

**EXPLANATORY MEMORANDUM
TO**

**THE FURTHER EDUCATION (PROVIDERS OF EDUCATION) (ENGLAND)
REGULATIONS 2006**

2006 No.3199

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 require further education (FE) institutions to undertake on-appointment checks on all new staff providing education in the institution. These requirements also apply to staff who have had a break from employment in a school or FE institution of more than three months. Checks also have to be carried out in respect of staff supplied by a supply agency. The mandatory checks comprise:

- identity;
- right to work in the UK;
- relevant qualifications;
- List 99;
- enhanced Criminal Records Bureau (CRB) disclosures (where the person's position will involve regularly caring for, training, supervising or being solely in charge of persons under 18); and,
- where appropriate, additional checks on those who have lived outside the UK (for example, via the embassy or police force of the relevant country/countries).

2.2 These regulations also require FE institutions to maintain a single record which shows, in respect of each person providing education, whether the relevant check was done and when.

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

3.1 None

4 Legislative Background

4.1 The then Secretary of State for Education and Skills, Ruth Kelly, gave an undertaking (HC Statement 19 February 2006 col 966) to introduce a range of measures to safeguard young learners (and vulnerable adults). One specific commitment was to make CRB checks mandatory for all new appointments to schools. In a written statement to the House of Commons (HC 1 March 2006 col 24WS), she extended the commitment to 'equivalent regulations' for FE institutions. As paragraph 7.5 of this Explanatory Memorandum explains, existing legislation allows enhanced CRB checks to be made mandatory for staff providing education who regularly caring for, train, supervise or are solely in charge of persons under 18.

4.2 Following the publication of Ofsted's report '*Safeguarding Children*', the current Secretary of State, Alan Johnson, in a statement to the House of Commons on 20 June (HC 20 June 2006 col 1191) went further. He announced that all FE institutions, in common with all schools, should undertake checks on existing staff for whom no record is extant. FE institutions will be expected to hold a defined minimum of information on staff, maintained in a single, central record. These will be checked as part of regular Ofsted inspections.

5 Territorial Extent and Application

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 Following the murder of two schoolgirls in Soham in 2002 and the public outcry that followed, the Government appointed a commission of enquiry headed by Sir Michael Bichard. His report was published in June 2004 and its recommendations included significant strengthening of vetting procedures, compulsory enhanced CRB checks for teachers in schools, and stronger guidance on safeguarding and recruitment procedures. The major legislative response has been the Safeguarding Vulnerable Groups Act which establishes a new vetting and barring scheme, independently administered, to improve the safeguarding of young people (and vulnerable adults). The provisions of the Act will come into effect in 2008.

7.2 Currently, statutory guidance issued by the Department for Education and Skills recommends that members of teaching staff in FE institutions should have a range of checks, including CRB checks, prior to, or as soon as possible following, appointment. However, there is no legal requirement upon institutions to undertake such checks. Instead, the Learning and Skills Council (LSC), which funds FE institutions, requires through its funding agreements that they exercise care over learners. The LSC's monitoring arrangements aim to ensure that safeguarding measures are adopted by those institutions with whom they contract.

7.3 Strong though these measures are, the Government has concluded that until the provisions of the Safeguarding Vulnerable Groups Act come into force, the potential risk to children from unsuitable persons requires the introduction of Regulations. These Regulations are an important measure designed to strengthen existing safeguarding arrangements in FE institutions.

7.4 The Regulations require a number of specific checks on all those providing education in an FE institution, as well as enhanced CRB checks for people providing education whose responsibilities include regularly caring for, training, supervising or being solely in charge of persons under 18. The Regulations also require that a proper record of those checks be kept by the FE institution. It is the Government's view that persons "providing education" is likely to include not just teachers and trainers, but

also teaching assistants, laboratory technicians and classroom/workshop demonstrators.

7.5 There is no scope under existing legislation to introduce regulations either to make these checks mandatory for staff who are not providing education or to make enhanced CRB checks mandatory for those whose roles do not require them to have regular contact with children. Existing legislation also prevents these regulations from making enhanced CRB checks mandatory for those teaching vulnerable adults.

Consultation

7.6 The Department undertook a focused consultation via its Learning and Skills Safeguarding Stakeholder Group, which included representatives from key organisations working across the learning and skills sector, including the Association of Colleges, LSC, Association of College Managers, Ofsted and others. The consultation ran from 8 September and closed on 13 October. The length of the consultation period was dictated by the short timescale for bringing in regulations and by the fact that those consulted were already aware of the main issues as members of the stakeholder group. Five responses were received.

7.7 The consultation asked questions that focussed on the types of checks that should be undertaken and the frequency with which they should be carried out. There was agreement in the responses that enhanced CRB checks (where they apply) and checks on staff from overseas did not need to be repeated where the person had continuity of service, ie had not had a break of more than three months between employments in an educational institution. This is reflected in the regulations.

7.8 There was, however, no clear consensus on the frequency of checks on supply staff but there was agreement that they should be treated in the same way as permanent staff. Again, the regulations reflect this.

7.9 The responses did acknowledge the need for regulation, although there was general concern about the narrow scope of the regulations. 7.5 above explains why the Department cannot widen the scope at present.

Guidance

7.10 The Department published revised and consolidated guidance - *Safeguarding Children and Safer Recruitment in Education* - on 14 November 2006. This guidance sets out the responsibilities of FE institutions (and schools and local authorities also) to safeguard children and young people and explains the obligations that these regulations will introduce.

Consolidation

7.11 The regulations do not amend another instrument.

8 Impact

8.1 A Regulatory Impact Assessment has been prepared and is attached to this Explanatory Memorandum. As most FE institutions already undertake checks when

making new teaching appointments and also record checks properly, the impact of these Regulations should not prove onerous or expensive.

8.2 The obligations in this instrument will have limited impact on the public sector. This is set out in detail in the attached Regulatory Impact Assessment.

9 Contact

9.1 Any enquiries about the contents of this memorandum should be addressed to: Mr Lawrence Fry, Improvement Group, Department for Education and Skills, email: lawrence.fry@dfes.gsi.gov.uk, telephone: 0114 259 1159

REGULATORY IMPACT ASSESSMENT (RIA)

REGULATIONS FOR MAKING SAFEGUARDING, IDENTITY AND QUALIFICATION CHECKS MANDATORY FOR THOSE PROVIDING EDUCATION IN FE INSTITUTIONS AND FOR FE INSTITUTIONS TO KEEP A SINGLE RECORD OF CHECKS ON THESE STAFF

1. PURPOSE AND INTENDED EFFECT

Objective

1.1 To make mandatory the existing guidance to carry out the following list of checks on all new staff who are providing education and appointed to the workforce of further education (FE) institutions (ie FE colleges), either prior to appointment, or as soon as possible following appointment:

- identity;
- right to work in the UK;
- relevant qualifications;
- List 99;
- enhanced Criminal Records Bureau (CRB) disclosures (where the person's position will involve regularly caring for, training, supervising or being solely in charge of persons under 18); and,
- where appropriate, additional checks on those who have lived overseas (for example, via the embassy or police force of the relevant country/countries).

1.2 The Government proposes to implement these requirements via regulations made under Section 136(c), 210(7) and 214 of the Education Act 2002. Section 136(c) empowers the Secretary of State to "specify conditions to be complied with by or in respect of persons providing education at a FE institution."

1.3 The regulations apply to staff directly appointed by the FE institution and to staff supplied by employment agencies who 'provide education' and, in the case of enhanced CRB checks, who are also regularly caring for, training, supervising or being in sole charge of persons aged under 18. It is the Government's view that persons 'providing education' in FE institutions would include teachers and trainers, and also teaching assistants, laboratory technicians, and classroom/workshop demonstrators.

1.4 The regulations also require that FE institutions maintain a register of the checks that they make on those providing education. For each of these checks the date on which the check was completed must also be recorded.

1.5 These regulations are one of a number of measures designed to strengthen current safeguarding arrangements until the provisions of the Safeguarding Vulnerable Groups Act come into effect in 2008.

Background

1.6 On 19 January 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'. In a written statement to the House on 1 March, she confirmed that FE institutions would be subject to 'equivalent regulations' introducing a similar mandatory requirement for CRB checks

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 checks as strongly recommended in DfES guidance. Their report, '*Safeguarding Children*', was published on 20 June. Of the institutions surveyed, all had complied with guidance by seeking enhanced CRB checks for all staff with 'substantial' or 'specific' contact with children. 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 was subject to a public consultation, which closed on 12 October, and was published as *Safeguarding Children and Safer Recruitment in Education* on 14 November. It consolidates and updates a range of previous guidance and explains the recruitment and vetting checks that should 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 being proposed here 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 teaching staff in FE institutions should have a range of checks - including enhanced CRB checks - 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 making these checks mandatory for those providing education in FE institutions would help to reduce further the possibility that unsuitable people could gain access to children through the college teaching workforce. In turn it would, reduce the risk of harm and associated costs, both social and economic.

1.13 However, it is important to note that there is no scope under existing legislation to introduce regulations either to make these checks mandatory for staff who are not providing education or to make enhanced CRB checks mandatory for those whose roles do not require them to have regular contact with children. Existing legislation also prevents these regulations from making enhanced CRB checks

mandatory for those teaching vulnerable adults in an FE institution. Nor do these regulations have application beyond colleges. However, revised Departmental guidance does make it clear that, with the exception of the enhanced CRB check, all staff should receive these checks and evidence suggests that in practice they do so.

1.13 It is also sensible to strengthen the current record-keeping regime in FE institutions. The recent Ofsted report reported 'robust procedures in place to carry out checks on teaching staff who normally come into contact with children.' However, despite some good practice, the procedures adopted by most of the FE institutions 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 will ensure that the good practice identified by Ofsted will become standard practice across all institutions.

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 other officials within the Department for Education and Skills have all been consulted on these proposed regulations.

Public Consultation

1.16 Consultation on these regulations was carried out via the Learning and Skills Safeguarding Stakeholder Group between September and October 2006. This group comprises key stakeholders from the FE sector and advises the Department on safeguarding. Wider consultation with the sector has been encouraged through these stakeholder contacts.

1.17 Revised guidance was 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 nothing.

Option 2

2.2 Make the checks listed at 1.1 mandatory (subject to the limitation whereby an

enhanced CRB disclosure can only be a requirement for those providing education and who will be regularly caring for, training, supervising or being solely in charge of persons under 18) for:

- all new staff providing education in FE institutions (ie those who have never worked in a school or FE college before), and
- all those providing education who have not worked with under 18s within a school or FE institution during the preceding three month period.
- Require FE institutions to set up and maintain a single record of these checks.

Option 3

2.3 Make these checks compulsory for:

- all staff, existing as well as new, providing education in FE institutions (subject to the limitation whereby an enhanced CRB disclosure can only be a requirement for those providing education and who will be regularly caring for, training, supervising or being solely in charge of persons under 18)
- require FE institutions to set up and maintain a single record of those checks.

3. BENEFITS AND COSTS

Sectors and groups affected

3.1 FE institutions, new appointments of staff who “provide education”.

Benefits

Option 1

3.2 Allows FE institutions to continue as present. However, this would lead to inconsistent practice when compared to schools 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 is but one element of the process and the guidance would lack legal enforceability unless these regulations were made. Therefore, leaving the current system untouched is not an option.

3.3 A commitment to make CRB checks compulsory for all new staff appointed to the schools workforce was made in January and a commitment to ‘equivalent regulations’ was made by Ruth Kelly in the following March. The Government considers that this, together with a requirement to make and record the other checks specified in the regulations, would help to strengthen the existing system, further help to safeguard children from harm and help to maintain public confidence in the system.

In addition, with this option, the deficiencies in record keeping highlighted in the Ofsted report would also go unaddressed.

Option 2

3.4 This option strengthens the existing safeguarding regime at minimal cost and effort. For new staff providing education, making these checks mandatory as part of the recruitment process will provide important additional safeguards, as the FE institution will have no track record of their performance in the education sector and limited knowledge of their history. It is proposed that enhanced CRB checks will also be required for all staff providing education (and who will be regularly caring for, training, supervising or being solely in charge of persons under 18) who have been out of the schools/college workforce for more than three months. The single record will address concerns about record keeping and ensure that the full range of checks specified in the regulations is maintained.

Option 3

3.5 The Government does not believe it is necessary to CRB check all existing staff providing education, 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.

3.6 That said, following the Ofsted report on record keeping in June, the Government decided that all FE institutions 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 checks and the other checks set out in para 1.1 having been carried out 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 checks 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. As with Option 2, this option requires the creation of a single record for these checks.

3.7 In some circumstances, checks will be considered by an FE institution to be appropriate for some existing staff (although the current exercise should plug these gaps.) 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 making an enhanced CRB check; for example if there is evidence of behaviour giving cause for concern, or if there is a potential for harm.

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 proposed regulations do not put entirely new responsibilities on FE institutions. They are based on good practice that is already applied by many FE institutions as a result of guidance that has been issued by the Department over a number of years, as well as contractual obligations imposed by the Learning and Skills Council (LSC). Both Departmental guidance and LSC funding conditions and monitoring arrangements are currently in the process of being tightened.

3.10 Most FE institutions are already carrying out these checks with respect to staff working regularly with children. In the event that some may not have adopted the strong guidance and good practice, some additional costs will be incurred. However, the responsibility for paying for these checks rests with the prospective employee. Where FE institutions decide to meet these costs, it is expected that the costs will be small and can be met from within their existing budgets. The record-keeping exercise may also identify gaps in records and where these are CRB checks on staff that should have had them prior to the start of the exercise, FE institutions will be expected to meet the cost. Although it is not possible at this stage to give a firm indication of the burden that additional checks may have upon FE institutions, for the majority the additional costs are expected to be minimal.

3.11 Similarly, many FE institutions maintain effective record keeping processes, either electronic, paper-based or a combination of both. However, the Ofsted report did draw attention to deficiencies, so regulating to ensure that a minimum level of information is centrally maintained will deal effectively with anomalies and ensure that a 'level playing-field' will extend across all institutions. Any costs associated with setting up and maintaining the record are likely to be small and can be met from within existing college resources.

Option 3

3.12 As with Option 2 above, the current record-keeping exercise will ensure that all the checks identified under para 1.1 above should be completed to bring existing records up to date. Although this will throw up some gaps in the CRB record for existing staff, legislating to make enhanced CRB checks mandatory for the entire workforce at this stage represents an unnecessary burden. Aside from the additional costs involved, there is the logistical issue of the CRB being resourced to cope with a potentially large number of additional CRB checks. The workforce will be captured over time following the introduction of the Vetting and Barring Scheme, expected to come into effect in 2008.

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 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 welcome these regulations, which will help to create even greater consistency across the workforce.

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 As part of their inspections, Ofsted will look to ensure that FE institutions have correctly followed recruitment processes, including CRB checks where appropriate. We are also working with the LSC to enhance existing monitoring procedures to ensure better safeguarding of learners.

7. IMPLEMENTATION AND DELIVERY PLAN

7.1 These regulations will come into force on 1 January. For all new staff appointed after this date to whom these regulations apply, FE institutions will be required to carry out and record these checks. From 1 April all FE institutions should 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 FE institutions' records to ensure compliance with these regulations. Where non-compliance is reported, the Department will consider what additional steps may be necessary to ensure that new staff recruited to roles providing education are properly checked and those checks recorded.

9. SUMMARY AND RECOMMENDATION

9.1 The Government is committed to strengthening the existing safeguarding regime. To this end the Department has published revised guidance and, following Ofsted's June recommendations, is in the process of ensuring that the records held by FE institutions on their existing staff is complete. Regulations have been promised to make a range of checks mandatory for all new appointments to positions providing education in FE institutions.

9.2 Option 2 best meets ministerial policy commitments to safeguarding young learners whilst simultaneously minimising adverse impact on FE institutions and those that supply teaching 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:
Bill Rammell

Minister of State for Lifelong Learning, Further and Higher Education
Department for Education and Skills

30 November 2006

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