EXPLANATORY MEMORANDUM
TO

THE SCHOOL STAFFING (ENGLAND) (AMENDMENT) (No.2) REGULATIONS 2006

2006 No. 3197

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 School Staffing (England) Regulations 2003, which apply to schools in England maintained by local authorities (except for Pupil Referral Units). The amendments introduce a number of additional requirements for new staff appointed to these schools from 1 January 2007, alongside existing requirements for enhanced Criminal Records Bureau (CRB) checks and in relation to qualifications, health, physical capacity and the absence of any bar from working with children. The additional requirements for staff appointed from 1 January 2007 comprise:

- the person's identity and right to work in the UK must be checked;
- foreign nationals must be subject to an enhanced CRB check, in the same way as all other staff;
- further checks must be carried out on those who have lived overseas if a CRB check is insufficient to establish suitability to work in a school; and
- if a person moves from a post they were appointed to before 12 May 2006 which did not bring them regularly into contact with children to one which does, the person must be subject to an enhanced CRB check.

2.2 The Regulations include new requirements for schools where staff are supplied by a supply agency. Before such supply staff begin work, the school must:

- receive written notification from the supply agency that it has carried out the checks the school is required to make for its own staff before appointment, that it has applied for or obtained a CRB certificate and, where it has received a CRB certificate, whether or not the CRB certificate included any disclosed information or any information was provided to the agency alongside the certificate; and
- receive a copy of the CRB certificate if the agency has received a CRB certificate which included any disclosed information or any information was provided to the agency alongside the certificate.

2.3 Schools must place agencies under an obligation to provide the written notifications and certificates at 2.2, through their contracts or other arrangements with them. Schools must also carry out there own identity checks to confirm that the individual arriving at the school is the individual the agency is intending to supply.

2.4 The Regulations also place a new requirement on schools to keep a single register of the checks they have made in respect of their staff and for supply staff.

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

3.1 None

4 Legislative Background

4.1 Sections 35 and 36 of the Education Act 2002 give the Secretary of State power to make regulations with respect to the staffing of schools maintained by local authorities. The regulations made under that section, the School Staffing (England) Regulations 2003, as amended by the School Staffing (England)(Amendment) Regulations 2006, require staff appointed to maintained schools to be subject to enhanced Criminal Records Bureau (CRB) checks (where applicable) and to meet specified requirements in relation to qualifications, health, physical capacity and the absence of any bar from working with children.

4.2 These School Staffing (England) (Amendment) (No.2) Regulations 2006 further amend the Regulations at 4.1.

5 Extent

5.1 These Regulations apply to England only.

6 European Convention on Human Rights

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

7 Policy Background

7.1 The government commissioned Ofsted to carry out a survey of recruitment processes and record keeping in schools and institutions, including the use of CRB Disclosures, as strongly recommended in DfES guidance. Their report, '*Safeguarding Children: An Evaluation of Procedures for Checking Staff Appointed by Schools'*, was published on 20 June. Of the institutions surveyed, all had complied with guidance by seeking enhanced CRB Disclosures for staff working in schools. However, there were inconsistencies in record-keeping.

7.2 Following this the Secretary of State, Alan Johnson, in a statement to the House of Commons on 20 June (HC 20 June 2006 col 1191), made commitments in the light of the recommendations on record keeping. These included the requirement for schools to maintain a single central record, as well as additional requirements in respect of checks on agency staff and staff who have lived overseas.

7.3 Guidance previously issued by the Department for Education and Skills required staff in schools to have a range of checks, including enhanced CRB checks, prior to, or as soon as possible following, appointment. On 14 November, the Department launched revised and consolidated guidance for education institutions

which sets out existing requirements and those that these new Regulations will introduce. This guidance comes into effect on 1 January 2007 when the regulations come into force.

Consultation

7.4 The revised guidance and draft regulations were subject to a consultation between July and October 2006. The consultation gave support to the regulatory changes and the majority of respondents who made comments favoured more stringent regulation and guidance in respect of which staff should be required to have CRB Disclosures. Consultation was also carried out via a stakeholder group including key stakeholders from the school sector and through a series of regional meetings with head teachers, local authority and FE institution representatives.

8 Impact

8.1 A Regulatory Impact Assessment has been prepared and is attached to this Explanatory Memorandum.

9 Contact

9.1 Any enquiries about the contents of this memorandum should be addressed to: Shahid Bashir, Safeguarding Group, Department for Education and Skills, email: shahid.BASHIR@dfes.gsi.gov.uk, telephone: 020 7273 5759.

REGULATORY IMPACT ASSESSMENT (RIA)

AMENDMENTS TO THE SCHOOL STAFFING (ENGLAND) REGULATIONS 2003 BY THE SCHOOL STAFFING (ENGLAND) (AMENDMENT) (NO.2) REGULATIONS 2006 and THE EDUCATION (PUPIL REFERRAL UNITS) (APPLICATION OF ENACTMENTS) (ENGLAND) (AMENDMENT) (NO. 2) REGULATIONS 2006.

1. Purpose and intended effect

Objective

1.1 To make mandatory through these amendments that schools, including Pupil Referral Units (PRUs):

i. must ensure CRB disclosures are obtained for foreign nationals recruited directly from abroad

ii. make checks of:

- identity and right to work in the UK;
- identity of staff supplied through an agency;

iii. carry out CRB Disclosures if the individual was in a school post that did not previously have regular contact with children and is moving to a post that does, unless the person was appointed to their previous post after 12 May 2006;

iv. keep a register that the necessary pre-employment checks have been carried out. The register must record whether checks have been carried out on:

- identity;
- right to work in the UK;
- relevant qualifications;
- List 99;
- enhanced Criminal Records Bureau (CRB) disclosures where required; and,
- additional criminal record checks, where appropriate, for those who have lived outside the United Kingdom.

v. make additional checks, where appropriate, including criminal record checks, for those who have lived outside the United Kingdom (for example, via the embassy or police force of the relevant country/countries)

vi. obtain confirmation from supply agencies in writing that all the above checks have been completed, or in the case of a CRB Disclosure applied for, for any staff supplied and to keep a record of receiving that confirmation. This confirmation is to include a copy of any CRB disclosure which includes additional information.

vii. ensure in their contractual relationships with supply agencies that the agencies confirm that checks corresponding to those set out in (vi) above have been carried.

1.2 The Government proposes to implement these requirements by means of amendments to the School Staffing (England) Regulations 2003 in The School Staffing (England) (Amendment) (No. 2) Regulations 2006, and The Education (Pupil Referral Units) (Application of Enactments) (England) (Amendment) (No. 2) Regulations 2006.

1.3 The regulations, reflected in updated guidance, *Child Protection: Safer Recruitment and Vetting in the Education Service*, seek to strengthen the procedures

that schools need to follow when recruiting staff, reducing the risk that unsuitable people gain access to children in the schools workforce, and so helping to reduce the risk of children suffering harm.

Background

1.6 On 19 January 2006 the then Secretary of State, Ruth Kelly, in a statement to the House of Commons made a commitment to 'require mandatory Criminal Records (CRB) checks for all newly appointed school employees, replacing current guidance'. This commitment was implemented except for certain foreign nationals in regulations made on 12 May 2006.

1.7 The Government commissioned Ofsted to carry out a survey of recruitment processes and record keeping in schools and institutions, including the use of CRB Disclosures, as strongly recommended in DfES guidance. Their report, *Safeguarding Children,* was published on 20 June 2006. Of the institutions surveyed, all had complied with guidance by seeking enhanced CRB Disclosures for staff working in schools. However, there were inconsistencies in record-keeping.

1.8 Following this the Secretary of State, Alan Johnson, made additional commitments in the light of the recommendations on record keeping. These included the requirement to maintain a single central record as well as additional requirements in respect of checks on agency staff and staff who have lived overseas.

1.9 In addition to the proposed regulations, the Secretary of State committed the Government to the preparation of revised guidance. The draft guidance and regulations were subject to a public consultation, which closed on 12 October, and the guidance was published as *Safeguarding Children and Safer Recruitment in Education* on 14 November. The guidance is to be effective from 1 January 2007. It consolidates and updates a range of previous guidance and explains the recruitment and vetting checks that need to be made on all people who wish to work with children and young persons through a role in the education service.

1.10 The regulations underpin the guidance and should be read with it.

Rationale

1.11. Before the publication of *Safeguarding Children and Safer Recruitment in Education,* guidance recommended that members of the school workforce should have a range of checks. All new appointments to the schools workforce, except foreign nationals for whom a CRB Disclosure was inappropriate have been required by law to have an enhanced CRB Disclosure since 12 May 2006 - prior to, or as soon as possible following, appointment. These checks were in addition to the usual pre-appointment and interview checks; for example, previous employer references.

1.12 However, ministers had concluded that strengthening the existing guidance and a range of other measures to tighten regulation of recruitment in schools and schools engagement of supply staff would help to reduce further the possibility that unsuitable people could gain access to children through the school workforce. In turn it would, reduce the risk of harm and associated costs, both social and economic.

1.13 It is also sensible to strengthen the current record-keeping regime in schools. The recent Ofsted report reported ‘robust procedures in place to carry out checks on the schools workforce’. However, despite some good practice, the procedures adopted by most schools in terms of recording information about checks carried out on staff were inappropriate and did not comply with the CRB code of practice. Regulating to ensure a minimum standard of required checks and of recording will ensure that the good practice identified by Ofsted will become standard practice across all schools.

1.14 These measures will not only help to improve further safeguards for children but will help to maintain public confidence in the system, which has suffered following press reports that sex offenders are being allowed to work in educational settings.

Consultation

Within Government

1.15 The Criminal Records Bureau, the Home Office and the Department for Trade and Industry have all been consulted on these proposed changes to the regulations.

Public Consultation

1.16 Consultation was carried out via a stakeholder group. This group comprises key stakeholders from the school and FE sector, including the chair of the Implementation Review Unit (IRU) and a representative from the Recruitment and Employment Confederation (REC) which represents supply agencies. The stakeholder group advised the Department on the development of the guidance. Wider consultation with the sector was undertaken through a series of regional meetings with head teachers, local authority and FE institution representatives.

1.17 The draft guidance and regulations were also subject to a full twelve week consultation between July and October 2006. The consultation gave support to the regulatory changes and the majority of respondents who made comments favoured more stringent regulation and guidance in respect of which staff should be required to have CRB Disclosures and that such disclosures should be repeated at regular intervals.

2. OPTIONS

Option 1
2.1 Do not regulate further or reflect commitments in updated guidance.

Option 2 A voluntary approach through guidance

2.2 The Department could seek to implement the recommendations through a voluntary approach, by updating the guidance and strongly recommending that schools implement the revised guidance.

Option 3

2.3 Make the regulatory changes listed at 1.1 and reflect the regulatory changes in revised guidance

3. BENEFITS AND COSTS

Sectors and groups affected

3.1 The regulations affect the following:

i. All maintained schools and Pupil Referral Units

ii. Local Authorities as employers and in their support to maintained schools in fulfilling the regulatory requirements

iii. Teacher and other supply businesses that provide staff to schools and local authorities

In addition, as well as the above, the guidance affects independent schools, non-maintained special schools, and Further Education Institutions. These are, or will be, the subject of separate regulations.

Benefits

Option 1

3.2 Allows schools to continue as present. However, this would lead to inconsistent practice and would do nothing to improve the existing safeguarding regime. The Government has concluded that the system does need to be strengthened in advance of the vetting and barring scheme established by the Safeguarding Vulnerable Groups Act 2006 and scheduled to be introduced in 2008. The recently-published revised guidance due to come into force on 1January 2007 is but one element of the process. The guidance would lack legal enforceability unless these regulations were made. No change, therefore, leaving the current system untouched is not an option. The Government considered that implementing these commitments would help to strengthen the existing system, further help to safeguard children from harm and help to maintain public confidence in the system.

Option 2 A voluntary approach through guidance

3.4 While a voluntary approach could go some way to further strengthening the existing system, it may lead to inconsistent practice across the workforce, with the result that some schools do not carry out the necessary checks and keep the necessary

records to ensure that they are taking every reasonable step to safeguard their children from harm. It is the Government's view that effective systems must be used by every school to ensure that all children are safeguarded from harm and that public confidence is maintained, and that clarity and consistency of approach is needed.

Option 3 Regulation and guidance

3.5 This option strengthens existing regulation. It supports this with guidance at minimal cost and effort and offers the greatest consistency across the workforce, helping to ensure that schools and educational establishments are using good practice recruitment processes to help minimise the risk of harm to children. This is the preferred option and should help to provide the public with reassurance that robust measures are in place to help protect children from harm. It reduces the risk of children suffering harm and reduces the associated social and economic costs. Through the amended regulations it makes mandatory what has been good practice and previously strongly recommended in guidance.

3.6 The Government does not believe it is necessary to require CRB Disclosures for all existing staff working in schools, as there is likely to be a history of performance and a range of checks will already have been carried out. In many cases police checks will have been done where staff were in post prior to the CRB being set up. In addition, the police notifying scheme should have captured relevant individuals where they were in relevant employment. There is a balance to be struck between protection of children, always the first priority, and the need to check an entire teaching workforce, the vast majority of whom pose no risk whatsoever.

3.7 That said, following the Ofsted report on record keeping in June, the Government decided that all schools should check their existing records and ensure that the information held was up-to-date and properly recorded. Where there is no evidence of list 99, enhanced CRB Disclosures and the other checks set out in paragraph 1.1 having been carried out where required for staff currently in post, these gaps should be filled. A general exercise in bringing records up to date is currently underway. List 99 checks should be completed by the end of December 2006 and outstanding CRB Disclosures by the end of March 2007. Once completed, all existing staff should have complete records of appropriate checks and that record will address these concerns.

3.8 In some circumstances, checks will be considered by a school to be appropriate for some existing staff. The employer, as the key decision-maker, must strike the right balance and act proportionately to risk. The employer needs to decide when there is a case for requesting an enhanced CRB disclosure; for example if there is evidence of behaviour giving cause for concern, or if there is a potential for harm.

3.9 This option seeks to strike the right balance between further regulation, the use of guidance and the exercise of judgment by schools in their application of the guidance.

Costs

Option 1

3.8 No additional direct costs. However, there could be considerable costs to society if children are harmed by individuals who slip through the net as a result of not having these checks, particularly an enhanced CRB disclosure.

Option 2

3.9 The Government would strongly recommend that schools follow these procedures, and the vast majority of schools will do so; the costs would be approximately the same as the additional costs required by the new regulations. These are minimal.

Option 3

3.10 The proposed regulations place limited additional responsibilities on schools. They are based on good practice that is already applied by most schools as a result of guidance that has has been issued by the Government over a number of years. The regulations do affect local authorities as local authorities employ the staff in community schools, unattached teachers and school meals staff..

3.11 The fee for a CRB Disclosure is paid by the individual applying for a disclosure not the employer. Most employers choose to pay the fee on behalf of the employee but it is at their discretion, therefore the need to conduct CRB Disclosures all foreign nationals does not necessarily represent an added financial burden on schools. The costs associated with processing the forms do not represent a new burden on schools as this has been a long standing requirement in relation to staff appointments, with the exception of foreign nationals recruited direct from overseas, for which costs can be met from within existing resources. The numbers affected by this requirement will be small. Information was sought on numbers as part of the consultation. Those responding indicated numbers were small but were not able to provide figures.

3.12 The proposed regulations requiring schools to obtain evidence from supply agencies that the necessary checks have been undertaken on all supply staff engaged by a school is based on good practice that is already applied in many educational settings and supply businesses as a result of the strong guidance that has been issued by the Department for Education and Skills over a number of years. The Government does not expect there to be significant additional costs. This element of the regulations will have limited impact on local authorities where they act as a supply agency.

3.13 Requiring schools to undertake the checks outlined in paragraph 1.1 ii and the records described in paragraph 1.1.iv that the necessary checks on staff have been carried out extends and clarifies the existing strong guidance. While it is the Government's view that schools should have been undertaking these checks and keeping records, Ofsted's findings suggest that many while undertaking the checks are not keeping adequate records. The additional burden on schools of undertaking these checks and maintaining a single central record of checks, once it is created, will be small. It is expected that undertaking the checks can be built into the routine processes of recruitment and that keeping this record up to date will usually be no more than two days of an administrative staff's time spread over the year, depending on the size of the school, the number of teachers and the frequency with which supply

staff are used. The Government is providing advice and guidance to schools on record keeping. Local authorities will already keep records of staff they employ and these regulations should not impose any significant additional administrative burden on them.

3.14 The Government recognises that, while the one-off exercise of creating the record is not a large one, it will involve a certain amount of work for school administrative staff as well as oversight from the school's senior management. There will be costs in terms of staff time associated with this one-off exercise which should be containable within increases in schools' budgets for the 2006-07 financial year and funded through headroom within the Dedicated Schools Grant. The Government is working closely with a group of stakeholders, including the IRU, to ensure that the Government's guidance for schools is as clear as possible and that the process is managed so as to keep burdens to a minimum. The IRU is a group of 12 senior school practitioners appointed by the Secretary of state to work with the DfES, local authorities and other partners to reduce the impact of bureaucratic burdens on schools.

4. SMALL FIRMS IMPACT TEST

4.1 These proposals do not have any significant impact on small businesses. There may be a small impact on supply agencies and employment businesses. However, indications are that the vast majority of supply agencies and employment businesses are already carrying out the full range of checks, including CRB checks. Additional costs associated with the latter are likely to be minimal. Agencies responding to the consultation welcomed these regulations, which will help to create even greater consistency across the workforce.

4.2 The number of foreign nationals recruited from overseas engaged by small firms is likely to be small so the additional cost of carrying out the additional checks on overseas staff is likely to be minimal. Moreover supply agencies are able to decide whether or not to reimburse the supply teacher for that cost.

5. COMPETITION ASSESSMENT

5.1 The standard RIA competition test has been applied, and there is no indication of adverse effects.

6. ENFORCEMENT, SANCTIONS AND MONITORING

6.1 In relation to maintained schools local authorities will have a central leadership role in ensuring that schools take the necessary steps to safeguard children from harm. Ofsted, as part of their regular inspection process will seek to determine how well schools comply with the regulations and associated guidance. Where schools are found to be placing the children for which they are responsible at risk of harm, Ofsted will comment on this in their report, if schools do not take the necessary steps to correct the situation then local authorities will have their powers of intervention which they could use to ensure that schools comply with the regulations. The Secretary of State also has powers under s497 of the Education Act 1996 to compel local authorities and governing bodies to comply with their statutory duties.

7. IMPLEMENTATION AND DELIVERY PLAN

These regulations will come into force on 1 January 2007. For all new staff appointed after this date to whom these regulations apply, schools will be expected to carry out and record these checks. From 1 April 2007 all schools must have a central record of all staff - existing and new appointments – who are covered by these regulations.

8. POST-IMPLEMENTATION REVIEW

8.1 Ofsted inspectors will examine school records to ensure compliance with these regulations. Where non-compliance is reported, the Government will consider what additional steps may be necessary to ensure that the regulations and guidance are followed.

9. SUMMARY AND RECOMMENDATION

9.1 The Government is committed to strengthening the existing safeguarding regime. To this end the Government has published revised guidance and subject to parliamentary procedure made revised regulations. Following Ofsted's June recommendations, the Government is in the process of ensuring that the records held by schools on their existing staff is complete. These regulations were promised to make the recording of a range of checks mandatory for all appointments to positions in schools, to strengthen the requirements schools in relation to supply staff and to ensure that foreign nationals recruited from overseas are all required to have a CRB disclosure.

9.2 Option 3 best meets ministerial policy commitments to safeguarding children whilst simultaneously minimising adverse impact on schools and those that supply staff to them. This is the recommended option.

10. DECLARATION AND PUBLICATION

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

Signed:
Jim Knight
Minister of State for Schools
Department for Education and Skills

29 November 2006

CONTACT POINT

Shahid Bashir
Child Protection Division
Department for Education and Skills
Caxton House

London SW1H 9NA

Telephone: 020 7273 5759

E-mail: shahid.bashir@dfes.gsi.gov.uk