

Teacher Misconduct: revised DfE advice

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Summary

This briefing focuses on the Government's response to the 2013 public consultation on changes to teacher misconduct arrangements. It also provides the key messages from the advice on factors related to decisions leading to the prohibition of teachers. The advice has been revised in the light of the consultation outcomes and the Government's response. This briefing is on:

DfE: [Consultation on changes to teacher misconduct: the prohibition of teachers' advice: Government response](#) (January 2014)

NCTL: [Teacher misconduct: the prohibition of teachers: advice on factors relating to decisions leading to the prohibition of teachers from the teaching profession](#) (January 2014)

This briefing will be of interest to head teachers, teachers, governors, local authorities and parents as well as national organisations involved in education policy development in this area. It will be of particular interest to those directly involved in a teacher conduct panel.

Overview

The Education Act 2011 moved responsibility for regulating the teaching profession and for holding a list of teachers prohibited from teaching because of serious misconduct to the Secretary of State from 1 April 2012. Arrangements for carrying out these responsibilities were delegated to the then Teaching Agency (TA) now subsumed by the National College for Teaching and Leadership (NCTL). The regulatory arrangements at this central level do not include cases of teacher incompetence or less serious matters of conduct which are dealt with at a local level by head teachers, governors and local authorities. These arrangements replaced the responsibilities of the General Teaching Council for England (GTCE) whose functions included the maintenance of the teacher register and the regulation of teacher competence and conduct until its closure in March 2012.

Sections 141A to E and Schedule 11 of the Education Act 2002 (amended as a consequence of section 8 of the Education Act 2011) and The Teachers' Disciplinary (England) Regulations 2012 provide the legislation that underpins the teacher prohibition process. In performing their role as professional conduct panels, members act in accordance with the associated legislation.

In Autumn 2012, the DfE published a series of information and advice documents for all those involved in the national processes of teacher conduct investigation, hearings and decision-making (See [Related Briefings](#)). In June 2013, the DfE announced its intention to revise the NCTL *Teacher Misconduct: the prohibition of teachers' advice (prohibition advice)*. The planned revisions were intended to clarify the DfE's expectations that, apart from in exceptional circumstances, any sexual conduct by a teacher and any criminal caution involving indecent images of children are

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likely to lead to the prohibition of the teacher concerned. The subsequent public consultation last summer, sought views on these issues and invited additional comment on the content of the prohibition advice in particular.

The primary purpose of the prohibition advice is to add transparency in relation to the evidence and factors that are taken into account when allegations of teacher misconduct could result in prohibition. Another purpose is to inform further the professional panel and decision-makers in the NCTL and ensure that the regulatory processes are fully understood. It is intended that all related existing advice will be updated to reflect the prohibition advice.

The DfE press release (17/01/14) emphasised that: *'Nothing is more important than ensuring children are protected when they are at school. We have already improved the system to make it tougher than ever before... High standards are expected of all teachers, and when making decisions panels should always take into account the need to maintain high levels of public confidence in the profession'*

Briefing in full

Consultation on changes to teacher conduct and prohibition advice

The online public consultation sought views on the draft version of the revised prohibition advice over an eight-week period ending on 16 September 2013. 30 responses were received from a mixture of teacher associations, local authority employees, head teachers, parents as well as 'other' organisations including safeguarding boards/councils, teaching/schools councils and educational boards/organisations.

86% of respondents agreed that the advice on prohibition should be revised to clarify that panels should give serious consideration to evidence that a teacher has committed activity involving any sexual conduct. In general respondents welcomed the proposal to raise the profile of sexual misconduct in relation to teacher conduct panel consideration, while continuing to support the need for the panels to apply their own judgement and weigh the public interest with the professional interest of the individual teacher. Suggestions for additional changes and clarification were:

- what would be considered to constitute sexual misconduct;
- the boundaries between sexual misconduct and serious sexual misconduct;
- make clear that panels should consider whether any behaviours demonstrated affect the suitability of the individual to be a teacher.

Other comments were related to the need for panel members to receive more rigorous training in order to ensure a level of consistency of approach in such cases.

90% of respondents supported revisions to the prohibition advice, clarifying that panels should give serious consideration to evidence that a teachers has committed activity involving indecent images of children. Respondents strongly supported the draft amendment, welcoming additional guidance both to assist employers in determining when to make a referral involving these issues and in clarifying to panel members the position when considering cases involving indecent images of children. Additional suggestions made were to:

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- ensure panels had a proper understanding of the scales used to assess imagery and the relevance of the determined level in relation to risk;
- clarify the types of imagery that the panels should consider;
- provide more detail on the range of images that could be considered as improper for the purposes of teacher prohibition.

93% of respondents also agreed that the draft advice should be revised to indicate to panels that they should consider criminal cautions as well as convictions. Additional comments included the need to provide clarity and consistency on the consideration that panel give to accepted police cautions; ensure that panels have a clear understanding of the circumstances in which a caution is issued by the police; and provide clarity about the difference between cautions and convictions as relevant evidence.

Further comments made in the consultation about the revised advice in general included:

- clarification of what was meant by the 'prohibited list';
- the need for further advice addressing the uncertainty about the process for referring cases of serious teacher misconduct to the NCSL;
- greater clarity about the relationship between the NCSL remit in this area and the Disclosure and Barring Service's responsibilities to consider safeguarding referrals;
- the potential to introduce automatic prohibitions for specific offences/certain situations;
- in relation to images of children, the importance of panel members to understand the behaviours involved and the associated risk that an individual could pose to a child.

Government response

In the Government's response, it stresses that a careful consideration has been given of all comments received and further amendments to the draft advice have been made which address the vast majority of the comments made. On the specific key consultation areas related to panel consideration of evidence of sexual conduct, actively involving indecent images of children and relevant cautions, further revisions include:

- on the sections of the prohibition advice that deal with consideration of cautions, further detail on the circumstances in which cautions are issued by the police, and the removal of those references that respondents considered were confusing and potentially contradictory;
- providing additional explanation to reflect that in considering images of children, panels should not be limited by the criminal sentencing position on indecency;
- clarification that, in addition to the information within the prohibition advice, panel members receive training that covers their role and responsibilities, consideration of evidence, decision making factors and child safeguarding, including assessing risk of harm;
- confirmation that behaviours associated with committing offences that did not result in a conviction, are relevant in a panel's consideration of unacceptable professional conduct and conduct that may bring the profession into disrepute;
- more detailed explanations of specific terms used within the advice;
- new 'links' that direct readers to relevant additional background information, which provide a better and more consistent understanding of specific processes and procedures e.g. links to the Ministry of Justice advice, which explains the circumstances in which police officers may issue a caution for an offence and to specific advice about when it is appropriate to

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make referrals of allegation of misconduct to the Disclosure and Barring Service (DBS) and/or to the National College for Teaching and Leadership (NCTL).

The Government response also signals that it has also made revisions to the section of the advice that deals with the circumstances in which an interim prohibition order (IPO) may be issued. This clarifies the approach that will be taken when considering whether it is appropriate to issue an IPO, particularly in cases that involve police arrests and Crown Prosecution Service action, and this provides greater transparency in relation to the IPO decision-making process.

However, a small number of concerns raised by respondents, including the suggestion that automatic prohibitions should apply in certain cases and that there should be no account taken of mitigation in any case where a panel considers a teacher to have committed activity involving indecent images, have not been reflected in the revised advice. Such changes would have required a significant revision to the current policy and associated legislative provisions. At this time the Government considers the existing option to impose an interim prohibition order in the most serious cases provides sufficient safeguard to pupils pending the formal consideration of their case. It is emphasised that this is not intended to rule out a wider review of the teacher regulation policy and associated legislation in which these suggestions would be given further consideration.

To help clarify the differing roles of the DBS and NCTL in considering misconduct cases, the newly published advice is amended to provide links to additional information that explain the responsibilities of each organisation.

Amended NCTL advice on factors relating to teacher panel decisions on prohibition

The NCTL advice sets out the factors to be considered by a professional conduct hearing panel convened for the purpose of the regulation of teacher conduct. Its primary purpose is to inform panel considerations leading to a decision as to whether to recommend the imposition of a prohibition order on a teacher following a finding of “unacceptable professional conduct”, “conduct that may bring the profession into disrepute” or a “conviction, at any time, of a relevant offence”. It is intended to inform panel members, employers, teacher and panel witnesses, teachers in general, the public and NCTL staff involved in determining whether a case should proceed to a professional conduct hearing.

The key features of the teacher regulatory system are that:

- The arrangements apply to anyone undertaking teaching work, as defined in the 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 NCTL 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.
- Where a teacher has been dismissed for serious misconduct or would have been dismissed had they not resigned, their employer (including an agency) must consider whether to refer

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the case to the NCTL. The employer should use the advice in this document to help make a judgement as to whether, on the grounds that a prohibition order may be appropriate, it is necessary to refer. Where the employer is in any doubt, a referral should be made.

- All referrals should be made promptly. Once a referral is received, a decision will be taken about whether it is appropriate to issue an interim prohibition order, pending further investigation.
- The police, the Disclosure and Barring Service (DBS), other regulators, members of the public and other interested organisations may also refer cases.
- The Secretary of State has the power to make prohibition orders – there are no other sanctions.
- The Secretary of State has the power to impose an interim prohibition order if he considers that it is necessary in the public interest to do so. This will apply in cases where there has been a particularly serious allegation and a judgement is made that the teacher should not teach while an investigation is undertaken.

Roles of the Disclosure and Barring Service (DBS)

The DBS is responsible for deciding whether an individual should be barred from working with children and vulnerable adults and for maintaining a list of those individuals who are determined to be unsuitable (the barred list). The DBS is also responsible for processing requests for Criminal Records Checks, including those made as part of the checks carried out by schools prior to appointing staff.

The DBS will consider cases that concern safeguarding matters (i.e. harm or the risk of harm to a child), barring individuals from working with children where appropriate. When considering whether to bar a teacher, the criteria used by the DBS differ from those used by the NCTL. Where the DBS has decided a case does not meet its criteria for barring, the NCTL can still decide to refer the case to a professional conduct panel for its consideration. More information on the role of the DBS is on this webpage: [What we do: Disclosure and Barring Service](#).

Professional conduct decision-making process

After considering all of the evidence put before it, a professional conduct panel must make three decisions, in the order shown below. If a panel decides that 'no' is the answer to any of these questions, it will not need to proceed to the next question. A panel may answer 'yes' to (i) and (ii) and still decide that it is not appropriate to recommend a prohibition order.

(i) - Is the panel satisfied that the facts of the case have been proved?

A panel must decide whether the facts of the case have been proved on the balance of probabilities. This is the same as the standard of proof in civil law cases and therefore means that a panel will decide that an event occurred if, on an assessment of the evidence available to it, it believes that the occurrence was more likely than not. A different standard is applied in criminal law cases, where the facts must be proved 'beyond all reasonable doubt'.

Criminal convictions: If there has been a conviction, at any time, of a criminal offence, the hearing will not re-examine the facts of the case and the panel will accept the conviction as conclusive proof that establishes relevant facts.

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Police cautions (including reprimands, final warnings and formal warnings) Where there is evidence that the person concerned has received a caution, this establishes that they have made a clear admission of guilt in respect of committing the offence, or offences, for which the caution has been given. Whilst a panel cannot deem evidence of a caution to be conclusive of relevant facts in the same way as a conviction, it will carry significant weight in their considerations. The circumstances in which the police are able to issue cautions are set out in the Ministry of Justice guidance: [Simple Cautions for Adult Offenders](#)

Evidence presented to a panel may also include: details of a variety of sanctions issued by the police other than cautions; information relating to disciplinary hearings or tribunals; or considerations by other regulators.

(ii) - Has there been: a) “unacceptable professional conduct”; b) “conduct that may bring the profession into disrepute”; or c) “conviction, at any time of a relevant offence”?

If a panel is satisfied about the facts of the case, it must determine whether this means that one of the three categories above applies.

a) **“Unacceptable professional conduct”** is misconduct of a serious nature, falling significantly short of the standard of behaviour expected of a teacher. 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.

In making a judgement as to whether the behaviour demonstrated falls short of the standard expected of a teacher, a panel should draw on its own knowledge and experience of the teaching profession and the personal and professional conduct elements of the standards published by the Secretary of State ([“the Teachers’ Standards”](#)).

A panel is likely to conclude that an individual’s conduct would amount to “unacceptable professional conduct” where they are found to have displayed behaviours associated with any of the offences shown listed below, but were not convicted of the offence. There will also be other behaviours that panels will determine as amounting to “unacceptable professional conduct”. It is likely that a panel would consider the acceptance of a caution for any of the offences in the list that begins on page 8 to confirm behaviours that would amount to “unacceptable professional conduct.

b) **“Conduct that may bring the profession into disrepute”** should be judged by a panel in a similar way. Misconduct outside of the education setting may be considered to be relevant 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. Panel members should use their knowledge and experience to take into account how the teaching profession is viewed by others, and the influence that teachers may have on pupils, parents and others in the community. Panels should take account of the uniquely influential role that teachers can hold in pupils’ lives and that pupils must be able to view teachers as role models in the way they behave

Panels will be likely to conclude that an individual’s conduct will amount to “conduct that may bring the profession into disrepute” where they are found to have displayed behaviours associated with

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any of the offences shown in the list below, but were not convicted of the offence. There will also be other misconduct that panels will determine as amounting to “conduct that may bring the profession into disrepute”. It is likely that a panel would consider the acceptance of a caution for any of the offences in the list to confirm behaviours that would amount to “conduct that may bring the profession into disrepute”.

c) **“Conviction, at any time, of a relevant offence”** refers to a conviction of an offence that is relevant to a person’s fitness to be a teacher, either by a British criminal court or by an overseas court where the offence would have constituted a relevant offence had it been committed in England and Wales.

Where there has been a conviction, the panel is concerned to establish its relevance to the teacher’s on-going suitability to teach. An offence can be considered relevant even if it did not involve misconduct in the course of teaching. In making a judgement on relevance a panel will consider all the facts of the case. These will include the nature and gravity of the offence, its circumstances and any mitigating circumstances and, in committing the offence, whether and to what extent the individual’s actions were contrary to the standards of personal and professional conduct expected of a teacher, with reference to the Teachers’ Standards:

- were relevant to teaching, working with children and/or working in an education setting;
- would be likely to have an impact on the safety or security of pupils or members of the public; or
- would be likely to affect public confidence in the teaching profession if the teacher were allowed to continue teaching.

A 'relevant offence' would have probably involved a term of imprisonment and could be any of the following:

- violence;
- terrorism;
- fraud or serious dishonesty;
- theft from a person or other serious theft;
- possession of class A drugs;
- supplying of illegal substances of any classification;
- sexual activity;
- arson and other major criminal damage;
- serious driving offences, particularly those involving alcohol or drugs;
- serious offences involving alcohol;
- serious offences involving gambling;
- possession of prohibited firearms, knives or other weapons;
- any activity involving viewing, taking, making, possessing, distributing or publishing any indecent photograph or image or pseudo photograph or image of a child, or permitting any such activity, including one off incidents.

The role of Prohibition Orders in the process

A Prohibition Order is when a person concerned is not allowed to undertake unsupervised teaching work in schools or other settings as set out in the advice. Where an individual is

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prohibited, their details will be featured on the Prohibited List. The Order is likely to be appropriate when the behaviour of the individual concerned is '*fundamentally incompatible with being a teacher*', and its primary purpose is to '*protect pupils, maintain public confidence in the teaching profession and uphold proper standards of conduct referred to in the public interest*'. A prohibition Order is a lifetime ban though some teachers may request for it to be reviewed after a specific period of time, with a minimum of not less than two years. An Interim Prohibition Order prevents a person from teaching until their case has been fully considered and concluded and may only be made if the Secretary of State considers that it is necessary in the public interest. Professional conduct panels have no role in considering whether an interim prohibition order should be made.

(iii) - Is a Prohibition Order appropriate?

If a panel has found that there has been “unacceptable professional conduct”, “conduct that may bring the profession into disrepute” or a “conviction, at any time, of a relevant offence”, it must make a judgement about whether to recommend the imposition of a prohibition order by the Secretary of State. A prohibition order aims to protect pupils and to maintain public confidence in the profession. A panel should consider what is in the public interest and whether a prohibition order is an appropriate and proportionate measure. 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.

Public interest considerations would usually include:

- the protection of pupils and other members of the public;
- the maintenance of public confidence in the profession;
- declaring and upholding proper standards of conduct.

In deciding whether or not the recommendation of a prohibition order is appropriate, panels need to apply the principle of proportionality, weighing the public interest considerations (as above) against those of the teacher. This will include consideration of any mitigation in relation to the seriousness of the behaviour in question.

It is likely that a teacher’s behaviour will be considered to be incompatible with being a teacher if there is evidence of one or more of the factors below:

- serious departure from the personal and professional conduct elements of the Teachers’ Standards;
- misconduct seriously affecting the education and/or well-being of pupils, and particularly where there is a continuing risk;
- actions or behaviours that undermine fundamental British values, democracy and law, promote political and/or religious extremism, or demonstrate deliberate intolerance and/or lack of respect of the rights, faith and beliefs of others;
- a deep-seated attitude that leads to harmful behaviour;
- abuse of position or trust (particularly involving vulnerable pupils) or violation of the rights of pupils;
- dishonesty especially where there have been serious consequences, and/or it has been repeated and/or covered up;

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- sustained or serious bullying, or other deliberate behaviour that undermines pupils, the profession, the school or colleagues;
- possession of prohibited firearms, knives or other weapons;
- sexual misconduct e.g. involving actions that were sexually motivated or of a sexual nature and/or that use or exploit the trust, knowledge or influence derived from the individual's professional position;
- any activity involving viewing, taking, making, possessing, distributing or publishing any indecent photograph or image or pseudo photograph or image of a child, or permitting such activity, including one off incidents;
- the commission of a serious criminal offence, including those that have resulted in a conviction or caution, paying particular attention to offences that are 'relevant matters for the purposes of the Police Act 1997 and criminal record disclosures.

If there is proven evidence of one or more of the factors set out above, the advice recommends that the panel should take into account any mitigation presented before opting for prohibition order. Areas for mitigation could be that the teacher's actions were not deliberate, they were acting under duress or they have a previously good history.

Panel recommendations on prohibition

Following its consideration of all the evidence presented, a panel will make a recommendation to the Secretary of State about whether a prohibition order should be made with a summary of the evidence that it has considered. A panel should consider recommending to the Secretary of State that a prohibition order is imposed with no provision for the teacher to apply for it to be set aside after any period of time where the case involved any of the following:

- violence;
- fraud or serious dishonesty;
- theft from a person or other serious cases of theft;
- class A drug abuse or supply;
- serious sexual misconduct e.g. where the act was sexually motivated and resulted in, or had the potential to result in, harm to a person or persons, particularly where the individual has used their professional position to influence or exploit a person or persons;
- arson and other major criminal damage;
- terrorism;
- any activity involving viewing, taking, making, possessing, distributing or publishing any indecent photograph or image or pseudo photograph or image of a child, or permitting such activity.

Once a NCTL senior official has received a recommendation on prohibition from a panel, they will make a decision on whether to impose the order, within two working days wherever possible.

Interim prohibition orders

An Interim Prohibition Order prevents a person from teaching until their case has been fully considered and concluded. It may be made only if the Secretary of State considers that it is necessary in the public interest. In respect of considering Interim Prohibition Orders (IPO), references to public interest considerations would likely be to the need to protect children and/or

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other members of the public. Professional conduct panels have no role in considering whether an interim prohibition order should be made. In all cases, where the NCTL receives an allegation of teacher misconduct, a senior official will consider whether it is appropriate to make an interim prohibition order.

Decisions about whether to make an interim prohibition order will be taken on a case by case basis, taking account of the nature and severity of the allegation and the available evidence, including any information as to the likelihood of further incidents. The seriousness of the risk to pupils and the public should the individual be allowed to continue to teach unsupervised should be balanced against the interests of the teacher, having regard to the need for proportionality and the adverse consequences for the practice and reputation of the teacher if an order is imposed.

Although not an exhaustive list, when balanced with the other necessary considerations, the following is likely to indicate that the imposition of an IPO is necessary in the public interest:

- information that the teacher is under investigation by the police, or has been charged, in connection with a serious offence, particularly of a sexual nature and/or involving children;
- predatory or sexually inappropriate conduct toward pupils; or
- any activity involving indecent images of children.

Comment

The key focus of this consultation is related to the tightening up the advice for teacher regulation panels, on the way that they deal with teachers who have been involved in sexual misconduct with children and in some cases might also have handled indecent images of children. It is obviously an uncontroversial issue with this group of individuals having no place in the teaching profession. It is helpful to re-issue the advice to support teacher regulatory panels and the decision-making processes around prohibition orders in general, as with those orders being the sole sanction, the stakes are very high for teachers subject to such hearings. The panels have the difficult task of balancing the need to maintain the high levels of public confidence in the profession with the interests of the individual with their potential areas of mitigation.

The DfE press release accompanying the response to the consultation and the revised advice appears to be celebrating the increase in teacher Prohibition Orders over last year. It compares the 67 Prohibition Orders of the last year of GTCE operation with the 98 issued by the Secretary of State in 2012-13. This is a misleading use of Prohibition Orders as a performance indicator; the GTCE had a series of sanctions available to it to use with teachers appearing before the Council on competence and conduct grounds and used Prohibition Orders sparingly for the most serious cases of misconduct. Prohibition Orders act as a very blunt instrument in the current context as is reflected in the range of serious misconduct areas in the advice, resulting in some very difficult decision-making for those panel members involved. In situations where a Prohibition Order is not recommended, there is no other sanction or source of professional support for a teacher for whom the immediate continuation of their teacher career might not be appropriate.

Another key part of the teacher regulatory context missing here is the management of teacher competence operating in local areas and in individual institutions. If the Government is to say something more meaningful about its performance in overseeing the current teacher regulatory

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framework, it needs to represent the outcomes of local management of teacher competence as well as those resulting from national conduct panel decision-making.

External Links

DfE: [Government response to the consultation on changes to teacher misconduct: the prohibition of teachers' advice](#) (January 2014)

NCTL: [Teacher misconduct: the prohibition of teachers: Advice on factors relating to decisions leading to the prohibition of teachers from the teaching profession](#) (January 2014)

Related Briefings

[Managing teachers at the national level: the regulation of teacher conduct](#) (November 2012)

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