

Taking Regulatory Action

Version 2 – For Consultation



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Section 1: Background

About Ofqual

We regulate all academic and vocational qualifications in England, together with vocational qualifications in Northern Ireland, where those qualifications are provided by a body recognised by Ofqual to provide them. Each recognised body is known as an “awarding organisation” and each qualification for which it is recognised is known as a “regulated qualification”.

We are a statutory body, created by the Apprenticeships, Skills, Children and Learning Act 2009, as amended by the Education Act 2011 (the Act). The Act sets out the legal framework within which we operate, gives us powers to take specific forms of regulatory action, and defines the objectives that we must seek to achieve when we exercise those powers.

We regulate to secure standards of, and public confidence in, regulated qualifications. We also regulate to secure efficiency in the provision of regulated qualifications and to raise awareness of the range and benefits of regulated qualifications to learners, employers and higher education institutions. We aim to regulate so that, among other purposes set out in the Act, the interests of learners are protected.

We also keep under review all aspects of statutory assessment arrangements (“regulated assessment arrangements”, i.e. National Curriculum and Early Years Foundation Stage) that are delivered on behalf of the Secretary of State.

About this document

This document is for consultation. While we consult and prepare a new version, the first version of *Taking Regulatory Action* (June 2011)¹ remains in force until we advise of a change.

This document sets out the approach we intend to follow in exercising our statutory powers to take regulatory action. It is consistent with the Act in its description of our powers, the way in which we will exercise them, and the matters to which we will have regard. Where the Act gives us discretion, we say how we intend to use it.

This document will be of interest to those whom we regulate and to others who have an interest in our approach to regulation. From time to time we will re-evaluate our

¹ www.ofqual.gov.uk/files/2011-06-23-taking-regulatory-action.pdf

approach to taking regulatory action and revise or update this document as appropriate.

This document forms part of the Qualifications Regulatory Framework, which sets out how we intend to perform our monitoring and enforcement functions.

We have different duties and powers with regard to regulated qualifications and to regulated assessment arrangements. In this document we address only the regulatory action we can take in respect of awarding organisations and the regulated qualifications they award. Our role in relation to regulated assessment arrangements and our approach to the performance of these duties is set out in the *Regulatory Framework for National Assessments: National Curriculum and Early Years Foundation Stage* (2011).²

Our approach to regulatory action

We are committed to regulating in accordance with regulatory best practice, particularly the Better Regulation Executive's five principles of good regulation³ and the Macrory report *Regulatory Justice: Making Sanctions Effective* (November 2006)⁴.

In line with these principles, we target our regulatory activities in accordance with our assessment of risks to learners, standards, efficiency and public confidence, while having regard, among other matters set out in the Act, to the number of regulated qualifications available and the desirability of facilitating innovation. All of our decisions are informed by the evidence available to us.

Our approach to regulating awarding organisations is based on the premise that awarding organisations are themselves accountable for the quality and standards of their regulated qualifications.

We will take action that is proportionate to the degree of risk associated with the nature or behaviour of a specific awarding organisation or class of awarding organisation, the type of regulated qualification in question, the number and type of affected or potentially affected learners and other users of qualifications, and the

² www.ofqual.gov.uk/files/2011-regulatory-framework-for-national-assessments.pdf?Itemid=143

³ We therefore aim to be: transparent, consistent, proportionate and targeted as we undertake our regulatory role and to be accountable for our actions

⁴ www.bis.gov.uk/files/file44593.pdf

impact (or potential impact) on standards, public confidence in regulated qualifications, or the efficiency with which such qualifications are provided.

When things go wrong, and an awarding organisation is or is likely to be in breach of its conditions of recognition, we will use the range of our powers to take action to (as appropriate):

- secure that the awarding organisation brings itself back into compliance with the conditions, and take further action if it does not;
- prevent the awarding organisation gaining from the breach;
- seek to deter all awarding organisations from future breaches of conditions; and
- promote public confidence in qualifications, through visible, appropriate and effective regulatory action.

We will act consistently. This means that we will treat like cases alike, but will also make distinctions between cases where there are relevant differences of fact which mean that we should treat them in different ways. When we make decisions, we will consider all the circumstances of the case in the light of the evidence available to us.

For example, where it appears to us that an awarding organisation has failed or is likely to fail to comply with its conditions of recognition, we will take into account all the facts relevant to that awarding organisation, including its past compliance history (including whether or not the non-compliant behaviour is a one-off or part of a pattern), whether the awarding organisation has identified the issue itself and taken steps to address it, the awarding organisation's acceptance of responsibility, its co-operation with our investigations, and whether it acted in good faith.

We will be transparent in our approach. We will give reasons for our decisions and report publicly on the regulatory action we take.

Range of regulatory actions available

Each awarding organisation must comply with the conditions of recognition we place on it.

Where necessary we will take regulatory action in order to secure our statutory objectives and duties. We can make a range of regulatory interventions, these include investigations into a particular issue, statutory and non-statutory regulatory actions (which are set out in detail under the headings below) and making changes to our own regulatory requirements. For example we may:

- in relation to a risk that has been newly identified, impose a further condition:
 - on an individual awarding organisation or description of awarding organisations,
 - for a specific qualification or description of qualification, or
 - in respect of credits relating to different components of qualifications or descriptions of components in qualifications,
- investigate whether any condition should be revised or removed,
- identify and address any non-compliance with a condition of recognition,
- determine or vary the surrender date should an awarding organisation wish to cease to be recognised, or
- investigate complaints in relation to the award of a regulated qualification.

Statutory actions

Each recognised awarding organisation is subject to conditions of recognition. If a condition is breached or is likely to be breached, we may use one or more of our statutory sanctions. We will impose such sanctions on an awarding organisation when this represents the most suitable response to non-compliance or likely non-compliance with its conditions of recognition. In some cases it may be that we use our statutory powers in conjunction with one another or with one or more of our non-statutory actions.

We have a number of statutory powers available to us.

In order to enforce compliance, and bring to an end any ongoing failures to comply, we can, in particular:

- give a direction,
- impose a monetary penalty (a fine) and
- withdraw recognition, in full or in respect of specified qualifications or a description of qualifications.

We can also seek to influence an awarding organisation's behaviour by using our powers to:

- remove a general condition from a specified awarding organisation,
- impose special conditions of recognition, including
 - an entry and inspection condition, and
 - a fee-capping condition, and
- make some or all of an awarding organisation's qualifications subject to an accreditation requirement by applying an accreditation condition.

Non-statutory actions

We will often use non-statutory means, at least in the first instance, to influence an awarding organisation's behaviour. We will typically use non-statutory approaches where:

- the nature and effect of the issue does not justify formal intervention,
- we have not identified any non-compliance with the conditions of recognition, but taking such action at this stage will effectively reduce the risk of non-compliance arising in the future
- it appears, on the basis of the evidence available to us, that there has been, or is likely to be, non-compliance, but it is not significant and its impact on learners and others is low, or
- the awarding organisation has brought an issue to our attention and is already taking corrective or investigative actions itself which we deem to be sufficient.

For example we may:

- ask an awarding organisation to propose for our agreement the action it will take to address an issue, and monitor its progress in doing so,
- accept an undertaking from an awarding organisation, and take statutory regulatory action in cases where it is not met (in accordance with the condition of recognition that provides for binding undertakings to be given),
- publish any evidence we have found that conditions of recognition are not being complied with (whether involving an individual awarding organisation or across a number of awarding organisations), and where appropriate make clear our

dissatisfaction with the behaviour of the awarding organisation or awarding organisations, or

- give an awarding organisation a period of time to address any failure to comply with one or more of the conditions to which its recognition is subject, and to demonstrate to us that it has done so within the timeframe.

Further, we may::

- publish any evidence we have found in order to indicate that new conditions are necessary to address specified market behaviour (whether involving an individual awarding organisation or across a number of awarding organisations), or
- ask an awarding organisation to co-operate with a regulatory review of documents or processes, or to participate in a market research exercise
- undertake a formal regulatory inquiry into a particular incident or series of incidents which raise concerns about the operation of the system or the behaviour of one or more awarding organisations.

From time to time we might find evidence of matters that other competent authorities have the most appropriate or effective powers to address. In such cases we will refer the matters to those authorities.

Examples might include: fraud, which we would generally refer to the appropriate investigating authority; unlawful discrimination, which we would generally refer to the Equality and Human Rights Commission; or anti-competitive practice, for which we would generally pass cases to the Office of Fair Trading.

Section 2: Imposing conditions of recognition

General and special conditions

Each awarding organisation will be subject to conditions of recognition. Most of the conditions of recognition to which an awarding organisation is subject will apply to all awarding organisations (general conditions). However, different general conditions might also be applied to different types of awarding organisation, different qualifications or types of qualification, or in respect of credits relating to different components of qualifications or types of such components.

We may also impose additional conditions of recognition on an individual awarding organisation. The Act refers to these as being conditions “other” than the general conditions, and they are more usually referred to as “special conditions”.

The Act states that the special conditions which may be applied to an individual awarding organisation include in particular:

- entry and inspection conditions (as explained below), or
- fee-capping conditions.

However, we also have the power to impose additional types of special condition where it would be appropriate to do so in the case of an individual awarding organisation.

Imposing a new general condition or revising the general conditions

Before setting or revising general conditions we will carry out a public consultation.

We will publish the general conditions of recognition and any revisions to them.

Imposing a special condition

We may impose a special condition at the time of recognition or at any later time.

When we are considering imposing an entry and inspection condition we will follow the procedure set out in the following section.

When we are considering any other condition we will give the awarding organisation an opportunity to make representations in response to a written notice of our

intention to impose a condition of a particular type. The period we allow the awarding organisation to make representations will be specified in the notice and will be determined by the urgency with which we need the condition to be complied with in order to have a positive impact.

When might we impose additional conditions of recognition on an awarding organisation?

When we impose a special condition on an individual awarding organisation, that condition will be designed to address a particular issue relating to the awarding organisation's performance, behaviour or activities which we consider, on the evidence available to us, requires an additional condition.

The range of circumstances in which it would be appropriate to impose an additional condition is wide and might include, but is not limited to, the following:

- a need by the awarding organisation to address a significant failing in its IT systems that puts at risk its ability to award qualifications that meet the requisite requirements. The condition might impose a duty on the awarding organisation to report to us at specified intervals on action it is taking to address the defect or to utilise external resources to address the defect
- a concern that the awarding organisation is entering into arrangements with centres (such as schools and colleges) without adequate checks, controls or safeguards such that there is a risk to learners, to standards or to public confidence. The condition might impose a duty on the awarding organisation to demonstrate to us before it enters into any new arrangement with a centre that it has undertaken appropriate checks and put in place appropriate controls and safeguards.

Removing a specified condition

We may decide that an individual awarding organisation is not to be subject to a specified general condition at the time of recognition, or is to cease to be subject to a specified general condition or to a special condition at any later time.

We will do so either on considering a request from an awarding organisation to remove a specified condition or by initiating ourselves a review of the application of a specified condition.

When we determine whether or not a particular condition should be removed we will consider a range of evidence, including:

- the effectiveness or likely effectiveness of the condition in the case of the awarding organisation,
- whether the behaviour or risks that the condition was imposed to address are present or continuing,
- the risks to learners, standards, public confidence and/or efficiency of removing the condition,
- (where relevant) any changes the awarding organisation has made to its behaviour and ways of working since the condition was first imposed, and
- any costs or other adverse impact that compliance with the condition has had or will have on the awarding organisation.

Section 3: Accreditation requirements

Making a qualification subject to an accreditation requirement

We have the power to apply an accreditation requirement to all qualifications of a particular description or to specified qualifications. The accreditation requirement could be applied for all purposes (i.e. in respect of all awarding organisations offering the relevant qualification), or for the purposes of award by a specified awarding organisation.

Where we apply an accreditation requirement, an awarding organisation which is recognised to award the relevant qualification will be subject to an accreditation condition. This means that the awarding organisation can only award a form of the specified qualification if that form has first been accredited by us.

Any duty on an awarding organisation to ensure that a form of a qualification is accredited by us will be in addition to the requirements relating to its qualifications that are imposed through the general or special conditions on awarding organisations' recognition.

Process of accreditation

Where an accreditation requirement applies, we will undertake a check on the qualification before it can be entered on our Register of Regulated Qualifications⁵ (The Register) and introduced by the awarding organisation to the market. An awarding organisation which is subject to an accreditation condition for that qualification must first submit the form of the qualification to us for accreditation.

We will accredit the qualification only where the form of the qualification submitted meets the criteria for accreditation most recently set and published by us for that qualification. Once accredited, we will enter the qualification onto The Register. An accredited qualification can be offered to learners from such date as is specified by us.

If we refuse an application for accreditation of a qualification we will notify the applicant awarding organisation in writing of the reasons for that refusal.

⁵ <http://register.ofqual.gov.uk/>

When might we impose an accreditation requirement?

We will impose an accreditation requirement due to an identified risk connected with either the qualification or the awarding organisation.

We might apply an accreditation requirement to a specific qualification because of its complex nature, particular characteristics, or because of the wider impact if the qualification is not well designed, delivered and assessed.

We may also apply an accreditation requirement where we do not have full confidence in an awarding organisation's own qualification design, development, approval or quality assurance arrangements to design, develop and award the qualification.

Consulting with the awarding organisation(s) awarding the relevant qualification(s)

Where we apply an accreditation requirement to a specific qualification, or description of qualifications, we will consult publicly on our intention to do so.

Where we intend to apply an accreditation requirement only to a specified awarding organisation's qualifications – either to all or some of its qualifications – we will consult with the awarding organisation in question. This will be a private consultation. We will explain the reasons why we intend to make one or more of its qualifications subject to an accreditation requirement and invite the awarding organisation to make any representations it wishes to make to us and give it a reasonable period in which to make those representations.

The above consultation processes will include consideration of the accreditation criteria that we propose to make applicable for the relevant qualification(s).

Publishing use of an accreditation requirement and accreditation criteria

Where we decide that all forms of a qualification or a description of qualification are subject to an accreditation requirement, or where we revise that decision, we will publish details on the decision in respect of the accreditation requirement.

We will not publish lists of qualifications to which an accreditation requirement is applied in respect of an individual awarding organisation's qualifications. However, the fact that we have applied an accreditation requirement to specified awarding organisations' qualifications may be included in our public reports.

We will also publish our accreditation criteria and any subsequent revisions to those criteria.

Revising the accreditation criteria

We may subsequently revise an accreditation requirement or the criteria to which the accreditation is subject. Before we do so, we will re-consult the relevant awarding organisation(s).

Where we revise the accreditation criteria, the accreditation ceases to have effect on a date specified by us. After this date the form of the qualification will be removed from The Register of regulated qualifications.

In this event, the awarding organisation must submit a new form of the qualification which meets the revised criteria and seek re-accreditation, if it wishes to continue to market that qualification as a regulated qualification.

However, in appropriate cases, we may make and publish:

- a decision that this normal consequence of the revision to the criteria does not have effect, and/or
- an exemption or transitional provisions connected with the effect of revisions to the accreditation criteria.

The duration of the accreditation requirement

We will review from time to time the application of an accreditation requirement that is applied to a qualification or a description of qualifications. Any decision we might take to remove the requirement will be informed by responses to a public consultation.

We will also review from time to time the application of any accreditation requirement where it applies to a specific awarding organisation's qualifications. Any decision we might take to remove the requirement will be informed in particular by any representations made by the awarding organisation that the requirement should be lifted.

We will take into account:

- the quality of the qualifications the awarding organisation has submitted for accreditation,

- the quality of its other regulated qualifications,
- the robustness of its own qualification design, development, approval and quality assurance arrangements, and
- any evidence that the awarding organisation is behaving in accordance with the conditions of recognition to which it is subject.

If, having considered this evidence, we decide that we can be confident that the awarding organisation's own arrangements will ensure that its qualifications meet the appropriate regulatory requirements, without the need for further scrutiny by us, we will lift the accreditation requirement. In this case, the lifting of the accreditation requirement will not apply in cases where we have separately determined that an accreditation requirement is required for all awarding organisations that offer a particular qualification or a description of qualifications.

Section 4: Entry and inspection

We expect that an awarding organisation will normally co-operate with any reasonable request we might make to be provided with information or documentation, or to allow us access to its premises, where such co-operation would help us to fulfil our duties. Each awarding organisation is subject to a general condition to respond to information requests we might make, and to provide assistance to us in connection with our functions.

However, in appropriate cases we will impose an entry and inspection condition.

Entry and inspection conditions

An entry and inspection condition requires an awarding organisation to permit us to enter premises controlled by the awarding organisation for the purposes of inspecting and copying documents.

We are subject to certain statutory limitations relating to the situations in which an awarding organisation would be required to permit us entry under an entry and inspection condition. These are that:

- we can only require entry to premises that are not being used as a private dwelling,
- entry must be by an authorised person (a member of our staff who is authorised for the purpose of entry and inspection),
- reasonable notice must have been given to the awarding organisation, and
- entry must be at a reasonable time.

Setting of an entry and inspection condition

We will use a risk-based approach in considering whether or not to set an entry and inspection condition for an awarding organisation.

Factors that we will consider might in particular arise from circumstances in which:

- we are considering setting a fee-capping condition on the awarding organisation,

- we have reasonable grounds to believe that there is an ongoing risk to the maintenance of standards in relation to an awarding organisation's own qualification design, development or assessment arrangements,
- the awarding organisation has a history of non-compliance with the conditions of its recognition,
- the awarding organisation has a history of financial difficulty, or
- we have other reasons to believe that the awarding organisation might not co-operate with us by providing us with the full and accurate information we require for the purposes of effective regulation.

When we will seek to exercise the entry and inspection condition

In appropriate cases, we will seek to exercise our powers under an entry and inspection condition so far as is necessary to:

- satisfy ourselves that the appropriate standards are being maintained by an awarding organisation in relation to the award of any qualification for which the awarding organisation is recognised, or
- determine whether to impose a fee-capping condition and, if so, what that condition should be.

Appropriate cases may, for example, include those in which:

1. we have grounds to believe that an awarding organisation has been involved in malpractice or maladministration in relation to the award of a regulated qualification and it is important for us to preserve the integrity of evidence.
2. we need to inspect or copy documents which have previously been requested but which the awarding organisation has been unable or has refused to supply. (But an awarding organisation would be able to exclude from inspection any documents that were subject to legal privilege, that is, certain communications with its lawyers.)
3. we have not otherwise been able to obtain information needed to inform a decision to impose a fee-capping condition.
4. we are responding to incidents, for example security breaches with live question papers, which could affect the maintenance of standards and undermine public

confidence. We may wish to visit at short notice to inspect an awarding organisation's arrangements for the storage of live question papers.

5. we need to gain access to computer records that are key to the maintenance of standards of a regulated qualification and that can only be accessed at the awarding organisation's premises.

Before seeking to exercise the entry and inspection condition, we will give consideration to the:

- information being sought,
- justification, on the evidence available to us, as to why a visit to the awarding organisation's premises is necessary, and
- amount of notice that should be given to the awarding organisation.

Procedure for exercise of an entry and inspection condition

Notice

Where we require information, we will give an awarding organisation reasonable notice and, where possible, details of the information required.

The method of delivery of the notice will be determined by the urgency of the visit. The notice will set out the reasons for entry. If entry is required specifically in order to access computer systems, we will endeavour to give notice of the need to provide suitably trained personnel to enable us to access records.

Authorised persons

Entry to an awarding organisation's premises must be by an authorised person. An "authorised person" is defined as being a member of our staff who is authorised (generally or specifically) for this purpose.

We will maintain a record of all staff who are authorised to enter awarding organisations' premises. Authorisation will normally be restricted to staff who are routinely engaged in regulatory or complaint investigation activities. All staff visiting an awarding organisation will have information on the purpose of the visit. The awarding organisation can contact us for confirmation that the members of staff are authorised by us to enter premises under an entry and inspection condition.

Reasonable notice

The amount of notice given to an awarding organisation of our intention to seek entry to inspect depends on the reasons why we wish to enter and inspect.

When giving an awarding organisation reasonable notice that we wish to enter its premises, we have to balance the interests of the awarding organisation against the need to preserve the integrity of the information/evidence being sought and the urgency of any subsequent action that may need to be taken.

This will be particularly important in cases where we may have grounds to believe that there is a significant risk that an awarding organisation will remove, amend or destroy the information/documentation which we may wish to inspect and copy.

We would normally ensure that the awarding organisation is given a minimum of two working days' notice of the arrangements for the visit, but this may need to be reduced if there is an urgent need to access information in order to ensure that the maintenance of standards or public confidence in the qualification arrangements.

In instances where we need to enter premises urgently, for example in response to allegations of serious malpractice, we may need to give as little as one hour's notice.

Reasonable hours

We would normally expect to be permitted to have access whenever an awarding organisation is conducting its business. We would expect to have access during office hours, but would also expect access to be permissible when an awarding organisation is holding meetings or undertaking other activities later in the day or at the weekend.

Access to other premises

Where an entry and inspection condition exists, we will expect to have access to any premises where an awarding organisation conducts its business, but not to a private dwelling. In the event that we are unable to access premises because the awarding organisation is operating out of a private dwelling we will consider whether we should use other regulatory actions available to us.

Where the information/documentation which we require is held by a centre or a third party contracted by the awarding organisation to support the delivery of qualifications, we would expect the awarding organisation to co-operate and obtain the necessary information/documentation from these parties.

To enable us to carry out our normal monitoring and enforcement functions, an awarding organisation will need to ensure that each centre agrees to provide both it and us with access to premises, people and records, and to co-operate with the awarding organisation's own review and quality assurance activities and ours. This is covered by a general recognition condition.

Section 5: Giving a direction

Power to give a direction

We may direct an awarding organisation to take or refrain from taking specified steps if it appears, on the evidence available to us, that the awarding organisation has failed or is likely to fail to comply with any condition to which its recognition is subject.

A direction will be imposed with a view to securing compliance with the relevant condition. A direction is enforceable in the courts.

When might we give a direction?

We might consider giving an awarding organisation a direction to take specified steps to do something or to refrain from doing something in a wide range of scenarios.

These scenarios might include, but not be limited to, directions to:

- secure the consistency of the standards of its qualifications in line with those of other awarding organisations awarding a comparable qualification,
- withdraw approval from a centre that has been acting fraudulently,
- withhold or withdraw certificates from learners who have been guilty of misconduct in an assessment,
- take steps to address behaviour that has been found to discriminate against particular learners,
- require an awarding organisation to provide us with relevant information where it has not met a request to do so,
- make changes to its governance arrangements to bring them into line with the general conditions of recognition, and/or
- mitigate the adverse effect on public confidence of an incident relating to qualifications.

Decision to give a notice of intention to give a direction

We will first give notice to the awarding organisation of our intention to give a direction. In deciding whether to serve a notice of intention to give a direction, we may consider the following:

- any actions already taken by us to secure the awarding organisation's compliance with the condition,
- whether the awarding organisation accepts that it has failed or is likely to fail to comply with the relevant condition of recognition,
- any actions taken by the awarding organisation to comply with the condition,
- whether any steps proposed by the awarding organisation to address its failure or likely failure will secure compliance with the condition and address any relevant prejudice or adverse effect, and whether the timescale proposed by the awarding organisation for compliance is reasonable, taking into account the nature of the steps required and the nature and extent of any relevant prejudice or adverse effect which has occurred or is likely to occur, and/or
- whether there is a need to ensure action is taken rapidly, or in a co-ordinated manner, across a number of awarding organisations.

We will keep a record of the evidence considered.

Giving notice of our intention to give a direction

If we decide to give a direction we will send to the awarding organisation's responsible officer:

- the reasons why we propose that a direction should be given, and a summary of the facts on which we are relying,
- the nature of the proposed direction (including any timescale for compliance with the direction),
- information about the period in which the awarding organisation may make representations about the proposed direction, and the procedure to be followed to make representations (including the details of the designated officer at Ofqual dealing with the matter), and
- information about the steps that will be taken to enforce the direction, if it is given.

We will send the notice in writing. Where we send the notice by email, we will assume that the notice was received on the date the email was sent, unless there is evidence to the contrary.

Representations by the awarding organisation

Representations will need to be made in writing to the designated officer. We will set a period from receipt of the notice by which representations must be received. If it is not urgent for action to be taken, representations will normally need to be received by us no later than 30 days from receipt of the notice. This period may be reduced (to such time as will be specified in the notice) where, in our judgement, there is an urgent need to take action, in particular in order to protect the interests of learners and/or secure that the standard of, and public confidence in, qualifications is maintained. In such cases the time allowed for the awarding organisation to make representations might be very limited.

The representations should address the reasons for the proposed direction included in the notice, the accuracy of our summary of the facts, the reasonableness of the nature of the proposed direction and the timescale proposed for compliance.

Response to representations by the awarding organisation

We will consider any representations received from an awarding organisation.

We may decide that:

- the proposed direction should be given,
- a different direction should be given,
- no direction should be given,
- further information should be provided by the awarding organisation, within a given time period, to support its representations, following consideration of which a final decision will be taken in respect of the direction,
- the notice of intention to give a direction is not appropriate but that a notice of an intention to impose a fine should be issued, or
- the notice of intention to give a direction should be substituted with a notice of an intention to withdraw recognition.

We will publish any decision to impose a direction.

Enforcing compliance with a direction

Where we exercise our power to direct an awarding organisation to take or refrain from taking certain action, and the awarding organisation fails to do so in accordance with the direction, we may apply to the court for an order stating that it must comply. A failure to comply with a court order compelling the awarding organisation to do as directed may result in it being in contempt of court.

We will publish any decision to impose a direction.

Amendment or revocation of a direction

We may amend or revoke a direction after it is given.

Where we intend to amend a direction, we will follow the same process as for giving a direction, in particular:

- we will give notice of our intention to amend a direction before taking any further action,
- the notice of intention to amend a direction will follow the same process and contain the same information as if we were intending to give a direction (see above), and
- in making our decision as to whether to amend a direction, we will consider any representations made by the awarding organisation during the period specified for representations in the notice.

Section 6: Imposing a fine

Power to fine

The Act provides that we may impose a monetary penalty (a fine) on a recognised awarding organisation that has breached a condition of its recognition. The Act allows us to impose a fine of up to 10 per cent of an awarding organisation's annual turnover (as determined in accordance with an order made by the Secretary of State). This limit applies to each breach separately and is not a cumulative limit for a financial year. We will decide what the appropriate amount of the fine should be in all the circumstances of the case.

In imposing a fine, we will follow the procedural requirements in the Act, set out below under "Procedural matters".

Approach to using the fining power

We will impose a fine on an awarding organisation when this represents a suitable response to non-compliance with one or more conditions of recognition. A fine may be an appropriate response in a range of circumstances, for example a deliberate, negligent or persistent breach of condition(s) of recognition, or where the awarding organisation appears to have derived an advantage (such as a competitive advantage or a cost saving) from the breach. We expect that no awarding organisation should benefit financially from non-compliance, and a fine may help secure this. A fine may be imposed together with other regulatory sanctions.

We will follow a three-stage approach in imposing any fine:

1. we must be satisfied, on the basis of the evidence available, that the awarding organisation has failed to comply with a condition of recognition (which may be a general condition or a special condition),
2. the available sanctions will be considered, and a fine may be selected as suitable in response to the breach in the light of the principles outlined in this policy and our statutory objectives and duties,
3. once a decision has been made to impose a fine, we will determine the appropriate amount of the fine for this breach, again considering the relevant factors set out in this policy and our statutory objectives and duties.

We do not expect awarding organisations to pass the costs of fines onto their customers. In a competitive market, there should be an incentive for awarding organisations not to pass the cost of a significant fine back to purchasers as this would make them less competitive. After imposing a fine on an awarding

organisation, we will, if appropriate, monitor the fees that they charge for qualifications to see if they represent value for money.

Determining whether to impose a fine

We will determine whether to impose a fine according to the steps set out above. The following is a non-exhaustive list of factors which we will consider:

- the seriousness of the breach, particularly in relation to its effect on standards of qualifications, public confidence, or an efficient qualifications system
- the effect of the breach (both in terms of the seriousness of the impact and the number of those affected) on purchasers, learners and users of qualifications,
- the effect of the breach on our ability to regulate the organisation effectively in future,
- whether the breach was prolonged or repeated,
- whether the awarding organisation has breached regulatory requirements in the past, and if so how frequently,
- the extent to which the circumstances of the breach were within the control of the awarding organisation,
- the nature of the conduct of the awarding organisation in relation to the breach, including the intention of and any negligence on the part of the awarding organisation and whether the breach gives rise to concerns about the organisation's management or control, and
- whether a fine is likely to improve compliance with regulatory conditions in future (including by other awarding organisations).

In appropriate circumstances, we will also consider any financial sanctions which have been imposed in relation to the breach by another regulatory body (such as the Welsh Ministers) as a factor in determining whether to impose a fine.

Determining the amount of a fine

A fine may not exceed 10 per cent of the turnover of the awarding organisation, as defined in secondary legislation⁶. In determining the amount of the fine, we will take into account all the circumstances of the case. The relevant factors will vary but will be closely related to those relevant to the determination of a fine as an appropriate sanction, so the list of factors above under 'Determining when to impose a fine' will be taken into account in considering the amount of a fine.

As well as those factors listed above, we will also take into account all relevant factors, which could be aggravating factors which may increase the amount of the fine, or mitigating factors which may reduce the amount of the fine. The following is a non-exhaustive list of further factors which we will consider in determining the amount of a fine:

- steps taken by the awarding organisation to rectify and/or prevent any recurrence of the breach,
- whether the breach was reported promptly to us by the awarding organisation, and any attempt to conceal the breach,
- the level of co-operation with any investigation,
- whether the breach gave rise to financial gain or competitive advantage,
- the provision of restitution and compensation (where appropriate) to those affected by the breach,
- the circumstances of the breach in comparison to similar breaches for which fines have been imposed, and
- the turnover of the awarding organisation's regulated activities in relation to the turnover of the awarding organisation (from regulated activities and any other activities).

In appropriate circumstances, we will also consider financial sanctions which have been imposed in relation to the breach by another regulatory body as a factor in determining the amount of a fine.

All money received in payment of a fine is paid into the Government's Consolidated Fund. There is no financial incentive for us to impose a fine.

⁶ This definition is subject to a separate consultation which runs until 15th March, conducted by the Department for Education. It is available from www.education.gov.uk/consultations

Procedural matters

When a preliminary determination of the amount of the fine has been made, a notice will be served on the awarding organisation under section 151A(4) of the Act specifying the amount of the fine we intend to impose. It will set out the reasons for the fine and the way in which the awarding organisation and other interested parties may make representations to us. We will send the notice in writing. Where we send the notice by email, we will assume that the notice was received on the date the email was sent, unless there is evidence to the contrary. The notice will be published on our website.

The awarding organisation and other interested parties may make written representations to us within a period we will specify, which will not be less than 28 days. Following consideration of any representations, we will determine whether to withdraw, vary or confirm the fine.

If the fine is confirmed (including where the amount is varied), we will issue a notice under section 151A(8) of the Act. This will state the grounds for imposing the fine, how payment should be made and the consequences of non-payment. The notice will explain the awarding organisation's right of appeal and specify the period within which it must lodge any appeal. This will be 28 days from receipt of the notice unless we decide that exceptional circumstances mean that a longer period should be given. The notice will also state when payment is due, which will be within 28 days from receipt of the notice unless we decide that exceptional circumstances mean that a longer time for payment should be given or unless an appeal is made.

Under section 151C of the Act, the awarding organisation may appeal to the First Tier Tribunal. If an awarding organisation appeals to the Tribunal, the fine is suspended pending the appeal. The appeal may relate to the imposition of a fine, the amount of the fine, or both.

The Tribunal may withdraw, vary or confirm the fine. It may also impose a different or additional sanction (available to Ofqual) on the awarding organisation, or remit the decision on any matter relating to the fining decision back to us to consider.

If an organisation does not pay a fine it becomes liable for interest on the debt, as set out in section 151D of the Act, and we will recover the debt with interest through the courts if necessary and appropriate.

Section 7: Recovering the costs of enforcement action

The Act provides that we may require an awarding organisation to pay the costs we incur in relation to statutory sanctions we have imposed on it. This is where we have:

- directed an awarding organisation,
- fined an awarding organisation, or
- withdrawn recognition from an awarding organisation.

We may seek to recover the costs of our statutory enforcement actions. Although we have the power to recover our costs in every case in which we undertake statutory enforcement actions, we will not seek to recover such costs in each case. We will only do so where it would be proportionate and where the amount to be recovered is greater than the likely cost of recovering it.

In order to simplify this process and ensure consistency across actions taken in respect of different awarding organisations, we will not normally seek to recover the costs we incur in relation to an enforcement action in which the total amount is less than £10,000. We would normally seek to recover such costs in all other cases.

The costs that we will seek to recover are those associated with taking statutory enforcement action. This includes, in particular, investigation costs, administration costs and the costs of obtaining expert advice (including legal advice).

When we decide to recover enforcement costs, we will serve notice on the awarding organisation under section 152A (1) of the Act specifying the amount of the costs we require the awarding organisation to pay. The notice will include a detailed breakdown of those costs, state how payment should be made and set out the consequences of non-payment.

The notice will also explain the awarding organisation's right of appeal and specify the period within which it must lodge any appeal. This will be 28 days from receipt of the notice unless we decide that exceptional circumstances mean that a longer period should be given. The notice will also state when payment is due, which will be within 28 days from receipt of the notice unless we decide that exceptional circumstances mean that a longer time for payment should be given or unless an appeal is made.

Under section 152B of the Act, the awarding organisation may appeal to the First Tier Tribunal. If an awarding organisation appeals to the Tribunal, the payment of costs is suspended pending the appeal. The appeal may relate to the imposition of a requirement to pay costs, the size of the costs, or both.

The Tribunal may withdraw, vary or confirm the amount of costs an awarding organisation should pay. It may also take such other action as we could take in relation to the breach which led to the enforcement action (including imposing a sanction on the awarding organisation) or remit the decision on any matter relating to the decision to recover enforcement costs back to us to consider.

If an organisation does not pay its costs it becomes liable for interest on the debt, as set out in section 152C of the Act, and we will recover the debt with interest through the courts if necessary.

Section 8: Withdrawing recognition

Decision to withdraw recognition from an awarding organisation

We may withdraw recognition from an awarding organisation – in full or in respect of specified qualifications or a description of qualifications – if the awarding organisation has failed to comply with any condition to which its recognition is subject.

When might we withdraw recognition from an awarding organisation?

Withdrawing recognition from an awarding organisation is the most significant regulatory action we can take. We therefore expect to use the power infrequently.

The situations in which withdrawal of recognition might be proportionate to a breach by an awarding organisation of one or more of its recognition conditions might include those in which there is:

- a repeated failure by the awarding organisation to take appropriate sanctions (which it is capable of taking) against a centre which makes available the qualification for which the awarding organisation is recognised and which has been or is acting fraudulently with regard to learners or their assessments,
- a major failure by an awarding organisation,
- a serious and repeated failure to co-operate with us which prevents us from regulating the organisation effectively,
- a failure to address malpractice within the awarding organisation,
- a repeated failure to make awards to learners that they deserve,
- a serious concern about whether the awarding organisation's governance arrangements will secure the provision of high-quality qualifications,
- action taken by an awarding organisation which is unlawful or otherwise may be seen to bring the qualifications system into disrepute and/or undermines public confidence in the system, and/ or
- evidence that the awarding organisation does not have the resources or capability to put in place the actions required to ensure its compliance with its conditions of recognition.

Where the condition that is breached is a condition that reflects a recognition criterion (such that a person/body who is applying for recognition would be required to meet it in order to obtain recognition), withdrawal of recognition is likely to be much more strongly indicated as the appropriate action.

Decision to give a notice of intention to withdraw recognition

We will first give notice to the awarding organisation of our intention to withdraw recognition.

Our thinking will be informed by a consideration of at least the following issues:

- the impact a failure to withdraw recognition might have on learners, standards and/or public confidence in regulated qualifications,
- the impact the withdrawal of recognition would have on learners,
- whether the awarding organisation has a track record of similar failings, especially where we have taken statutory regulatory action in the past,
- any actions already taken by us to secure the awarding organisation's compliance with the condition, including whether a direction has been given,
- whether the awarding organisation accepts that the condition has been breached,
- any actions taken by the awarding organisation to comply with the condition and any direction,
- whether any steps proposed by the awarding organisation to address its failure will secure compliance with the condition and address any relevant prejudice or adverse effect, and whether the timescale proposed by the awarding organisation for compliance is reasonable, taking into account the nature of the steps required and the nature and extent of any relevant prejudice or adverse effect, and
- the nature of any saving or transitional provisions to be made to protect the interests of learners or for any other reason.

We will keep a record of the evidence considered.

Giving the notice of intention to withdraw recognition

Before we take a decision to withdraw recognition, we will give the awarding organisation notice of our intention to do so. This notice of intention will be sent to the awarding organisation's chair (or equivalent) and to its responsible officer.

The notice of intention to withdraw recognition will include:

- the reasons why we propose that recognition should be withdrawn, and a summary of the facts on which we are relying,
- the date of the proposed withdrawal, and whether the proposed withdrawal is in respect of all or only particular qualifications or types of qualification for which the awarding organisation is recognised,
- any saving or transitional provisions that we intend to make to protect the interests of learners or otherwise should the recognition be withdrawn as proposed, and
- information about the period in which the awarding organisation may make representations about the proposal, and the procedure to be followed to make representations (including the details of the designated officer at Ofqual dealing with the matter).

We will send the notice in writing. Where we send the notice by email, we will assume that the notice was received on the date the email was sent, unless there is evidence to the contrary.

We may, in appropriate cases, publish the notice of intention and consult with other interested parties.

Representations by the awarding organisation

Representations will need to be made in writing to the designated officer. The representations should address the reasons for the proposed withdrawal of recognition included in the notice, the accuracy of our summary of the facts, the reasonableness of the proposal and any saving or transitional arrangements, and the date for the proposed withdrawal.

Representations will need to be made in writing to the designated officer.

Representations will normally need to be received by us no later than 30 days from receipt of the notice. This period may be reduced (to such time as will be specified in the notice) where, in our judgement, there is an urgent need to take action, in

particular in order to protect the interests of learners and/or secure that the standard of, and public confidence in, qualifications is maintained. In such cases the time allowed for the awarding organisation to make representations might be very limited.

Response to representations by the awarding organisation

We will consider any representations received from an awarding organisation.

The following decisions may be made:

- the withdrawal should proceed as proposed in the notice,
- the withdrawal should proceed subject to an amendment to the timing of the withdrawal and/or the scope of the withdrawal,
- the withdrawal should not proceed, but should be replaced with a notice of an intention to give a direction,
- the withdrawal should not proceed, but further efforts should be made to secure compliance with a direction previously given,
- the withdrawal should not proceed, but should be replaced with a notice of an intention to impose a fine,
- the withdrawal should not proceed, or
- further information should be provided by the awarding organisation, within a given time period, to support its representations following consideration of which a final decision will be taken in respect of the appropriate regulatory action to be taken.

Final decision notice

If we decide to withdraw recognition from an awarding organisation, we will give notice in writing to the awarding organisation of our decision and of the date on which withdrawal is to take effect, and any saving or transitional provisions we deem appropriate.

By giving further notice, we may vary the date on which the decision is to take effect at any time prior to the original date specified in the final decision notice.

Independent review of a decision to withdraw recognition

An awarding organisation may request a review of a decision to withdraw recognition. If such a request is made, an independent reviewer, appointed by us for the purpose, will undertake the review. The reviewer may be a single person, a body, or a panel of people.

A request for a review must be submitted by the awarding organisation in writing to the designated officer no later than 30 days after receipt of the confirmed decision to withdraw recognition. The review of the decision would normally be completed within 60 days of the receipt from the awarding organisation of a request for a review of the decision. Once a decision to withdraw recognition has taken effect, unless we decide otherwise, that decision will continue to have effect throughout any independent review of the decision.

The independent reviewer will consider the evidence that informed the original decision and any representations made by the awarding organisation. The independent reviewer may also decide to consider new evidence if that evidence could not reasonably have been provided to us prior to our decision to withdraw recognition.

The independent reviewer may also seek advice from other experts with skills relevant to the review, but the final recommendation would be made by the reviewer alone.

The independent reviewer will consider whether the:

- process we used to make our decision to withdraw recognition was fair, and
- decision was reasonable taking into account all the relevant evidence.

The independent reviewer may:

- confirm that the process by which our decision was taken was fair and that our decision was reasonable, or
- remit the matter to us to be reconsidered and make recommendations for us to consider particular evidence or remedy any defects in our process.

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