

27 October 2008

Additional monitoring and enforcement powers for Ofqual: response from AQA to the draft proposals

A. Introductory comments

AQA remains concerned that there is as yet insufficient clarity about the way the new regulatory arrangements will apply in the devolved administrations. While we note the assurance in the covering letter of 10 October 2008 which accompanied the draft proposals that, 'the regulators of qualifications in England, Wales and Northern Ireland work closely together, to the benefit of all concerned', the fact remains that, as that letter explicitly states, 'the proposed changes...would apply only to regulation in England'.

AQA offers its qualifications in Wales and Northern Ireland as well as in England and is concerned that there might be differences in approach across the three administrations which would create confusion and could undermine public confidence in the new regulatory arrangements. This concern is starkly illustrated by the current differences between England and Wales over the proposed requirements for Functional Skills. We believe that it will be damaging to public confidence in the new regulatory arrangements, as well as extremely confusing to learners and users of qualifications, if there were to be (as proposed in *Promoting Achievement*) a hurdle in England requiring level 2 in Functional Skills in mathematics, English and ICT for the award of Grades A* - C in the new GCSEs while in Wales this hurdle would not apply. We continue to urge the three administrations to address this specific issue, and the broader implications for consistency of regulatory arrangements across the three administrations, as a matter of urgency and before the formal establishment of Ofqual in its substantive form.

B. Comments on the individual proposals on the proposed monitoring and enforcement powers for Ofqual

Plans to establish Ofqual- background

Relationships with QCDA (Para. 4)

As indicated in our response to the initial consultation on *Confidence in Standards*, we welcome Ofqual's independence from ministers. We also welcome in principle the 'clear separation between the advice, development and delivery functions of the QCDA on the one hand and the regulatory functions of Ofqual on the other' and recognise that there will no longer be 'the conflicts of interest that are inherent in the current system'.

We are, however, concerned that there should be clarity about the role of the QCDA and that of Ofqual, especially in regard to the development of qualifications. We believe that it is essential that, while Ofqual engages constructively with QCDA, Ofqual itself must have the final power to approve and adopt key principles about criteria, forms of assessment, assessment structures and the direction of the curriculum in so far as it affects the regulation of qualifications. It is also important that such decisions are made in a clear and timely way since protracted discussions could create unsustainable tensions and delays in the work of the Awarding Bodies in meeting the challenges involved in the development of new qualifications. Such tensions or conflicts, and any lack of clarity about the role of Ofqual in determining the way in which the emerging curriculum was developing, would also inevitably undermine public confidence in both the new organisations.

Setting and enforcing standards (Para. 5)

The powers of Ofqual in respect to standards will be critical not only for its effectiveness and public credibility but also for all learners and users of qualifications. It is essential that the public has complete confidence that the standards set in all qualifications are appropriate and are comparable between awarding bodies and over time. In order to meet the expectations of Ministers, as stated in their Foreword to *Confidence in Standards*, that 'people must be confident that tests and qualifications are as rigorous now as they were in the past that standards across different qualifications and subjects at the same level are comparable', Ofqual must have appropriate powers, enshrined in legislation, to enable it to meet these aims.

We agree that it is essential that Ofqual must have 'an appropriate and proportionate set of enforcement powers' and to have the 'right powers to intervene particularly where there is a real risk of standards being compromised'. To enable it to achieve these broad aims, Ofqual needs to have clear, well-defined and specified powers enabling it to intervene if it believes that standards are not being determined appropriately. It needs to have the authority to become directly involved in the arrangements made by awarding bodies in the determination of standards and the power to intervene proactively and decisively where it has concerns. In our view, its powers must not, however, be confined to the process by which standards are set but must extend to give it the authority to direct an awarding body over the standard itself. Where Ofqual believes that inappropriate and unjustifiable standards are being applied, we believe that it must have powers to intervene and to direct awarding bodies over the standard to be applied.

We believe strongly that it is essential that those powers can be used not only in response to emerging concerns about standards in a particular examination series but also throughout the standard setting process. Exercising these powers will be especially important where Ofqual has concerns that outcomes are markedly different in a new qualification than appears to be justified. These powers will be of particular significance in maintaining public confidence at times when first awards are being made in new qualifications.

We urge that the legislation is introduced in sufficient time for Ofqual to be decisively involved as the first awards are made in 2010 for the new Diplomas and A-level examinations (including, if possible, the first awards at AS in the summer of 2009). Not only will this be important in respect of these new qualifications themselves but will demonstrate publicly the way in which Ofqual will engage with other new qualifications as they too are examined for the first time- the new GCSEs and Functional Skills. We

believe that it is particularly important that Ofqual has these powers in respect of the 'high risk' qualifications, including A-levels, GCSEs and the Diploma. It is vital, therefore, that Ofqual has the resources, expertise and powers to be able to identify where standards might be compromised and to take whatever measures are necessary to intervene decisively.

It is helpful to note (para. 8) that Interim Ofqual believes that 'its task of maintaining standards will be achieved most effectively by developing sound working relations with stakeholders and an atmosphere of mutual understanding and respect'. AQA warmly welcomes this approach and is committed to working with Ofqual in a reciprocal way. It is important that working relationships are established both at a strategic and more detailed level to enable debate about emerging issues relating to standards to be undertaken at an early stage. Although our expectation that this co-operative, professional engagement will be sufficient on most occasions, it is essential that Ofqual has unequivocal powers to intervene on those occasions where such intervention is necessary.

Consultation on appeals (Para. 6)

While welcoming the establishment of an independent appeals body to hear examination appeals, we repeat the point made in our response to *Confidence in Standards* that the awarding bodies should be involved in discussions about the detailed working arrangements for the new body. We would also hope to have the opportunity to comment on the arrangements proposed for the recruitment and training of members of appeals panels and, in particular, on the powers of the new body.

The proposals indicate that the new appeals body will be set up by Ofqual 'working with its counterparts in Northern Ireland and Wales'. We hope that this indicates that there will be a single appeals body working across the three countries. Such an arrangement would, of course, further strengthen the argument for a common approach to all aspects of regulation under the new arrangements (see our introductory comments above).

Proposals for new enforcement and monitoring powers- A new suite of powers (Paras. 9 and 10)

We agree that Ofqual needs the enforcement powers proposed for it so that, when necessary, it can be a strong regulator.

We also welcome the fact that the stronger set of powers proposed for Ofqual are to be coupled with various safeguards to ensure that it 'acts proportionately, fairly and in ways consistent with Human Rights Legislation'.

Setting regulatory conditions (Para. 14)

We fully accept that Ofqual will be able to set conditions with which an awarding body must comply. It would be helpful if working protocols are established setting out the arrangements Ofqual will put in place for monitoring these conditions. It is hoped that the conditions will be, as far as possible, at the strategic level and will not extend to relatively minor matters of detail which could lead to burdensome bureaucratic processes which would add little value. Some discussion on the framework for the establishment and monitoring of conditions would be helpful.

Ofqual as a market regulator (Para. 16)

We note that the intention is to extend the current powers of QCA/Interim Ofqual to cap fees and any other charges made by an awarding body in relation to the award of a qualification.

This is a matter of fundamental importance to all awarding bodies and it is important that the criteria which will be applied by Ofqual in these matters are transparent. What constraints will there be to ensure that Ofqual acts reasonably and what rights of appeal will awarding bodies have? What lead in time will be given before such caps are enforced and at what point in an annual cycle can such powers be exercised? What safeguards will be in place to ensure that it can be seen that Ofqual acts impartially and consistently in these matters? What account will be taken of the impact of any such decision to cap fees and other charges on the broader educational plans and strategies of awarding bodies? We stand ready to work with Ofqual to help it develop answers to these questions which provide market regulation processes which are fair and transparent.

Gathering information and evidence; requirements on Ofqual to consult on its monitoring and enforcement policy (Paras. 18, 20 and 29)

We welcome the safeguards that are to be built into the proposed legislation with respect to Ofqual's powers to enter awarding bodies' premises, in particular the intention to include a requirement to give reasonable written notice and placing restrictions on the times when Ofqual will be able to enter premises.

We are glad to note in this paragraph (and also in para. 29) a commitment to consult on the regulatory framework which is likely to be published and in which the proposed safeguards are likely to be contained. It would be helpful to know whether there would also be consultation if the alternative approach is adopted and it is decided to include these safeguards directly within the legislation. From para. 29 we note that the regulatory framework document will cover a range of important areas, including how Ofqual would use its monitoring and enforcement powers. We look forward to this consultation and would urge that it is undertaken as soon as possible as it will clearly be of significance in understanding how Ofqual intends to operate. It is vital that we have an early opportunity to comment on the framework and, in particular, that the consultation is designed to allow us to have real influence on the outcome.

A power to withdraw recognition (Para. 25)

As the proposals acknowledge, the power to withdraw recognition is very significant. We welcome the fact that in order to deal appropriately with such circumstances, dispute resolution procedures will be put in place. It is essential that such procedures are transparent and truly independent. It would be helpful, in the spirit of working together in a mutually co-operative way, for there to be consultation on the draft resolution procedures.

We believe that it should also be recognised that the development of a range of penalties would be helpful. The proposals recognise that withdrawal of recognition would be used only in the most exceptional circumstances. It would be sensible, we believe, for a graduated range of penalties also to be available. In particular, the withdrawal of accreditation for a particular specification would be a proportionate penalty which would

underpin the power which we argue Ofqual should have to direct awarding bodies concerning standards. This could also be preceded by public warnings relating to the withdrawal of accreditation by a particular date if the awarding body had not made specified changes by that time.

Publishing monitoring and enforcement decisions (Para. 26)

We recognise that it is essential that Ofqual has powers to publish reports on its monitoring activities. We would, however, expect that, as part of the process, awarding bodies would have the opportunity to raise points of factual accuracy, including questions on interpretations which, in the view of the awarding body, were based on an inaccurate understanding of factual information.

Public censure (Para. 27)

We understand that it is entirely appropriate, in the interests of accountability and public confidence, for Ofqual to have powers to censure an awarding body publicly.

In our response to *Confidence in Standards*, we did, however, express very serious reservations about the proposed powers for Ofqual to make ‘non-binding recommendations over a complaint’. We are disturbed that this provision appears in these proposals and that the example given relates to compensation for candidates or their families who ‘suffer loss as a result of maladministration’.

The fundamental relationship between the awarding body and its centres and candidates would be challenged by this change. It is unclear what criteria Ofqual would use to apply such sanctions and what measures would be in place to satisfy all concerned that they were being applied consistently. For example, if a recommendation were made in respect of a candidate whose grade had been changed after remarking, what would be the position for other candidates who had suffered from similar problems? Would there have to be specific consequences for a candidate before the sanction was applied? How would the awards be calculated? Is it envisaged that these powers would be exercised by Ofqual officials or by an independent panel? How would ‘maladministration’ be defined? There are clear differences between a change of grade because an examiner had made an initial judgement which, on review, was found to be harsh (maybe very marginally so) and a change of grade following the failure of the awarding body to apply a particular process (say an examiner’s adjustment). We believe that it would be particularly inappropriate for any such recommendation to be made where the awarding body had complied fully with the *Code of Practice*. Moreover, we anticipate that once it became known publicly that a recommendation of this kind had been made in a particular case, there would be a real danger that awarding bodies would be subject to multiple speculative approaches from the public making claims for real or perceived problems, creating increased costs to no effect.

It is, we believe, disingenuous to suggest that the recommendations would, in practice, be ‘non-binding’ as the public pressure would be such that awarding bodies would be likely to face severe public censure if they failed to comply. What redress would the awarding body have if it wished to challenge the proportionality of the award? As we pointed out in our response to *Confidence in Standards*, the practical impact of the applications of such powers could be potentially serious for awarding bodies. For a non-profit making body such as AQA, where the majority of our income comes from the fees paid by schools and colleges taking our qualifications, the impact could be particularly serious and might leave

us with no choice but to reduce our exposure to risk by withdrawing provision in small entry subjects: these are financially burdensome but we currently maintain them because of their social and educational value (see also related comment on paras. 33 and 34 below).

This is such a significant matter that we strongly urge that the proposal relating to non-binding recommendations for compensation be withdrawn from the draft legislation. We would ask that, if the decision is taken for it to remain, an urgent meeting is arranged for awarding body chief executives and senior officials from the Department.

Information Sharing (Para. 28)

We seek reassurance that, in sharing information with other regulators as it feels appropriate, Ofqual will ensure that it maintains commercial confidentiality.

Requirements on Ofqual to consult on its monitoring and enforcement policy (Para. 29)

Please see the comments above under Paras. 18, 20 and 29.

Whether Ofqual should have a power to fine (Paras. 33 and 34)

We agree that Ofqual's powers will be sufficiently strong to make it unnecessary to include in the proposed legislation a power to enforce fines on awarding bodies. Were such a power to be introduced there would also be a need to establish a transparent appeals process and we would expect clear guidelines to be available on the criteria which would be applied in imposing fines and a rationale to explain the levels of fines.

It is vital for awarding bodies that they retain public confidence. Public censure by Ofqual will, in itself, be a sufficiently effective sanction for the power to impose fines to be unnecessary. Indeed, we believe that for an educational charity such as AQA, fines would be counterproductive. The greatest proportion of our income is from fees paid by centres entering students for our qualifications: as indicated in para. 27 above, the burden of fines would actually fall on the schools and colleges paying the entry fees for the qualifications they were taking with AQA. There could also be an impact on our overall provision. A number of the qualifications we offer do not cover their costs but we believe that they are educationally (and in some instances such as the minority modern foreign languages, socially) important. The impact of a substantial fine could be that we would have to withdraw some minority provision to the detriment of overall educational provision (see also related comments on para. 27 above). We believe that Ofqual will have the powers to exert sufficient influence and pressure on awarding bodies to make the power to fine them unnecessary.

AQA, JDM, 271008