

EDUCATION ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS AND SCHEDULES

Part 8 – Teachers

Teachers' Pay and Conditions

Sections 119 to 130

Section 119 & Schedule 11: School Teachers' Review Body

253. This section affirms the continued existence of the School Teachers' Review Body (STRB) set up under the STPCA. The arrangements will continue to apply to England and Wales. The section also provides that the members of the STRB will be appointed by the Secretary of State, rather than by the Prime Minister as under the STPCA. This will bring the appointment of members of the STRB into line with similar bodies, reflecting the general move away from Prime Ministerial appointments. The Chairman of the STRB will, however, continue to be appointed by the Prime Minister. Schedule 11 reflects consequential changes. The Schedule recasts Schedule 1 to the STPCA and makes minor simplifications and modifications to it. Matters covered are STRB membership, arrangements for the appointment of a chairman and deputy chairman, resignation and dismissal arrangements, payments to members and proceedings of the STRB.

Section 120: Review Body: function

254. Under this section, the STRB will, as at present, report on school teachers' remuneration and related conditions of employment (professional duties and working time), at the request and under the direction of the Secretary of State, including on the timing of a report. Any such report will be sent to the Prime Minister and the Secretary of State and published.

Section 121: Consultation by Review Body

255. This section requires bodies which the STRB deems it appropriate to consult to be notified of any referral to them by the Secretary of State. The 'relevant bodies' for consultation are LEA associations, LEAs, organisations representing governors of maintained schools, and bodies representing school teachers (teacher unions). These bodies must be given an opportunity to submit evidence and make representations. The STRB will be explicitly able to determine the way in which the relevant bodies are entitled to respond and may limit this as appropriate. For example, if the STRB considered it appropriate, some bodies could be permitted to respond in writing only.

256. The section also gives the Secretary of State a formal entitlement to submit evidence and make representations. This has been accepted practice hitherto.

Section 122: Power to prescribe pay and conditions

257. This section enables the Secretary of State to make orders determining school teachers' pay, working time and professional duties. This replicates the existing structure whereby such orders legally define school teachers' conditions of employment by reference to a document. As at present, school teachers must be paid only in accordance with such orders and nothing in a teacher's contract which is prohibited by or inconsistent with an order will be effective.
258. The section also defines 'school teacher'. A school teacher provides primary or secondary education under a contract of employment or a contract for services, where the other party to the contract is the governing body of a maintained school or an LEA. This includes teachers who are self-employed, but excludes those who are employed by an agency such as a teacher supply agency. A school teacher will either be a qualified teacher, as defined elsewhere under regulation; or unqualified, as prescribed by order. The latter category will encompass overseas-trained teachers, instructors, and those following the Graduate or Registered Teacher Programme routes. The definition also specifically includes anyone serving as a head teacher of a school maintained by a local education authority, which will ensure that all relevant head teachers are covered by pay and conditions orders made under this section. Teachers employed by local authorities for social services purposes are excluded from the definition.

Section 123: Order under section 122: scope

259. This section sets out some specific matters which the orders under the previous section may cover. It is not an exhaustive list. An order may confer discretions on LEAs or governing bodies. It may also confer a function on the Secretary of State or on another person who has agreed to carry it out. This may cover matters such as assessments or the exercise of a discretion. In practice this would include arrangements such as those relating to threshold or fast track assessment. An order may also require that any guidance issued relating to such matters is taken into account. Appeals rights may also be set out in an order.
260. Orders may also enable a teacher's pay to be set with regard to qualifications, experiences, duties, skills or previous salary, though this does not exclude other factors from being taken into account. The reference to previous salary is to make clear that there are, for example, powers to safeguard teachers' previous teaching salary in certain specific cases where they have moved to other posts, such as where there are statutory school closures or reorganisations. Limits on payments may be set and certain provisions may be applied to certain schools. For example, there are at present special arrangements for calculating the pay of head teachers of special schools.
261. Retrospective provision is allowed by order under this section, but not so as to reduce a teacher's remuneration, or alter a teacher's conditions of employment to his or her disadvantage, prior to the order. Orders may also specify that certain matters are not to be treated as remuneration, or related to professional duties or working time. This will enable it to be made clear that certain conditions of employment should be determined locally.

Section 124: Order under section 122: supplemental

262. This section provides for an order made under section 122 to make provision through a document, which must also be published. This means that current practice, whereby a document which sets out all appropriate pay and conditions requirements is brought into effect by a pay order, can continue.

Section 125: Reference to Review Body

263. This section sets out the circumstances in which the Secretary of State may make an order under section 122. Usually, as at present, the provision in an order will follow a

request for a report to the STRB, and the STRB's response. But the section also makes some changes to the Secretary of State's powers. At present, the STPCA allows the Secretary of State to make orders relating to matters which she does not consider so significant as to require referral to the STRB. The section here enables the Secretary of State to make an order where the matter concerned is subsidiary; or where the STRB's chairman is consulted on disapplying the provision requiring detailed consideration by the STRB.

264. The section explains what 'subsidiary' means for this purpose. It will cover the standards which the Secretary of State may set for different classes of teachers – for example, Advanced Skills Teachers – and criteria for progression from one pay scale to another – this would cover movement from the main pay scale to the upper pay scale following threshold assessment. (It should be noted that this does not mean that the Secretary of State will take decisions without involving the STRB on whether such categories of teachers or such pay scales should exist at all.)
265. Minor but necessary amendments could in future also be made to pay orders without reference back to the STRB in order to cover issues arising from the implementation of their recommendations, for example to ensure that groups of teachers are not disadvantaged, or to make recommendations work in practice. This might cover matters such as the complex arrangements necessary for the payment of recruitment and retention allowances, and assimilation arrangements resulting from changes to the pay structure. The matters might also be those which are minor in policy effect and therefore do not need to be subject to the full rigour of the STRB process, such as a desirable adjustment following on from a main policy or an interpretation of the intention, for example a change in the way training days are calculated to enable teachers to be paid for additional training undertaken in the evenings.
266. The section also gives the Secretary of State power by order to determine that provision of a particular kind should be, or cease to be, subsidiary, and to describe this provision by reference to her own opinion or to the opinion of another person. Section 210 provides for an order making such a determination to be subject to affirmative resolution procedure.

Section 126: Consultation by the Secretary of State

267. This section requires the Secretary of State to consult appropriate bodies before making any order under section 122 or section 125(4)(a). The relevant bodies are again LEAs and LEA associations, governor bodies, and bodies representing school teachers (teacher unions). Consultation with relevant bodies takes place under existing arrangements for making pay orders and is an important part of the review process. The consultation requirement relating to section 125(4)(a) relates to the Secretary of State's power to make an order identifying a certain provision as 'subsidiary', which may be used where such a provision is not already covered in section 125(3).

Section 127: Guidance

268. This section enables the Secretary of State to issue guidance on how any order made under section 122 should be put into practice, and requires LEAs and governing bodies to have regard to it. There must be consultation with the usual parties (as above) before any guidance may be issued. LEAs and governing bodies are expected to follow such guidance, and this section provides that a court or tribunal could take failure to do so into account in any proceedings.

Section 128: Education action zone

269. As at present under section 3 of the STPCA, this section entitles the governing body of a school in an EAZ to seek permission from the Secretary of State for it to determine the pay and conditions of the teachers at its school. This must, as at present, follow consultation with all the teachers at its school. The section provides a new power for

*These notes refer to the Education Act 2002 (c.32)
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the Secretary of State to make regulations to deal with the situation which could arise if the opt out should end for a particular reason.

Section 129: Transfer of employment

270. This section carries forward the current arrangements about Transfer of Undertakings and provides that pay and conditions orders shall not apply to any teacher of a previously independent school which becomes a maintained school, including a maintained nursery school, except at the request of the teacher.

Section 130: Repeal

271. This section repeals the STPCA. As described above, most of the STPCA is being re-enacted in the new legislation, with minor modifications where necessary.

School Teachers' Appraisal

Section 131

Section 131: Appraisal

272. This section updates existing powers under section 49 of the Education (No. 2) Act 1986 (EA 86) under which the Secretary of State, or the NAW, may make regulations requiring appraisal of the performance of schoolteachers employed under national pay and conditions and teachers in FE. Further, this section makes explicit: that the regulations can impose duties on specified groups of people in relation to the appraisal of teachers' performance; that the appraisal process may involve the exercise of a discretion conferred on persons identified in the regulations, for example, head teachers, governors and those teachers appointed by the headteacher to review performance; and that schools may use appraisal data in pay decisions. Before making regulations under this section the Secretary of State will consult bodies which she thinks appropriate. This section repeals section 49 of the EA 86.

School Teachers' qualifications

Sections 132 to 135

Section 132: Qualified teacher status

273. This section and section 133 re-enact and amend section 218 (1)(a) and (2) of the Education Reform Act 1988 (ERA) by defining the term 'qualified teacher'. It provides that the Secretary of State continues to have the power to determine who is a qualified teacher.

Section 133: Requirement to be qualified

274. This is a new regulatory power. Under the provisions of this section, the Secretary of State may set out the specified work which only qualified teachers may carry out in schools. In addition, certain other persons may carry out this work in schools if they satisfy specified requirements. The unqualified teachers who are permitted to be employed in schools under the current secondary legislation will continue to do so and they will be able to carry out the specified work in the same circumstances as previously. The section will also provide for teaching assistants and teaching support staff to carry out the specified work in schools if they are appropriately supervised.

Section 134: Requirement to be registered

275. Under this section, the Secretary of State, or the NAW, may by regulations provide that a specified activity may be carried out in a school maintained by an LEA or a non-maintained special school by a qualified teacher only where that teacher is registered

with full registration with the General Teaching Council (GTC) for England or for Wales. It also provides that a trainee teacher may undertake a specified course of training leading to qualified teacher status only where that teacher is registered with provisional registration with the GTC for England or for Wales. In addition provisional registration may be required of unqualified teachers undertaking specified work in schools.

Section 135: Head teachers

276. This section provides that the Secretary of State and the NAW may by regulations make it compulsory for persons serving as head teachers to be qualified teachers. Also the Secretary of State and the NAW may by regulations make it compulsory for first-time head teachers to hold a specified qualification if they are appointed on or after the date when the regulations come into force. Subsection (5) makes clear that the Regulations will apply to LEA-maintained schools and non-maintained special schools.

Further education

Sections 136 to 140

Section 136: Provision of education

277. This section enables the Secretary of State to make regulations which have the effect of requiring FE teachers to have a specified qualification and which can require lecturers to serve a probationary period. This section re-enacts section 218(1)(a), (c) and (d) of the ERA with amendments.

Section 137: Principals of further education institutions

278. This section provides that the Secretary of State may make regulations making it compulsory for the principal of an FE college to have a specified qualification, which could include an induction programme. The regulations may allow a person to serve as principal while he is undertaking the induction programme within a specified period of time.

Section 138: Training in provision of further education

279. This section enables the Secretary of State to make regulations regulating the provision of courses which lead to a teaching qualification for an FE teacher or an FE principal qualification under sections 136 and 137. This section makes provision similar to that in section 218(9)(b) and (c) of the ERA.

Section 139: Wales: provision of higher education

280. This section allows the NAW to make regulations relating to the provision of courses of higher education at FE institutions in Wales. The section re-enacts section 218(9)(d) of the ERA so as to enable regulations to prohibit provision of such courses without the NAW's approval and to regulate the numbers and categories of students on such courses. This provision will assist the NAW to assist in the planning of post 16 learning provision in Wales.

Section 140: Further education: general

281. This section permits exceptions to the regulations created under sections 136 to 139 and identifies the bodies that may have a function imposed on them under those sections. It also includes a definition of "education" which applies to sections 136-139. This definition includes certain types of training and reflects part of the definition of "further education" in the EA 96.

Health and fitness

Section 141

Section 141: Health and fitness

282. This section re-enacts section 218(5) of the ERA with a minor amendment. The Secretary of State and the NAW continue to have power to impose requirements as to the health and physical capacity of persons such as teachers in schools and further education institutions. In addition the Secretary of State and the NAW may impose requirements as to the health and physical capacity of persons who are employed by LEAs or governing bodies otherwise than as teachers and who are regularly in contact with persons aged under 18. Section 218(5) of the ERA refers to persons aged under 19.

Misconduct etc.

Sections 142 to 144

Section 142: Prohibition from teaching etc.

283. This section re-enacts and modifies the Secretary of State's power in section 218(6) of the ERA to prohibit or restrict the employment of teachers and workers with children. The Secretary of State and, in Wales, the Secretary of State and the NAW acting concurrently continue to have power to make directions prohibiting a person from: providing education at a school, FE institution or LEA; taking part in the management of an independent school; or carrying out work, in relation to schools, FE institutions or LEAs, that brings the person regularly into contact with children aged under 18 years (the current provision refers to persons aged under 19). The section provides the Secretary of State and the NAW with the power to prevent a person from working for a company exercising functions on behalf of a local education authority, a person working for a contractor and a person working voluntarily.
284. The Secretary of State and the NAW can prohibit or restrict someone's employment on the grounds of his misconduct, that he is unsuitable to work with children, that he is included permanently on the list of people considered unsuitable to work with children that is kept by the Secretary of State for Health under the Protection of Children Act 1999 (POCA), or on medical grounds. The Secretary of State and the NAW will also have power to direct that a person may not take part in the management of an independent school on grounds of that person's professional incompetence. The power to make directions on educational grounds is to be repealed. The Secretary of State and the NAW will have power to revoke or vary a direction except where a direction was given on the grounds that a person is unsuitable to work with children and that person claims he is no longer unsuitable. Provision is made for the procedure for making directions and the grounds on which a person may seek to have a direction revoked or varied to be set out in regulations. The section also provides for the enforcement of this duty.

Section 143: Directions under section 142: contractor, agency, etc

285. This section imposes a duty on bodies such as employment agencies or businesses, contractors, or voluntary organisations, that provide or employ individuals to do work that is within section 142 (2) or (3) not to arrange for an individual who is subject to a direction under section 142 to carry out any work that would contravene that direction. Such organisations will have to ensure that any person they propose to provide or employ to do such work is not subject to a direction that would prevent him or her from undertaking the work in question. If the Secretary of State or NAW think that such a body is likely to fail to comply with the duty they may issue a direction to secure compliance. Such a direction may require the body to take or refrain from taking steps

specified in the direction. The direction may be enforced by the S/S or NAW by a mandatory order

Section 144: Directions under section 142: appeal

286. This section partially re-enacts section 218A of the ERA to allow a person who is subject to a direction under section 142 to appeal against a decision to make a direction or not to revoke or vary a direction. It provides for appeals to be heard by the Tribunal established under section 9 of the POCA. The section also allows a person who is subject to a direction on the grounds that he is unsuitable to work with children to apply to the Tribunal for a review of the direction. The Secretary of State or the NAW may make regulations preventing an appeal being made on the grounds that the person did not commit an offence of which he has been convicted. Regulations may also set out the circumstances in which the Tribunal will allow an appeal or grant an application for a review and the powers available to the Tribunal on allowing an appeal or granting a review.

Sections 132 to 140: general

Sections 145 and 146

Section 145: Specification of qualification

287. Regulations made in relation to teachers' qualifications may refer to initial teacher training (ITT) courses at accredited institutions and may confer a discretion on the Teacher Training Agency or Higher Education Funding Council for Wales, or other specified persons or bodies. The regulations may also impose a duty on the Teacher Training Agency. The Secretary of State has to consult the GTC about changes to the content of initial teacher training.

Section 146: Repeal of sections 218 and 218A of the Education Reform Act 1988

288. This section repeals sections 218 and 218A of the ERA.

1999 Pay document

Section 147

Section 147: Application of pay-scale

289. School teachers' pay and conditions are determined under the provisions of the STPCA, and set out in the School Teachers' Pay and Conditions Document which is updated as of September each year. Until 31 August 1999, the school teachers' pay spine comprised 18 points, numbered 0 to 17. Two points were awarded for possession of a good honours degree, and points were awarded incrementally for years of experience up to a total of 9 points for both qualifications and experience. Points could also be awarded on the basis of other criteria. Newly qualified teachers normally started on point 0 or point 2, depending upon whether or not they were a good honours graduate.
290. With effect from 1 September 1999, point 0 was removed and the differential for good honours degrees reduced to 1 point for new entrants. Subsequently, the Department formed the view that the legal effect of the amendments was uncertain. The Department sought to remedy this by means of a remedial order, which took effect on 1 April 2000. However the Department believes that the order did not resolve the matter fully. This section now seeks to tidy up the way in which point 0 was removed in order to ensure that all teachers' true lawful pay entitlement is clearly the entitlement intended in the 1999 and subsequent School Teachers' Pay and Conditions Documents. The provisions should work in practice by making no difference to teachers' pay.

General Teaching Councils for England and Wales

Section 148

Section 148 and Schedule 12: The General Teaching Councils

291. This Schedule amends section 2 of the Teaching and Higher Education Act 1998 (THEA) by extending the existing advisory functions of the GTCs for England and for Wales.
292. The Schedule amends section 3 of the THEA (relating to the registration of teachers with the GTCs for England and for Wales) giving the Secretary of State or the NAW power to introduce a new category of provisional registration of teachers. Eligibility for such registration will be defined in the regulations, and is expected to apply to trainee teachers and overseas teachers. Registration for teachers with qualified teacher status is consequently redefined as “full” registration.
293. The Schedule also provides that a person will not be eligible for registration, whether full or provisional, unless he or she has been judged by the GTCs as suitable to be a teacher. It will be for the GTCs to determine suitability. They might, for example, wish to satisfy themselves as to the good character of individuals by means of criminal record checks and character references for overseas teachers. Amendments to the Police Act 1997 provide that the GTCs have access to criminal records. The GTCs will exercise their functions on the assessment of suitability at the point that a person applies to become provisionally registered or re-registered; or fully registered or re-registered.
294. The Schedule provides for a right of appeal to the High Court against a refusal of an application for registration on the grounds of suitability. The power to make regulations in section 4 of the THEA is extended so that an applicant so refused may be informed of the reasons for the decision and of his or her right of appeal.
295. Section 4 of the THEA is also amended to provide that the GTCs, in setting the level of the fee, should have regard to expenditure on all their functions, including registration.
296. The Schedule extends the functions of the GTCs to include activities designed to promote the standing of the teaching profession.
297. The Schedule amends Schedule 1 to the THEA to allow the Secretary of State and the NAW by order to amend certain provisions of Schedule 1 with a view to removing or relaxing the controls which they exercise over the GTCs for England and Wales respectively – for example, to remove the need for their consent to the borrowing of money by the GTCs, or to the provision of pension schemes.
298. The Schedule amends Schedule 2 to the THEA to allow the GTCs to attach conditions to any suspension order made in relation to a teacher against whom they bring disciplinary proceedings. Where a suspension order is made, the teacher’s name is removed from the register. Under the amendment, the teacher would be required to comply with any conditions – for example, to undertake a course of counselling – before he or she is eligible to be registered again.
299. The Schedule also amends Schedule 2 to the THEA to provide that references to registration mean either full or provisional registration.