Regulatory Triage Assessment

<table>
<thead>
<tr>
<th>Title of measure</th>
<th>Amendment to the Childcare Disqualification arrangements</th>
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<tr>
<td>Lead Department/Agency</td>
<td>Department for Education</td>
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<tr>
<td>Expected date of implementation</td>
<td>3 September 2018</td>
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<tr>
<td>Origin</td>
<td>Domestic</td>
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<tr>
<td>Date</td>
<td>09/05/18</td>
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<tr>
<td>Lead Departmental Contact</td>
<td>Mark Sawyer</td>
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<td>Departmental Triage Assessment</td>
<td>Low cost deregulation (below ±£5m EANDCB)</td>
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**Rationale for intervention and intended effects**

A consequence of the childcare disqualification arrangements is that it is an offence for a childcare provider to employ a person convicted or cautioned for specified offences, or where someone in their household has a relevant conviction or caution (known as 'disqualification by association'). Depending on the offence, the person is entitled to make representations to Ofsted to waive disqualification, but they cannot work in childcare during this period.

DfE is proposing to reform these arrangements, by removing the disqualification by association provision for staff providing childcare in non-domestic settings such as schools and nurseries. In these settings, disqualification by association is having a negative impact on:

- individuals who have not committed a crime and often feel they are being stigmatised;
- their families, which in some cases are separating to allow the childcare worker to remain in work;
- employers, who often find it difficult to redeploy staff, particularly in nursery settings. Employers often have no option other than to suspend that member of staff until an Ofsted waiver is obtained. In some cases, the arrangements are affecting employers’ ability to recruit.

Removing the disqualification by association restriction for employees in non-domestic settings will help realign the arrangements, so that the circumstance by which a person in non-domestic settings becomes disqualified is more proportionate to the risk. Employees will no longer need to seek a waiver and employers will not be compelled to redeploy or suspend a person disqualified by association.

Disqualification by association will continue to apply in domestic settings (e.g., where childcare is provided in a childminder’s home).

**Viable policy options (including alternatives to regulation)**

We made significant improvements to employers understanding and operation of the childcare disqualification arrangements by publishing statutory guidance (Disqualification under the Childcare Act 2006) in February 2012. Whilst this guidance was for schools, it is widely used by nurseries in the private, voluntary and independent (PVI) sector.

Although the guidance has been well received, the DfE’s ongoing engagement with stakeholders has shown that the fundamental concerns about the unfairness of disqualification by association and the negative impact it has can only be addressed
through changes to the legislative framework. Consequently, DfE considered three options for making change which it set out in a consultation document published in May 2016.

To meet our policy objective we consulted on 3 options:

1 - remove disqualification by association for childcare workers in schools/registered non-domestic (i.e. PVI) settings;
2 - introduce a new right to representation for all workers disqualified by association, or disqualified for other reasons, such as having registration refused or cancelled in relation to childcare; and
3 - reduce the scope of automatic disqualification by association, removing workers currently disqualified by association for less serious offences and removing those disqualified by association for other reasons, such as having registration refused or cancelled in relation to childcare.

The majority of responses to the consultation supported option 1, as do safeguarding experts and the majority of stakeholders DfE has continued to consult with.

**Initial assessment of impact on business**

By removing the disqualification by association criteria, the policy is likely to impact on a range of parties, including individuals and childcare providers both public and private. However, for the purpose of this assessment we will only consider the impact on private childcare providers (16,250), and independent schools (1,008).

The policy is anticipated to provide a net benefit, with the one off familiarisation costs (c.£7 and c.£19 per provider respectively) to in-scope providers in the first year of introduction, outweighed by the continuing annual benefits to them of reduced admin costs (c.£3,000 total per year) and lost work hours (c.£94,000 total per year).

As such, we anticipate the policy will have provide small but significant savings to providers.

**BIT status/score**

Non-qualifying regulatory provision.

**Rationale for Triage rating**

The equivalent annual net direct cost to business of the policy is below the +/-£5 million self-certification threshold. This has been agreed with the Department’s Better Regulation Unit.

**Departmental signoff (SCS): Stephen Baker**

Date: 10 May 2018
Supporting evidence

The policy issue and rationale for Government intervention

1. Under the current arrangements set out in the Childcare Act 2006 and the Childcare (Disqualification) Regulations 2009 (‘the Regulations’), it is an offence for a childcare provider to employ a person who is convicted of or cautioned for offences specified in the legislation, or where someone in their household has been cautioned or convicted of a specified offence. Depending on the offence, the person is entitled to make representations to Ofsted to waive disqualification, but they cannot work in childcare during this period.

2. At the point an employer becomes aware that an employee is disqualified they can either redeploy the individual, suspend them whilst the individual makes an application for waiver to Ofsted, or dismiss them where the employer considers there is reason for doing so. These arrangements mean that a significant number of individuals have been temporarily excluded from working in childcare whilst Ofsted considered their application, many due to disqualification by association, i.e. because someone in their household has committed a relevant offence. Further details of the current regulatory position are set out in Annex A below.

3. Individuals are obliged to identify that they are disqualified. Many childcare workers are unaware or unwilling to declare their disqualified status, particularly where it relates to disqualification by association. A change in policy provides an opportunity for the government to help employers approach disqualification by association differently, by encouraging them in statutory guidance to better manage cases where criminality in the home is identified without the need to prohibit workers through legislation.

4. Stakeholder engagement over the last four years has shown that this policy is widely misunderstood, particularly in relation to the relevant qualifying offences, their disclosure and when it is necessary for individuals to apply for a waiver in cases of disqualification by association. Updating guidance to support delivery of the proposed change by amendment to the Regulations, along with supporting departmental communications around the changes, provides an opportunity to better address some of these misconceptions and raise awareness.

5. The arrangements have a significant impact on independent schools and private, voluntary and independent nurseries, as well as affected individuals. DfE is seeking to address the above issues by amending the Regulations.

Policy objectives and intended effects

6. The objective is to reform the system so that it continues to protect children from risk of harm, safeguards employers - helping them make sound employment decisions - and protects individuals’ rights to fair treatment, by addressing the unfairness of the disqualification by association arrangements within the current regime.

7. To meet these objectives DfE will rebalance the effect of the Regulations so that the process by which a person becomes disqualified is more proportionate to the risk to children. Where there is no or extremely little risk to children’s safety, amended regulations will remove a number of childcare workers from the arrangements. This will stop some employers having to redeploy or suspend a person who is disqualified by association, while that individual makes representations to Ofsted.
8. DfE initially concluded that improved understanding and clarity might result in more cases of disqualification coming forward and potentially a greater cost burden across settings. Based on the significant decrease in Ofsted waiver applications since 2015 and their steady state over the subsequent years DfE now consider an increase in numbers of staff identifying themselves as disqualified to be unlikely.

9. Publishing departmental advice in 2014, followed by statutory guidance in 2015, did result in a significant increase in waiver applications to Ofsted, particularly from school-based staff. The total number of waiver applications received in the period October 2014 to September 2015 was 1,397, none of which were declined. The numbers of waiver applications have reduced significantly and stabilised since 2015. Based on the number of waiver applications from school staff in 2016/17, removing the disqualification by association requirement would have removed 175 of the 260 applications received from schools settings.

10. On the basis of these numbers, DfE expect the workload of employers and Ofsted to reduce as a result of the change we are making.

Policy options considered, including alternatives to regulation

11. DfE published statutory guidance in February 2015 in the form of Disqualification under the Childcare Act 2006. Whilst this guidance is primarily targeted at schools, it is relevant to all childcare providers in non-domestic settings and is referenced in the DfE’s Early Years Foundation Stage (EYFS), which sets standards that all early years providers must follow, including childminders, pre-schools, nurseries and school reception classes.

12. Although this guidance was well received DfE continues to receive representations from a range of stakeholders, including about individuals’ employment status (i.e. do the arrangements prohibit an individual from working in childcare) and more widely the impact of the arrangements on the delivery of childcare. These representations have focussed particularly on the unfairness of the disqualification by association component of the arrangements, which require immediate suspension or redeployment of a childcare worker where a relevant offence has been committed by someone living or working in the worker’s home.

13. Whilst DfE is committed to reviewing and improving its guidance, it is clear that these ongoing concerns can only be addressed through changes to the legislative framework. That is why the department considered and published three options for making change, as follows:

Option 1 - Remove disqualification by association for childcare workers in schools and registered non-domestic settings. This option would remove those childcare workers in schools and non-domestic settings who fall within scope from the arrangements. Based on Ofsted’s Management Information (MI) of waiver applications prior to consultation, DfE estimated that this option would remove around 60 - 65% of all childcare workers disqualified under the current arrangements. Based on current Ofsted MI its estimate of impact remains the same. The option carries a low risk associated to child protection - in that it could be interpreted that DfE is relaxing child protection arrangements (Ofsted’s MI for the Financial Year 2016/17 shows two waiver applications declined in cases of disqualification by association in a school setting and none in a registered non-
school setting). DfE plans to mitigate the associated risk by providing revised statutory guidance to enable employers to manage locally issues related to disqualification by association.

**Option 2 - Introduce a new right to representation** for all workers disqualified by association in schools and non-domestic settings (PVIs), or disqualified for other reasons, such as having registration refused or cancelled in relation to childcare. This option assumes that all these disqualified childcare workers would otherwise have had a waiver granted by Ofsted, after a period of suspension. Whilst it would allow childcare workers to continue to work in childcare while Ofsted considered the worker’s representations, it would create an additional tier to the arrangements, adding to their complexity, and generate additional work for Ofsted. It would not though address the perceived unfairness of by association, or address issues of disharmony in the home and workplace.

**Option 3 - Reduce the scope of automatic disqualification by association**, removing workers currently disqualified by association for certain less serious offences (e.g. minor violent and non-sexual offences) and removing those disqualified by association for other reasons, such as having registration refused or cancelled in relation to childcare or children’s homes. This option would also introduce a new right to make representations for all other workers disqualified by association (i.e. where disqualification relates to a more serious offence) and for those workers who themselves are disqualified for other reasons (e.g. they have had their registration refused or cancelled in relation to childcare or children’s homes). Whilst this option would go some way to address the unfairness of disqualification by association and the arrangements more widely, it would make them more complex to understand and operate.

**Consultation**

14. DfE carried out an 8-week consultation on these options for reform, which concluded on 1 July 2016. The consultation received 441 responses, the overwhelming majority of which (78%) indicated that the current disqualification by association arrangements are unfair and disproportionate to the risk to children.

15. The most favoured option for change was option 1, with 60% of respondents expressing a preferred option choosing it. Alternatively, 17% favoured option 2 and 22% option 3. The principal arguments in support of option 1 included:

- the by association arrangements take no account of the actual risk to children;
- the wider safeguarding arrangements in place under the Disclosure and Barring Service (DBS) regime are largely sufficient to guard against the risks to children;
- the arrangements are complicated as they stand and are thus ineffective.

16. Further arguments are made in support of option 1 on the grounds that the by association arrangements are unfair/unjust, i.e. they penalise innocent people and in many cases force them to choose between their partners or family, and work. In contrast, the arguments put forward against option 1 and/or in support of the other two options were relatively narrow in scope and focused on these alternatives being an acceptable compromise. There was though widespread acknowledgement that both options 2 and 3 (particularly the latter) add complexity to a regime that is already difficult to understand and operate.
17. Following consultation, only option 1 is being carried forward for cost/benefit analysis, including its impact on businesses.

**Expected level of business impact**

**Scope of impact**

18. The proposed changes to the arrangements focus on the childcare disqualification arrangements applying to schools, private, voluntary and independent (PVI) nurseries and other non-domestic registered providers.

**Analysis of preferred option (1)**

19. It should be noted that this analysis was originally undertaken in 2016, and as such many of the assumptions are underpinned by evidence dating back to 2014 and 2015. However given the policy environment, wages, market composition, workforce and costs have remained relatively stable since then we are confident that these assumptions are still valid. This combined with the small impact associated with the policy, means we have taken a proportionate approach to this analysis, and have continued to use the original assumptions and evidence used rather than update the under lying assumptions.

20. Under this option, there are only monetised transactional costs, and all benefits arise from the change in approach to disqualification by association cases only, i.e. the removal of disqualification by association for childcare workers in schools and registered non-domestic settings. These annual benefits and equivalent costs are:

<table>
<thead>
<tr>
<th>Costs</th>
<th>£0.132m over 10 years for transitional familiarization costs for managers to become acquainted to the changes in regulations and accompanying guidance;</th>
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<tr>
<td></td>
<td>(Number of PVI providers x manager hourly rate x 0.5 hours x percentage accrued in businesses) + (number of schools x manager hourly rate x 0.5 hours x percentage accrued in businesses)</td>
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<td></td>
<td>PVI (250001 * £13.972 * 0.53 * 0.65) + Schools (168001 * £37.252 * 0.53 * 0.065) =</td>
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<tr>
<td></td>
<td>£0.132m</td>
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<td>To consider the annual equivalent value, we divide this total by anuity rate for the 10-year evaluation period.</td>
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1 Childcare and Early Years Provider Survey: 2013, DfE, (2014)
2 Childcare and Early Years Provider Survey: 2013, DfE, (2014), with addition 25% on cost assumption based on DfE School Paybill Model
3 Working assumption, due to lack of available evidence. Sensitivity analysis found that doubling the assumption still lead to EANDCB <£5m, and a positive NPV to the policy.
4 Childcare and Early Years Provider Survey: 2013, DfE, (2014), with internal DfE guidance for % public provision by age group
5 Schools, pupils and their characteristics: January 2015, DfE, (2015), based on % of school based under 5 pupil headcount from independent sector
<table>
<thead>
<tr>
<th>Benefits</th>
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<tr>
<td>£0.094m per year directly for businesses, due to workers who</td>
<td>£0.003m per year resulting from provider admin staff not</td>
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<tr>
<td>would otherwise have been suspended pending the outcome</td>
<td>having to support staff applying for waivers, considering</td>
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<td>of a waiver application, now being able to work;</td>
<td>assessments of disqualification, or notifying Ofsted;</td>
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<tr>
<td>Number of cases × % not in public sector × hours lost per case ×</td>
<td></td>
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<tr>
<td>average hourly wage (incl. on-costs) in each setting:</td>
<td>(Number of cases × time spent per case × hourly wage of</td>
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<tr>
<td>PVIs (100(^7) * 65(^8)% * 84hrs(^9) * £9.84(^10)) + Schools (299(^7) * 6(^11)% *</td>
<td>support staff) × % not in public sector</td>
</tr>
<tr>
<td>84hrs(^9) * £26.52(^12)) = £0.094m</td>
<td>PVIs (100(^7) * 2.175hrs(^13) * £13.97(^10)) * 65(^8)% +</td>
</tr>
<tr>
<td></td>
<td>Schools (299(^7) * 2.175hrs * £26.52(^12)) * 6(^11)% = £0.003m</td>
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### Other (non-monetised) Impacts

21. In addition to the costs and benefits listed above, there are likely to be further impacts not considered here associated with better employer-employee relations. These include an improved well-being and sense of fairness leading to improved productivity, reduced strain on providers, needing to redeploy or suspend staff, and having to find cover, and potentially a greater range of applicants. However, we have not attempted to include these, due to a lack of readily available evidence and a desire to take a proportionate approach given the scale of the policy.

22. In addition, there are other benefits not included here, such as the time saved for workers no longer having to apply for waivers, and Ofsted no longer having to spend staff time processing waiver cases. However as these benefits do not

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\( a_{r,t} = \sum_{j=0}^{t-1} \prod_{i=0}^{j} \left( \frac{1}{1 + r_i} \right) \)

\( 6 \) Based on the Green Book discount rate of 3.5%, time period of 10, and the following annuity rate equation;

\( 7 \) Based on information provided by Ofsted

\( 8 \) Childcare and Early Years Provider Survey: 2013, DfE, (2014), with internal DfE guidance for % public provision by age group

\( 9 \) Based on management information and feedback provided by Ofsted

\( 10 \) Childcare and Early Years Provider Survey: 2013, DfE, (2014), with addition 25% on cost assumption based on DfE School Paybill Model

\( 11 \) Schools, pupils and their characteristics: January 2015, DfE, (2015), based on % of school based under 5 pupil headcount from independent sector

\( 12 \) School workforce in England: November 2014, DfE, (2015), with addition 25% on cost assumption based on DfE School Paybill Model

\( 13 \) Based on management information and feedback provided by Ofsted, assumed to be 50% of time required for Ofsted to process cases
accrue directly to businesses, they are out of the scope of this RTA.

23. As such, we believe the true value of the benefits arising from the policy have the potential to be larger than quoted here.

24. We acknowledge that removing disqualification by association where childcare is provided in non-domestic settings does present a very small residual risk to the safeguarding of children. We have taken advice from a range of professionals about the consequences of this change and informed opinion is that the risks associated with the reform are considerably outweighed by the benefits the removal of disqualification by association will have on employees and employers, in what are widely considered safe settings.

25. This is supported by the evidence we have from the Ofsted waiver process, particularly the extremely low number of waiver applications in cases of by association in non-domestic settings that have been declined over a number of years. Similarly, from what we know about historic cases of child abuse in a nursery setting, we are not aware that this was instigated by anyone in the employee’s household, so the arrangements and guidance as they currently stand would not have mitigated the risk.

26. Conversely, representations we have received have indicated that a significant number of families are being disrupted by the current arrangements, so the change will address this and support safe and stable home environments in a modest, but not insignificant number of households.

27. We intend to manage the residual risk through improvements to our statutory guidance, which will support employers in this important area. Revised guidance will reinforce existing safeguarding policies provided in our *Keeping children safe in education* statutory guidance, particularly in the area of safer recruitment checks. It will also encourage employers to consider whether their policies are clear about the expectations they place on staff, including where their relationships and associations outside of the workplace may have implications for the safeguarding of children in the school or setting. Our aim is to help schools and providers create the right culture and environment, so employers can both safeguard their employees’ welfare and help them manage children’s safety.

**Net saving to business:**

28. Using the BEIS - IA calculator, **2014 prices** and **2015 present value base year**, the following benefits are estimated:

   a. *(EANDCB)* in 2014 prices/2015 base year is **£ 0.1m**
      i. Equivalent of PV over 10 years of benefits minus costs, divided by the annuity rate of 8.607
   b. A **BIT score** *(5*EANDCB)* in 2014 prices/2015 base year of **-0.5**
   c. In **NPV** terms over 10 years, total economic benefit to business is estimated to be **£0.7m**.

29. For reference, if we instead use 2018/19 as the price year, the benefits would be estimated as;

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14 This is consistent with the time period of the evidence, which we believe is still representative, and when this analysis was originally carried out.
a. (EANDCB) of -£0.1m
b. A BIT score of -0.5
c. A Business NPV over 10 years of £0.74m
Annex A: Childcare disqualification arrangements

The childcare disqualification arrangements are set out in the Childcare Act 2006 and the Childcare (Disqualification) Regulations 2009 (‘the Regulations’). They apply to schools, private, voluntary and independent (PVI) nurseries and other non-domestic providers, as well as childcare providers working on domestic premises. The childcare disqualification regime is additional to the arrangements in place to safeguard and promote the welfare of all children set out in *Keeping children safe in education* and apply only childcare.

The childcare disqualification arrangements automatically disqualify a person from providing, working in or being directly concerned in the management of that childcare at the point they are convicted of or cautioned for specified offences, or where they meet other disqualification criteria set out in the Regulations. The qualifying offences and relevant orders are set out in the Regulations and are reproduced in the DfE’s statutory guidance *Disqualification under the Childcare Act 2006.*

The obligations under the Childcare Act prohibit employers from employing a person who is disqualified under the Regulations to work in relevant childcare provision. Relevant childcare provision includes schools and PVIs providing childcare to children that are under 8 years of age in specified settings and includes:

a. care that is provided for a child up to and including reception age (September after the child’s 5th birthday), including education to those in nursery and reception classes and/or any form of supervised activity for children in the same age range both during and out of school hours; and

b. childcare outside of school hours for children under the age of 8.

The disqualification criteria, which are laid out in the regulations, include:

- being cautioned for or convicted of certain violent and sexual criminal offences against children and adults;
- inclusion on the children’s barred list held by the Disclosure and Barring Service (DBS);
- grounds relating to the care of children (including where an order is made in respect of a child under the person’s care);
- having registration refused or cancelled in relation to childcare or children’s homes or being disqualified from private fostering;
- living in the same household where another person who is disqualified lives or works (disqualification by association).

The arrangements in schools are supported by statutory guidance, *Disqualification under the Childcare Act 2006.* This guidance replaced supplementary advice *Keeping children safe in education: childcare disqualification requirements* first published in October 2014. The DfE provides guidance for PVIs in the *Early Years Foundation Stage* (EYFS).

Employers must act on information provided by the employee. This means that where a childcare worker notifies their employer that they meet the relevant criteria the employer must not deploy the worker to work in childcare, although it may redeploy the worker, or suspend them. Exceptionally the employer may dismiss the childcare worker.

Depending on the offence, the childcare worker is entitled to make representations to Ofsted to waive the disqualification, but they cannot work in childcare during this period.

**URN:** BIS/16/178