

Taking Regulatory Action Version 2

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Background

About Ofqual

We regulate to secure the standards of, and public confidence in, qualifications. We also regulate to secure efficiency in the provision of qualifications and to raise awareness of the range and benefits of regulated qualifications. When things go wrong, or we anticipate they may go wrong, we take appropriate regulatory action.

We regulate academic and vocational qualifications in England, and vocational qualifications in Northern Ireland. We only regulate these qualifications if they are provided by a body we have recognised to provide them. Each recognised body is known as an “awarding organisation”. The qualifications we regulate are known as “regulated qualifications”.

We are a statutory body, created by the Apprenticeships, Skills, Children and Learning Act 2009, as amended by the Education Act 2011. This Act sets out our legal framework.

We also review all aspects of statutory assessment arrangements (“regulated assessment arrangements”, i.e. National Curriculum and Early Years Foundation Stage assessments).

About this document

This document sets out how we will use our powers to take regulatory action. From time to time we will evaluate our approach and revise this document as appropriate. We will consult when we decide to make any changes.

This is the second version of our Taking Regulatory Action policy. It has been revised mainly to reflect the changes that were made to our powers by the Education Act 2011. The first version was published in June 2011. It is part of the Qualifications Regulatory Framework, which sets out how we monitor awarding organisations and enforce each awarding organisation's compliance with the conditions to which its recognition is subject ("its conditions of recognition").

The policy relates only to regulated qualifications and the awarding organisations that provide them. For information about regulated assessment arrangements, see the *Regulatory Framework for National Assessments: National Curriculum and Early Years Foundation Stage* (2011).¹

¹ www.ofqual.gov.uk/files/2011-regulatory-framework-for-national-assessments.pdf?itemid=143

How we approach regulatory action

We follow good regulatory practice, particularly the Better Regulation Executive's five principles of good regulation² and the Macrory report Regulatory Justice: Making Sanctions Effective (November 2006).³ In line with these principles, we target our regulatory activities according to our assessment of risks to learners, standards, efficiency and public confidence.

We hold awarding organisations accountable for the quality and standards of their regulated qualifications.

We take action when we believe it is appropriate. This may include acting to prevent something going wrong, such as to stop an awarding organisation from breaching its conditions of recognition. When things go wrong we will consider the action we should take to make sure the situation is put right. In particular, when an awarding organisation is in breach of, or likely to breach, its conditions of recognition, we act as appropriate to:

- make sure the awarding organisation takes a particular course of action to comply with its conditions of recognition, and take further action if it does not,
- prevent the awarding organisation gaining from any breach of its conditions,
- deter other awarding organisations from similar breaches, and
- promote public confidence in qualifications through visible, appropriate and effective regulatory action.

We treat like cases alike, and we recognise where differences of fact mean that cases should be treated differently. When taking decisions, we consider all the circumstances of the case in the light of available evidence.

In relation to the breach of a condition by an awarding organisation, we take into account all relevant facts, including:

- the organisation's compliance history (such as whether the non-compliance is a one-off or part of a pattern),
- whether the organisation identified the issue itself and has taken steps to address it,
- the organisation's acceptance of responsibility,
- its co-operation with our processes, and
- whether it acted in good faith.

² We, therefore, aim to be: transparent, consistent, proportionate and targeted as we undertake our regulatory role, and to be accountable for our actions

³ www.bis.gov.uk/files/file44593.pdf

We will be transparent in our approach.

Range of regulatory actions available

Each awarding organisation must comply with its conditions of recognition. Where an awarding organisation fails to comply with its conditions, or we judge that there is a likelihood that it will fail to comply, we will decide what action is appropriate. We can use the powers explicitly given to us in legislation, but there is a wider range of actions available to us.

We have the power to:

- give a direction to an awarding organisation,
- impose a monetary penalty (a fine) on an awarding organisation, and
- withdraw an awarding organisation's recognition, in full or in respect of specified qualifications or a description of qualifications.

We can also seek to influence the way an awarding organisation behaves by using our powers to:

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

Depending on the circumstances, we may try to influence the way an awarding organisation behaves without using these powers. For example we may:

- agree with an awarding organisation the action it will take and monitor its progress in doing so,
- accept an undertaking from an awarding organisation, under Condition B8 of the *General Conditions of Recognition*⁴, to take a specific course of action⁵,
- publicise our concerns about an awarding organisation's compliance with our regulatory requirements.

⁴ See www.ofqual.gov.uk/files/2011-05-16-general-conditions-of-recognition.pdf

⁵ For example, in response to the errors seen in general qualification papers in 2011 we agreed undertakings with a number of awarding organisations to reduce the risk of their papers containing errors in the future (see <http://www.ofqual.gov.uk/news-and-announcements/83/878>).

We may also:

- require an awarding organisation to co-operate with a regulatory review of its activities, documents or processes, or to participate in a market research exercise,
- investigate a particular incident or series of incidents that raise concerns about the operation of the wider qualifications system or the behaviour of one or more awarding organisations.

We can use our powers in combination. For example, we might direct an awarding organisation to take action to bring itself back into compliance with its conditions of recognition and also decide that a fine is a suitable response to that breach.

We will refer a matter to other bodies to investigate if they are better placed to do so. For example, if we were concerned about fraud we would generally refer the matter to the appropriate investigating authority; unlawful discrimination we would generally refer to the Equality and Human Rights Commission; and anti-competitive practice we would generally pass to the Office of Fair Trading.

Imposing conditions of recognition

General and special conditions

Each awarding organisation must comply with conditions of recognition. Most of these conditions of recognition will apply to all awarding organisations (we call these the *General Conditions of Recognition*⁶). However, different general conditions might also be applied to different types of awarding organisation, different qualifications or types of qualification or components of qualifications. We may also place additional conditions on an individual awarding organisation. We call these additional conditions “special conditions”.

Two particular types of special conditions which we can impose are:

- entry and inspection conditions (as explained in Section 4), and
- fee-capping conditions.

We can also impose other types of special condition on an individual awarding organisation where appropriate.

Setting or revising general conditions

When we set new general conditions, or revise those we have already set, we will consult on the changes we propose. We will then publish any changes we make.

Imposing a special condition

We may impose a special condition when we first recognise an awarding organisation, or at any later time.

When we are considering imposing an entry and inspection condition, we will follow the procedure set out in this policy.

When we are considering imposing a special condition on an awarding organisation, we will give the awarding organisation written notice of our intention. We will normally allow the awarding organisation to make representations to us. Where we do this we will tell the awarding organisation in the notice the date by which it must make its representations. The time we allow will be determined by the urgency with which we need to put the condition in place in order for it to have the impact intended.

⁶ They are available at: www.ofqual.gov.uk/files/2011-05-16-general-conditions-of-recognition.pdf

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

We may use a special condition to address a particular issue with the awarding organisation's performance, behaviour or activities, and this may follow other regulatory action we have taken.

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

- specific failings in an awarding organisation's IT systems that put at risk its ability to award qualifications properly. The condition might require the awarding organisation to report to us at specified intervals on what it is doing to address the defects and oblige it to put in place specified IT systems,
- a concern that the awarding organisation is putting learners, standards or public confidence in qualifications at risk by entering into arrangements with schools or colleges without doing adequate checks, or without putting controls or safeguards in place. The condition might require the awarding organisation to show to us before it enters into any new arrangement with a school or college 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. We may also decide that an awarding organisation 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. We will review the special conditions we have in place from time to time to make sure that the burdens we are placing on awarding organisations are appropriate.

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 behaviours 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,
- 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.

Accreditation requirements

Making a qualification subject to an accreditation requirement

We can impose an accreditation requirement on an awarding organisation to allow us to review qualifications before they are offered or awarded to learners.

We can choose to use these powers to set a general accreditation requirement that applies to all qualifications and awarding organisations. As well as explaining the process of accreditation, this policy covers occasions when such a requirement is not in force, and sets out how we will determine which qualifications will be accredited.

We have the power to impose an accreditation requirement to all qualifications of a particular description or to specified qualifications. We can also impose an accreditation requirement to all awarding organisations offering the relevant qualification or in respect of a specific awarding organisation only.

Where an accreditation requirement applies, an awarding organisation is subject to an accreditation condition, which states that the awarding organisation can only award a form of the specified qualification if we have first accredited it.

The general or special conditions on an awarding organisation will continue to apply when a qualification is subject to an accreditation requirement.

Process of accreditation

An awarding organisation that is subject to an accreditation condition for a qualification must first submit to us for accreditation the form of the qualification it wishes to provide. We will review the qualification before it can be entered on our Register of Regulated Qualifications⁷ (the Register) and offered or awarded to learners.

We will accredit the qualification only where the form of the qualification submitted meets the criteria for accreditation we have set and published for that qualification. Once it has been accredited, we will enter the qualification onto the Register. An accredited qualification can be offered to learners from the date we specify.

If we refuse an application for accreditation of a qualification we will inform the applicant awarding organisation in writing of the reasons for that refusal. The awarding organisation cannot make that form of the qualification available.

⁷ <http://register.ofqual.gov.uk/>

When might we impose an accreditation requirement?

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

We may 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.

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

Where we are considering applying 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 impose an accreditation requirement only to a specific awarding organisation's qualifications – either to all or some of its qualifications – we will consult the awarding organisation in question. 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 to us, giving it reasonable time to do so.

At this point in time we will also consult with the awarding organisation on the accreditation criteria that we propose to apply to the relevant qualification(s).

Publishing use of an accreditation requirement and accreditation criteria

Where we decide that all forms of a qualification or of a description of qualifications are subject to an accreditation requirement, we will publish details of our decision.

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

We will also publish our accreditation criteria.

Revising the accreditation criteria

We may revise accreditation criteria. Before we do so, we will consult with the relevant awarding organisation(s).

Where we revise the accreditation criteria, the accreditation of an existing form of the relevant qualification ceases to have effect on a date specified by us. After this date the form of the qualification will be removed from the Register. 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 provide the 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, taking into account 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. 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,
- any evidence that the awarding organisation is behaving in accordance with its conditions of recognition, and
- representations from the awarding organisation that the requirement should be lifted.

If an accreditation requirement has been applied to a specific awarding organisation's qualifications and we are 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.

Entry and inspection

We expect that an awarding organisation will normally co-operate with any reasonable request we might make for information or documentation, or to allow us access to its premises. Each awarding organisation is subject to a general condition to respond to information requests we might make, and to help 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 allow us to enter premises it controls so that we can inspect and copy documents.

We are subject to certain statutory limitations relating to the situations in which an awarding organisation would be required to allow 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 when considering whether to set an entry and inspection condition for an awarding organisation. We might set such a condition where, for example:

- 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 its conditions of 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 of its regulated qualifications, 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 that have been requested previously 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 an incident, for example a security breach with live question papers, which could affect the maintenance of standards and undermine public confidence. In this case we may wish to visit at short notice to inspect the 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.

Procedure for exercise of an entry and inspection condition

Before we seek to exercise our powers under an entry and inspection condition, we will consider the:

- information we are seeking,
- reason why a visit to the awarding organisation's premises is necessary, and
- the amount of notice we should give the awarding organisation.

Notice

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

The urgency with which we need to visit will determine how we deliver the notice. The notice will set out the reasons for entry. If entry is required specifically in order to access computer systems, we will normally 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 we give to an awarding organisation of our intention to enter and inspect depends on the reasons why we wish to do so.

When we give an awarding organisation notice that we wish to enter its premises, we have to balance the awarding organisation's interests 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 that 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 we urgently need to access information.

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 given access whenever an awarding organisation is conducting its business. We would expect to have access during office hours, but we would also expect to be given access when an awarding organisation is holding meetings or undertaking other activities earlier or 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. If 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 that 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 obtain the necessary information/documentation from these parties.

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

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Giving a direction

Power to give a direction

We may direct an awarding organisation to take, or not to take, 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 a condition of its recognition.

We impose directions in order to try to secure compliance with the relevant condition, or to prevent non-compliance.

A direction is enforceable in the courts.

Decision to give a notice of intention to give a direction

Before we issue a direction, we will give notice to an awarding organisation of our intention to do so. In deciding whether to serve such a notice, we may consider the following:

- any actions already taken by us to secure the awarding organisation's compliance with the relevant condition of its recognition,
- whether the awarding organisation accepts that it has failed or is likely to fail to comply with the relevant condition of its recognition,
- any actions taken by the awarding organisation to comply with the relevant condition of its recognition, and the reasonableness and timeliness of any actions it has taken or plans to take,
- whether there is a need to ensure that action is taken rapidly or in a co-ordinated way, across a number of awarding organisations.

We will keep a record of the evidence considered.

When might we give a direction?

We might consider giving an awarding organisation a direction in a wide range of scenarios. These scenarios might include, but are not limited to, directions to:

- make sure the standards of its qualifications are in line with those of other awarding organisations awarding a comparable qualification,
- withdraw approval from a centre that has been acting fraudulently,
- withhold, or take reasonable steps to withdraw, certificates from learners who have been guilty of misconduct in an assessment,
- take steps to address behaviour that discriminates 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 its conditions of recognition, or
- take reasonable steps designed to reduce the adverse effect on public confidence of an incident relating to qualifications.

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 have based this decision,
- 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 to us about the proposed direction, and the procedure for making representations (including the details of the designated officer at Ofqual dealing with the matter), and
- information about the steps that we will take 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.

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

Representations by the awarding organisation

We will give the awarding organisation an opportunity to make written representations to us, addressed to the designated officer. We will include in the notice the date by which representations must be received by us. If it is not urgent for action to be taken, representations must normally be received by us no later than 30 days from our issue of the notice. We may reduce this period if we judge that there is an urgent need to take action, for example to protect the interests of learners and/or to secure that the standards 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 awarding organisation's 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/or 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, which we will consider before we make a final decision about whether to impose a direction,
- the notice of intention to give a direction should be substituted with a notice of intention to impose a fine, or
- the notice of intention to give a direction should be substituted with a notice of intention to withdraw recognition.

We will publish any decision to impose a direction.

Enforcing compliance with a direction

Where we use our power to direct an awarding organisation and the awarding organisation fails to comply with the direction, we may apply to the court for an order stating that it must do so. A failure to comply with a court order compelling the awarding organisation to comply with a direction may result in it being in contempt of court.

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 given for representations in the notice.

We will publish any decision to amend or revoke a direction.

Imposing a fine

Power to fine

We can impose a monetary penalty (a fine) on an awarding organisation if it appears, on the evidence available to us, that it has breached a condition of its recognition. A fine may be for an amount up to 10 per cent of an awarding organisation's annual turnover. This limit applies to each fine we decide to impose and is not a cumulative limit for a financial year. We will decide what the appropriate amount of the fine should be taking into account all the circumstances of the case.

In imposing a fine, we will follow the procedural requirements set out below.

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 of its conditions of recognition.

We will follow a four-stage approach in considering whether to impose a fine:

1. it must appear to us, on the basis of the evidence available, that the awarding organisation has failed to comply with a condition of its recognition (which may be a general condition, an accreditation condition or a special condition),
2. if it appears to us that there has been a breach of a condition, we will consider all the actions available to us and decide whether a fine is an appropriate sanction for the breach in the light of the principles outlined in this policy and our statutory objectives and duties,
3. if we decide that a fine is appropriate, 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, and
4. before we impose a fine we will check that the amount we intend to impose does not exceed 10 per cent of an awarding organisation's annual turnover.

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 do so, as this would make them less competitive. After imposing a fine on an awarding organisation, we will, if appropriate, monitor the fees that it charges for qualifications to see if they represent value for money.

Decision to impose a fine

When we are deciding whether to impose a fine, we will consider a number of factors, including:

- the seriousness of the breach, particularly in relation to its effect on standards of qualifications, public confidence or the efficiency of the qualifications system,
- the effect of the breach (both in terms of the seriousness of the impact and the number of people affected) on purchasers, learners and users of qualifications,
- the effect of the breach on our ability to regulate the awarding organisation effectively in the 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 behaviour of the awarding organisation in relation to the breach, including whether it happened intentionally, whether there was any negligence on the part of the awarding organisation, and whether the breach gives rise to concerns about the organisation's management or control systems,
- whether the breach gave rise to financial gain or competitive advantage, and
- whether a fine is likely to improve compliance with regulatory conditions in the future (including by other awarding organisations).

We will also consider any financial sanctions that have been imposed in relation to the breach by another regulatory body, such as the Welsh Government, as a factor in determining whether to impose a fine.

When might we use our power to fine?

We might consider imposing a fine on an awarding organisation in a wide range of scenarios in which the awarding organisation has breached one or more of its conditions of recognition. These scenarios might include, but are not limited to, cases in which an awarding organisation has:

- made a serious error when setting an assessment which affects a significant number of candidates,
- demonstrated significant failings in its marking of assessments which has undermined the standard of the qualification,
- knowingly reduced the scale of its quality assurance activity which has resulted in

- significant negative consequences for learners, standards and/or public confidence,
- benefited financially from a breach of its conditions of recognition,
- given us assurances about specified steps that it will take or not take, which it has deliberately or negligently not carried out,
- deliberately or negligently allowed the confidentiality of its assessments to be compromised,
- intentionally misled us, or
- made serious and persistent failings in the service it offers to its customers, such as failing to provide the appeals arrangements required by its conditions of recognition.

In instances where no breach of its conditions of recognition has taken place but we are concerned that a breach is likely, we cannot impose a fine on an awarding organisation. In such cases, we may choose to issue a direction requiring an awarding organisation to take or not to take specified steps.

In certain circumstances we may decide not to impose a fine because we consider an alternative action to be more appropriate. For example, in a situation in which, in our judgement, an awarding organisation does not have the resources and expertise to continue to offer some or all of the qualifications for which it is recognised, we may instead seek to withdraw its recognition in respect of those qualifications.

In circumstances where another body, such as the Welsh Government, has used its power to fine in relation to the same breach, we may decide that the action taken by that regulator is sufficient and no further action by us is needed.

Determining the amount of a fine

Any fines we impose cannot exceed 10 per cent of the annual turnover of the awarding organisation, as defined in secondary legislation. Providing fines are within this limit, we are not required to determine the amount of a fine by reference to a percentage of an awarding organisation's annual turnover. We will determine an amount we judge is appropriate, and then check that it is within the 10 per cent limit.

When we decide the amount of the fine, we will take into account all the circumstances of the case. The factors we will take into account will include all those set out above under 'Decision to impose a fine'.

We will also take into account all other relevant factors, which could be aggravating factors, which may lead us to decide to increase the amount of the fine, or mitigating factors, which

may lead us to decide to reduce the amount of the fine. Further factors that we will consider in determining the amount of a fine include:

- 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 whether there was any attempt to hide the breach from us,
- the level of co-operation with any investigation we have carried out,
- the likely impact of the fine on the awarding organisation's provision of regulated qualifications,
- 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 awarding organisation's turnover from regulated activities in relation to its total turnover.

We will also take into account any financial sanctions that have been imposed in relation to the breach by another regulatory body.

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

Procedural arrangements

When we seek to impose a fine on an awarding organisation, we will first make a preliminary decision to impose a fine and the amount the fine should be. We will keep a record of the evidence considered.

At this point, we will serve a written notice on the awarding organisation, stating the amount of the fine we intend to impose. We will publish the notice on our website. We will set out in the notice the reasons for the fine and the way in which the awarding organisation and other interested parties may make representations to us. 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 awarding organisation and other interested parties may make written representations to us within a specified period, which will be at least 28 days from the date of the issue of the notice. When we have considered any representations, we will decide whether to withdraw, vary or confirm the fine.

If we confirm our decision to impose a fine (including where the amount is varied), we will serve a written notice on the awarding organisation. 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 normally be 28 days from the date of our decision. The notice will also state when payment is due, which will be no later than 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. 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 will publish the notice on our website.

Awarding organisations may appeal our decisions to impose fines 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. Full details of how to make an appeal to the First-tier Tribunal are provided in Appendix 1.

The Tribunal may withdraw, vary (increase or decrease) or confirm the fine. It may also impose a different or additional sanction (available to us) on the awarding organisation, or remit the decision on any matter relating to the fining decision back to us to consider. If the Tribunal decides to withdraw or vary a fine, we will publish this decision on our website.

If an organisation does not pay a fine it becomes liable for interest on the debt and we will recover the debt with interest through the courts, if appropriate.

Withdrawing recognition

Decision to withdraw recognition from an awarding organisation

We may withdraw recognition from an awarding organisation – in full or for specified qualifications or descriptions of qualifications – if the awarding organisation has failed to comply with any of its conditions of recognition.

Withdrawing recognition from an awarding organisation is the most significant regulatory action we can take. We do not expect to use the power often.

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.

The factors we consider when we are deciding whether to take action will include:

- 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 regulatory action in the past,
- any actions taken by us to encourage the awarding organisation to comply with the condition(s) of its recognition that it has breached, including whether a direction has been given,
- whether the awarding organisation accepts it has breached its conditions of recognition,
- any actions taken by the awarding organisation to comply with its conditions of recognition, any direction(s) we have given it, and the reasonableness and timeliness of any actions it has taken or plans to take,
- 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.

When might we withdraw recognition from an awarding organisation?

The situations in which withdrawal of recognition might be a proportionate response to a breach by an awarding organisation of one or more of its conditions of recognition might include, but are not limited to those in which there is:

- a repeated failure by an awarding organisation to take appropriate sanctions against a centre that delivers one or more of its regulated qualifications and that has been or is acting fraudulently,
- a major failure by an awarding organisation,
- a serious and repeated failure to co-operate with us that prevents us from regulating the awarding organisation effectively,
- a failure to address malpractice within the awarding organisation,
- a repeated failure to make the 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 that is unlawful or in some other way may be seen to bring the qualifications system into disrepute and/or seriously undermine public confidence in the system, 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 (something that a person/body who is applying for recognition must demonstrate in order to become recognised by us), withdrawal of recognition is likely to be much more strongly indicated as the appropriate action.

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. We will send this notice of intention 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 have based our decision,
- the date of the proposed withdrawal, and whether the proposed withdrawal is for all or only particular qualifications or descriptions of qualifications for which the awarding organisation is recognised,

- any saving or transitional provisions that we intend to make, should the recognition be withdrawn as proposed, and
- information about the period in which the awarding organisation may make representations about the proposal to us, 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

When an awarding organisation chooses to make representations to us, these representations must 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/ or the date for the proposed withdrawal.

Representations must normally be received by us no later than 30 days from receipt of the notice. If we judge that there is an urgent need to take action, this period may be reduced to a length of time we will set out in the notice. We may need to reduce the time for representations for a variety of reasons, in particular to protect the interests of learners and/or to 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.

We may make the following decisions:

- 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 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 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, which we will consider before we make a final decision.

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, of the date on which withdrawal is to take effect, and of any saving or transitional provision we have decided to make.

We might make such provision for a wide range of purposes. These could include, but are not limited to, provision to safeguard the interests of learners or to secure standards as recognition is withdrawn.

By giving further notice, we may vary the date on which the decision is to take effect.

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, 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 while the independent review is taking place.

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 before 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
- the 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 correct any weaknesses in our process.

Recovering the costs of enforcement action

We can 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.

Although we have the power to recover our costs in every case in which we undertake statutory enforcement actions, we will not always seek to do so. We will only do so where we believe the amount we are seeking to recover is greater than the likely cost of recovering it.

In order to simplify this process and make sure we are consistent, 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 we have incurred in taking statutory enforcement action against an awarding organisation. 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 written notice on the awarding organisation, 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. 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 will publish the notice on our website.

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 normally be 28 days from the date of our decision. The notice will also state when payment is due, which will be no later than 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.

Awarding organisations may appeal our decisions to recover costs 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. Full details of how to make an appeal to the First-tier Tribunal are provided in Appendix 1.

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 that 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 the Tribunal decides to withdraw or vary the amount of the costs an awarding organisation should pay, we will publish this decision on our website.

If an organisation does not pay its costs it becomes liable for interest on the debt and we will recover the debt with interest through the courts, if necessary.

Appeals

Where we have imposed a monetary penalty or required an awarding organisation to pay our costs, an appeal may be made to the General Regulatory Chamber of the First-tier Tribunal. Appeals should be made by sending a notice of appeal to the Tribunal so that it is received within 28 days of the date on which the notice of the sanction or other decision was sent to the awarding organisation. The First-tier Tribunal's address is:

First-tier Tribunal
General Regulatory Chamber (Exam Boards)
PO BOX 9300
Leicester
Leicestershire
LE1 8DJ

Tel: 0300 1234 503

Fax: 0116 249 4253

Email: GRC.Examboard@hmcts.gsi.gov.uk

The First-tier Tribunal (General Regulatory Chamber) Rules⁸, together with any practice directions given by the Senior President of Tribunals or the Chamber President, govern the practice and procedure to be followed by the Tribunal. The overriding objective of the Rules is to enable the Tribunal to deal with cases in the interest of justice and minimising parties' costs, which includes dealing with cases in ways that are proportionate to the importance of the case and the complexity of the issues.

Section 151C of the Apprenticeships, Skills, Children and Learning Act 2009 (the Act) confers a right of appeal against:

- a decision to impose a monetary penalty,
- a decision as to the amount of the penalty.

There is no right of appeal against a notice of intent to impose a monetary penalty.

Section 152B of the Act confers a right of appeal against:

⁸ The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009; available at: www.legislation.gov.uk/uksi/2009/1976/contents/made

- a requirement to pay enforcement costs,
- the amount of the costs.

If the question of whether a breach of a condition of recognition has or has not been committed is one that the Tribunal needs to determine in any appeal, we will carry the burden of proof. This means that it will not be for the awarding organisation to prove that it did not breach a condition upon which it is recognised. Instead, we will need to prove on the balance of probabilities that the awarding organisation did breach such a condition.

The grounds on which an appeal can be brought against any particular decision, as set out in the Act, are:

- that the decision was based on an error of fact,
- that the decision was wrong in law,
- that the decision was unreasonable.

The Rules give the Tribunal judge wide case management powers, which include the power to strike out proceedings if they consider that there is no reasonable prospect of the appellant's case, or any part of it, succeeding. The Rules also allow the Tribunal to award costs against a party, but only where a party has acted unreasonably in bringing, defending or conducting the appeal.

The Lord Chancellor has the capacity to charge fees for appeals to the First- tier Tribunal, for example an application fee. Where he is proposing to introduce fees, he is required to consult the Senior President of Tribunals and the Administrative Justice and Tribunals Council, and must conduct a public consultation. Any decision to charge fees could then only take effect if contained in secondary legislation approved by both Houses of Parliament. At the date of this Guidance no formal proposal to charge fees for appeals relating to the imposition of monetary penalties under the Act has been made by the Lord Chancellor.

Either party can ask for permission to appeal against the decision of the Tribunal but only on a point of law arising from the Tribunal's decision. Such an application for permission must be provided to the Tribunal within 28 days of the date on which the Tribunal gave its decision in writing.

The Tribunal will consider the application, and may also undertake a review of its own decision. If, on undertaking such a review, it is satisfied that there was an error in law in the Tribunal's decision, the Tribunal will notify the parties. Alternatively, the Tribunal can give

permission to appeal to the Upper Tribunal or refuse to give permission.

Where permission is given, the further appeal would be heard by the Administrative Appeals Chamber of the Upper Tribunal.

If an appeal against a decision of the Tribunal reaches the Upper Tribunal, the latter can set aside that decision and give a new decision, or it can refer the case back to the Tribunal for re-hearing.

More information about the First-tier and Upper Tribunals can be found here:
www.justice.gov.uk/about/hmcts/tribunals

