

EXPLANATORY MEMORANDUM TO THE
DAY CARE AND CHILD MINDING (DISQUALIFICATION) (ENGLAND)
REGULATIONS 2005

2005 No. 2296

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

2. Description

2.1 The regulations give the grounds on which an applicant for registration as a childminder or day care provider is automatically disqualified. They list directions, determinations, offences and orders from all jurisdictions within the British Isles that indicate that an individual is not suitable to work with children. They give Ofsted the power to waive the disqualification in certain circumstances. Ofsted will also have the power to waive the disqualification for an employee. They also prescribe determinations made under the regulations as determinations against which the applicant has a right of appeal under section 79M of the Children Act 1989.

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

3.1 None

4. Legislative Background

4.1 These regulations are made under section 79C and paragraph 4 of Schedule 9A to the Children Act 1989.

4.2 Section 79C allows the Secretary of State to make regulations governing the activities of registered persons and provides that such regulations may provide for contravention of the regulations to be an offence.

4.3 Paragraph 4 of Schedule 9A allows the Secretary of State to make regulations providing for a person to be disqualified for registration for child minding or provision of day care (paragraph 4(1)). It also provides for regulations to allow the registration authority (Ofsted) to consent to the registration of a person who would otherwise be disqualified if that person makes the relevant facts known to the authority and the registration authority consents in writing (paragraph 4(3A)).

4.4 Paragraph 3A was inserted by the Education Act 2002. The existing regulations (The Child Minding and Day Care (Disqualification) (England) Regulations 2001) were made before this amendment to the Children Act 1989 and limited the automatic disqualification of applicants to those who had committed offences under the Criminal Justice and Court Services Act 2000 and those whose name appears on the Protection of Children Act list or on the Education Act list (List 99). The new regulations extend the range of directions, determinations, offences and orders which result in automatic disqualification to take into account the new power of waiver.

4.5 Section 79M of Part 10A of the Children Act 1989 was amended by the Education Act 2002 to allow for appeals to be made against determinations by HMCI in respect of decisions other than those already set out in section 79H, 79M(1)(a) and 79M(1)(b) of the Act. The effect of these regulations will allow for appeals to be made against decisions made by HMCI in respect the use of the power of waiver in disqualification cases under Schedule 9A of the Act.

5. Extent

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 No statement is required.

7. Policy background

7.1 The policy intent is to provide the greatest degree of protection of children by specifying the circumstances in which someone applying for registration as a childminder or day care provider is automatically disqualified. The grounds for disqualification include conviction for serious sexual and or violent offences against adults or children and orders which prevent the care of children in other contexts. Less than 1% of applicants are currently refused registration. We would not expect that percentage to change as a result of these regulations. Ofsted already rejects applicants on suitability grounds where applicants have committed certain offences.

7.2 An amendment to the Children Act has reintroduced the power of waiver that was previously available when local authorities acted as the registration authority. In re-introducing this we wanted Ofsted to be able decide whether to register persons who may otherwise be disqualified, providing that there is no threat to children. However we recognised that the waiver should not apply where an individual is on the Protection of Children Act list, or is on the Education Act list on the grounds of misconduct or has an order preventing the care of children against him/her under the Criminal Justice Court Services Act. In addition we wanted Ofsted to have the power to waive a disqualification that might otherwise apply to an employee.

7.3 We consulted¹ over a 12 week period, with organisations and

individuals that have an interest in the day care and childminding. 134 responses were received. This included 44 from local authorities and 62 from individual childminders or day care providers. 87% of respondents are supportive of these regulations. There was some concern about how Ofsted will use its power of waiver and a small number (2%) oppose its introduction. The Government however is satisfied that Ofsted, working in the child's best interests, will only use this power where it is satisfied that an applicant for registration poses no risk to children despite a past conviction.

7.4 These regulations have created little media attention. However in the wake of recent child protection cases these regulations serve to assert the importance of protecting children by ensuring that those that already have certain convictions or orders against them are not allowed to care for children as childminders or day care providers.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 There will be little impact on the public sector. Ofsted has indicated that there will be no increase in the cost of undertaking checks, or the time taken to do the checks, as a result of these regulations.

8.3 There are no additional costs to DfES or Ofsted other than the normal expenses of producing and distributing regulations and guidance.

9. Contact

Paul Oates at the Department for Education and Skills Tel: 0207 273 5686 or e-mail: Paul.OATES@dfes.gsi.gov.uk can answer any queries regarding the instrument.

¹ Early years regulations - <http://www.dfes.gov.uk/consultations/conResults.cfm?consultationId=1305>. Consultation closed on 24 June 2005

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 whilst 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.

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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

Early Years Regulations Team

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