

**EXPLANATORY MEMORANDUM & REGULATORY IMPACT
ASSESSMENT FRAMEWORK
TO
THE PERSONS PROVIDING EDUCATION AT FURTHER EDUCATION
INSTITUTIONS IN WALES (CONDITIONS) REGULATIONS 2007
2007 No.**

1. This explanatory memorandum has been prepared by the Department for Education, Culture and Welsh Language and is laid before the National Assembly for Wales.

2. Description

- 2.1 These regulations require further education (FE) institutions to undertake pre-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.
- 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 Subordinate Legislation Committee

- 3.1 None

4 Legislative Background

- 4.1 The Welsh Ministers propose to implement these requirements via regulations made under Sections 136(c), 210(7) and 214 of the Education Act 2002. Section 136(c) empowers the Welsh Ministers to “specify conditions to be complied with by or in respect of persons providing education at a FE institution.” Exercise of these powers was conferred on the National Assembly for Wales in the Education Act 2002 and transferred to the Welsh Ministers by the provisions of paragraph 30 of Schedule 11 of Government of Wales Act 2006⁽¹⁾.
- 4.2 The statutory instrument is to be made using the negative resolution procedure.

⁽¹⁾ 2006 c32.

5. Purpose and Intended Effect of the legislation

Background

5.1 Currently, guidance² issued by the Welsh Assembly Government recommends that members of teaching staff in FE institutions should have a range of checks, including Criminal Records Bureau (CRB) checks, prior to, or as soon as possible following, appointment. However, there is no legal requirement upon institutions to undertake such checks.

5.2 On 24 January 2006 the then Minister for Education, Lifelong Learning and Skills, Jane Davidson, wrote to relevant stakeholders, including FE institutions, notifying them of the actions she intended to take in order to strengthen child protection arrangements in Wales. The Minister's letter reiterated existing policy about the need for employers to exercise robust pre-appointment procedures to prevent unsuitable people from working with children. The Minister also gave notice to stakeholders of the intention to introduce new legislation to make CRB checks compulsory across the school work force in Wales.

5.3 In addition, in February 2006, the Minister commissioned Estyn to carry out a survey³ of existing vetting practices in a sample of schools and further education institutions in Wales. Overall, the survey confirmed that there were satisfactory arrangements in place:

- for Enhanced Criminal Records Bureau checks to be carried out on job applicants whose work would involve contact with children;
- to confirm applicant's identity;
- to take up of professional and character references; and
- for ensuring supply staff have the necessary CRB clearance.

However, the survey also identified a number of areas as being unsatisfactory and which need to be addressed including record keeping.

5.4 In light of these recommendations the then Minister for Education, Lifelong Learning and Skills made additional commitments in respect of further education institutions in Wales. These included the intention to introduce new legislation to make a number of pre-employment checks compulsory, the requirement to maintain a single central record of the checks carried out as well as additional requirements in respect of checks on agency staff and staff who have lived overseas.

5.5 Similar provision has been made in England and came into force on 1st January 2007.

² Child Protection: Preventing Unsuitable People from Working with Children and Young Persons in the Education Service, NAFW Circular 34/2002

³ A Survey of Procedures for Vetting School Staff and Other Adults, Estyn 2006

Objective

- 5.6 To make mandatory the existing guidance to carry out the following checks on all new staff who are providing education and appointed to the workforce of FE institutions, either prior to appointment, or as soon as possible following appointment:
- identity;
 - right to work in the UK;
 - relevant qualifications;
 - List 99;
 - enhanced 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).
- 5.7 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, to staff who are also regularly caring for, training, supervising or being in sole charge of persons aged under 18. It is the view of the Welsh Assembly Government that persons 'providing education' in FE institutions would include teachers and trainers, and also teaching assistants, laboratory technicians, and classroom/workshop demonstrators.
- 5.8 The regulations also require that FE institutions maintain a register (single record) 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.
- 5.9 These regulations are designed to strengthen current safeguarding arrangements until the provisions of the Safeguarding Vulnerable Groups Act come into effect in 2008.

Intended Effect

- 5.10 Prior to the introduction of these regulations, Welsh Assembly Government guidance recommended that members of staff in FE institutions should have a range of checks, including enhanced CRB checks, prior to, or as soon as possible following, appointment⁴.
- 5.11 In November 2006 the then Education, Lifelong Learning and Skills Minister, concluded that 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 workforce.

⁴ Child Protection: Preventing Unsuitable People from Working with Children and Young Persons in the Education Service, NAFW Circular 34/02

- 5.12 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.
- 5.13 It is also sensible to strengthen the current record-keeping regime in FE institutions. Estyn identified deficiencies in record-keeping arrangements in a survey of procedures for vetting arrangements in a sample of schools and colleges in Wales.⁵. Regulating to ensure a minimum standard of record keeping of the required checks will ensure coherent practice across all institutions. These measures will not only help to improve further safeguards for children but will help to maintain public confidence in the system.

6. Implementation

- 6.1 These regulations will come into force on 1 September 2007. For all new staff appointed after this date to whom these regulations apply, FE institutions will be required to carry out and record the checks listed in paragraph 5.6 above. From 1 September 2008 all FE institutions should have in place a central record of all staff, existing and new appointments, who are covered by these regulations.
- 6.2 If the requirements for introducing the Criminal Records Bureau checks on all new staff appointed to the workforce of further education institutions and staff engaged by FE institutions through supply agencies are not introduced, there would be no mandatory requirement or standardised practice in FE institutions in Wales, which could lead to young people being put at risk and not being safeguarded.
- 6.3 Regulations introducing mandatory checks including enhanced CRB checks in respect of the school staff workforce were agreed in Plenary on 20 March 2007. Similar provision has also been made for staff in pupil referral units.
- 6.4 Parallel regulations came into force in England on 1 January 2007. If these regulations are not made FE institutions in Wales would be not be subject to the same statutory requirements as FE institutions in England.

7. Consultation

- 7.1 Public consultation on these regulations has been undertaken details of which are included in the Regulatory Impact Assessment below.

⁵ A Survey of Procedures for Vetting School Staff and Other Adults, Estyn, 2006

8. Regulatory Impact Assessment

OPTIONS

Option 1

8.1 Do nothing.

Option 2

8.2 Make the checks listed at 5.6 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 (i.e. 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

8.3 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.

BENEFITS AND COSTS

Sectors and groups affected

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

Benefits

Option 1

8.5 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 Welsh

Assembly Government has concluded that the system needs 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 existing guidance would lack legal enforceability unless these regulations were made. Therefore, leaving the current system untouched is not an option.

- 8.6 A commitment to make CRB checks compulsory for all new staff appointed to the schools workforce was made in January 2006 and a commitment to 'equivalent regulations' was made by Jane Davidson in November 2006. The Welsh Assembly 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 Estyn survey would also go unaddressed.

Option 2

- 8.7 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

- 8.8 The Government does not believe it is necessary to CRB check all existing staff providing education. Guidance issued in 2002 following the establishment of the CRB advised employers that they should not ask existing staff to apply for a CRB check unless they had grounds for concern about the persons suitability to work with children and young people. Prior to 2002 guidance set out the procedures for undertaking checks against List 99 as well as with local police forces about the possible criminal background of those who apply or move to work with children. In addition the Welsh Assembly Government is in the process of ensuring that the records held by FE institutions on their existing staff are complete.

Costs

Option 1

- 8.9 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

- 8.10 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 over a number of years, as well as contractual obligations imposed by the Welsh Assembly Government. Guidance, funding conditions and monitoring arrangements are currently in the process of being tightened.
- 8.11 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.
- 8.12 Similarly, many FE institutions maintain effective record keeping processes, either electronic, paper-based or a combination of both. However, the Estyn survey 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

- 8.13 As with Option 2 above, the current record-keeping exercise will ensure that all the checks identified under paragraph 5.1 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 Safeguarding Vulnerable Groups Act contains provision to extend membership of the Vetting and Barring Scheme to the whole of the children's workforce. This is a significant undertaking that will require careful planning to manage the effective transition of the workforce into the scheme.

COMPETITION ASSESSMENT

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

CONSULTATION

Within Government

- 8.15 The Regulations were notified to the Education, Lifelong Learning and Skills Committee, via the list of forthcoming legislation on 17 January 2007 (ELLS(2) 01-07 (p.2), item number ELL 43-06) and remained on the list since that date. The regulations were not identified for detailed scrutiny.
- 8.16 The then Minister for Education, Lifelong Learning and Skills, also indicated her intention to introduce regulations for mandatory CRB checks for the school workforce as part of her response to Estyn's survey of vetting practice in schools and colleges which was discussed at the Education, Lifelong Learning and Skills Committee on 3 May 2006 and 7 June 2006. Committee Members would have also received a copy of the Minister's letter of 24th January 2006 referred to in paragraph 8.18 below.
- 8.17 Officials within the Children and Schools Group of the Department for Education, Culture and the Welsh Language have been consulted on these proposed regulations to ensure consistency of approach in respect of pre-employment checks across the education workforce.

Public Consultation

- 8.18 On 24th January 2006, the then Minister for Education, Lifelong Learning and Skills wrote to key stakeholders in the school, further and higher education sectors in Wales announcing her intentions to bring forward regulations to ensure that CRB checks are compulsory across the whole school workforce. A copy of that letter was sent to the recipients listed at Annex A as well as all Assembly Members. No responses opposing this approach have been received.
- 8.19 CRB checks are only one element of any robust pre-appointment procedure. These regulations make statutory those 'strongly advised' pre-employment procedures outlined in Guidance Circular 34/2002. Those procedures are also identified within the draft statutory guidance issued for consultation in March 2007 which sets out how local education authorities and governing bodies of schools and FE institutions should exercise their functions with a view to safeguarding and protecting children.
- 8.20 Consultation on these regulations was carried out for a period of 8 weeks from 1 May to 26 June 2007. The length of the consultation period was dictated by the short timescale for bringing these regulations into force. A list of consultees is included at Annex B.

- 8.21 In total 9 consultation responses were received. In addition officials have discussed the practical implications arising from the requirements of the draft regulations with the representatives from the majority of FE institutions in Wales and will continue to work with the institutions, through Fforwm, the representative body for FE institutions in Wales to ensure that institutions comply with the requirement to keep a single record of pre-employment checks.
- 8.22 Overall the consultation responses were supportive of the need for the proposed regulatory changes as well as the timescales for introduction of the requirements. However, there was a general concern about the narrow scope of the regulations. Several respondents requested consideration of how the legislative framework might be extended to cover staff in the further education sector beyond those providing education and that consideration be given to arrangements for protecting vulnerable adults. Paragraph 5.12 above explains why the Welsh Assembly Government cannot widen the scope of the regulations at present. The majority of the concerns raised by respondents to the consultation will be addressed when the provisions of the Safeguarding Vulnerable Groups Act 2006 are brought into force in Wales from 2008 onwards.

Amendments to the draft regulations

- 8.23 Minor amendments to the draft regulations have been made as a result of the consultation. In order to ensure consistency with regulations introducing mandatory pre-employment checks in respect of the school staff workforce in Wales amendments have been made to regulations 9 and 19 of the draft regulations. In the consultation draft these regulations provided for an exemption to the requirement for a new enhanced CRB check on staff who have a continuous record of employment in maintained schools or FE institutions in Wales or England in a role with a similar level of contact with children. In the revised regulations such an exemption will only apply in the case of staff who have a continuous record of employment in a maintained school or FE institution in Wales in a role with a similar level of contact with children.

9. POST-IMPLEMENTATION REVIEW

- 9.1 The Welsh Assembly Government will put in place arrangements for the monitoring of FE institutions' records to ensure compliance with these regulations. Where non-compliance is reported, the Welsh Assembly Government 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. In addition, as part of the inspection process under the Common Inspection Framework, Estyn report on whether institutions have effective procedures for the protection of children and young people.

- 9.2 The regulations will be reviewed in relation to future changes in legislation arising from the provisions of the Safeguarding Vulnerable Groups Act 2006.

10. SUMMARY AND RECOMMENDATION

- 10.1 The Welsh Assembly Government is committed to strengthening the existing safeguarding regime. In March 2007 the Welsh Assembly Government issued draft statutory guidance on the roles of local authorities, and governing bodies of all schools and FE institutions in respect of their responsibilities for safeguarding children under section 175 of the Education Act 2002⁶. In addition the Welsh Assembly Government is in the process of ensuring that the records held by FE institutions on their existing staff are complete.
- 10.2 These Regulations make a range of pre-employment checks mandatory for all new appointments to positions providing education in FE institutions to ensure that an individual has not been prohibited from working with children as they have been deemed unsuitable, and that similar requirements will apply to staff provided by supply agencies.
- 10.3 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.

⁶ Safeguarding Children in Education: The role of local authorities and governing bodies under the Education Act 2002.

Annex A

List of Recipients of Minister's Letter of 24th January 2006

Headteachers of Schools in Wales
Chair of Governors of Schools in Wales
Directors of Education
Diocesan Directors of Education
Cabinet Members responsible for Education
Teaching Unions in Wales
Governors Wales
General Teaching Council for Wales
Children's Commissioner for Wales
Teacher Supply Agencies
Independent Schools in Wales
Welsh Independent Schools Council
Welsh Secondary Schools Association
Welsh Primary Schools Association
PTA Association
Initial Teacher Training Providers.
UCET
Further Education Institutions
FENTO
FFORWM
Association of Director of Education in Wales
Careers Wales
Chief Inspector for Training and Education in Wales

Annex B

List of Consultees

Principals and Governing Bodies of Further Education Institutions

Fforwm

Estyn

Teaching unions

Professional Associations

The General Teaching Council for Wales

Supply agencies in Wales