

CONSULTATION DECISIONS

# Amending the Taking Regulatory Action policy

Updating our approach to taking regulatory action and  
supporting compliance

**ofqual**

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# Introduction

We [consulted between 8 October and 2 December 2019 on making changes to our Taking Regulatory Action policy](#). Respondents could complete the questions online or download and submit a response.

We received 30 responses to the consultation.

## Summary of decisions

We have decided to implement all of the changes about which we consulted. We will publish a new version of the Taking Regulatory Action policy (the TRA policy) which:

- is titled 'Supporting Compliance and Taking Regulatory Action'
- explains that we will usually record instances of non-compliance even where we decide to take no further action and that we will retain these records
- explains that we might issue a rebuke in appropriate cases
- explains that we will often allow only a short period for representations where we propose to give a direction
- explains that, where we have the power to recover our costs, we will do so whenever we consider it is proportionate
- explains that we might notify awarding organisations when we have concerns about a centre

We have also decided that we should explain in the TRA policy that we might decide to develop an approach to using fixed monetary penalties.

## Details

We divided our proposals into three broad categories: managing non-compliance, supporting compliance, and changes to the current policy. We made more than one proposal in each category. We have explained our decisions using the same format and headings.

### Managing non-compliance

We explained five proposals relating to the way we manage non-compliance. Those proposals concerned:

- explaining how we record non-compliance in cases where we decide to take no other action

- adding the issue of a rebuke to the non-statutory ways in which we might respond to non-compliance
- developing an approach to using fixed penalties in appropriate cases
- explaining our approach to settlement in relation to monetary penalties
- removing the expectation that we would usually not seek to recover our investigation and enforcement costs where those costs totalled less than £10,000

We have decided to implement all of the proposals on which we consulted, although we have decided to delay further work in respect of fixed penalties until late 2021 at the earliest.

### ***Recording non-compliance***

We proposed that we would explain in the TRA policy how we approach recording incidents of non-compliance in those cases where we decide to take no other action in relation to an incident. The majority of non-compliance is managed in this way.

Our proposals reflected our current approach to recording non-compliance, and using those records, which we considered should be included in the TRA policy to increase transparency.

We explained that we do not currently publish details of the non-compliance we record in this way, and we did not consider we should routinely do so. We proposed that in appropriate cases we might decide to publish general information, particularly where we can identify themes which might assist other awarding organisations, but would do so without identifying the organisations affected.

Most respondents agreed with our proposals. We have decided to implement those proposals in line with the consultation.

### ***Issuing a rebuke***

We proposed adding the issue of a rebuke to the ways in which we might respond to non-compliance. We explained that we might issue a rebuke in cases which are not sufficiently serious that a monetary penalty should be imposed, but in which just recording the non-compliance would not sufficiently meet the needs of deterrence and public confidence.

We proposed that any rebuke we issued would be published and that the publication would include similar information to that which we currently publish when we impose a monetary penalty.

A small number of respondents disagreed with our proposals to add rebuke to the non-statutory outcomes available to us, with a majority agreeing or submitting a neutral response (neither agree nor disagree). More respondents agreed with our

proposals about publication than disagreed, although the largest number of respondents submitted a neutral response.

Respondents made a number of observations about our proposals, which included concerns at the potential for a rebuke to cause reputational damage for an awarding organisation, and the possibility that public confidence in qualifications might be undermined by the use of (and publication of) rebukes, particularly if the context is not properly understood.

Some respondents commented on the interrelationship between rebukes and other responses available to us, others queried the process we would follow in deciding to issue – and to publish - a rebuke and whether there would be a mechanism for an awarding organisation to appeal.

We have decided to implement our proposals and to include the use and publication of a rebuke when we publish the next version of the TRA policy. We will take into account the variety of feedback received when we explain the detail of our approach to using a rebuke.

### ***Fixed penalties***

We consulted on a proposal that we should develop an approach to using fixed penalties where this would support our regulatory strategy. We explained that our consultation was on a question of principle only and that further consultation would follow if we decided to proceed with this proposal.

More respondents agreed that we should develop a fixed penalty approach than disagreed, with about a third of respondents neither agreeing nor disagreeing. Most respondents made additional comments, with many recognising the need for further work so we could be clear where fixed penalties might be used and how they would be calculated.

We have decided that we should include the possibility that we might use fixed penalties in the TRA policy, but that we should delay further work to consider an approach to using fixed penalties until late 2021 at the earliest.

### ***Settlement***

Nearly all respondents agreed that we should explain our approach to settlement in the TRA policy and no respondent disagreed. We have decided to implement this proposal.

Respondents to the consultation made a number of comments on matters of detail which we will take into account when we develop the next version of the TRA policy.

### ***Recovering our costs***

We explained why we considered it was no longer appropriate to restrict the instances in which we might recover our investigation, administration and

enforcement costs to cases in which those costs exceeded £10,000. We proposed that we should instead recover our costs whenever the power was available to us and we considered it proportionate to do so.

Most respondents agreed with our proposal, and we received useful feedback which will help us to explain our approach to recovering our costs in the TRA policy. We have decided to implement this proposal.

## Supporting compliance

We explained two proposals which reflected that most of our work is to support awarding organisations to remain compliant, rather than to address instances of non-compliance.

We proposed:

- to include information in the TRA policy about our ability to make requirements or recommendations and to give advice to awarding organisations to which they must have regard
- that in appropriate cases we might issue notices, to which awarding organisations would have regard, where we have concerns about a particular centre

### *Making requirements*

Nearly all respondents agreed that we should explain our approach to making requirements, recommendations or giving advice in the TRA policy and no respondent disagreed. We have decided to implement this proposal.

Respondents to the consultation made a number of useful comments which we will take into account when we develop the next version of the TRA policy.

### *Notices about centres*

The majority of respondents agreed with our proposal that we should issue notices where evidence received from awarding organisations gives us sufficient concerns about a centre and we judge those concerns should be brought to the attention of other awarding organisations.

Although several respondents commented on the benefits of Ofqual issuing such notices, respondents also identified the potential for unintended consequences in certain circumstances and noted the possibility that notices might go into the public domain whether or not this is something we intend.

At a level of principle, we think we should implement this proposal. However, we think we should do further work to make sure any notice we issue is as effective as possible. We also consider that our approach to issuing notices about centres might change over time. We have therefore decided that although the possibility that we

might issue notices about centres will be included in the next version of the TRA policy, the detail of how and when we might do so will be published later, as an annex to the policy.

The feedback we received from the consultation will help us to develop the detail of our approach to the use of notices about centres.

## Amendments to existing text

We explained that we proposed making three specific further changes to the way we describe aspects of our approach which were already included in the TRA policy, concerning:

- the way we use and publish undertakings<sup>1</sup>
- the period of time usually permitted for representations to be made where we propose giving a direction
- the name of the policy

### *Accepting an undertaking*

All respondents agreed with our proposal to explain more in the TRA policy about the circumstances in which we might accept an undertaking and to explain in the policy our approach to publishing undertakings. We have decided to implement this proposal.

### *Giving a direction*

We explained in the consultation that the TRA policy does not reflect the way we currently use our power to give a direction. In particular, we use the direction power rarely and most commonly in urgent cases where we will allow only a short period for representations to be made. This is not reflected in the policy, which contemplates that urgent cases will be exceptional and that we will normally be able to allow 30 days for representations.

The majority of respondents agreed with our proposals that the TRA policy should reflect:

- when we give a direction, it will usually be in relation to an urgent case and we will usually allow only a short period for representations.
- if we give a direction in a non-urgent case, our starting point will be that we should allow 14 days for representations to be made

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<sup>1</sup> An awarding organisation may give an undertaking to Ofqual under Condition B8

The minority of respondents who disagreed were concerned about the potential adverse impact on an awarding organisation from a shorter period for representations. In practice, however, we do not think the time actually allowed for representations will reduce as a result of our proposals. This is because our proposals are to bring the TRA policy into line with our current practice, which is to give a direction only in urgent cases in which we will currently allow only a short time for representations.

We have decided to implement these proposals as set out in the consultation. We will make clear in the policy how an awarding organisation might request an extended period of time to make representations.

### ***Changing the name of the Taking Regulatory Action policy***

Most respondents agreed with our proposal that we should change the name of the TRA policy to 'Supporting Compliance and Taking Regulatory Action' to reflect that the majority of our activity is to support awarding organisations to come into, and maintain, sustainable compliance. We have decided to rename the policy as we proposed.

## **Implementation timescales**

We will publish a new version of the TRA policy, which reflects the decisions explained in this document, as soon as we can.

We will consider further work in respect of fixed penalties and centre notices later in 2021.

We are considering ways in which we can further explain our approach to taking regulatory action, including how we decide which cases should be considered for statutory action and which should be resolved less formally, and hope to begin to communicate some further information in the autumn.

## **Equalities impact assessment and regulatory impact assessment**

We explained in the consultation that we assess the impact of any action we propose to take on a case-by-case basis. This is because the various actions available to us have no impact until we use them in a particular case. No respondents disagreed with this approach.





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