

Consultation on safeguards for the confidentiality of assessment materials



May 2018

Ofqual/18/6374/4

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1. Background

- 1.1 This consultation is also a response to an earlier consultation on statutory guidance for Condition G4, which ran between 9 March and 7 April 2017¹. We initially intended to publish the outcomes of that consultation later in 2017. However, before we were able to do so, we became aware that we might need to consult again on Condition G4 when we committed to reviewing the approaches awarding organisations take to safeguarding the use of teachers in contributing to confidential assessment materials.
- 1.2 We decided to wait until our review, and any resulting consultation, had concluded, and then run a single technical consultation, which covered all of our revisions to Conditions and guidance.
- 1.3 Following our review, we consulted on teacher involvement in the development of confidential assessment materials between 14 March and 25 April 2018².
- 1.4 On 11 May 2018, we published the following documents:
 - the analysis of responses to our March-April 2017 consultation³
 - the analysis of responses to our March-April 2018 consultation⁴
 - the decisions we made following both consultations⁵
 - the consultation you are currently reading

How to respond

The closing date for responses to this consultation is 8 June 2018 at 14:00.

[Visit the consultation on GOV.UK](#) for details on how to respond to this consultation.

¹ <https://www.gov.uk/government/consultations/consultation-on-amending-statutory-guidance-for-condition-g4>

² <https://www.gov.uk/government/consultations/consultation-teacher-involvement-in-the-development-of-confidential-assessment-materials>

³ <https://www.gov.uk/government/consultations/consultation-teacher-involvement-in-the-development-of-confidential-assessment-materials>

⁴ <https://www.gov.uk/government/consultations/consultation-teacher-involvement-in-the-development-of-confidential-assessment-materials>

⁵ <https://www.gov.uk/government/consultations/consultation-teacher-involvement-in-the-development-of-confidential-assessment-materials>

Evaluating the responses

To evaluate responses properly, we need to know who is responding to the consultation and in what capacity. We will only consider your response if you complete the information page.

We will publish the evaluation of responses. Please note that we may publish all or part of your response unless you tell us (in your answer to the confidentiality question) that you want us to treat your response as confidential. If you tell us you wish your response to be treated as confidential, we will not include your details in any published list of respondents, although we may quote from your response anonymously.

2. About this consultation

- 2.1 We are seeking views on how we propose to change our regulatory requirements to implement new arrangements on which we have already consulted. This is in order to ensure appropriate safeguards for the confidentiality of assessment materials, in particular where teachers⁶ have been involved in their development, and where awarding organisations deliver training to teachers who are teaching the qualification. This follows on from our earlier consultations on these two issues.
- 2.2 This consultation is about the specific wording of the Conditions and guidance we propose to put in place to implement our decisions following our two earlier policy consultations as described below. A summary of the decisions we took following consultation and are now seeking to implement can be seen in the next section.

3. Consultation summary

- 3.1 Our policy decisions cover four key areas. The main changes we propose to make are summarised here.
- 3.2 Changes to General Condition of Recognition A4 “Conflicts of interest” and associated statutory guidance following the decisions made after our policy consultation.
- We are proposing revised wording of the Condition in order to implement our decision to make it an explicit requirement that awarding organisations must establish and maintain an up to date register of all conflicts of interest, which relate to it.
 - We are proposing revised wording of the guidance for this Condition to offer greater specificity in terms of the positive and negative indicators, which would suggest that an awarding organisation is likely or unlikely to comply.
- 3.3 Changes to the statutory guidance for General Condition A8 “Malpractice and maladministration”.
- We are proposing revised wording of the guidance to this Condition so that where the awarding organisation finds that a Teacher has disclosed confidential assessment information, the awarding organisation notifies the Teaching Regulation Agency or other regulatory body where appropriate.

- 3.4 Changes to General Condition of Recognition G4 “Maintaining confidentiality of assessment materials, including the conduct of specified training events” and associated statutory guidance.
- We are proposing revised wording for the Condition, including to its title, in order to implement our decision to emphasise the importance of maintaining confidentiality when teachers or other third parties have been involved in the development of assessment materials.
 - We are proposing revised wording of the guidance for this Condition in a number of ways. We have developed clearer guidance about what is meant by confidential information, and provide examples of the different types of training offered by an awarding organisation which might be permitted under this Condition. We have developed more specificity in terms of the positive and negative indicators which would suggest that an awarding organisation is likely or unlikely to comply.
- 3.5 Creation of a new section of statutory guidance which identifies a number of Conditions that place obligations on awarding organisations which are relevant to the issue of teachers’ involvement in the development and delivery of confidential assessment materials. It also outlines some of the factors that will be relevant in an awarding organisation’s analysis of the nature and extent of the safeguards it needs.
- We are proposing the wording for the new section of guidance we have decided to write which will sit at the end of the Guidance to the General Conditions of Recognition, similar in form (but not content) to the current section “Guidance on making changes to incorrect results” which can be found on page 103 of that document.
 - The guidance will list in one place all the requirements which are especially relevant to the risks around the involvement of teachers in the development of assessments.
 - It will describe what factors we would expect an awarding organisation to consider in determining the package of safeguards that would be appropriate, and set out some examples of the potential safeguards that an awarding organisation may use to prevent the disclosure of confidential assessment information.
 - The guidance will include some examples to illustrate the different safeguards that an awarding organisation may choose to put in place for qualifications with different risk profiles.

- It will make clear that for qualifications such as GCSEs, A levels and the main alternatives, the stakes of the qualification, for both Learners and Centres, are sufficiently high that we will normally expect an awarding organisation to manage its assessment development in such a way so no Teacher of the relevant qualification knows with certainty the content of any specific assessment.

4. How to respond to this consultation

4.1 The closing date for responses to this consultation is 8 June 2018 at 14:00. You can answer as many of the consultation questions as you like. You do not have to answer all of the questions, unless you wish to do so. Please respond to this consultation in one of three ways:

- Complete the online response (click 'Respond online' on the consultation homepage).
- Complete the response form, available on the consultation homepage, and email your response to consultations@ofqual.gov.uk. Please include the consultation title (Updating our rules and guidance for teacher involvement in the development of confidential assessment materials) in the subject line of the email and make clear who you are and in what capacity you are responding.
- Post your response to: Teacher involvement in the development of confidential assessment materials, Ofqual, Spring Place, Herald Avenue, Coventry, CV5 6UB, making clear who you are and in what capacity you are responding. We can only consider your response if you fill in the 'About you' section at the end of the document.

How we will use your response

4.2 Your response will be used to help us finalise the legal drafting of our Conditions and guidance to implement policy decisions that have already been taken. After the consultation ends, we will publish a summary of responses received. We will not include your personal details in any published list of respondents, although we may quote from your response anonymously.

Our proposed Conditions and guidance

5. Condition A4

5.1 We proposed that we should make it an explicit requirement in our General Condition of Recognition A4 that all awarding organisations must hold up to date records of all conflicts of interest. As made clear in our proposed guidance, this will include conflicts relating to anyone who develops or otherwise sees information about confidential assessment materials.

5.2 We have decided that we should introduce this requirement. We are now proposing wording which will do this by adding a single clause to Condition A4, which appears below as A4.3

Condition A4 Conflicts of interest

Definition of conflict of interest

A4.1 For the purposes of this condition, a conflict of interest exists in relation to an awarding organisation where –

- 5
- (a) its interests in any activity undertaken by it, on its behalf, or by a member of its Group have the potential to lead it to act contrary to its interests in the development, delivery and award of qualifications in accordance with its Conditions of Recognition,
- 10
- (b) a person who is connected to the development, delivery or award of qualifications by the awarding organisation has interests in any other activity which have the potential to lead that person to act contrary to his or her interests in that development, delivery or award in accordance with the awarding organisation's Conditions of Recognition, or
- (c) an informed and reasonable observer would conclude that either of these situations was the case.

Identifying conflicts of interest

15 A4.2 An awarding organisation must identify and monitor –

- (a) all conflicts of interest which relate to it, and
- (b) any scenario in which it is reasonably foreseeable that any such conflict of interest will arise in the future.

20 A4.3 An awarding organisation must establish and maintain an up to date register of all conflicts of interest which relate to it.

Managing conflicts of interest

- A4.4 An awarding organisation must take all reasonable steps to ensure that no conflict of interest which relates to it has an Adverse Effect.
- 25 A4.5 Where such a conflict of interest has had an Adverse Effect, the awarding organisation must take all reasonable steps to mitigate the Adverse Effect as far as possible and correct it.

Interests in assessment

- A4.6 An awarding organisation must take all reasonable steps to avoid any part of the assessment of a Learner (including by way of Moderation) being undertaken by any person who has a personal interest in the result of the assessment.
- 30 A4.7 Where, having taken all such reasonable steps, an assessment by such a person cannot be avoided, the awarding organisation must make arrangements for the relevant part of the assessment to be subject to scrutiny by another person.

The written conflict of interest policy

- 35 A4.8 An awarding organisation must establish, maintain, and at all times comply with an up to date written conflict of interest policy, which must include procedures on how the awarding organisation intends to comply with the requirements of this condition.
- A4.9 When requested to do so by Ofqual in writing, an awarding organisation must promptly submit to Ofqual its conflict of interest policy, and must subsequently ensure that the policy complies with any requirements which Ofqual has communicated to it in writing.

Question 1 – Do you have any comments on the wording of the proposed amended Condition A4.3? For specific comments, please refer to the relevant line numbers in your response.

6. Guidance for Condition A4

- 6.1 We think that there are improvements and additions we could make to the guidance to Condition A4 in light of the changes we have proposed above.
- 6.2 The guidance currently starts with some definitions which we no longer consider necessary, as we intend to make the guidance less specific in that rather than referring to ‘senior examiners’ we will refer to ‘third parties’. This term will cover senior examiners as well as other who may come across or have access to confidential assessment materials.
- 6.3 We propose to put in place additional guidance to support awarding organisations understanding the steps they may take in identifying and recording conflicts of interest which relate to third parties who may come across or have access to confidential information.

- 6.4 For example, we intend to set out that awarding organisation should have contractual requirements with third parties which require them to notify the awarding organisation of any conflicts of interest.
- 6.5 We also propose revised 'negative indicators' that would suggest an awarding organisation is not likely to comply with our Conditions. These would include, for an example, cases where an awarding organisation was not aware that a Teacher who it contracted to help develop confidential assessment materials was also teaching the qualification.

Guidance on Condition A4 – Conflicts of interest

Examples of 'positive indicators' that would suggest an awarding organisation is likely to comply

The awarding organisation:

- 5
- ensures that its contractual arrangements with staff and third parties who have access to confidential assessment information⁷ clearly set out any obligations on those staff and third parties to manage conflicts of interest arising from other activities that they undertake;
 - puts in place contractual arrangements which require, at a minimum, staff and third parties who have, or have had, access to confidential assessment information through the assessment development process (including quality assurance) to provide details to the awarding organisation of –
- 10
- all instances in which such a person is, or has been, a Teacher for the relevant qualification, or is employed by a Centre at which that qualification is taught or delivered (even if that person does not themselves teach or deliver the qualification); and
- 15
- all other conflicts of interest. including personal conflicts such as, for example –
- where a child, sibling, or other close family member is due to take the assessment in relation to which the person has confidential assessment information, and
 - where a partner or other close family member is teaching, or is due to teach, the relevant qualification;
- 20

⁷ In this guidance 'confidential assessment information' refers to both the contents of assessment materials and information about the assessment in relation to which confidentiality must be maintained under Condition G4.1.

- 25
 - requires such details to be provided on an ongoing basis for as long as the relevant assessment information remains confidential;
 - retains relevant entries on its conflicts register for as long as the relevant assessment information remains confidential or as long as required to undertake effective monitoring, whichever is later;
- 30
 - puts in place contractual arrangements requiring staff and third parties who have, or have had, access to confidential assessment information through the assessment development process (including quality assurance) to promptly notify it of all instances in which they have been, or are currently, involved in the preparation of a resource designed to support the preparation of Learners and persons likely to become Learners for assessments for that qualification. One example of such a resource would be a textbook for the specification. This does not apply to the preparation of teaching resources or materials by a Teacher exclusively for Learners that he or she teaches (although the awarding organisation may choose to monitor such materials in order to deter and detect any breach of confidentiality);
- 35
 - monitors assessments set by staff and third parties who are, or have been, involved in the preparation of a resource designed to support the preparation of Learners and persons likely to become Learners for assessments for that qualification, to ensure that the fitness for purpose of those assessments has not been compromised by that resource. One example of such a resource would be a textbook for the specification. This does not apply to the preparation of teaching resources or materials by a Teacher exclusively for Learners that he or she teaches (although the awarding organisation may choose to monitor such materials in order to deter and detect any breach of confidentiality).
- 40
 - investigates credible concerns which come to its attention in relation to conflicts of interest.

45 **Examples of 'negative indicators' that would suggest an awarding organisation is not likely to comply**

The awarding organisation:

- 50
 - did not know that the partner of a staff member involved in the development of confidential assessment information was employed at the time as a Teacher for the qualification for which the assessment would be taken;
 - did not know that a third party who it contracted to develop or quality assure confidential assessment materials was employed at the time as a Teacher for the qualification for which the assessment would be taken;
 - did not know that a third party who it contracted to assist with the development of confidential questions for an assessment – who did not teach the relevant qualification at the time – later became a Teacher of that qualification before the assessment was taken;
- 55
 - did not know that a third party who modified confidential assessment materials worked at the time as a private tutor in respect of the qualification for which the assessment would be taken;

- where a current Teacher holds confidential assessment information, deletes relevant information from its conflicts register where the Teacher stops teaching the relevant qualification before the assessment is taken or before any monitoring takes place

Question 2 – Do you have any comments on the wording of the proposed amended guidance for Condition A4? For specific comments, please refer to the relevant line numbers in your response.

7. Guidance for Condition A8

7.1 We proposed in our consultation that we would expect an awarding organisation to apply appropriate sanctions, and, where appropriate, to notify the National College for Teaching and Leadership (NCTL). The NCTL has now become the Teaching Regulation Agency. We have considered where best to place this guidance, and we propose that it fits most naturally under Condition A8.

7.2 As we were reviewing guidance on Condition A8, we are also taking the opportunity to remove a reference to Northern Ireland which is no longer appropriate. The reference dates from when we still had responsibility for vocational and technical qualifications there. As this is no longer the case, we propose to remove this reference. It does not change the fact that when a recognised awarding organisation offers a regulated qualification elsewhere they must have regard to this guidance.

Guidance on Condition A8 – Malpractice and maladministration

Examples of ‘positive indicators’ that would suggest an awarding organisation is likely to comply

The awarding organisation:

- 5
- has ways of working that reduce the risk and incidents of malpractice or maladministration occurring;
 - makes sure that individuals involved in the development, delivery and award of its qualifications understand and routinely follow these ways of working;
- 10
- takes all reasonable steps to ensure that current (and former) staff and contractors do not provide information about its qualifications which is inaccurate or misleading;
 - has policies, practices and/or procedures that reduce the risk of malpractice and maladministration, covering, among other things:
 - plagiarism, collusion, tampering, breach of confidentiality of assessment materials;
 - incidents that occur outside of England (if it operates elsewhere);

- 15
- knows what to do if evidence of malpractice or maladministration comes to light, whether in the organisation itself or within a third party involved with the design, delivery or award of a qualification;
 - acts quickly when it has evidence of malpractice or maladministration;
- 20
- investigates promptly any allegations for which there are reasonable grounds that current (or former) staff or contractors have provided inaccurate or misleading information to Centres or Teachers about its qualifications and, if the awarding organisation establishes that Teachers have been misinformed, takes reasonable steps to correct any misunderstandings with the Centres or Teachers that are affected;
 - captures, logs and addresses all suspicions and evidence of malpractice.

25 The awarding organisation uses and regularly reviews a standardised investigations policy and approach that sets out:

- who investigates concerns about malpractice or maladministration;
 - how an investigation is undertaken;
 - how whistleblowers will be treated, and in such a way that individuals will not be prejudiced;
- 30
- when and how interested parties will be notified lawfully;
 - how any interviews should be conducted;
 - how facts will be gathered and evidence found, collated and stored;
 - how documentary evidence will be verified;
 - how confidentiality of investigation materials is assured;
- 35
- how the records of its investigations will be presented and their accuracy assured;
 - how and when any visits to Centres will be announced and undertaken;
 - which principles will be followed when it undertakes an investigation with other bodies.

The awarding organisation has on record:

- clear terms of reference for the investigations that it has undertaken;
- 40
- a log of all allegations, including those that were not investigated, that it can cross-reference if new information is provided.

Where the awarding organisation finds that a Teacher has disclosed confidential assessment information, the awarding organisation notifies the Teaching Regulation Agency (TRA), or any

organisation that carries out the same function in England or another jurisdiction, where appropriate.

45 In considering whether or not such a referral is appropriate the awarding organisation considers whether:

- the Teacher in question is subject to professional regulation by the TRA or other teaching regulator; and
- the malpractice identified is serious based on the facts of the case and the seriousness of the sanction imposed by the awarding organisation.

50

The awarding organisation should also take into account any guidance issued by the appropriate regulator. In general, a referral should be made where there was a deliberate or persistent disclosure in contravention of the requirements for the conduct of the assessment, or in breach of confidentiality of confidential assessment information, particularly where the action had, or was intended to have, a significant impact on the outcome of the assessment for at least one Learner. If in doubt, an awarding organisation should err on the side of a referral. An awarding organisation should also remind any Centre at which the Teacher is employed of its obligation to make its own referral to the TRA where the Centre determines the matter to be sufficiently serious.

55

Where the awarding organisation finds that a person not subject to regulation by the TRA or another teaching regulator has disclosed confidential assessment information, it should notify any other professional regulator to which that person is subject, where appropriate.

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Question 3 – Do you have any comments on the wording of lines 42 onwards of the proposed amended guidance for Condition A8? For specific comments, please refer to the relevant line numbers in your response.

8. Condition G4

8.1 Condition G4.1 requires awarding organisations to maintain the confidentiality of assessment materials where confidentiality is required to ensure that the qualification reflects an accurate measure of attainment.

8.2 Condition G4.2 currently highlights, in particular, the requirement to ensure that any training delivered by an awarding organisation does not lead to information about confidential assessment materials being disclosed. We proposed in our policy consultation to amend this condition so that it similarly highlights that when using teachers to develop assessment materials there are particular risks which an awarding organisation must mitigate.

8.3 Some responses to our previous consultation said that to focus only on teachers was unwarranted, as others third parties may also be involved in the

development and delivery of confidential assessment materials. We have reflected this in our proposed wording.

8.4 Additionally, we propose to make a minor adjustment to G4.3 to clarify our definition of 'prohibited training'. There is no substantive change to the Condition; we are just changing the wording to improve its clarity.

8.5 The title of Condition G4 is currently "Maintaining confidentiality of assessment materials, including the conduct of specified training events". We do not think that the second half of this title is necessary, as it gives undue prominence to a specific risk to confidentiality. We propose to change the title to simply "Maintaining confidentiality of assessment materials". This change will not remove or change the expectations on awarding organisations.

Condition G4 Maintaining confidentiality of assessment materials

G4.1 Where confidentiality in –

(a) the contents of assessment materials, or

5 (b) information about the assessment,

is required in order to ensure that a qualification which an awarding organisation makes available, or proposes to make available, reflects an accurate measure of attainment, the awarding organisation must take all reasonable steps to ensure that such confidentiality is maintained.

10 G4.2 In particular, an awarding organisation –

(a) must take all reasonable steps to ensure that such confidentiality is maintained where it (or any person connected or previously connected to it) provides training or training materials in relation to such a qualification,

(b) must not provide or endorse any prohibited training, and

15 (c) must take all reasonable steps to ensure that any person connected or previously connected to it does not provide or endorse any prohibited training.

G4.3 For the purposes of this condition, 'prohibited training' is training –

(a) provided to one or more Teachers in relation to such a qualification,

20 (b) at which two or more persons are present (whether physically or remotely by means of simultaneous electronic communication),

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- (c) where any one of those persons holds information in relation to the content of assessment materials or information about the assessment for that qualification, and
- (d) where disclosure of the information to Teachers would breach such confidentiality.
- 25 G4.4 An awarding organisation must, in respect of any training it provides to Teachers in relation to such a qualification (and, in relation to any such training provided by any person connected to it, must take all reasonable steps to) –
- (a) ensure that the training is reasonably available to all Teachers preparing Learners, or persons likely to become Learners, for assessments for that qualification,
- 30 (b) advertise to Teachers the availability of the training, including in particular by publishing details of the training, and
- (c) publish the content of any training materials which have been provided to Teachers in connection with the training, as soon as reasonably practicable after the training has been held.
- G4.5 An awarding organisation must take all reasonable steps to ensure that –
- (a) no person connected to it, or previously connected to it, and
- 35 (b) in particular, no Teacher or other third party who has been involved in the development of assessment materials,
- discloses, or offers to disclose, information about any assessment or the content of any assessment materials where that information is (or is said or implied to be) confidential.
- 40 G4.6 Where any breach of such confidentiality (including through the loss or theft of confidential assessment materials) is either suspected by an awarding organisation or alleged by any other person and where there are reasonable grounds for that suspicion or allegation, the awarding organisation must:
- (a) investigate that breach,
- 45 (b) ensure that such an investigation is carried out rigorously, effectively, and by persons of appropriate competence who have no personal interest in its outcome, and
- (c) so far as possible, establish whether or not a breach of such confidentiality has occurred.

Question 4 – Do you have any comments on the wording of the proposed amended Condition G4.3, G4.5 or the title of the condition? For specific comments, please refer to the relevant line numbers in your response.

9. Guidance for Condition G4

- 9.1 Both our consultations proposed changes to the guidance for Condition G4. In particular, our 2017 consultation proposed that this updated guidance would replace, in its entirety, the existing guidance for Condition G4.
- 9.2 Our subsequent policy consultation in 2018 did not give us cause to reconsider this proposal. Our proposed guidance for Condition G4 therefore looks very different from the existing guidance.
- 9.3 As we have chosen to combine the guidance we consulted on in 2017 with the guidance we consulted on in 2018, our proposal here looks quite different to our 2017 proposal. However, it covers many of the same issues and follows the same principles – revising the format to make it easier to understand and follow, and refining the wording to make it clear the guidance does not impose rules beyond what the Condition requires.
- 9.4 Our proposed guidance is divided into six sections. The first section sets out guidance around what might be considered ‘confidential information’.
- 9.5 We then propose to describe what kinds of third party activities might be covered by Condition G4, before going on to give some guidance around types of permitted training and training on centre-marked assessments.
- 9.6 We include sections on both positive and negative indicators that would suggest an awarding organisation is likely or unlikely to comply with our conditions. In keeping with our proposals from 2017, we have removed some detail from the existing guidance that we think is unnecessary, such as instances where the positive and negative indicators mirror one another.

Guidance on Condition G4 – Maintaining confidentiality of assessment materials

Confidential information

5 Condition G4.1 refers to confidentiality in respect of:

- (a) the contents of assessment materials, and
- (b) information about the assessment for a qualification.

10 This covers any information which, if divulged inappropriately, could impact on the validity and/or reliability of an assessment. Information about when or how particular knowledge, skills or understanding will be assessed will be confidential if the assessment was designed in a way that assumes the Learner will not know that information before taking the assessment.

15 For some assessments, it might be enough to maintain confidentiality in relation to precise information about specific questions. For other assessments, knowledge of a broad overview about the topics to be set or the general structure of the paper might compromise the ability of the assessment to measure the Learner's attainment effectively.

In the guidance below 'confidential assessment information' refers to both the contents of assessment materials and information about the assessment in relation to which confidentiality must be maintained under Condition G4.1.

20 *Third party activities covered by Condition G4*

An awarding organisation must ensure that it takes appropriate steps to meet the requirements of Condition G4 in relation to its own employees.

25 Awarding organisations are also likely to contract with a variety of third parties in relation to the development and delivery of assessments, many of whom will have access to confidential assessment information. This will include not only those persons who set questions and quality assure the assessments but also those involved in printing assessments and distributing them to Centres. For online assessments it may also include any third party that hosts the platform through which an assessment is provided.

30 Condition G4.1 requires an awarding organisation to take all reasonable steps to ensure confidentiality is not breached by anyone during any part of the assessment development and delivery process.

For the purposes of Conditions G4.3 to G4.5, awarding organisations should also remember that the term 'Teacher', as defined in Condition J1.8, includes not only qualified teaching staff in schools and colleges, but also covers home-schooling parents, private tutors and employers providing training to Learners in relation to vocational qualifications.

35 *Examples of permitted training*

Provided that confidentiality, as defined by Condition G4.1, is not breached and all other regulatory requirements are met, training for Teachers can be delivered if it:

- does not relate to a particular regulated qualification; or
- is about a particular regulated qualification and:
 - 40 ○ is attended by persons who:
 - had sight of the contents of previous assessments that are part of the current specification but have no confidential information on assessments that have yet to be taken; or
 - 45 ■ had confidential information about assessments for an earlier specification for the same qualification but do not have confidential assessment information in relation to the current specification; and

- does not involve the presence of anyone with information about that qualification that must not be shared with Teachers and Learners.

50 Where a staff member with confidential information about qualification A attends a training event in relation to qualification B, that training will not become prohibited training simply because an attendee asks, or might ask, a question about qualification A. If the answer to the question would involve the staff member breaching confidentiality, he or she should simply decline to answer it, and could refer the questioner to publicly available information.

55 Condition G4.2 concerns the provision of training. 'Training' should be given its ordinary meaning and, in general terms, will usually encompass meetings – attended either in person or remotely – at which attendees are either taught a particular skill or provided with information in relation to a particular regulated qualification, with the aim of better equipping them to deliver that qualification. The obligations in Conditions G4.2 and G4.4 will not, therefore, apply to meetings with Teachers where the purpose is to facilitate the development or design of a particular regulated qualification by an
60 awarding organisation.

However, it is important to note that meetings with Teachers, at which the primary purpose is not to provide training, may incorporate a training element. We expect awarding organisations to consider carefully whether each particular meeting with Teachers will provide training to them and, if so, whether any such training will adhere to the requirements in Conditions G4.2(a) and G4.4.

65 Likewise, a staff member with confidential information will not automatically be providing prohibited training if he or she takes a telephone call from a Teacher. However, prohibited training will include one-to-one training where all of the elements of the definition in Condition G4.2 are met. If therefore, the caller asks a question, the answer to which would involve divulging confidential assessment
70 information, the call would become prohibited training if the question was answered and the staff member should decline to do so.

Pre-recorded training – such as a webinar – from someone with confidential information will not fall within the definition of 'prohibited training' under Condition G4.3 because that person would not be 'present' under the definition of that term in Condition G4.3(b), which concerns the use of simultaneous electronic communication.

75 The awarding organisation would, of course, need to comply with Condition G4.2(a) in that the pre-recorded training could not disclose information that would breach Condition G4.1. It must also comply with the obligation under Condition G4.4(c) concerning the publication of training materials.

We note that the above examples are for illustrative purposes only and are not exhaustive.

Training on Centre-marked assessment

80 Condition G4 allows a distinction to be made between:

- (a) information that can be shared with Teachers that they cannot then pass on to their Learners (for example, in the context of training on how to conduct Centre-marked assessments); and

(b) information that neither Teachers nor Learners should see because this would breach the requirement of confidentiality in Condition G4.1.

85 So, for example, if an awarding organisation was to share model answers at a training event where Teachers were being standardised in relation to Centre-marked assessments, this would be permissible under Condition G4.2(b). This is because the event falls outside the definition of 'prohibited training'.

90 However, although the disclosure of such information to Teachers would not breach confidentiality as defined by Condition G4.1, an awarding organisation must take all reasonable steps to ensure that such information is not passed on to Learners where this would affect the ability of the assessment to reflect an accurate measure of attainment.

95 A person can attend a training event if he or she holds only confidential information in relation to the qualification that, if disclosed to Teachers, would not breach the requirement of confidentiality in Condition G4.1. One such example would be if the person held confidential information in relation to the standardisation of marking in Centre-marked assessment only.

However, a person could not attend such training if he or she holds confidential information in relation to external assessment for that qualification as that information, if disclosed to Teachers, would breach the requirement of confidentiality in Condition G4.1.

100 **Examples of 'positive indicators' that would suggest an awarding organisation is likely to comply**

The awarding organisation:

is clear which assessment materials and information are confidential;

- 105 ■ knows who has had access to confidential assessment information and the extent to which this is the case (for example if they have seen entire assessments or parts or assessments), for each of its qualifications;
- trains relevant staff about how to protect confidential assessment information, including during interactions with Teachers;
- 110 ■ puts in place and monitors the application of confidentiality policies and processes for its staff and contractors, which include –
 - details on how to maintain confidentiality during interactions with Teachers; and
 - provision in relation to the protection of confidentiality by staff and third parties who have access to confidential assessment information through the assessment development process, including quality assurance (in relation to which, see our
- 115 overarching guidance on safeguarding confidentiality where Teachers are involved in developing assessments);

- 120 ■ makes sure that, where it provides training to Centres about how to set, deliver or mark assessments, the Centre is trained on how to protect confidential assessment information and maintain confidentiality, and the training itself is designed and delivered to minimise the risk of a breach of confidentiality by the future disclosure of materials provided in connection with the training;
- monitors the training and training materials that it delivers to make sure confidential information is not shared at events, for example by:
 - reviewing training materials before they are used;
 - 125 ○ reviewing recordings of training events;
 - sending observers to monitor samples of training events;
- 130 ■ requires all current (and former) staff and contractors who have had access to confidential assessment information in relation to a particular qualification to apply in writing for the awarding organisation's permission before providing, endorsing or attending any Teacher training events in respect of that qualification, and only gives permission where doing so would not lead to prohibited training taking place;
- puts all presentations and other training materials used at its Teacher training events on its website (or in a secure area of its website accessible to all Teachers for the qualification), clearly linked from the pages containing the relevant qualification specifications;
- 135 ■ has on record clear terms of reference for the investigations it has undertaken into suspected or alleged breaches of confidentiality;
- has on record a log of all allegations of breaches of confidentiality, including those that were not investigated, that it can cross-reference if new information is provided.

The awarding organisation:

- 140 ■ takes all reasonable steps to ensure that resources designed to support the preparation of Learners and persons likely to become Learners which are prepared by current (and former) staff and contractors who have confidential assessment information in relation to that qualification do not compromise the confidentiality of assessments for that qualification;
- 145 ■ trains relevant staff about how to protect confidential assessment information, including during the preparation of any resources designed to support the preparation of Learners and persons likely to become Learners, for a qualification in respect of which they have access to confidential assessment information;
- 150 ■ requires all current (and former) staff and contractors who have confidential assessment information to notify the awarding organisation promptly of all instances in which they have been, or are currently, involved in the preparation of a resource designed to support the

preparation of Learners and persons likely to become Learners for a qualification in respect of which they have access to confidential assessment information. This does not apply to the preparation of teaching resources or materials by a current (or former) contractor exclusively for Learners that he or she teaches;

- 155 ■ monitors assessments set by all current (and former) staff and contractors who are, or have been, involved in the preparation of a resource designed to support the preparation of Learners and persons likely to become Learners for assessments for the same qualification in respect of which they have confidential assessment information, to ensure that the confidentiality of those assessments has not been compromised by that resource. This does not apply to the
- 160 preparation of teaching resources or materials by a current (or former) contractor exclusively for Learners that he or she teaches.

Examples of ‘negative indicators’ that would suggest an awarding organisation is not likely to comply

The awarding organisation:

- 165 ■ does not make sure its confidentiality policies and processes for staff and contractors are up to date and followed;
- does not ensure that its conflict of interest register maintained under Condition A4.3 is up to date and contains details of all relevant conflicts in relation to staff and contractors who hold confidential assessment information;
- 170 ■ provides Teacher training events where current (or former) staff or contractors are present in the audience who have had access to confidential assessment information in relation to that qualification and has not taken steps to ensure that the information held is no longer confidential;
- 175 ■ provides material information about an assessment to Teachers at a training event that is additional to, or contradicts, its published information regarding the relevant qualification, without publishing that information as soon as reasonably practicable after the training event;
- does not take all reasonable steps to establish whether its staff or contractors with access to confidential assessment material provide, or intend to provide, Teacher training relating to the qualification (whether privately or through another organisation);
- 180 ■ has not properly evaluated, and where required, validated evidence collected during an investigation into a suspected or alleged breach of confidentiality;
- has not contacted relevant parties that are critical to an investigation into a suspected or alleged breach of confidentiality, or to the outcomes of that investigation;
- 185 ■ has not kept records and documents relating to the breach of confidentiality and the investigation for an appropriate period.

Question 5 – Do you have any comments on the wording of the proposed amended guidance for Condition G4? For specific comments, please refer to the relevant line numbers in your response.

10. Guidance on safeguarding confidentiality where teachers are involved in developing assessments

10.1 In our 2018 consultation, we proposed to introduce a new section of statutory guidance to assist awarding organisations to decide on safeguards that would be appropriate and proportionate for their different qualifications, when teachers are involved in developing assessments. We proposed this statutory guidance will appear at the end of our Guidance to the General Conditions of Recognition, similar in form (but not content) to the existing section “Guidance on making changes to incorrect results”.

10.2 We are proposing to call this section of guidance “Guidance on safeguarding confidentiality where teachers are involved in developing assessments”.

10.3 This guidance is intended to perform a number of functions:

- It highlights in one place the requirements that are of particular relevance for an awarding organisation regarding this issue.
- It assists awarding organisations by demonstrating the thought processes necessary to ensure that adequate safeguards are in place for qualifications where teachers contribute to confidential assessment materials.

It does this by describing some factors in deciding what safeguards are appropriate for any given qualification, and also the potential safeguards that might be put in place for a specific qualification.

- It sets out some examples to illustrate the different safeguards that an awarding organisation may choose to put in place for qualifications with different risk profiles. It is clear that these examples are not intended to mandate any particular approach in relation to any particular type of qualification but rather to aid an awarding organisation's own consideration of how best to comply with the Conditions, and what judgements we expect awarding organisations to make for themselves.

Guidance on safeguarding confidentiality where teachers are involved in developing assessments

Introduction

5 Many awarding organisations use Teachers in the development of assessments, and we accept that in some cases there are clear benefits to doing so. However, we expect awarding organisations to be alive to the risks around confidentiality and malpractice to which the use of practising Teachers gives rise, and to put in place appropriate safeguards to ensure compliance with the Conditions.

10 This guidance identifies a number of Conditions that place obligations on awarding organisations which are relevant to this issue. It also outlines some of the factors that will be relevant in an awarding organisation's analysis of the strength of the safeguards it needs, as well as examples of the types of safeguards that it might put in place in light of that analysis and some worked examples for illustrative purposes.

15 There is no 'one size fits all approach' to mitigating the risks of a Teacher misusing confidential information about assessments. Each awarding organisation must use safeguards that are appropriate for each of its qualifications. Responsibility for taking a suitably robust approach to complying with the Conditions will sit with each awarding organisation, having had regard to this statutory guidance, as well as the specific guidance in relation to the relevant Conditions.

20 In the guidance below 'confidential assessment information' refers to both the contents of assessment materials, and information about the assessment, in relation to which confidentiality must be maintained under Condition G4.1.

What requirements must an awarding organisation meet?

25 Awarding organisations must comply with all of the Conditions which apply to the qualifications they offer. These include Conditions requiring assessments to be fit for purpose when set and delivered. In particular, the Conditions below are especially relevant to the risks around the involvement of Teachers in the development of assessments.

30 ▪ **Condition A4.2** requires an awarding organisation to identify and monitor all current and reasonably foreseeable conflicts of interest (as defined in Condition A4.1) that relate to it. This will include identifying any relevant teaching roles held by Teachers involved in the development of assessments, and monitoring any such conflict.

35 ▪ **Condition A4.4** requires an awarding organisation to take all reasonable steps to ensure that no conflict of interest that relates to it has an Adverse Effect. An awarding organisation is thus required to do everything that it can to ensure that no Teacher involved in developing assessments breaches confidentiality. Where an Adverse Effect does occur, **Condition A4.5** requires an awarding organisation to take all reasonable steps to mitigate that effect as far as possible and correct it.

40 ▪ **Condition A6.1** requires an awarding organisation to take all reasonable steps to identify the risk of occurrence of any incident that could have an Adverse Effect. This will include an awarding organisation's assessment of risk in relation to breaches of confidentiality by Teachers involved in assessment development. **Condition A6.2** requires an awarding organisation to take all

reasonable steps to prevent any such incident from occurring and prevent (or if it cannot be prevented, mitigate) any Adverse Effect that the incident would have if it occurred.

- 45 ▪ Where an incident occurs, which could have an Adverse Effect, **Condition A7.1** requires an awarding organisation to promptly take all reasonable steps to prevent the Adverse Effect – or, where it occurs, to mitigate and correct it as far as possible and give priority to assessments which accurately differentiate between Learners.
- 50 ▪ **Condition A8.1** requires an awarding organisation to take all reasonable steps to prevent the occurrence of malpractice in the development, delivery or award of qualifications. A deliberate breach of confidentiality in relation to assessments will almost certainly constitute malpractice. Where any such malpractice is reasonably suspected or alleged, **Condition A8.2** requires an awarding organisation to investigate it.
- 55 ▪ Where malpractice is established, **Condition A8.6** requires an awarding organisation to take all reasonable steps to prevent it from reoccurring and to take proportionate action against those responsible, or seek the cooperation of third parties in taking such action.
- 60 ▪ Where an awarding organisation arranges for a third party – such as a Teacher – to undertake any part of qualification development on its behalf, **Condition C1.1** requires the awarding organisation to (i) ensure that those arrangements enable the awarding organisation to comply with the Conditions, and (ii) to monitor and enforce those arrangements where necessary to ensure compliance with the Conditions.
- 65 ▪ **Condition G4.1** requires an awarding organisation to take all reasonable steps to maintain the confidentiality of the content of, or information about, assessment materials where this is required to ensure the qualification reflects an accurate measure of attainment. In particular, **Condition G4.5(b)** requires an awarding organisation to take all reasonable steps to ensure that no Teacher or other third party involved in the development of assessments breaches, or offers to breach, such confidentiality.

Factors in deciding what safeguards are appropriate

Each awarding organisation must use safeguards that are appropriate for each of its qualifications.

70 In determining the package of safeguards that would be appropriate, we expect an awarding organisation to consider all relevant factors. In particular, we expect an awarding organisation to consider the following:

- 75 ▪ **The nature and amount of confidential assessment information held by a Teacher** – We will expect that the more confidential assessment information that a Teacher has about an assessment – or the greater the effect that its disclosure would have on the fitness for purpose of the assessment – the stronger the package of safeguards an awarding organisation will need to use to put in place to meet the requirements of the Conditions.
- **The Teacher’s role in delivering qualifications** – We expect that the more directly a Teacher is involved with delivering the qualification for which he or she holds confidential assessment information, the stronger the package of safeguards that will be needed. A stronger package of safeguards should be used for a Teacher currently involved in teaching the relevant qualification,

80 including as a private tutor, than for a Teacher who teaches an alternative qualification (such as one offered by a different awarding organisation), or who is no longer actively teaching.

85

- **Potential pressures on Teachers to misuse confidential assessment information** – We expect that an awarding organisation will take stronger steps to prevent a Teacher inappropriately using confidential assessment information about a qualification used for school or college accountability purposes, or which is particularly high stakes in that it directly affects a Learner's progression options or life chances. This will include, in particular, qualifications that are used for progression to higher education, or which confer a licence to practise.

90

- **The impact if confidential assessment information is misused** – In considering what safeguards to put in place, we expect an awarding organisation to consider the ease with which it could replace assessment materials, or Learners could re-take an assessment, should a Teacher be found to have made inappropriate use of confidential assessment information.

95

For example, it is likely to be more difficult for an awarding organisation to mitigate the impact of an inappropriate disclosure in relation to a qualification that is assessed once annually, is taken by large numbers, and for which there is a pre-determined and key results date (such as GCSEs and A levels) than for a qualification for which there are regular assessment opportunities.

100

Some qualifications will be awarded on the basis of one assessment only, whereas for others, a number of assessments will contribute to the final result. In qualifications for which there are multiple assessments, if one assessment is compromised, a result might be awarded based on a Learner's performance in the other assessments. The number of assessments that contribute towards a qualification is therefore a further factor for an awarding organisation to consider when determining the ease with which it could mitigate the impact of a breach of confidentiality.

Potential safeguards

105

Below we set out some examples of the potential safeguards that an awarding organisation may use to prevent the disclosure of confidential assessment information or to limit any Adverse Effect resulting from such a disclosure.

The examples we provide relate to:

- assessment development and design;
- support for Teachers and Centres; and
- detection and deterrence.

110

It is the responsibility of each awarding organisation to consider what (if any) safeguards will be required in relation to each of its qualifications, taking into account all relevant factors, including those outlined in the previous section.

115

We will expect an awarding organisation to consider the appropriate balance between up-front measures to prevent and (if necessary) mitigate the disclosure of confidential assessment information, and end-point measures which allow it to quickly identify and mitigate any disclosure that takes place.

Assessment development and design

120 ▪ **Teachers are not involved in developing confidential assessment materials** – The surest way for an awarding organisation to guard against Teachers inappropriately using confidential assessment information is to make sure no Teachers have such information. An awarding organisation could choose to keep its assessment production process entirely in-house and not contract services from currently employed Teachers. It could secure any necessary Teacher insights and expertise from recently retired Teachers or Teachers who are taking a break from teaching.

125 ▪ **Teachers involved with developing confidential assessment materials cannot teach the qualification** – An awarding organisation might stipulate that any Teachers it engages to develop confidential assessment materials could not themselves teach the qualification for which those materials would be used, while those materials remained confidential. Its contractual provisions would need to address the risks of disclosure to teaching colleagues and address the opportunities for the Teacher to work as a private tutor, for example.

130 While the above two approaches might work well for some qualifications, an awarding organisation would need to balance their use against the different risks to which they could give rise, including as to the quality of the assessments developed. In relation to the second example, Teachers might not wish to develop assessments for qualifications they are not allowed to teach. Such a prohibition could limit their ability to change jobs and the options of their Centre to change awarding organisation.

135 ▪ **No serving Teacher knows whether or when the assessment materials they have developed or seen are used** – An awarding organisation might commission Teachers to write whole or parts of assessments, but the decision on whether or when the materials would be used would be tightly controlled and not be known to any Teacher. For example, the use of a question bank, or question paper bank, may achieve the necessary degree of uncertainty, although consideration would need to be given to the size of the question bank and the frequency with which it is updated (and it would still need to be made clear to Teachers that information in relation to each question or task within the bank was confidential⁸).

145 The form and degree of unpredictability needed to make this approach an effective safeguard will vary by qualification. An awarding organisation should consider the number and the nature of the assessment tasks/questions, whether the tasks/questions would be memorable if seen in advance, and whether a Learner who had prior information about the task/question would likely be advantaged over others.

150 For qualifications such as GCSEs, A levels and the main alternatives, the stakes of the qualification, for both Learners and Centres, are sufficiently high that we will normally expect an awarding organisation to manage its assessment development in such a way so no Teacher of the relevant qualification knows with certainty the content of any specific assessment. Where it does

⁸ We will view each individual item in a bank as confidential. However, the number of items in the bank, and the structure of the relevant assessment, will be relevant to the risks arising from any breach of confidentiality in relation to an individual item, and how easily the Adverse Effect arising from any such breach can be mitigated.

not do so, we will expect an awarding organisation to be able to offer a compelling justification for any alternative approach.

- 155
- **No serving teacher is involved with developing all of the assessments for any one qualification** – Where the confidentiality of one assessment has been compromised by a Teacher, an awarding organisation might disregard the affected Learners' performance in that assessment and estimate their overall mark based on their performance in the other assessments for the qualification, relative to the performance of other Learners who completed all of the assessments (an 'assessed result'). This will only be possible where there is more than one assessment for the qualification, and not all of those assessments have been compromised by the Teacher's actions.
- 160

165

An awarding organisation that allows Teachers to develop assessments for qualifications they also teach might ensure that no such Teacher sees all the assessments to be taken by a Learner for that qualification (for example, both exam papers). This would limit the impact, including on Learners, of a Teacher inappropriately using confidential assessment information. It could also assist with the awarding organisation's monitoring activities as it would allow the awarding organisation to consider whether Learners performed better than expected in the assessment their Teacher had developed or otherwise seen, relative to their performance in their other assessments.

Support for Teachers and Centres

170 The types of support an awarding organisation might give to a Teacher who holds confidential assessment information include:

- clear contractual arrangements setting out the Teacher's obligations with respect to confidential assessment information and any limitations on other roles the Teacher could undertake while information he or she held remained confidential,
- 175
- providing training and advice to the Teacher in relation to maintaining confidentiality of assessment materials and information,
 - having direct contact with the Teacher's Centre (if any) to emphasise the importance of ethical practice, the potential consequences of wrong-doing and the support the Centre might provide the Teacher to avoid deliberately or sub-consciously using the information they hold in an inappropriate way, and
- 180
- requiring annual declarations from the Teacher that he or she understands and will at all times comply with their obligations to protect confidential assessment information.

185

Where a Teacher has access to confidential assessment information, we will expect an awarding organisation's contract with that Teacher to at least provide for termination in the event of any deliberate disclosure of such information.

Detection and deterrence

An awarding organisation is required to actively monitor all conflicts of interest that apply to it (Condition A4.2), as well as its contractual arrangements (Condition C1.1(b)). It is also required to take all reasonable steps to prevent (i) any conflict of interest having an Adverse Effect (Condition A4.4), (ii) the

190 occurrence of any incident that could have an Adverse Effect (Condition A6.2(a)), (iii) any malpractice in relation to the development and award of qualifications (Condition A8.1), and (iv) any breach of confidentiality in relation to confidential assessment information (Condition G4.1).

195 A Teacher who holds confidential assessment information may be deterred from using that information inappropriately if he or she knows that such use is likely to be detected. We will therefore expect an awarding organisation to consider whether, in view of the risks it faces in relation to a particular qualification, the transparent use of any monitoring procedures will be a reasonable step that it is required to take to meet the requirements of the above Conditions.

We will expect awarding organisations to undertake some level of monitoring in relation to high stakes qualifications in relation to which Teachers hold confidential assessment information.

200 The monitoring undertaken by an awarding organisation may be shaped by the safeguards that it has put in place at the development stage. For example, more robust upfront safeguards may mean that less rigorous monitoring is required. However, an awarding organisation must always be alive to the risk of a breach of confidentiality – no matter how robust its upfront safeguards – and the need to swiftly identify and deal with any breach that occurs.

205 Some illustrative examples of the types of monitoring that an awarding organisation could undertake are as follows:

- reviewing the evidence generated in the relevant assessment by Learners whose Teacher had confidential assessment information to look for any unusual patterns in their responses;
- where appropriate, sampling the teaching plans, teaching materials and formative assessments used by Teachers who hold confidential assessment information to look for signs they had inappropriately narrowed their teaching;
- monitoring social media to look for signs that confidential assessment information has been disclosed; and
- undertaking statistical monitoring to look for unusual results or patterns of results in Centres where Teachers with confidential assessment information are teaching.

In each case an awarding organisation should consider whether a particular type of monitoring will yield reliable information.

Examples

220 We have set out above some general indications as to when we will expect to see stronger safeguards depending on the risks associated with a particular qualification.

225 Below we set out some examples to illustrate the different safeguards that an awarding organisation may choose to put in place for qualifications with different risk profiles. These examples are not intended to mandate any particular approach in relation to any particular type of qualification but rather – when read together with the sections above – to aid an awarding organisation's own consideration of how best to comply with the Conditions.

Example 1

The qualification and associated risks

- A high stakes qualification used for school accountability purposes, taken by c. 250,000 Learners annually and used to support progression to employment or higher education.
- 230 ▪ The assessments comprise two unseen written exam papers, each containing six questions from which Learners must attempt three questions.
- The nature and number of questions on each paper makes them memorable and, if known in advance, teaching and learning could be narrowed.
- 235 ▪ The impact of a breach would be high, including because of the numbers of Learners who could be affected and the damage to public confidence.

One possible approach

- The awarding organisation considers that Teacher input to developing the assessment materials will enhance the quality of the assessments and, because risks can be managed as set out below, it decides to retain that input.
- 240 ▪ In light of the potential impact of any breach of confidentiality, and the opportunities to narrow teaching and learning if the exam questions are known in advance, the awarding organisation:
 - commissions three different Teachers to write questions on specific aspects of the curriculum and requires them to document the assessment objectives and their relative weightings that will be assessed for each question, for use when the exam paper is put together;
 - ensures that no one Teacher knows which of his or her questions will be used in any particular exam paper in any particular assessment series;
 - identifies a permanent member of staff, advised by a recently retired Teacher of the qualification, to select the questions to be used in the two exam papers for any assessment series.
 - 250
 - sets out the Teachers' obligations with regard to the confidential materials in their contracts, and provides for the termination of the contract in the event of disclosure of confidential assessment information by the Teacher;
 - 255
 - makes sure each Teacher's head of Centre knows the role the Teacher has played and that he or she will not know whether or when the questions they have written will be used; and
 - reviews the Learners' scripts of at least one of the Teachers each year to look for unusual patterns of responses.

260 **Example 2**

The qualification and associated risks

- 265 ▪ A high stakes qualification used for school accountability purposes, taken by c.100,000 Learners annually and used to support progression to employment or higher education.
- 265 ▪ The assessments comprise three unseen written exam papers, each covering different aspects of the curriculum. Learners must attempt all questions on each paper.
- 265 ▪ The nature and number of questions on each paper means they are not particularly memorable. The nature of both the subject content and of the exam questions means that, even if the questions were known in advance, teaching and learning the whole of the curriculum would be needed to secure a good mark.
- 270 ▪ The impact of a breach would be high, including because of the numbers of Learners who could be affected and the damage to public confidence.

One possible approach

- 275 ▪ The awarding organisation has had difficulties recruiting people with appropriate subject and assessment expertise to develop the assessments. In the longer term it commits to commissioning the writing of multiple papers so no Teacher currently teaching the qualification who develops assessments knows if or when any particular assessment will be used.
- 280 ▪ In the short term it is concerned the extra workload of such an approach would deter anyone considering applying for an examiner role. It therefore engages two Teachers who currently teach the qualification to each write one of the papers. The third paper is written by a full-time employee who, until recently, had taught the specific aspects of the curriculum assessed by that paper. Neither of the Teachers sees the two papers that they have not written, only the employee sees all three.
- 285 ▪ The awarding organisation reviews the exam scripts of the Learners who were taught by the two Teachers to look for any unusual patterns of response. It also undertakes a statistical analysis to determine whether the Learners' performance in the paper their Teacher had developed was out of line with their performance in the other papers, relative to the performance of all Learners taking the qualification. It interviews the Teacher and the Learners, where appropriate, to understand the reasons for any unusual patterns.
- 290 ▪ Each Teacher's contract with the awarding organisation sets out the Teacher's obligations with regard to the confidential assessment information, and provides for the termination of the contract in the event of disclosure of such information by the Teacher.
- 295 ▪ The awarding organisation makes sure each Teacher's head of Centre knows the role they have played and advises them of the steps it will take to detect any inappropriate use of the information held by the Teacher.

Example 3

The qualification and associated risks

- A high stakes qualification for the Learner and for those who rely on the qualification as an indication of competence to practise.
- 300
- Assessment is by observation of the Learner undertaking a predetermined set of tasks which are well known and will have been practised extensively before undertaking the assessment.
 - The nature of the assessment is intentionally highly predictable, as the Learners are assessed on their competence in performing a known set of tasks.

One possible approach

- 305
- As Learners know they will be assessed on their full range of skills, and the assessments are intentionally predictable, the awarding organisation does not consider it necessary to limit who can write the tasks or to use particular safeguards where practitioners who write the tasks also employ people who are preparing for the assessments. It does not therefore adopt any additional safeguards.

Question 6 – do you have any comments about our proposed guidance on safeguarding confidentiality where teachers are involved in developing assessments? For specific comments, please refer to the relevant line numbers in your response.

11. Equality analysis

11.1 We are subject to the public sector equality duty. Appendix A sets out how this duty interacts with our statutory objectives and other duties.

11.2 We considered the potential impact on students who share protected characteristics of the draft Conditions and guidance included in this consultation. The Conditions and guidance apply equally to all awarding organisations offering regulated qualifications. Awarding organisations must follow the Conditions and have regard to the guidance; they do not have a duty to follow the guidance directly in all cases.

11.3 We did not identify any positive or negative impacts of our proposed amended Conditions or guidance for people because of their protected characteristics.

Question 7: We have not identified any ways in which the proposed amended Conditions or guidance would impact (positively or negatively) on persons who share a protected characteristic. Are there any potential impacts we have not identified?

Question 8: Are there any additional steps we could take to mitigate any negative impact resulting from these proposals on persons who share a protected characteristic?

Question 9: Do you have any other comments on the impacts of the proposals on students who share a protected characteristic?

12. Regulatory impact

12.1 We considered the regulatory impact of introducing this revised guidance. Awarding organisations must have regard to our guidance, so amending and increasing the length of the guidance will increase the overall impact of our requirements in terms of the amount of information that awarding organisations must have regard to. Awarding organisations will need to read and familiarise themselves with this guidance.

- 12.2 Awarding organisations do not have to follow our guidance. Where an awarding organisation has good reason to depart from the guidance, it can do so. Providing guidance should also help awarding organisations to understand better how to comply with our requirements. The obligation on an awarding organisation is to comply with the Conditions. The only changes to the Conditions we have proposed are to make explicit requirements in relation to conflicts of interest and confidentiality which were already implicit in the existing Conditions. Indeed, most awarding organisations that responded to our previous consultation indicated that they are already compliant with these requirements.
- 12.3 In our 2018 consultation, we asked awarding organisations what costs they predicted if we were to amend the Conditions and guidance as we proposed.
- 12.4 On the maintenance of a register of third parties and their conflicts of interest, two exam boards confirmed this was already done, so no incremental burden would be imposed, the other two exam boards indicated costs of £96k and £50-100k per annum. A large awarding organisation indicated a cost of £20k per annum. This would suggest an average incremental burden of £50k per annum for the large awarding organisations and exam boards. For the remaining, smaller awarding organisations the impact would be significantly less, since the numbers employed will be lower, however none provided specific figures in their responses.
- 12.5 On ensuring the unpredictability of assessments, which we suggested as a potential safeguard to ensure assessment material is confidential, the responses focused on the cost of producing additional assessments in the implementation period, with ongoing costs then largely unchanged. One exam board indicated they were already compliant with the proposals, so no incremental burden would be incurred. One exam board estimated a one-off cost of £2m and another suggested a £1.0-1.2m cost. One large awarding organisation indicated a one-off cost of £130k for their affected qualifications. This would suggest exam boards would incur one-off costs of, on average, £1m, while other awarding organisations will incur additional costs of up to £130k each, depending on the number of qualifications where conflicts could arise.
- 12.6 We did not receive any further information regarding the potential impact of our proposals when we asked about this in our policy consultation. We took this to mean that awarding organisations consider further impact to be limited, either as their qualifications are not affected by this issue or because they already have a range of safeguards in place. We are including an opportunity here, however, for further input in this regard as it is only now that awarding

organisations will have seen the detailed wording of our Conditions and guidance.

12.7 We consider the impact of the guidance we are putting in place to be proportionate and necessary to ensure that confidential information about assessments is not shared.

Question 10: Do you have any further comments on the estimated costs of awarding organisations, large and small, complying with our proposed new Conditions and following our revised guidance?

Question 11: Are there any additional steps we could take to reduce the regulatory impact of our proposals?

Question 12: Are there any costs or benefits associated with our proposals which we have not identified?

Question 13: Do you have any comments on the readability and accessibility of the guidance?

Question 14: Do you have suggestions on how it might be improved?

Appendix A – Ofqual’s role, objectives and duties

Our statutory objectives include the qualifications standards objective, which is to secure the qualifications we regulate:

- a) give a reliable indication of knowledge, skills and understanding; and
- b) indicate:
 - (i) a consistent level of attainment (including over time) between comparable regulated qualifications; and
 - (ii) a consistent level of attainment (but not over time) between qualifications we regulate and comparable qualifications (including those awarded outside of the UK) that we do not regulate.

We regulate so that qualifications properly differentiate between students who have demonstrated that they have the knowledge, skills and understanding required to attain the qualification and those who have not.

We also have a duty under the Apprenticeship, Skills, Children and Learning Act 2009 to have regard to the reasonable requirements of relevant students, including those with special educational needs and disabilities, of employers and of the higher education sector, and to aspects of government policy when so directed by the Secretary of State.

As a public body, we are subject to the public sector equality duty 6. This duty requires us to have due regard to the need to:

- a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Equality Act 2010;
- b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The exam boards design, deliver and award GCSE, A level and AS qualifications and are required by the Equality Act, among other things, to make reasonable adjustments for disabled people taking their qualifications, except where we specified that such adjustments should not be made.

When we decide whether such adjustments should not be made, we must have regard to:

- a) the need to minimise the extent to which disabled persons are disadvantaged in attaining the qualification because of their disabilities;
- b) the need to secure that the qualification gives a reliable indication of the knowledge, skills and understanding of a person upon whom it is conferred;
- c) the need to maintain public confidence in the qualification.

Legislation therefore sets out a framework within which we must operate. We are subject to a number of duties and we must aim to achieve a number of objectives. These different duties and objectives can, from time to time, conflict with each other. For example, if we regulate to secure that a qualification gives a reliable indication of a student's knowledge, skills and understanding, a student who has not been able to demonstrate the required knowledge, skills and/or understanding will not be awarded the qualification. A person may find it more difficult, or impossible, to demonstrate the required knowledge, skills and/or understanding because they have a protected characteristic. This could put them at a disadvantage relative to others who have been awarded the qualification. It is not always possible for us to regulate so that we can both secure that qualifications give a reliable indication of knowledge, skills and understanding and advance equality between people who share a protected characteristic and those who do not. We must review all the available evidence and actively consider all the available options before coming to a final, rational decision.

Qualifications cannot be used to mitigate inequalities or unfairness in the education system or in society more widely that might affect, for example, students' preparedness to take the qualification and the assessments within it. While a wide range of factors can have an impact on a student's ability to achieve a particular mark in an assessment, our influence is limited to the way the qualification is designed and assessed.

We require the exam boards to design qualifications to give a reliable indication of the knowledge, skills and understanding of those on whom they are conferred. We also require the exam boards to avoid, where possible, features of a qualification that could, without justification, make a qualification more difficult for a student to achieve because they have a particular protected characteristic. We require exam boards to monitor whether any features of their qualifications have this effect.

In setting the overall framework within which exam boards will design, assess and award GCSE, A level and AS qualifications, we want to understand the possible impacts of the proposals on persons who share a protected characteristic.

The protected characteristics under the Equality Act 2010 are:

- Age

- Disability
- Gender reassignment
- Marriage and civil partnerships
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

It should be noted that with respect to the public sector equality duty under section 149 of the Equality Act, we are not required to have due regard to impacts on those who are married or in a civil partnership.

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