



Department
for Education

Amending the childcare disqualification arrangements in schools and non-domestic registered settings

Government consultation

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Respond by 1 July 2016

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Introduction

This consultation paper sets out options for changing the childcare disqualification arrangements in schools and non-domestic registered settings. Currently, a childcare worker can be disqualified because someone who lives or works in their household is disqualified – this is known as disqualification ‘by association’. Disqualification by association was introduced with the intention of preventing an individual from working with young children, where the individual may be under the influence of a person who lives with them and who is likely to pose a risk to children.

Concerns have been raised with the department about the fairness and proportionality of these arrangements on childcare workers in schools and other non-domestic registered settings. Accordingly we are seeking your views on three separate options which are intended to improve the fairness of the current arrangements. These are:

- Option 1 - remove disqualification by association in schools and non-domestic registered settings
- Option 2 - retain disqualification by association, but introduce a new right to make representations to Ofsted before the disqualification takes effect
- Option 3 - retain disqualification by association, but reduce its scope and introduce a new right to make representations to Ofsted before the disqualification takes effect

Implementing any of these options will require amendments to regulations 9 and 10 of the Childcare (Disqualification) Regulations 2009 (“the Regulations”) and may also entail amendments to other secondary legislation. We also propose to use this opportunity to address two anomalies in the Regulations, both in regulation 4(2) (see page 16).

Who this is for

- Local authorities
- Governing bodies of maintained schools, including maintained nursery schools, and proprietors of non-maintained and independent schools (including academies, free schools and alternative provision academies) and management committees of pupil referral units (PRUs)
- Providers of early years childcare, including childminders and other providers of childcare on domestic and non-domestic premises on the Early Years Register (or registered with an early years childminder agency)
- Providers of later years (age 5-7) childcare, including providers registered on Part A of the General Childcare Register
- Membership and representative bodies for early years providers and schools.

About this consultation

This consultation paper sets out options for making changes to the childcare disqualification arrangements for childcare workers in non-domestic settings.

The first part of the paper sets out the background and legislative context to the consultation. It then gives details of three options for changes to the current arrangements, each of which would require changes to the Regulations. The paper sets out further proposals for correcting unintentional anomalies/errors in the Regulations, provides some examples of the impact of our proposals on childcare workers and concludes with a set of questions relating to these options.

We would welcome your views on our proposed options.

Other ways to respond

If, for exceptional reasons, you are unable to use the online system - for example, because you use specialist accessibility software that is not compatible with the system - you may download a word document version of the form and email it or post it.

By email

- ChildcareDisqualification.CONULTATION@education.gsi.gov.uk

By post

Childcare Disqualification Team
Department for Education
Level 1, Bishopsgate House
Feethams, Darlington
DL1 5QE

Background

The Regulations automatically disqualify a person from providing, or working in, childcare settings at the point they are convicted of, or cautioned for, specified offences, or where they meet other criteria for disqualification from registration, set out in the Regulations. The Regulations apply to the following types of childcare provision:

- early years provision¹ and later years provision² for children under the age of 8 for which the provider is required to be registered; and
- early years and later years provision for pupils under the age of 8 in schools³.

The Regulations set out the grounds for disqualification from registration which include:

- being cautioned for, or convicted of, specified violent and sexual offences;
- inclusion on the children's barred list held by the Disclosure and Barring Service (DBS);
- grounds relating to the care of children (including where an order is made in respect of a child under the person's care);
- having registration refused or cancelled by Ofsted in relation to childcare or children's homes, or being disqualified from private fostering;
- living in the same household where another person who is disqualified lives or works (disqualification by association).

Where a childcare worker notifies their employer that they are disqualified from working with children by virtue of any of the criteria set out in the Regulations, the employer must not employ that person to work in a childcare setting, although they may suspend or redeploy the person pending the outcome of any waiver application.

A disqualified person can apply to Ofsted for a waiver of disqualification for specified grounds of disqualification but, at present, this application can only be made after the disqualification has taken effect. There is however no right to request a waiver where an individual is on the children's barred list, is the subject of a relevant court order or is subject to a direction under section 142 of the Education Act 2002 (which concerns prohibition from teaching and other related matters). Ofsted may grant a waiver to allow

¹ Early Years provision means any childcare (including education and supervised activity) for a child from birth until the 1 September following his fifth birthday (s18 and s19 Childcare Act 2006). It therefore includes nursery and most reception provision in school.

² Later years provision means childcare for an older child and does not include education or supervised activity during the school day (s18 Childcare Act 2006).

³ The Regulations apply even though a school is exempt from registration as a childcare provider under s34(2) and s53(2) of the Childcare Act 2006.

the individual to be employed in relation to early or later years provision. In considering a waiver, Ofsted will consider:

- the risk to children;
- the nature and severity of any offences, cautions or orders;
- the age of any offences or orders;
- repetition of any offences or orders or any particular pattern of offending;
- information relating to any interviews with the disqualified person, applicant for registration or registered person, including their explanation of and attitude to the disqualifying event;
- any other information available from other authorities, such as the police or local authority children's services department in relation to the offences;
- any mitigating circumstances given.

Further details are provided in Ofsted's factsheet [Applying to waive disqualification: early years and childcare providers](#).

Reasons for change

Inconsistencies in the operation of the childcare disqualification arrangements between schools and other early years settings were brought to the Department's attention in 2014. These representations revealed that many providers were unclear about the arrangements, particularly in relation to the by association requirement. Consequently we published supplementary advice to [Keeping children safe in education](#) in October 2014, to help schools understand their statutory responsibilities. This led to a large number of waiver applications to Ofsted, a significant number of which were not necessary because the member of staff in question did not in fact meet the disqualification criteria and/or was not providing early or later years childcare.

Following publication of our initial advice, we conducted an extensive stakeholder engagement exercise. This informed new statutory guidance [Disqualification under the Childcare Act 2006](#), published in February 2015 for local authorities, maintained, academy and independent schools. Whilst the guidance has helped significantly to reduce the number of waiver applications to Ofsted from schools, it has not diminished stakeholders' view that it is unfair that individuals are prohibited from working in childcare when they themselves have not committed a relevant offence.

Although the guidance has been widely considered to be helpful, concerns continue to be raised about the inconsistency of approach in applying the arrangements. It remains a widely held view that the complexity of the legislation continues to result in differing interpretations of the arrangements amongst employers, and that this would be best addressed by simplifying the arrangements as much as possible.

The Department continues to receive representations which may be summarised as follows:

- the disqualification arrangements (particularly in relation to disqualification by association) are disproportionate;
- the wider safeguarding arrangements in place under the DBS regime are sufficient to guard against the risks to children;
- schools are highly regulated, as is the teaching profession, and provide an extremely safe environment, which make these arrangements unnecessary;
- the disqualification by association arrangements are unjust – an offence committed by someone in the household has no bearing on the childcare worker’s job (in cases where the childcare worker works on non-domestic premises);
- the application of the arrangements is inconsistent – employers are making significantly different decisions, often based on differing interpretations of the legislation by those who are advising them;
- restricting the arrangements to early and later years settings means they are ineffective as staff who are disqualified are able to move to work with other age groups outside childcare but within school settings, so the perceived risk would remain in school;
- that arguably there are greater risks to older children, who may be more susceptible to risk, for example, grooming;
- that automatic disqualification is unfair, as this often results in suspension – workers should have a right to make a case against disqualification and continue working;
- the impact in registered early and later years settings - where redeployment is often not an option - is significant.

The proposals put forward in this consultation are in response to these concerns and the arguments that have been made to us. These are predominantly about the unfairness of the policy, whereby childcare workers are automatically disqualified, if another person who is disqualified lives or is employed (i.e. disqualified ‘by association’) in that household. For such childcare workers, their only recourse is by way of an application for a waiver, with no possibility to make representations to support their continued working in childcare prior to being disqualified. In proposing changes to the arrangements, our aim is to ensure these are proportionate to the risk posed and strike the right balance between ensuring that children in childcare are protected, whilst at the same time ensuring the fairness of the arrangements for those who provide childcare.

Those out of scope

We are not proposing that current disqualification arrangements should be changed for childcare workers providing childcare in domestic settings. This includes all childminders registered on the Early Years Register or Part A of the General Childcare Register. All childcare provision in domestic settings would still be subject to the current arrangements, i.e. automatic disqualification with the right to apply for a waiver as now. This is because we consider the potential risk to children to be too high to allow childcare to be provided on domestic premises where someone who is disqualified is living or working, whilst Ofsted consider applications for a waiver.

Our proposals do, however, assume that all three options should include headteachers and the registered person in other relevant settings.

Option 1: Remove disqualification by association in schools and non-domestic registered settings

Option and rationale

Option 1 - remove disqualification by association for all childcare workers in schools and non-domestic registered settings.

As a result of the current arrangements, there are a significant number of childcare workers disqualified from working in childcare because someone who lives or works in their household has committed a relevant offence. This provision is widely considered to be unfair (for the reasons set out in the 'Reasons for Change' section to this paper on pages 6 & 7).

In the period October 2014 to September 2015 Ofsted declined none of the 1148 waiver applications it received from childcare workers in schools in cases of disqualification by association. In this period it received a further 249 applications from childcare workers in non-domestic registered settings and declined just two. Accordingly Ofsted's management information (MI) appears to support the view that a significant number of workers who present no apparent risk to children's safety are being unnecessarily disqualified and prevented from working in childcare.

On the basis of this there would appear to be no evidence to suggest that removing the disqualification by association provision would present an unacceptable risk to children in schools. Similarly the evidence suggests the risk to children in registered early years settings is extremely low, and the disqualification by association arrangements could be viewed as a disproportionate response to these.

There are no comparable "by association" elements in safeguarding arrangements for other groups of children, including those who would be considered to be similarly vulnerable to children in early years settings (e.g. some children with special educational needs). Accordingly, removing disqualification by association from the childcare disqualification arrangements in schools and non-domestic settings would provide an opportunity for a level playing field across the children's workforce.

We know there are some schools that have strategies in place for dealing with 'by association' type matters that are brought to their attention, for example where staff work with older pupils. In implementing this option we would strengthen the department's guidance by drawing on the widespread experience that exists in schools and other registered non-domestic settings, as well as on Ofsted's experience in considering waiver applications. This should help providers better identify and manage cases of disqualification by association that may present a risk to children. This would mitigate the low risk of removing disqualification by association from the arrangements and also help childcare providers, schools and other educational settings to manage any 'by association' type situations that do arise. We would continue to supplement the

department's guidance with the telephone helpline (01325 340 409) and mailbox (Mailbox.disqualification@education.gsi.gov.uk) facilities we currently have in place.

Effect of the proposed option

This option would remove from the childcare disqualification regime all workers employed to work in childcare in schools and non-domestic registered early and later years settings who would have been disqualified by association. On the basis of Ofsted's MI we estimate that this option would remove from the regime in excess of 70% of childcare workers who meet the current disqualification arrangements.

This consultation

We are seeking views on whether we should amend the Regulations to remove automatic disqualification for childcare workers in schools and registered non-domestic settings who would currently be disqualified by association.

Option 2: Retain disqualification by association but introduce a new right to make representations to Ofsted

Option and rationale

Option 2 - retain disqualification by association, but introduce a new right to make representations to Ofsted before disqualification takes effect for:

- **all childcare workers disqualified by association (i.e. those workers living in the same household where another person who is disqualified lives or works) who work in schools and non-domestic registered premises;**
- **those childcare workers in these settings whose registration has been refused or cancelled by Ofsted in relation to childcare or children's homes;**
- **childcare workers in these settings disqualified from private fostering; and**
- **those childcare workers in these settings who themselves are disqualified on grounds relating to the care of children (for example, where a child in their care is subject to a care order).**

Offering these workers the opportunity to make representations to Ofsted before disqualification takes effect could benefit both employees and employers, without presenting unacceptable risks to children's safety.

Employers would no longer have to suspend or redeploy such staff whilst Ofsted considered an application for waiver. Employees within scope, who choose to take up the new right of making representations to Ofsted, would be able to continue to work in childcare. These workers would not be disqualified until after they have had a chance to submit representations and then only if Ofsted's review of those representations, determines that they should be disqualified. In these circumstances they could then apply to Ofsted for a waiver.

This would make the arrangements fairer for childcare workers who have not themselves been cautioned for, or convicted of, criminal offences, and for those who are currently disqualified for reasons such as having registration refused or cancelled in relation to childcare. Those with cautions or convictions for relevant offences against children and adults would, however, continue to be automatically disqualified.

Effect of the proposed option

This option would retain the current disqualification by association regime, but would introduce a new right to make representations to Ofsted for all workers disqualified by association in schools and registered non-domestic early and later years settings (i.e. over 70% of childcare workers who meet the current disqualification arrangements).

Provided these workers made representations within the prescribed time limit (we propose 28 working days) of being disqualified, and Ofsted accepted these, they would be able to continue to work in childcare and they would not need to apply for a waiver. Only where Ofsted, having considered the representations, made a decision to disqualify the worker, would the employer need to suspend or redeploy the worker, who could then apply for a waiver of disqualification.

We would set out the operation of the new arrangements in regulations and guidance. Childcare workers satisfying the existing disqualification criteria would need to check whether they were required to make representations to, or apply for a waiver from, Ofsted. They would need to inform their employer of their status; and in turn employers would be required to inform Ofsted.

On receipt of an individual's representation Ofsted would consider issues such as the nature of the offence, the risk to children and mitigating factors in favour of allowing the individual to continue to work in childcare. If Ofsted decided the worker was not disqualified, they would be able to continue to work in childcare.

This consultation

We are seeking views on whether we should amend the Regulations to introduce in the circumstances described here a right to make representations to Ofsted for childcare workers in schools and registered non-domestic settings, before making a decision on disqualification.

Option 3: Retain disqualification by association, but reduce its scope, and introduce a right to make representations to Ofsted

Option and rationale

Option 3 - retain disqualification by association, but reduce its scope, removing from it childcare workers:

- **disqualified by association in schools and in non-domestic registered settings in relation to certain less serious offences (to be specified in the Regulations); and**
- **disqualified by association on the basis of someone living or working in their household having their registration refused or cancelled by Ofsted in relation to childcare or children's homes, or where someone in the household is disqualified from fostering, or on grounds relating to the care of children.**

In addition, introduce a new right to make representations for all other childcare workers disqualified by association in non-domestic registered settings and those workers in these settings whose registration has been refused or cancelled by Ofsted in relation to childcare or children's homes, or who are themselves disqualified from private fostering, or disqualified on grounds relating to the care of children.

For those disqualified by association on the basis of someone living or working in the household having committed a 'less serious' offence (or that person having had registration refused or cancelled in relation to childcare or children's homes, or from fostering, or on grounds relating to the care of children), this option would have the same impact as option 1. By way of an example, it would remove from the scope of the arrangements those childcare workers who are disqualified by association where the disqualified person in the household had committed ABH or other less serious offences against an adult.

In all other cases of disqualification by association (and where the childcare worker would themselves be disqualified for having registration refused or cancelled in relation to childcare or children's homes, or who would be disqualified from fostering, or on grounds relating to the care of children), workers would have a right to make representations to Ofsted. This would apply in the same way as we propose for all those disqualified by association under option 2. For example, this option would provide those childcare workers who are disqualified by association where a person living or working in the household had committed GBH or other more serious violent and sexual offences

against children and adults with the right to make representations to Ofsted to enable them to continue to work in childcare.

Those childcare workers who themselves have cautions or convictions for relevant offences against children and adults would continue to be automatically disqualified.

Effect of the proposed option

Employers would no longer have to suspend or redeploy staff whilst Ofsted considered a waiver application from those childcare workers within scope of this option. As a result the following workers would no longer be disqualified and would be removed from the arrangements:

- childcare workers disqualified by association due to a person in the household having a relevant caution or conviction for a less serious offence; and
- workers disqualified by association due to someone in their household having registration refused or cancelled in relation to childcare or children's homes, or where someone in the household would be disqualified from fostering, or where someone in the household would be disqualified on grounds relating to the care of children.

In cases of disqualification by association, where the caution or conviction was for a more serious offence, or where the worker themselves would be disqualified for having registration refused or cancelled in relation to childcare or children's homes, or who would be disqualified from fostering, or on grounds relating to the care of children, the worker would have the right to make representations. This would mean they would be able to continue to work in childcare, should they take up the option of making representations to Ofsted, and their employer would no longer need to suspend or redeploy these staff (pending Ofsted's decision).

On the basis of Ofsted's MI we estimate that this option would remove from the regime around 30% of childcare workers who meet the current disqualification arrangements and a further 40% would be eligible to continue work whilst they made representations to Ofsted.

This consultation

We are seeking views on whether we should amend the Regulations to remove automatic disqualification for childcare workers in schools and non-domestic registered early and later years settings and introduce a right to make representations to Ofsted for childcare workers in the circumstances described above.

Our proposals at a glance

In summary

The following table sets out in summary the impact of each of our three proposals on childcare workers disqualified by association and on those workers who are themselves disqualified.

| Type of worker affected | Childcare workers disqualified by association - where someone who lives or works in the worker's household has committed a relevant offence or they are disqualified on other ⁴ grounds | | | Childcare workers themselves disqualified for any of the grounds listed on page 5 of this consultation paper (i.e. not due to someone they are associated with) | | |
|-------------------------|--|---------------|--|---|---|-----------------------|
| | Type of offence | Other grounds | Less serious offences | Serious offences | Other grounds | Less serious offences |
| Option 1 | Removes all workers disqualified by association from the arrangements in schools and non-domestic settings | | | No change - these workers remain in scope of the arrangements | | |
| Option 2 | All these categories of workers remain in scope of the arrangements – but have a new right to make representations to Ofsted before disqualification | | | No change - these workers remain in scope | | |
| Option 3 | Removes all workers disqualified by association from the arrangement in schools and non-domestic settings in these circumstances | | Remain in scope – right to reps to Ofsted introduced | | No change – these workers remain in scope | |

⁴ For the purpose of this table *other grounds* covers childcare workers disqualified where a relevant person's registration has been refused or cancelled by Ofsted in relation to childcare or children's homes; or where the person is disqualified from private fostering; or where the person is disqualified on grounds relating to the care of children (including where an order is made in respect of a child under the person's care). The relevant person may be the childcare worker themselves, or in cases of disqualification by association, someone living or working in the childcare worker's household.

Further proposals for reform of the childcare disqualification arrangements

Background

During the course of the stakeholder engagement that informed the publication of new statutory guidance [Disqualification under the Childcare Act 2006](#), we received representations about two anomalies in the Regulations, both in regulation 4(2). These are that the regulation:

- may be interpreted to mean that childcare workers who are foster carers or who have adopted children in their household are automatically disqualified where the child in their care is subject to a care order; and
- it inadvertently disqualifies childcare workers who themselves were once the subject of a care order.

Proposal

We accordingly propose to amend regulation 4(2) to correct both of these anomalies.

Examples of the impact of our proposals on childcare workers

Example A

AB has worked in a nursery for three years; she gets married but her husband was cautioned in 2010 for ABH when he was 18 years old. This means AB is automatically disqualified, and because she cannot be redeployed she is suspended from her nursery job whilst Ofsted considers her waiver application. Under option 1, where there is no disqualification by association, her husband's previous caution would mean AB would not be caught by the disqualification regime and it would have no impact on her work. Under option 2, AB could continue in her job whilst Ofsted considered her representations. Under option 3, her husband's caution for ABH would be considered a 'less serious' offence and so AB would not be caught by the disqualification regime.

Example B

CD has worked in a nursery attached to a maintained primary school for five years. Her son, who is 29 and has served a prison sentence for offences relating to grooming, comes to live with her. This means CD is automatically disqualified but the headteacher is able to redeploy her to work with older children in the primary school whilst Ofsted considers her waiver application. Under option 1, there is no disqualification by association, therefore her son's previous conviction would mean CD would not be caught by the disqualification regime and it would have no impact on her work. Under option 2, CD could continue her job whilst Ofsted considered her representations. Under option 3, her son's conviction would be prescribed as a 'more serious' offence; however CD could continue in her job whilst Ofsted considered her representations.

Example C

EF has applied to work as a nursery assistant in a private nursery. He had previously intended to open a private nursery but Ofsted had refused his application to register as a provider. This means EF is disqualified from undertaking a nursery job until Ofsted considers his waiver application. Under option 1, as EF is disqualified from working in childcare because Ofsted has refused his registration to establish a nursery, he would need to apply for a waiver to work in childcare. Under options 2 and 3, EF could work in childcare whilst Ofsted consider his representations.

Example D

GH has been a headteacher of an academy school with a nursery for three years. She moves in with her partner who has a conviction for GBH from 30 years ago. This means GH is automatically disqualified but her academy trust is able to redeploy her for a short secondment to another school in the trust whilst Ofsted considers her waiver application. Under option 1, where there is no disqualification by association, her partner's previous conviction would have no impact on GH's work. Under option 2, she could continue in her job whilst Ofsted considered her representations. Under option 3, her partner's conviction for GBH would be considered a 'more serious' offence; however GH could continue in her job whilst Ofsted considered her representations.



Department
for Education

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