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Dear Jeremy,

Additional monitoring and enforcement powers for Ofqual – draft proposals

I am responding on Ofqual's behalf to your letter of 10 October 2008, which set out proposals for the monitoring and enforcement powers in relation to qualifications that should be available to support Ofqual's functions.

We are grateful that you copied your letter to Kathleen and Isabel, and have given us the opportunity, along with other stakeholders, to respond to the proposals. We have discussed these proposals with colleagues at Ofqual and with the Ofqual Committee.

We welcome the intention to give Ofqual a range of powers that will help us to safeguard standards and to regulate the qualifications market. We also recognise the balance you are aiming to reach between setting up Ofqual as a regulator that:

- has the power it needs to take proportionate and timely action to protect learners; and
- takes account of concerns of stakeholders, complies with Human Rights legislation and recognises the nature of the market.

In examining your proposals we have looked both at the powers you propose and at the range of events which might cause us to want to take some regulatory action. We considered whether these proposals would be sufficient to achieve a change in behaviour where this was necessary.

We agree that using enforcement powers should be the exception and not the norm. We have made it clear that we intend to work collaboratively with awarding organisations and other stakeholders because we believe that this is the best way of achieving effective regulation. However our ability to regulate collaboratively will be

significantly strengthened by having an appropriate suite of powers to use if necessary.

We agree that we need both

- monitoring powers; and
- enforcement powers.

In summary, we agree with the general thrust of the proposals. We want to draw attention to the following points:

- we recognise that a condition as proposed in your consultation paper is a much wider term than the term "condition of accreditation " as used in *The Statutory Regulation of Qualifications* (2004) (page 6). We welcome the fact that it is not your intention to link our powers (ie to direct an awarding organisation or to access premises) to pre conditions of recognition, accreditation or continued accreditation.
- the proposals regarding access to information as currently formulated could inhibit Ofqual's ability to obtain the information that would form the basis of regulatory actions and decisions;
- the proposals will not enable us to take action where the problems lie with a third party; and
- we consider the power to fine an essential tool, which should not be ruled out of our regulatory armoury.

Each of these points is developed later in this response.

Turning to the proposals outlined in your letter, our detailed thoughts are set out below.

Setting criteria for recognition and the accreditation of qualifications

1. We agree that we should inherit the new powers being assigned to QCA in the Education and Skills Bill which is currently before Parliament. These are to:

- recognise organisations and accredit qualifications as separate processes;
- develop criteria for the recognition of organisations and, where these criteria are met, to recognise them;
- make rules and procedures for dealing with the effect on the continued accreditation of qualifications where a recognised organisation ceases to be recognised; and
- impose conditions and make directions in relation to the recognition of an awarding organisation in the same way as in relation to the accreditation of a qualification.

Setting regulatory conditions

2. We agree that we should be able to set conditions in relation to recognition or accreditation both at the initial approval stage and subsequently. We agree that our approach should be risk based and as such we may choose not to look at all qualifications individually.

Ofqual as a market regulator

3. We welcome the continued power to cap fees and other charges made by an awarding organisation.

Gathering information and evidence

4 We welcome the proposal for explicit powers to collect information and to require sight of documents from an awarding organisation. We recognise that in this consultation you are looking only at these powers as they are required for our objectives in relation to qualifications, particularly "monitoring standards" and "meeting our market regulation objectives". Gathering information is at the heart of our monitoring activities, which provide the evidence base for our regulatory actions and decisions. If Ofqual sets regulatory criteria and imposes conditions on recognition and accreditation it must be able to collect information and gain access to premises to ensure ongoing compliance with all its regulatory requirements. In addition, we need to be clear that we are able to collect the information we need to pursue our role as a market regulator to cap fees and to impose fines (see below). We need to be sure that our powers provide us with sufficient information about awarding organisations' financial status. We also believe that, in some circumstance, gaining a full understanding of matters might require access to awarding organisations' staff as well as access to documentary evidence.

5. We also agree that we need powers to enter premises but we are concerned that these are linked to conditions of recognition. Linking this power to a condition would limit our intervention to recognised awarding organisations. However, there are circumstances when other parties are involved in the qualifications process and we might require access to premises to maintain the integrity of the system. Examples where such a power might be required include: a distribution company has large numbers of candidates' scripts which an awarding body has been unable to recover; a centre is issuing false certificates to candidates; and the Diploma Aggregation Service fails and learners are unable to gain Diploma results. We therefore believe that Ofqual should have a more general power to enter premises to assist it fulfilling its statutory functions, which should be linked to our defined objectives and in a way that is compatible with the European Convention on Human Rights.

A power to direct

6. We agree that we should have a power to direct a recognised awarding organisation. By definition, Ofqual will need to pre-empt difficult situations arising and to direct an awarding organisation in anticipation of such situations. It will be very difficult for Ofqual to do this decisively and this could create an overly bureaucratic system that still does not achieve the desired outcome. We welcome your confirmation that this power is not to be linked to "conditions of accreditation" as defined in the Statutory Regulations. since that would mean either we had to anticipate every eventuality at the outset or impose a new condition as and when a problem arises, which is time consuming and militates against timely action. It would be more helpful if the power to direct was linked to objectives set out in Ofqual's statutory functions, which should be linked to defined objectives. Safeguards could be built in to ensure the power is not used inappropriately.

7. We retain concerns about linking our power to direct to "conditions", even in the wider sense. We remain of the view that the concept of a "condition" is difficult to explain and hence not the most transparent hook on which to hang our power of direction.

A power to withdraw recognition

8. The withdrawal of recognition is clearly a sanction we would expect to use in only the most extreme cases and where other means to resolve the issue have not been effective. Withdrawal of accreditation is also an appropriate sanction and while you refer (para 24) to rejecting applications it is not clear that we would be able to withdraw accreditation.

Publishing monitoring and enforcement decisions

9. We will publish reports resulting from monitoring and enforcement.

Public censure

10. We welcome the ability to censure an awarding organisation publicly and believe that this will be a helpful tool available to the regulator. We may well use published monitoring and enforcement decisions, or other means, to censure awarding organisations and, where appropriate, third parties whose activities have had a detrimental impact on public confidence in the qualifications system.

Information sharing

11. We welcome the power to share information with other regulators, but as we have discussed, Ofqual should not be limited to sharing information with such bodies. There may be occasions where the integrity of the qualification system requires us to share information more widely, including with awarding organisations. For example,

where we have been notified that an awarding organisation has removed approval from a centre because of malpractice, we would want to be able to inform other awarding bodies offering similar qualifications of this fact so that this information can be included in their risk management systems.

Requirements on Ofqual to consult on its monitoring and enforcement policy

12. We welcome and support the requirement to consult on and publish Ofqual's policies on how it plans to use its monitoring and enforcement powers. We would see this as a vital opportunity to work with awarding organisations and other stakeholders to develop a common understanding of our powers and how we will apply them. We think that this will be essential if the new system is going to be transparent and to work efficiently and effectively.

Ensuring appropriate safeguards are in place

13. We recognise the importance of ensuring compatibility with Human Rights legislation.

Whether Ofqual should have a power to fine

14. We see the power to fine as an essential tool and note that this suggestion commanded wide support in the earlier consultation on the proposals. It is a tool widely available to other regulators and would give Ofqual another sanction that could be applied to awarding organisations in preference to removing accreditation or recognition where, for example, a sanction was considered necessary but it was not in the best interests of learners to remove recognition or accreditation. We do not accept the point that because we would not use the power often we do not need the power at all. This totally ignores the deterrent effect a fining power would have.

15. We understand the concerns that there might be regarding the public funding of qualifications and Ofqual would need to take such concerns into account when determining whether a fine was appropriate and the level of the fine. We believe that a fining policy can be developed which takes account of the scale and nature of the awarding body's business and prevents the cost of the fine being passed on to customers.

16. We would suggest this is an area which warrants further discussion beyond the confines of this response prior to the finalisation of the draft legislation. In framing such further discussion it may be helpful to recall the Better Regulation Executive paper: "Regulatory Justice: Making Sanctions Effective", which was published in November 2006 which you referred to in "Confidence in Standards". The principles and characteristics set by Professor Richard B Macrory are helpful guides to regulatory behaviour. For ease of reference these are set out below.

Six Penalties Principles

A sanction should:

1. aim to change the behaviour of the offender;
2. aim to eliminate any financial gain or benefit from non-compliance;
3. be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. be proportionate to the nature of the offence and the harm caused;
5. aim to restore the harm caused by regulatory non-compliance, where appropriate; and
6. aim to deter future non-compliance

Seven characteristics

Regulators should:

1. publish an enforcement policy;
2. measure outcomes not just outputs;
3. justify their choice of enforcement actions year on year to stakeholders, Ministers and Parliament;
4. follow-up enforcement actions where appropriate;
5. enforce in a transparent manner;
6. be transparent in the way in which they apply and determine administrative penalties; and
7. avoid perverse incentives that might influence the choice of sanctioning response.

Once you and your colleagues have had an opportunity to consider our response to the proposals, I would be very happy to discuss any aspect of it further you would find that helpful to discuss them further. My direct contact details are given below. Please contact David Christopher (direct line: 020 75095545 and email: david.christopher@ofqual.gov.uk) if you would like to arrange a meeting with me.

Yours sincerely

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