Department for Education

Voice community

Official Response to the Government consultation

Teacher Misconduct: regulating the teaching profession

March 2022

Introduction

The Education Act 2002 (amended by the Education Act 2011) gives responsibility to the Secretary of State to regulate teachers' conduct and to hold a list of teachers who have been prohibited from teaching. We are consulting on proposed changes to the arrangements operated by the Teaching Regulation Agency (TRA) on behalf of the Secretary of State for Education. The arrangements apply to England only.

The Teachers' Disciplinary (England) Regulations 2012 ("the Regulations") provide specific and detailed information about how the system should operate. Some of the key features of the regulatory system are that:

• The arrangements apply to anyone undertaking teaching work, as defined in the 2012 Regulations, in schools, including academies (including 16- 19 academies and free schools), local authority maintained schools, non-maintained special schools and independent schools as well as sixth form colleges, relevant youth accommodation and children's homes.

• The TRA should only be involved in the most serious cases of misconduct, in order to make a decision about whether a teacher should be prohibited from teaching work. Other matters, including all cases of incompetence, should be dealt with locally by employers.

The proposed changes would be made to sections 141A and 141B of the Education Act 2002, with a view to coming into force at the next legislative opportunity.

Full details of the current arrangements are available on GOV.UK:

- Teacher misconduct: the prohibition of teachers – Advice on factors relating to decisions leading to the prohibition of teachers; and
- Teacher misconduct: regulating the teaching profession

This response

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About this consultation

Teachers are the single most important factor in a child's education and the overwhelming majority are highly competent and effective, and never engage in any form of misconduct.

It is of paramount importance that children are protected when they are at school and college and there are robust arrangements in place to safeguard and educate pupils and students effectively.

We continually look to improve our policies, processes and procedures in relation to the teacher prohibition arrangements and take seriously any feedback including judgments made by the High Court, relevant case law etc. that suggests improvements could be made, particularly where these impact on child welfare, safety and safeguarding.

The arrangements for regulating the teaching profession not only protect children but also help maintain public confidence in the teaching profession and uphold proper standards of conduct.

This consultation document makes a number of proposals to:

- Broaden the scope of the teacher misconduct provisions to include persons who commit misconduct when not employed as a teacher, but who have previously carried out teaching work;
- Broaden the scope of the teacher misconduct provisions to include a wider range of education settings; and
- Enable the Secretary of State to consider referrals of serious teacher misconduct regardless of how the matter comes to his attention.

The proposed changes are described in more detail below, and the consultation only invites views on the changes proposed.

We would like to hear your views on our proposals.

Proposed changes to the teacher misconduct regulatory regime

Background

The teacher misconduct regulatory regime extends to any person who carries out "teaching work" in a "relevant setting" in England[1].

Teaching work is:

- Planning and preparing lessons and courses for pupils
- Delivering lessons to pupils
- Assessing the development, progress and attainment of pupils
- Reporting on the development, progress and attainment of pupils

Relevant settings are:

- Schools in England
    - maintained schools (including maintained nursery schools and pupil referral units)
    - Non-maintained schools
    - Independent schools (including academies, 16-19 academies, free schools and alternative provision academies)
- Sixth form colleges in England
- relevant youth accommodation in England
- children's homes in England

The TRA considers only the most serious cases of misconduct. Low-level misconduct, including incompetence, is dealt with locally by the employer. Where a referral is received, the TRA will determine whether the case falls within the parameters described above, and whether the case is sufficiently serious and appropriately evidenced and if proven at its highest likely to lead to prohibition being imposed. Those cases will progress to be considered by an independent professional conduct panel (the panel), convened by the TRA to consider the evidence and, where the panel finds the facts of the allegation proven, determine whether one or more of the following categories applies:

- unacceptable professional conduct
- conduct that may bring the profession into disrepute
- conviction, at any time, of a relevant offence.

[1] The Teachers' Disciplinary (England) Regulations 2012

The panel will make a recommendation to the decision maker on whether prohibition is appropriate, and the decision maker, a senior TRA official acting on behalf of the Secretary of State, will consider the recommendation of the panel and decide whether or not to prohibit.

Where a prohibition order is imposed, its effect is to prevent the person from being employed or engaged to undertake teaching work in a relevant setting. Prohibition has a lifetime effect, although in some cases and under certain circumstances, the Secretary of State may allow a teacher to make an application for the prohibition order to be reviewed and set aside (after a minimum of two years), subject to the teacher demonstrating that a set aside is appropriate.

Proposals and rationale

The purpose of the teacher regulation policy is to safeguard pupils and students, maintain public confidence in the teaching profession, and uphold high standards of teacher conduct.

It is right therefore that we keep this under review, and look to improve our policies, processes and procedures, and take seriously any feedback (including judgments made by the High Court, relevant case law etc.) that suggests improvements could be made, particularly where these impact on child welfare, safety and safeguarding.

We are proposing to make the following changes to the teacher misconduct regime, when a suitable legislative opportunity becomes available.

Teachers covered by the teacher misconduct regulatory regime

Proposal

We want to broaden the scope of the teacher misconduct regime to enable the TRA to consider all referrals of serious misconduct committed by any individual who has at any time in the past been employed or engaged to undertake teaching work in a relevant setting.

By making this change, individuals as described above who are not currently working as a teacher or are between jobs (e.g. those on a career break or teaching infrequently, or supply teachers between jobs), and who commit serious misconduct during this time could be considered by the TRA if a referral is made.

Rationale

The overriding policy intent remains clear - that the teacher misconduct regime captures those individuals unsuitable (particularly from a child protection perspective) who have committed serious misconduct since they were last employed or engaged in teaching work and who are likely to try and return to the classroom.

However, interpretation of the teacher misconduct legislation in a High Court judgment only permits the Secretary of State to consider misconduct in more limited circumstances. In particular it prevents the Secretary of State from considering misconduct where that misconduct is committed when a person is not employed or engaged in teaching work in a relevant setting - even if that is only a day after leaving the setting and/or the Secretary of State is aware the individual is likely to try and return to teaching. We are therefore proposing a change which will ensure that the original policy intention is achieved.

The rationale behind our proposed change is to make it clear that the TRA is able to consider a referral in respect of those who commit serious misconduct whilst not in teaching but who have taught in the past, ensuring that where appropriate they are prevented from returning to the classroom in the future. We have carefully considered the options.

One option would be to place a limit on the length of time it has been since a person was employed or engaged in teaching work, but on balance we think it is important that the Secretary of State reserves the right to consider each case based on the evidence before him, and an artificial time limit may prevent consideration of extremely unsuitable people, who may potentially attempt to return to the profession.

It should be noted that the advice set out in Teacher misconduct: the prohibition of teachers[2] is already clear that misconduct outside of the education setting will only amount to "unacceptable professional conduct" if it affects the way the person fulfils their teaching role or if it may lead to pupils being exposed to or influenced by the behaviour in a harmful way. Similarly, misconduct outside of the education setting will only amount to "conduct that may bring the profession into disrepute" if it is serious and the conduct displayed would likely have a negative impact on the individual's status as a teacher, potentially damaging the public's perception of them, therefore bringing the profession into disrepute. Our proposal will not change this.

A prohibition order aims to safeguard pupils, to maintain public confidence in the profession, and uphold proper standards of conduct, referred to as public interest. Prohibition orders should not be given simply in order to be punitive or show that blame has been apportioned, although they are likely to have a punitive effect. In making a judgment as to whether to take forward a referral of serious misconduct, the TRA will consider the public interest, the seriousness of the behaviour, and if relevant any mitigation offered by the teacher, and decide whether it is necessary and proportionate to continue the case.

Public interest considerations may weigh both in favour of and against a teacher and include:

- the safeguarding and wellbeing of pupils and other members of the public
- the maintenance of public confidence in the profession – assessed by reference to the standard of the ordinary intelligent and well-informed citizen who both appreciates the seriousness of the proposed 'sanction' and recognises the high standards expected of all teachers
- declaring and upholding proper standards of conduct within the teaching profession
- that taking the case forward and, ultimately, prohibition strikes the right balance between the rights of the teacher and the public interest, if they are in conflict.

In deciding whether or not it is necessary to take the case forward, the TRA will always need to apply the principle of proportionality, and demonstrate that it has given careful consideration to whether not taking the case forward is appropriate.

Our guidance will allow TRA caseworkers to carefully consider each case on its merits, by weighing up the length of time a person has been away from the profession, any child protection considerations and the likelihood of them trying to return to the classroom when considering whether to progress a case.

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[2] Teacher misconduct: the prohibition of teachers – Advice on factors relating to decisions leading to the prohibition of teachers from the teaching profession

Questions on teachers covered:

6. Do you agree that the regulatory regime should apply to those who have taught in the past but subsequently commit misconduct whilst not employed or engaged in teaching work in a relevant setting?

   Yes / No / **No opinion** / Don't know

   Please explain your answer

   The Teacher Regulation Agency investigates those who have committed the most serious cases of misconduct of teachers. It is not appropriate for them to investigate former teachers nor the general public at large on the possibility that they may one day become teachers.

   Where an individual commits a criminal offence that would make them unsuitable to work with children then safeguarding measures, such as DBS and list 99 checks would ordinarily be sufficient to ensure the safety of children.

   It is important that children remain safe, however it is also important that individuals are not unduly, nor unreasonably sanctioned for something which is unrelated to their current or future work. Whilst it may be the intention of the proposal to prevent individuals from re-entering the teaching workforce, it may also prevent them from securing unrelated employment and as such could have far-reaching consequences.

   As the consultation outlines, one option could be for a time limit to apply. The document goes on to state that this artificial time limit might hinder the secretary of state in their work, however it is important to refer back to the existing safeguarding protections which exist through safer-recruitment processes, DBS and list 99 referrals.

   A prohibition order is a serious imposition, and it must not be done lightly as the consequences for the individual – even if they are no longer teaching – can be catastrophic, and wider legal opinion should be sought.

7. Do the public interest and proportionality tests explained above strike the right balance between protecting children from unsuitable teachers and considering how long ago the person last taught and whether the person is likely to return to the classroom?

Yes / No / **No opinion** / Don't know Please explain your answer

It is important that there is public confidence in the school system – especially around safety. As with all public buildings it is vital that they are well maintained, properly resourced and staffed by suitably qualified and vetted persons.

However, things do go wrong in schools, accidents and incidents happen, but these do not always warrant sharing with the public, nor do they undermine the ability of the school to manage its business in a safe and suitable manner.

As has been already stated, the teacher regulation agency only considers the most serious cases of misconduct – where often crimes have been committed and the police are involved. Where these things happen with practicing teachers the TRA already has a role to play. Even when issues happen outside of employment, the schools – as the employer – is able to consider sanctions if there are grounds that the profession has been brought into disrepute.

All of these safeguards, processes and sanctions already exist to protect schools, pupils and their staff and manage public interest considerations. So, the question is, with the safeguards already in place – is it necessary and proportionate to consider further action?

Relevant settings covered by the teacher misconduct regime

Proposal

We want to broaden the scope of the teacher misconduct regime to include a wider range of relevant settings offering education to pupils and students under the age of 18. This will enable the TRA to consider referrals of serious misconduct for teachers employed or engaged to undertake teaching work in these settings. It will also prevent prohibited teachers from carrying out teaching work in such settings.

We therefore propose to expand the list of relevant settings to include:

- Further Education colleges (and those designated as being within the FE sector under the Further and Higher Education Act 1992)
- Providers of post-16 education as set out in the Apprenticeships, Skills, Children and Learning Act 2009 (as amended) - i.e. Special Post-16 Institutions (SPIs) and Independent Training Providers (ITPs)
- Providers of online education

Rationale

It is important that the teacher misconduct regime keeps step with current policy and practice in the different ways that young people are being educated, and enables the Secretary of State to consider misconduct across a broad range of education settings.

We want to align the teacher prohibition regime with those institutions that are required by law to have regard to the department's statutory safeguarding guidance – *Keeping children safe in education (KCSIE)*.

It is right that the TRA is able to consider serious misconduct of teachers working in, and prohibit individuals from teaching children in, the settings that must have regard to KCSIE, and that the teacher regulation regime affords the same protection to children across all schools and colleges.

In addition, given the increase in online education over the last two years of the Covid pandemic, we are also considering how we might include online education providers within the teacher misconduct regime.

Regulation 3(2) of the 2012 Regulations, provides that within the definition of teaching work, 'delivering lessons to pupils' includes delivering lessons through distance learning or computer aided techniques.

This means that online education provision by settings that are within the teacher misconduct regime is already covered, but we want to understand how the regime might also cover settings where their whole provision is delivered online, and that do not fall into one of the categories currently set out in legislation or the proposal (described above) to include FE colleges and other post-16 providers.

The department is currently working with Ofsted, as the appointed quality assurance body, to develop the Online Education Accreditation Scheme (OEAS), with applications for the scheme expected to launch during 2022.

We will consider how membership of this scheme might help us to achieve our aim of bringing online education within the teacher misconduct regime, but we would also value views and comments from providers within this sector on whether the regime should go wider than the accreditation scheme, and if it should, how we might achieve that.

Questions on settings covered:

8. Do you agree the teacher misconduct regime should be extended to cover the Further Education and Post-16 providers described?

   Yes / No / **No opinion** /Don't know

   Please explain your answer

   Teachers with qualified teacher status working in sixth form centres attached to schools are already required to follow teacher standards and would fall under the remit of the TRA. It is important that the safeguards which apply in school-based sixth-form centres are also applied to all appropriate settings.

   Keeping Children Safe in Education and SEND provision apply to children and young people up to the age of 18 and 25 respectively – therefore it is clear that some protections exist beyond GCSEs. It is entirely appropriate for there to be a greater alignment of safeguarding, including the teacher misconduct regime.

   There must also be recognition that post-16, many learners have a different relationship with those they work with outside of school-based settings. Those undertaking apprenticeships, for example, are treated as employees and not subject to the usual pupil/teacher scenario. This will mean that consideration must be given to the different practices that exist in these workplaces and misdemeanours outside of the workplace may not bring the workplace into disrepute in the same way as in a school-based environment, therefore consideration must be given as to the impact of any incident.

9. Do you agree that online education providers should also be covered by the teacher misconduct regime?

   Yes / No / **No opinion** / Don't know

   Please explain your answer

   The proliferation of online learning brought about by the recent COVID-19 pandemic, including the widespread use of online tutoring for education recovery has brought it into the mainstream with many teachers and tutors having experience of the difficulties and vulnerabilities inherent with an emerging learning platform.

   Online learning is available through a wide range of providers to an even wider range of learners – including adult education. It would be unreasonable for an employer to hold employees to different standards depending on whether or not the work fell under the remit of the Teacher Regulation Agency. Recent adjustments to the National Tutoring Scheme, mean that tutors now only need to have A levels in order to tutor. This means that they cannot be measured against the teacher standards and would likely not fall under the remit of the TRA. Making changes to these demands, or increasing the oversight and regulation employers are required to have could improve the safety of learners but would almost certainly increase costs.

   There are already many examples of good practice guidelines for schools and post-16 providers when engaging with learners online. Voice Community have such advice and it would be important that those providing online learning were protected just as much as those receiving the tuition. This could be achieved through a contract or agreement.

   It may be more appropriate to have separate regulations which apply to those providing online tuition to provide a standard and expectation regardless of qualification, experience, age and stage. It is also vital that schools, colleges and other settings exercise control over any contracted online provision, ensuring that it falls under their own safeguarding protocol.

Internal referrals of serious misconduct

Proposal

We want to enable the Secretary of State to consider referrals of serious misconduct regardless of how the matter comes to his attention, by removing the requirement that the Secretary of State can only investigate an allegation that **is referred** to him.

Rationale

There are instances where a DfE official may undertake work which uncovers serious misconduct. The current teacher misconduct provisions do not permit anyone who acts on behalf of the Secretary of State (i.e. a DfE official in any DfE group, agency or arm's length body) to make a referral to him on the basis of information obtained through their role acting on behalf of the Secretary of State.

For example, DfE officials in ESFA (the Education and Skills Funding Agency) may uncover fraud during an academy audit, or STA (the Standards and Testing Agency) may uncover serious exam malpractice during an investigation.

At the moment such serious matters are not able to be referred to the TRA for consideration because, as in the example above, ESFA and STA are within the overall Department for Education and therefore it would be regarded as a self-referral, which is not permitted by the current legislation. Our proposal here is to allow DfE officials to refer a case to the TRA where, in the course of their normal duties, they are presented with a matter where the teacher involved may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute, or has been convicted (at any time) of a relevant offence.

To maintain the independence of the TRA in the operation of the teacher misconduct regime, we will ensure that such referrals may only be considered where the misconduct is uncovered during the course of a DfE official's normal duties. DfE officials will not be permitted to pro-actively seek out referrals.

Questions on internal referrals:

10. Do you agree DfE officials should be able to make a referral to the TRA for consideration?

    Yes / No / **No opinion** / Don't know

    Please explain your answer

    As the consultation points out, the Teacher Regulation Agency is a body within the DfE, therefore any referral made by the DfE or any body within DfE (such as STA or ESFA) would be a self-referral. It is not good practice for self-referrals to be encouraged as, although this could allow referrals to be made, it just as equally can allow for incidents to fail to move through the system.

    It is always appropriate for LAs, trusts, schools, and their staff to be held accountable for actions. The examples of fraud or serious exam malpractice given in the consultation document should be referred to the police to the exam boards or Ofqual as the regulator.

    Voice Community acknowledge that there may be some instances where an agency of DfE does uncover wrongdoing. In order for this to properly take place, the TRA needs to be independent of political control. This would allow it to receive referrals from all DfE agencies, as well as employers.

11. Do you agree any change should be clear that a referral can only stem from the normal course of a DfE officials' duties?

    Yes / No / No opinion / Don't know

    Please explain your answer

    It is vital that the work of the DfE is not interrupted, nor concentrated on uncovering misconduct. As above, where there is crime, it is appropriate for DfE to make referral to the police or other regulatory body.

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