emphasis on children having to be seen to continually progress up the levels framework, rather than being secure in their knowledge. The Government believes that national frameworks are needed at the end of Key Stages to provide consistent, comparable results, but that within Key Stages schools should be free to assess in a way that best suits their needs and supports the progression and attainment of their pupils.

7.4 The changes brought about by these intstruments underpin this change in policy and set out in legislation what schools need to do in a world without levels.

7.5 In relation to statutory participation in trialling at key stages 1 and 2, this is a policy change relating to improving the samples taking part in trialling and therefore improving the data from the trials. Currently, schools are invited to take part in trialling and relatively few accept the invitation (around 20% of invited schools). In making trialling statutory, it will no longer be dependent on a what is effectively a self-selecting

sample. This will reduce trialling costs and distribute the burden of trialling across the school population.

8. Consultation outcome

8.1 A consultation was undertaken during the period 27/2/15 to 13/3/15 on the changes outlined in these amendments with Ofqual Having reviewed the regulations, they made no comment other than to flag up a point in relation to the Miscellaneous Amendments Order. This concerns the discretion a head teacher has to decide on whether a pupil is entered into a trial or not and whether there should be limits placed on such discretion. In reply, the Department informed Ofqual that the Order already addresses this point by stating that the issue is to be addressed by way of delegated supplementary provisions. This will be in the form of guidance on the circumstances which may mean it is not appropriate for a pupil to be entered for a test. These circumstances will be the same as the circumstances which already apply for a pupil when he/she is entered for a 'live' end of key stage test.

8.2 The decision to remove levels has been in the public domain for some time; the recommendation was made by the National Curriculum Review Expert Panel and accepted by the Secretary of State in 2011 and the reforms to assessment were part of a public consultation in the summer of 2013. It is therefore not necessary to consult on the regulations more widely than with Ofqual as this is not a new policy decision.

8.3 Trialling test materials for use in key stage 1 and 2 'live' National Curriculum tests has been taking place for some years now, with schools participating in the trials on a voluntary basis. The proposal to make this a statutory process will not involve a substantive change to current practice, since the size of the sample will be similar to the voluntary samples used now, and the nature of the trial will not change. Further, statutory trialling will not impose an additional burden on schools, since a trialling agency will assume responsibility for the administration of the trials. In essence, the change is more technical in nature and arises out of a need to ensure that we secure reliable, robust and representative samples going forward from 2015 onwards. In view of this, the Department limited its consultation to discussions with Ofqual only.

9. Guidance

9.1 Schools have been made aware of the changes through various communications over the past 2 years, including media coverage, direct electronic communications (email, messages on the Department for Education website) and conference presentations. Communications will continue to go out before the start of the academic year 2015/16 and before the first end of Key Stage assessments are made in summer 2016.

9.2 Schools have not yet been notified as to the changes with respect to participation in trialling. Before the end of the summer term, we will meet with unions to notify of this change. Schools will be notified of the change in the autumn term, 2015 before any are drawn in a sample for a trial. The first trials using this order will take place in April 2016.

10. Impact

10.1 There will be no direct impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is mainly related to burdens on schools and is in connection with how they assess pupils and report results. We do not anticipate any additional burden given that schools already assess and report to parents annually on the achievement and progress their children have made; the change is merely to what schools report and how they assess. Similarly this will not impact on more schools, with regard to statutory trialling. The difference will be that schools will be required to participate in the trials, rather thanvolunteering to do so, as they have done until now. However there will not be an additional burden in terms of administering or marking as this responsibility will fall to a trialling agency, rather than the school.

10.3 An Impact Assessment has not been prepared for these instruments because no impact on the private or voluntary sector is foreseen.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 These instruments will not be subject to review in relation to the removal of levels or statutory trialling, although with regards to the latter we will monitor its effectiveness on a year-by-year basis to ensure it continues to be fit for purpose.

13. Contact

Orlando Soulsby at the Department for Education Tel: 0207 340 8354 or email: orlando.soulsby@education.gsi.gov.uk can answer any queries regarding the removal of levels.

Catharine Parkes at the Department for Education Tel: 0207 340 7520 or email: catharine.parkes@education.gsi.gov.uk can answer any queries regarding the introduction of statutory trialling.