

CONSULTATION

Legal establishment and location of awarding organisations

Consultation on the legal establishment and location of awarding organisations regulated by Ofqual

ofqual

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Proposals at a glance

We are seeking views on our proposal to change our requirements about the location of the awarding organisations we regulate.

Our proposals are intended to address two matters:

- the UK's new relationship with the EU during the transition period following the UK's exit from the EU; and
- to remove the possibility that we might recognise an awarding organisation which, although legally established in the UK, Gibraltar or in an EU or EFTA country, does not have a substantial presence in any of these countries.

We are seeking views on our proposals to change:

- our Criteria for Recognition (the Criteria), which we use to determine whether we should recognise an organisation to offer regulated qualifications; and
- our General Conditions of Recognition (the Conditions), with which awarding organisations, once recognised, must comply.

Audience

This consultation is open to anyone who may wish to make representation but may be of most interest to:

- Ofqual-recognised awarding organisations or awarding organisations seeking Ofqual recognition.

Consultation arrangements

Duration

This consultation will be open for 3 weeks starting on 31 January 2020 and ending on 21 February 2020.

Respond

Please respond to this consultation by using one of the following methods;

- complete the online response at www.gov.uk/government/consultations/legal-establishment-and-location-of-awarding-organisations
- email your response to consultations@ofqual.gov.uk - please include the consultation title in the subject line of the email and make clear who you are and in what capacity you are responding.

For information on how we will use and manage your data, please see annex A.

1. Introduction

Changes to the Criteria for Recognition

1.1 We currently require, in the Criteria, that an applicant seeking recognition as an awarding organisation:

- (a) is ordinarily resident in a member state of the European Union or the European Free Trade Association, or*
- (b) is legally established, or has a substantial presence, in a member state of the European Union or the European Free Trade Association (Criterion A2).*

1.2 We propose to amend the requirements so the Criteria require:

A.2 *The Applicant:*

- (a) is ordinarily resident in the **UK, Gibraltar** or a member state of the European Union or the European Free Trade Association, or*
- (b) has a substantial presence in the **UK, Gibraltar** or a member state of the European Union or the European Free Trade Association.*

1.3 The first proposed change would provide continuity during the transition period once the UK has left the EU. If we do not make this change, we will be unable to recognise new organisations based in the UK or Gibraltar which do not also have a substantial presence in an EU or European Free Trade Association (EFTA) member state. It would also allow awarding organisations based in the EU and/or EFTA countries to become recognised by Ofqual during the transition period, in line with the UK's obligations during the transition period. We will review the requirements again once the details of the UK's long-term relationships with the EU and EFTA are known following the transition period.

1.4 The second proposed change would prevent an organisation that is legally established in the UK, Gibraltar or a country in the EU or EFTA, but does not have a sufficient presence in any of those countries, from becoming an Ofqual recognised awarding organisation. Currently it is possible, in theory at least, for an organisation to gain recognition if it was legally established in the EU or EFTA, but all of its resources, facilities and premises are located in a non-EU or EFTA country.

1.5 The proposed change would mean we could only recognise an awarding organisation if we considered it had a substantial presence in the UK, Gibraltar or an EU or EFTA member state.

1.6 The changes we propose to make to the Criteria for Recognition will have no effect on awarding organisations which are currently recognised.

Changes to the General Conditions of Recognition

1.7 The General Conditions of Recognition, to which an awarding organisation becomes subject once recognised, reflect the same requirements as the Criteria in respect of residence, legal establishment and substantial presence. The current wording is:

A2.1 An awarding organisation must ensure that it at all times –

- (a) is ordinarily resident in a member state of the European Union or the European Free Trade Association, or*
- (b) is legally established, or has a substantial presence, in a member state of the European Union or the European Free Trade Association.*

1.8 We propose to change this to:

An awarding organisation must ensure that it at all times –

- (a) is ordinarily resident in the **UK, Gibraltar** or a member state of the European Union or the European Free Trade Association, or*
- (b) has a substantial presence, in **the UK, Gibraltar** or a member state of the European Union or the European Free Trade Association.*

1.9 We propose to adopt these requirements during the transition period following the UK's exit from the EU. We will consult again, as necessary, once the nature of the UK's long term relationships with the EU and EFTA are known.

1.10 The first proposed change is necessary because, unless we make this change, every awarding organisation which is located solely in the UK (or Gibraltar) will fail to comply with Condition A1.2 at one minute past 11pm on 31 January 2020, when the UK (and Gibraltar) leaves the EU and EFTA. Making the change will preserve the current position for awarding organisations based in the UK and the EU or EFTA. We have previously assured awarding organisations that we will not take regulatory action for such a technical breach brought about by the UK's exit from the EU and EFTA.

1.11 The second proposed change will mean that an awarding organisation which, although legally established in the UK, Gibraltar, or a member state of the EU or EFTA, has no substantial presence in one of those countries, will fail to comply with Condition A1.2. So far as we are aware, there are no awarding organisations on which this change will have an immediate impact.

2. Background to proposals

- 2.1 We must set and publish, as the Criteria for Recognition, the criteria that must be satisfied by an organisation seeking to be recognised by Ofqual to award or authenticate regulated qualifications in England. We must recognise any awarding organisation which applies for recognition and meets the Criteria and must not recognise any organisation which fails to satisfy any aspect of the Criteria. We may change the Criteria but must consult publically before we do so.
- 2.2 The current Criteria were set and published in May 2011.
- 2.3 We must also set and publish the General Conditions of Recognition, which are the regulatory requirements with which every organisation recognised by Ofqual must comply in connection with the development, delivery and award of regulated qualifications. We have statutory enforcement powers which we can use when we consider an awarding organisation has failed to comply with one or more of the Conditions.
- 2.4 The current Conditions were set in July 2011 and most recently amended in June 2019.

3. Proposed changes to the Criteria for Recognition

Organisations based in the UK or Gibraltar

- 3.1 The Criteria currently require that an organisation applying for Ofqual recognition must be based, or legally established, in an EU member state or in a member of EFTA, in line with the UK's obligations as an EU member state to allow free access to markets. As a result of the UK's current membership of the EU, the Criteria do not make any specific reference to organisations based, or legally established, in the UK or Gibraltar.
- 3.2 The UK will leave the EU on 31 January 2020. We are proposing to change the Criteria because, from 1 February 2020, the current Criteria will prevent us from recognising any new awarding organisation which is based solely in the UK.
- 3.3 When the UK leaves the EU, Gibraltar will also cease to be part of the EU. At present, an awarding organisation based, or legally established, in Gibraltar can apply for recognition because Gibraltar is part of the EU. From 1 February 2020 the current Criteria will prevent us from recognising any new awarding organisation which is based solely in Gibraltar.
- 3.4 The changes we are proposing will restore the current position after the UK leaves the EU; we will be able to recognise an organisation which applies for recognition and which is based in the UK or in Gibraltar, as well as those based in an EU or EFTA member state.
- 3.5 The UK's transition arrangements following its departure from the EU on 31 January 2020 will retain all current arrangements with regard to access to the UK market for organisations based in EU/EFTA countries. This means we must continue to allow such organisations to obtain recognition to award qualifications regulated by Ofqual during the transition period. We will review the Criteria again once the UK's continuing relationships with the EU and EFTA have been decided.

Organisations must have a substantial presence

- 3.6 The Criteria currently allow an organisation to be recognised by Ofqual if it is legally established in an EU or EFTA country even though all of its resources, facilities and premises are based outside the EU or EFTA, for example because it is legally established in England using a virtual business address which meets the requirements set by Companies House. Although we have not recognised any organisation of this type, if such an organisation were to meet all of the other Criteria for Recognition we would, at present, be required to recognise that organisation.

3.7 We do not think recognising such an organisation would be consistent with our objectives and duties as set out in the legislation which created Ofqual¹. We think recognising such an organisation would impede our ability to monitor and enforce compliance with the Conditions, in particular because:

- Travel costs, visa requirements and in some cases security considerations could make it more difficult for us effectively to monitor an awarding organisation based outside of the UK, Gibraltar, the EU or EFTA, through on-site audits, investigations and associated activities
- Our ability to impose and execute an Entry and Inspection Condition, requiring an awarding organisation to allow our staff access to its premises and records may be impeded where those premises are outside the UK, Gibraltar, the EU or EFTA by travel costs, visa requirements, security considerations and, particularly in respect of computer records, potentially by domestic law in that jurisdiction
- Our ability to enforce compliance with the Conditions by giving a direction requiring an awarding organisation to take, or refrain from taking, specified steps to comply with a Condition which it has breached or is likely to breach would be undermined because a direction takes its force from our ability to obtain a mandatory order from the Court to enforce that direction. If all of the persons accountable for the actions of the awarding organisation are out of the jurisdiction of the Court, and outside the judicial cooperation mechanisms of the EU and EFTA, obtaining such an order would have little impact because no-one could be held to account
- Our ability to enforce compliance with the Conditions by imposing a fine will be limited where all of the assets of the awarding organisation are outside of the jurisdiction of the Court and outside the judicial cooperation mechanisms of the EU and EFTA. In such circumstances, there would be no effective mechanism for Ofqual to enforce payment of a fine or its costs

3.8 An organisation which considers that its operations are effectively out of the reach of Ofqual's monitoring and enforcement powers might be less diligent about securing ongoing compliance with the Conditions and, in some cases, might choose not to comply with the Conditions in order to compete for business with other awarding organisations, particularly on price, confident that it could avoid being monitored by us because of its actual (rather than its virtual) location.

3.9 Similarly, an organisation which considers that, even were we to detect its failure to comply, we would not be able to enforce a direction or a financial penalty

¹ The Apprenticeships, Skills Children and Learning Act 2009

(should we impose one), might regard the possibility of such action as an acceptable business risk.

- 3.10 This would be unfair to other awarding organisations and would undermine our statutory objectives and duties because an organisation that was confident it could avoid the enforcement of a fine might take risks with the safe delivery and/or award of regulated qualifications that others would avoid. It might cut its costs and in turn undercut its competitors, standards could be compromised and public confidence in regulated qualifications undermined.
- 3.11 In addition, we consider that an awarding organisation which does not have a substantial presence in the UK, Gibraltar, the EU or EFTA would find it more difficult than others to comply on an on-going basis with all of the Conditions.
- 3.12 For example, our Conditions require awarding organisations offering similar qualifications to those made available by others to review, monitor and use levels of attainment set by those other organisations when setting their own expectations. This is likely to be more difficult for an awarding organisation that is operating at a significant distance to the qualifications system in England. Awarding organisations must also have enforceable agreements with all schools, colleges and training providers (centres) that deliver their qualifications requiring the centres to operate in ways which will allow the awarding organisation to secure the proper delivery and award of regulated qualifications. Again, it is likely to be more difficult for an awarding organisation operating at a substantial distance from its centres to monitor and enforce compliance with such agreements.
- 3.13 For these reasons, we think we should change the Criteria so that an organisation which has only a virtual presence in a relevant jurisdiction cannot secure recognition by Ofqual.
- 3.14 Together with the first proposed change to the Criteria, the impact would be that an organisation could not secure Ofqual recognition unless it was ordinarily resident, or had a substantial presence in, the UK, Gibraltar a member state of the EU or a member of EFTA. An organisation which is established in such a country, but has assets, resources and facilities only in a third country, would not be able to secure Ofqual recognition.
- 3.15 The UK's transition arrangements following its departure from the EU on 31 January 2020 will continue all current arrangements with regard to access to the UK market for organisations based in EU/EFTA countries. This means we must continue to allow organisations with a substantial presence in the EU or EFTA to be able to secure recognition to award Ofqual regulated qualifications during the transition period. Current travel and justice arrangements will continue, so we will be able to monitor and take enforcement action against any such organisations

as necessary. As set out above, we will review the Criteria again when the UK's ongoing relationship with the EU and EFTA has been determined.

4. Proposed changes to the General Conditions of Recognition

Organisations based in the UK or Gibraltar

- 4.1 Like the Criteria, the Conditions reflect the UK's obligations as an EU member state and currently require that an awarding organisation must at all times be based, or legally established, in a member state of the EU or EFTA.
- 4.2 From 1 February 2020, those awarding organisations which are based, or legally established, only in the UK² will no longer be compliant with the current Conditions because the UK will have ceased to be a member of the EU and EFTA.³
- 4.3 Our proposed changes will address this position, by providing that an awarding organisation must be based in the UK, Gibraltar or an EU or EFTA member state.

Substantial Presence

- 4.4 The Conditions currently allow an awarding organisation to move all of its premises, resources and assets out of the EU / EFTA so long as it remains legally established in the EU / EFTA. For example, an awarding organisation would remain compliant with the Conditions if it moved its registered office to a virtual business office within England but otherwise moved its operations to North America.
- 4.5 The risks we have identified in respect of this aspect of the Criteria apply equally to the Conditions. Just as a new awarding organisation would present unacceptable risks if its operations were all based outside the EU and EFTA, the same risks would arise if an existing awarding organisation moved all of its operations in the same way. We therefore propose amending the Conditions, so that an awarding organisation would fail to comply with the Conditions in these circumstances.
- 4.6 Taken together with the first change, this would mean the Conditions would require an awarding organisation at all times to ensure that it was ordinarily resident or maintained a substantial presence in the UK, Gibraltar, an EU member state or a member of EFTA.
- 4.7 An awarding organisation which did not maintain a substantial presence in a relevant country would fail to comply with Condition A2.1. That failure to comply

² There are currently no awarding organisations based in Gibraltar.

³ We have previously assured awarding organisations that we would not take enforcement action against them if they were strictly in breach of their Conditions of Recognition because the UK ceased to belong to the EU and/or EFTA.

would allow Ofqual to consider using its statutory enforcement powers which include the power to withdraw recognition from an awarding organisation.

4.8 As with the Criteria, we will review this aspect of the Conditions again once the UK's ongoing relationships with the EU and EFTA have been determined.

5. Impact

Changes to the Criteria

5.1 The main regulatory impact of our proposed changes to the Criteria will be:

- to allow us to recognise new awarding organisations which apply for recognition and which are based in the UK or Gibraltar, as well as those based in EU or EFTA countries; and
- to prevent us from recognising any new awarding organisation which, although legally established in the UK, Gibraltar, an EU member state or a member of EFTA, has no substantial presence in any of those countries.

5.2 These changes will affect only prospective awarding organisations. In practice, we do not consider these changes will have any negative impact as we have received very few applications for recognition, or enquiries about recognition, from organisations which might have satisfied the current Criteria on the basis of legal establishment and would not satisfy the proposed amended Criteria.

Changes to the Conditions

5.3 The main impact of our proposed changes to the Conditions will be:

- to prevent awarding organisations based in the UK or Gibraltar from failing to comply with Condition A2.1 where that non-compliance would arise only as a result of the UK ceasing to be a member of the EU and EFTA
- to cause an awarding organisation which moves its operations to a country which is not the UK, Gibraltar, an EU member state or a member of EFTA, but which remains legally established in one of those countries, to fail to comply with Condition A2.1.

5.4 All the awarding organisations we currently regulate have a substantial presence in the UK, the EU or EFTA. Our proposed change would not, therefore, have an impact on any organisations currently offering Ofqual regulated qualifications in England.

5.5 However, we are aware that some organisations based outside of the EU or EFTA are interested in becoming recognised by us. If we make the proposed change, such organisations would have to secure a substantial presence in the UK, Gibraltar, the EU or EFTA before applying for recognition.⁴ We believe that an organisation that wishes to offer regulated qualifications in England (we can only regulate qualifications that are taken by at least some learners in England) should

⁴ Or satisfy the requirements we put in place once the UK's future relationship with the EU and EFTA is clear.

also be able and willing have a substantial presence in the UK, Gibraltar, or an EU or EFTA country.

5.6 Awarding organisations do not have to be regulated to award qualifications in England, although they will not be able to award certain national qualifications, for example GCSEs, A levels or Functional Skills qualifications, if they are not. This will, therefore, limit the impact on organisations that do not have a substantial presence in the UK, Gibraltar, the EU or EFTA of the changes we propose to make to our regulatory requirements, as they would continue to be able to offer a wide range of qualifications in England on an unregulated basis.

Equality analysis

5.7 Ofqual is a public body, so the public sector equality duty in the Equality Act 2010 applies to us. We explain in Annex B how this duty interacts with our statutory objectives and other duties.

5.8 We have considered the potential impact of the proposals included in this consultation on people who share protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex or sexual orientation.

5.9 Our proposals have two separate aims: maintaining the current position in respect of awarding organisations and potential awarding organisations based in the UK and Gibraltar after the UK leaves the EU; and removing the possibility that we might regulate an organisation which has no actual presence in the UK, Gibraltar, the EU or EFTA.

5.10 We have not identified any potential for our proposals aimed at maintaining the current position to have any adverse impact on people who share any protected characteristic.

5.11 We recognise that removing the ability for an organisation to secure recognition without a substantial presence in a relevant territory might indirectly affect people who share protected characteristics, particularly race.

5.12 That is, our proposals will prevent applicants from outside the UK, Gibraltar, the EU or EFTA from meeting Criterion A.2 by establishing a virtual business address in the UK, Gibraltar, the EU or EFTA. Potential applicants will instead need to establish a substantial presence in one of those territories; it will be more difficult to satisfy Criterion A.2 than presently.

5.13 We consider the greater difficulty such applicants may encounter as a result of our proposals is proportionate. In particular, as we have explained in this consultation, were we to recognise an applicant from a third country with only a virtual presence in the UK, Gibraltar, the EU or EFTA then our ability to regulate effectively could be significantly compromised. This would have a detrimental impact on all awarding organisations, employers and learners. In addition, our records indicate that we have received only one application from an organisation which proposed to have only a virtual presence in a relevant territory. We therefore consider the number of organisations potentially affected, and therefore the number of persons sharing a protected characteristic potentially affected, is likely to be minimal.

Consultation Questions

Question 1

To what extent do you agree or disagree with our proposal to change the Criteria for Recognition to allow us to recognise organisations based in the UK and Gibraltar (as well as those based in an EU or EFTA country).

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

Please add any comments you have

Question 2

To what extent do you agree or disagree with our proposal to change the Criteria for Recognition to prevent us from recognising an awarding organisations which does not have a substantial presence in the UK, Gibraltar or a member state of the European Union or the European Free Trade Association, even if the organisation is legally established in one of those countries.

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

Please add any comments you have

Question 3

To what extent do you agree with our proposal to change the General Conditions of Recognition to allow awarding organisations to be based in the UK or Gibraltar (as well as member states of the EU and EFTA).

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

Please add any comments you have

Question 4

To what extent do you agree or disagree with our proposal to change the General Conditions of Recognition to require an awarding organisation to retain at all times a substantial presence in the UK, Gibraltar or a member state of the EU or EFTA.

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

Please add any comments you have

Question 5

To what extent do you agree or disagree with our assessment of the impact of our proposed changes to the Criteria for Recognition and the General Conditions of Recognition.

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

Please add any comments you have

Question 6

To what extent do you agree or disagree with our assessment of the impact of our proposed changes to the Criteria for Recognition and the General Conditions of Recognition on people who share particular protected characteristics? .

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

Please add any comments you have

Annex A - Your data

The identity of the data controller and contact details of our Data Protection Officer

This Privacy Notice is provided by The Office of Qualifications and Examinations Regulation (Ofqual). We are a 'controller' for the purposes of the General Data Protection Regulation (EU) 2016/679 and Data Protection Act 2018 ('Data Protection Laws'). We ask that you read this Privacy Notice carefully as it contains important information about our processing of consultation responses and your rights.

How to contact us

If you have any questions about this Privacy Notice, how we handle your personal data, or want to exercise any of your rights, please contact:

Data Protection Officer at dprequests@ofqual.gov.uk or write to us at: Data Protection Officer, Ofqual, Earlsdon Park, 53-55 Butts Road, Coventry, CV1 3BH.

As part of this consultation process you are not required to provide your name or any personal information that will identify you however we are aware that some respondents may be happy to be contacted by Ofqual in relation to their response. If you or your organisation are happy to be contacted with regard to this consultation, please give your consent by providing your name and contact details in your response.

Our legal basis for processing your personal data

For this consultation, we are relying upon your consent for processing personal data. You may withdraw your consent at any time by contacting us using the details above.

How we will use your response

We will use your response to help us shape our policies and regulatory activity. If you provide your personal details, we may contact you in relation to your response.

Sharing your response

We may share your response, in full, with The Department for Education (DfE) and The Institute for Apprenticeships (IFA) where the consultation is part of work involving those organisations. We may need to share responses with them to ensure that our approach aligns with the wider process. If we share a response, we will not include any personal data (if you have provided any). Where we have received a response to the consultation from an organisation, we will provide the DfE and IFA with the name of the organisation that has provided the response, although we will consider requests for confidentiality.

Following the end of the consultation, we will publish a summary of responses and may publish copies of responses on our website, www.gov.uk/ofqual. We will not include personal details.

We will also publish an annex to the consultation summary listing all organisations that responded. We will not include personal names or other contact details.

Please note that information in response to this consultation may be subject to release to the public or other parties in accordance with access to information law, primarily the Freedom of Information Act 2000 (FOIA). We have obligations to disclose information to particular recipients or including member of the public in certain circumstances. Your explanation of your reasons for requesting confidentiality for all or part of your response would help us balance requests for disclosure against any obligation of confidentiality. If we receive a request for the information that you have provided in your response to this consultation, we will take full account of your reasons for requesting confidentiality of your response, but we cannot guarantee that confidentiality can be maintained in all circumstances.

Members of the public are entitled to ask for information we hold under the Freedom of Information Act 2000. On such occasions, we will usually anonymise responses, or ask for consent from those who have responded, but please be aware that we cannot guarantee confidentiality.

If you choose 'No' in response to the question asking if you would like anything in your response to be kept confidential, we will be able to release the content of your response to the public, but we won't make your personal name and private contact details publicly available.

How long will we keep your personal data

For this consultation, Ofqual will keep your personal data (if provided) for a period of 2 years after the close of the consultation.

Your data

Your personal data:

- will not be sent outside of the European Economic Area
- will not be used for any automated decision making
- will be kept secure

We implement appropriate technical and organisational measures in order to protect your personal data against accidental or unlawful destruction, accidental loss or alteration, unauthorised disclosure or access and any other unlawful forms of processing.

Your rights, e.g. access, rectification, erasure

As a data subject, you have the legal right to:

- access personal data relating to you
- have all or some of your data deleted or corrected

- prevent your personal data being processed in some circumstances
- ask us to stop using your data, but keep it on record

If you would like to exercise your rights, please contact us using the details set out above.

We will respond to any rights that you exercise within a month of receiving your request, unless the request is particularly complex, in which case we will respond within 3 months.

Please note that exceptions apply to some of these rights which we will apply in accordance with the law.

You also have the right to lodge a complaint with the Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at ico.org.uk, or telephone 0303 123 1113. ICO, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF.

If there is any part of your response that you wish to remain confidential, please indicate so in your response.

Annex B – Ofqual’s objectives and duties

The Apprenticeship, Skills, Children and Learning Act 2009

Ofqual has five statutory objectives, set out in the Apprenticeship, Skills, Children and Learning Act 2009;⁵

1) **The qualification standards objective**, which is to secure that 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

2) **The assessment standards objective**, which is to promote the development and implementation of regulated assessment arrangements which:

- a) give a reliable indication of achievement, and
- b) indicate a consistent level of attainment (including over time) between comparable assessments

3) **The public confidence objective**, which is to promote public confidence in regulated qualifications and regulated assessment arrangements

4) **The awareness objective**, which is to promote awareness and understanding of:

- a) the range of regulated qualifications available,
- b) the benefits of regulated qualifications to learners, employers and institutions within the higher education sector, and
- c) the benefits of recognition to bodies awarding or authenticating qualifications

5) **The efficiency objective**, which is to secure that regulated qualifications are provided efficiently, and that any relevant sums payable to a body awarding or authenticating a qualification represent value for money.

We must therefore regulate so that qualifications properly differentiate between learners 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 learners, including those with special educational needs and disabilities, of employers and of the higher

⁵ <http://www.legislation.gov.uk/ukpga/2009/22/section/128>

education sector, and to aspects of government policy when so directed by the Secretary of State.

The Equality Act 2010

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 awarding organisations that design, deliver and award qualifications are required by the Equality Act, among other things, to make reasonable adjustments for disabled people taking their qualifications, except where we have 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.

We are subject to a number of duties and we must aim to achieve a number of objectives. These different duties and objectives can, sometimes conflict with each other. For example, if we regulate to secure that a qualification gives a reliable indication of a learner's knowledge, skills and understanding, a learner 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 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, justifiable decision.

Qualifications cannot mitigate inequalities or unfairness in the education system or in society more widely that might affect, for example, learners' preparedness to take the qualification and the assessments within it. While a wide range of factors can

⁶ Equality Act 2010, s.149. www.legislation.gov.uk/ukpga/2010/15/section/149

have an impact on a learner's ability to achieve a particular assessment, our influence is limited to the qualification design and assessment.

We require awarding bodies to design qualifications that give a reliable indication of the knowledge, skills and understanding of the learners that take them. We also require awarding organisations to avoid, where possible, features of a qualification that could, without justification, make a qualification more difficult for a learner to achieve because they have a particular protected characteristic. We require awarding organisations to monitor whether any features of their qualifications have this effect.

In setting our proposed requirements, we want to understand the possible impacts of the proposals on learners 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.

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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Published by:

ofqual

Earlsdon Park
53-55 Butts Road
Coventry
CV1 3BH

0300 303 3344
public.enquiries@ofqual.gov.uk
www.gov.uk/ofqual