



Consultation: teacher involvement in the development of confidential assessment materials



March 2018

Ofqual/18/6355/1

About this consultation

This consultation will be of most interest to:

- awarding organisations that involve teachers (or others who deliver qualifications) in developing confidential assessment materials;¹
- teachers who work with awarding organisations to develop confidential assessment materials; and
- schools, colleges and others who deliver qualifications and that employ teachers who are involved with developing confidential assessment materials for awarding organisations.

Summary

1. In September 2017 we announced we would review:
 - the risks and benefits of the long-established practice whereby some teachers who write or contribute to exam papers also teach the qualification²; and
 - the effectiveness of the safeguards used to reduce the risk of a teacher³ who has this dual role disclosing or otherwise misusing information about confidential assessments.
2. We started this review following well-publicised incidents during summer 2017 when two teachers who were involved in writing examinations for Pre-U qualifications (an alternative to A levels) were found by the awarding organisations to have inappropriately disclosed or used information about the contents of forthcoming exams. While the 2017 issues occurred in general qualifications, teachers develop assessments in some other regulated qualifications too. We have, therefore, considered the risks associated with this practice in all types of regulated qualification.
3. Teachers play an important role in developing exams and other assessments. Cases where a teacher has been proved to have disclosed or misused confidential information about assessments are rare. While we believe there are clear benefits of allowing teachers to be involved in the assessment process, we

¹ Confidential assessment materials are materials where confidentiality in the content of the assessment materials, or information about the assessment, is required in order to ensure that a qualification reflects an accurate measure of attainment.

² Teachers contribute to the development of exam papers and other assessments in a range of ways, including: as senior examiners who are responsible for the overall paper; as contributors of questions to exam papers, in the design of tasks that students will carry out in non-exam assessments; and as scrutineers who undertake a final check of tasks or exam papers. Our considerations, explained in this paper, cover all roles teachers play in developing exams and other forms of assessment.

³ We define Teacher in our regulatory framework as:

A person who prepares any Learner, or any person likely to become a Learner, for assessment for a qualification and who does so –

(a) as a lecturer, supervisor, tutor or other appropriate provider of education or training, or
(b) in circumstances in which that preparation takes place primarily at home

We use the term in this paper in this way – to cover the full range of people who prepare learners, not in the more limited way that it might be used in the teaching of General Qualifications.

require awarding organisations to take all reasonable steps to mitigate the risks of teachers inappropriately using information about forthcoming assessments.

4. We recognise an awarding organisation cannot guarantee that the confidentiality of its assessment materials will never be breached. However, we will always consider taking regulatory action against an awarding organisation that had not taken appropriate steps to stop this happening.
5. Our current rules are already demanding, but we believe there is room to strengthen them further. We propose to:
 - explicitly set out in our rules additional steps awarding organisations must take to help protect the integrity of the assessments to which teachers have contributed; and
 - publish further statutory guidance to help awarding organisations understand the factors they should consider and the steps they should take when they decide how to comply with the rules.
6. We are consulting now on our proposed amendments to the current rules and on the form of the extra statutory guidance we propose to put in place. We will consult on the actual wording of the revised Conditions and on the draft expanded statutory guidance once we have considered the responses to this consultation.
7. Awarding organisations are required by legislation to comply with our rules and to have regard to our statutory guidance when they decide how to comply.⁴ We take into account the extent to which an awarding organisation has followed our statutory guidance when we decide whether an awarding organisation has breached the rules and, if we decide it has, the nature and extent of any sanction, such as a fine, we impose.
8. The events of summer 2017 showed how public confidence in qualifications can be damaged if confidential information about assessments is wrongly used. Our rules require awarding organisations to review and, where appropriate, revise their ways of working where something has gone wrong with their own approach to developing and delivering qualifications and where they can learn from something that has gone wrong with another awarding organisation's approach (Condition D3.3).⁵

⁴ The Apprenticeships, Skills, Children and Learning Act 2009

⁵ Where an event relating to an awarding organisation (or an event, of which it is or should be aware, relating to any other awarding organisation) has had an Adverse Effect, the awarding organisation must review and revise where necessary its approach to the development, delivery and award of qualifications to ensure that its approach remains appropriate.

9. We therefore expect all awarding organisations will have reflected on the safeguards they use to protect their assessments, particularly where these have been developed, or otherwise are seen by, teachers before they are taken.
10. We have been clear with the awarding organisations that offer the main general qualifications that they should take extra steps to mitigate the risks in respect of the assessments that will be taken this summer. These awarding organisations will be publishing a joint statement setting out their intentions. We welcome the range of steps they are taking to reduce the risks for this year and expect them to use additional safeguards for future exam series, once they have reviewed their arrangements further in light of the revised Conditions and expanded statutory guidance.
11. Not all awarding organisations use teachers to develop assessments. Not all assessment materials need to remain confidential for the assessment to be valid. The proposals on which we are consulting will have little or no impact in such cases.
12. Please respond to this consultation no later than 25 April. Details of how to submit your response can be found in the *How to respond* section below.

Background

13. It requires skill and experience to develop successful exam papers and other forms of assessment. For GCSE exams, for example, the questions must be comprehensible to students of a wide range of abilities and differentiate between them so the full range of grades can be used. The questions must not be so predictable that students do not need to be taught the full curriculum, but neither must they stray from the curriculum. The papers must be capable of being completed within the allocated time and must be of the same level of demand from session to session.
14. Setting valid and reliable assessments for vocational and technical qualifications requires a similar range of skills. Question papers and assignments require input from both industry practitioners and those delivering the qualifications to make sure they are up to date, relevant and of the correct level of demand.
15. Experienced teachers have detailed subject knowledge and understand how students are likely to respond to questions. Many awarding organisations, although not all, engage teachers to develop assessments. We estimate that, in a typical year, approximately 1,300 teachers are involved in writing exam papers taken in England for GCSEs, AS and A levels and the main alternative general qualifications. Others are involved in developing confidential assessment materials for some of the wider range of qualifications we regulate.

16. We collect a wide range of data relating to malpractice in GCSEs, AS and A level qualifications and publish this data annually as official statistics.⁶ Our statistics show that in 2017 the GCSE, AS and A level exam boards issued penalties to 685 school and college staff, for a range of matters.⁷ The type of matter that most frequently resulted in a penalty was maladministration.
17. To inform our review we asked the exam boards to identify the number of cases in which there had been proven cases of inappropriate disclosure by teachers who were involved with developing assessment materials in the last three years. We asked Cambridge International and the International Baccalaureate Organisation (IBO) to provide us with the same information.
18. For GCSEs, AS, A levels, and the main alternative qualifications awarded by Cambridge International and IBO, there were 3 proven cases in 2015, 1 in 2016 and 3 in 2017. While such cases are, therefore, rare, they are deeply unfair and corrosive to public confidence, both in the affected qualification and in regulated qualifications more generally.
19. Hence, our rules relating to the handling of confidential assessment materials, conflicts of interest and malpractice are demanding.⁸ We require awarding organisations to:
- take *all reasonable steps*⁹ to protect the confidentiality of assessment materials, where such confidentiality is needed to secure the validity and reliability of their assessments;
 - identify and manage conflicts of interest and take *all reasonable steps* to ensure that no conflict of interest relating to it has an Adverse Effect;¹⁰
 - take *all reasonable steps* to prevent malpractice and to investigate suspicions of malpractice where they arise and;
 - *take all reasonable steps* to apply appropriate sanctions in relation to proven malpractice.

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/672008/Report_-_Malpractice_for_GCSE_and_A-level_summer_2017.pdf

⁷ There are some 350k staff employed in schools and colleges in England.

⁸ General Conditions G4, A4 and A8, respectively.

⁹ There is no fixed meaning for this term; the meaning is determined by what will be reasonable in the circumstances of the particular case. However, a requirement to take 'all reasonable steps' means an awarding organisation must be able to show it has taken *all* reasonable steps and not just some. If it there are more, or other reasonable steps it could have taken but did not, we would not consider it to have satisfied this terms.

¹⁰ An act, omission, event, incident or circumstance has an Adverse Effect if it:

- (a) gives rise to prejudice to Learners or potential Learners, or
- (b) adversely affects –
 - i. the ability of the awarding organisation to undertake the development, delivery or award of qualification in accordance with its Conditions of Recognition,
 - ii. the standards of qualifications which the awarding organisation makes available or proposes to make available, or
 - iii. public confidence in qualifications.

20. While the current requirements are demanding, we believe we could be more explicit about our requirements in particular areas and to expand the statutory guidance that supports the rules so awarding organisations are clear about our expectations. We will expect awarding organisations to review their safeguards in light of the revised rules and enhanced statutory guidance and to take further steps to protect the confidentiality of their assessment materials where necessary.
21. Should information about an awarding organisation's confidential assessments be disclosed or otherwise wrongly used, we would take into account the extent to which the awarding organisation had followed the statutory guidance when we decided whether to take regulatory action against it and the form and scale of any such action.
22. Some of the safeguards we propose to include in our expanded statutory guidance will take longer for an awarding organisation to introduce than others. If there is a breach of confidentiality, we will consider the extent to which an awarding organisation has taken timely action to review and, where necessary, enhance its safeguards, having had regard to the expanded statutory guidance, when deciding on the form and scale of any sanction, such as the size of a fine.
23. Our Taking Regulatory Action policy sets out the range of factors we would consider when deciding whether to impose a sanction on an awarding organisation, such as a fine, when it had breached its Conditions. These include the extent to which the breach was within the control of the awarding organisation.
24. We would expect to impose the most serious sanctions, in the event of a breach of confidentiality, on an awarding organisation that did not take all reasonable precautions to prevent a breach when using a teacher who taught a high-stakes qualification, such as a GCSE, A level or Pre-U, to develop assessment materials, where that teacher also knew when those materials would be used and taught students taking that assessment.

The evidence we have considered

25. We collected evidence from a range of sources to inform our review. We found consistent and strongly held support for allowing teachers to develop assessment materials. Many people we spoke to or heard from raised concerns about the alternatives. For example, if university teachers wrote GCSE and A levels papers instead of school and college teachers, many felt the exams would not function effectively; the examiners would not understand how students taking the exams would respond (in the same way that A level teachers are not expected to write undergraduate exam papers).
26. The summary of responses to our call for evidence and the report of interviews with several teacher/examiners include a range of such views and suggestions

and can be found here. These include suggestions on ways to deter or prevent the inappropriate use of information about confidential assessment materials, some of which we have built into the proposals on which we are now consulting.

27. Our review of the roles teachers play in developing assessment materials in several other countries illustrated a range of practices and a variety of safeguards to prevent inappropriate disclosure by teachers where they are involved, including:

- relying on personal integrity and potential threats to professional reputations;
- mechanisms associated with the appointment process, training and codes of practice;
- using secure environments to develop and store items and question papers;
- examiners not knowing in which examination questions they had written would appear;
- statistical monitoring of the exam results of classes taught by the examiner;
- building confidentiality clauses in to contracts;
- using legally binding non-disclosure agreements;
- Legislation that covers offences in relation to examinations.

28. Many of the safeguards used elsewhere are already widely used in England. The information we collected from the exam boards that offer GCSEs, AS and A levels and the main alternative qualifications showed that they currently use a range of measures. They have contractual arrangements with their exam writers which include explicit requirements to maintain confidentiality. All of the exam boards require their exam writers to accept terms of service for each task they carry out, they collect conflict of interest statements and they reiterate the importance of confidentiality in their examiner training.

29. The exam boards proactively monitor social media for evidence of any leaks of confidential material, and two of them also use statistical monitoring of centres at which their assessment writers are teaching, to look for any unusual patterns in their students' outcomes.

30. We have also spoken to a small sample of students and parents to better understand their views on teachers' roles in developing assessments and have produced a report on their feedback.

31. While the cases that prompted this review occurred in general qualifications, we believe that, where teachers are involved with developing, or otherwise see information about, confidential assessment materials, awarding organisations must use appropriate safeguards to prevent misuse of the information, whatever the qualifications. All awarding organisations are subject to the same rules on confidential assessment materials, conflicts of interest and malpractice. The changes we are proposing to make to our Conditions and the expanded statutory

guidance we propose to introduce would, therefore, cover all recognised awarding organisations and all regulated qualifications.

32. We have held three workshops with a range of awarding organisations to explain our proposals and to better understand the extent to which the full range of awarding organisations might be affected by them. We have reflected the feedback we have received in our proposals.
33. The practice of involving teachers in developing assessments is less common in many vocational and technical qualifications than it is for general qualifications. And for some qualifications, the confidentiality of assessment materials is not an issue as the assessments are deliberately and properly fully predictable. We believe for these types of qualifications many awarding organisations will not need to change their ways of working directly in response to the proposals on which we are consulting.
34. This consultation is about risks to confidentiality when teachers have developed or seen assessment materials. There are, of course, other ways by which the confidentiality of assessments could be breached, for example through the early opening by centre staff of assessment materials. Awarding organisations must manage such risks, even where teachers do not develop their assessment materials.

Our proposed approach

35. We propose changes to two of our General Conditions of Recognition.
36. Currently, Condition A4.2 requires awarding organisations to 'identify and monitor all conflicts of interest which relate to it'. We propose to make it explicit that an awarding organisation must maintain up to date records of all conflicts of interest relating to it, including conflicts relating to any teacher who has seen information about confidential assessment materials. The register should include any teaching roles such teachers hold and the details of the centre(s) in which they teach and have taught while holding the information.
37. The current Condition already requires awarding organisations to identify and monitor conflicts of interest, including of those who develop assessment materials, and to take all reasonable steps to make sure no conflict of interest held by anyone connected with it causes an Adverse Effect. We do not believe an awarding organisation could comply with this Condition unless it maintained a full and up to date register of conflicts of interest. However, for the avoidance of doubt, we propose to amend the Condition so that this implicit expectation becomes an explicit requirement.
38. We believe it is essential that each awarding organisation must know of all relevant interests held by people who have seen information about its confidential assessment materials. An awarding organisation could not otherwise look in a

targeted way for indications that the information had been misused. We do not believe confidential assessment materials would be protected further if such information was publically available. On the contrary, the evidence we gathered suggests greater risks could be introduced if students, parents and/or other teachers, knew that a given teacher held confidential information about specific assessments.

39. We do not propose to stop an awarding organisation that believes the confidentiality of its assessment materials would be better protected if the holders of the information were widely known, however we will not require awarding organisations to publish such information nor will we suggest it would typically be appropriate.

Question 1: To what extent do you agree or disagree with the following proposal?

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, including conflicts relating to anyone who develops or otherwise sees information about confidential assessment materials.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give reasons for your answer

Question 2: To what extent do you agree or disagree with the following proposal?

Awarding organisations should be free to decide whether to make public information about the people who are involved in developing their confidential assessment materials.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give reasons for your answer

Question 3 for awarding organisations only:

Do you already maintain an up to date record of all conflicts of interests?

Yes/No

If yes, does the record include conflicts of interest that relate to the interests of teachers involved with developing confidential assessment materials?

Yes/No

Does the record include information about:

- (a) The qualification(s) the teachers teach?**
- (b) The schools and/or colleges in which they teach and have taught when they held information about confidential assessment materials?**
- (c) Any other roles held they hold?**

40. 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. Condition G4.2 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 propose to amend this Condition so it similarly highlights that using teachers to develop assessment materials is an area where there are particular risks which an awarding organisation must mitigate.

41. This amendment would not change the requirements to which awarding organisations are subject. It would, however, make explicit that awarding organisations must consider the risks to the confidentiality of assessment materials when they involve teachers in their development.

Question 4: To what extent do you agree or disagree with the following proposal?

We should make explicit in our Condition G4.1 that awarding organisations need to manage the risks of teachers disclosing information about confidential assessment materials.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give reasons for your answer

42. Our other proposals relate to the statutory guidance we will publish to support awarding organisations to comply with the Conditions.

43. We propose to expand our statutory guidance to both of the Conditions mentioned above. We will set out some of the practices we would expect awarding organisations to adopt if they are complying with our rules. We also propose to introduce a new section of statutory guidance to assist awarding organisations to decide on safeguards that would be appropriate and proportionate for its different qualifications, when teachers are involved in developing assessments. We propose this statutory guidance will appear at the end of our *Guidance to the General Conditions of Recognition*, similar to the existing section “Guidance on making changes to incorrect results” to our guidance.
44. We do not believe a ‘one size fits all approach’ to mitigating the risks of teachers misusing information about confidential assessment materials would be appropriate. If we prescribed a single approach in this area for all awarding organisations and for all qualifications, it would be disproportionately burdensome in respect of some qualifications and insufficiently robust for others. Some safeguards that would work well for some qualifications would be inappropriate or irrelevant for others. Our proposed statutory guidance would recognise each awarding organisation must use safeguards that are appropriate for each of its qualifications and set out the good practice we would expect to see for different types of qualification. Hence, responsibility for taking a suitably robust approach to complying with the Conditions of Recognition would sit with each awarding organisation, having had regard to the statutory guidance.

Question 5: To what extent do you agree or disagree with the following proposal?

The safeguards an awarding organisation uses to protect the confidentiality of its assessment materials need to be tailored to its particular qualifications, having had regard to the statutory guidance.

- Strongly agree
 Agree
 Neither agree nor disagree
 Disagree
 Strongly disagree

Please give reasons for your answer

Question 6: To what extent do you agree or disagree with the following proposal?

We should publish expanded statutory guidance that makes clear the safeguards we would expect an awarding organisation to apply to different types of qualifications.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give reasons for your answer

Potential safeguards that we propose to include in our statutory guidance

45. We have categorised the safeguards awarding organisations can use to reduce the risk that a teacher who has information about confidential assessment materials uses the information inappropriately in three main ways. We described these in our progress report¹¹. They concern:

- how assessment materials are produced;
- how inappropriate behaviour is deterred and detected; and
- how teachers who have confidential information can be supported to behave appropriately.

46. We explain below the types of safeguard that fall within each of the categories and how we propose to include them in our expanded statutory guidance.

Producing assessment materials

Serving teachers are not involved in developing assessment materials

47. The surest way for an awarding organisation to guard against teachers inappropriately using information about its confidential assessment materials is to make sure no teachers have such information. An awarding organisation could keep its assessment production process entirely in house and not contract services from serving teachers. It could secure any necessary teacher insights and expertise from recently retired teachers or teachers who are taking a break from teaching.

48. We do not believe that the benefits of mandating such an approach would in all cases exceed the risks to the quality and functionality of assessments that would likely arise if teachers were not able to be involved in developing assessment materials. Nevertheless, an awarding organisation could decide not to use serving teachers to provide appropriate expertise when developing assessment materials. It might decide this is the best and most cost-effective way to address the risks that information about confidential assessments will be disclosed and obviate the need for further safeguards.

¹¹ <https://www.gov.uk/government/publications/teacher-involvement-in-developing-exam-papers-interim-report>

Teachers involved with developing assessment materials cannot teach the qualification

49. An awarding organisation might stipulate that any teachers it engages to develop 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.
50. While such an approach might work well for some awarding organisations and for some qualifications, limiting the use of teachers in this way could introduce different risks, including to the quality of the assessments developed. Teachers might not wish to develop assessments for qualifications they were not allowed to teach. Such a prohibition could limit their ability to change jobs and the options of their centre to change awarding organisation. We recognise, therefore, that these measures might be impractical and difficult to enforce in many cases and that awarding organisations might also want to benefit from insights from current teachers who best understand how students are responding to the course. Nevertheless, for some qualifications an awarding organisation might decide this is the best safeguard to use.

No serving teacher knows whether or when the assessment materials they have developed or seen are used

51. An awarding organisation might prefer to use other ways to reduce the risk of information about confidential assessment materials being disclosed by a teacher who has been involved in their development. One approach, we propose to include as an example in our expanded statutory guidance, would be for an awarding organisation to manage the way it develops assessment materials so that no teacher knows which materials would actually be used in which assessment. 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. We recognise that many assessments for vocational qualifications already make extensive use of question banks which might achieve this degree of uncertainty, although awarding organisations might need to review the size of these and the frequency with which they are updated.
52. We recognise such an approach could introduce extra costs, especially when first introduced, as more materials would have to be developed than were needed at any point in time. The approach might be more cost-effective for some qualifications, where the curriculum content is stable than for others, where the assessment must reflect current issues or recent developments. We note, though, that awarding organisations should already be prepared for situations

where a question paper gets into the public domain – for example if it is mistakenly opened early. In such cases the paper might need to be replaced, and this approach would put an awarding organisation in a good position to do so.

53. We also recognise the approach would change the way some awarding organisations manage their quality assurance arrangements and prepare for delivery and marking – as sight of the assessment would have to be tightly controlled while the materials remained confidential. Nevertheless, for qualifications for which teacher input is valued and yet the incentives on a teacher to misuse information are high and the impact if they did so would be great, the costs of these wider changes might be proportionate.
54. We recognise that the form and degree of unpredictability needed to make this approach an effective safeguard would vary by qualification. We propose that our statutory guidance should, therefore, encourage awarding organisations to take into account considerations such as the number and the nature of the assessment tasks/questions, whether the tasks/questions would be memorable if seen in advance, and whether a student who had prior information about the task/question would likely be advantaged over others.
55. We believe that for qualifications such as GCSEs, A levels and the main alternatives, the stakes of the qualification, for both students and their schools and colleges, are sufficiently high that the awarding organisation should normally manage the way it develops its assessment materials so no teacher of the qualification knows with certainty the contents of any specific assessments.
56. If an awarding organisation offering such high stakes qualifications allowed teachers to develop assessments for qualifications they also taught to know which, when and how the assessments materials it had produced would be used it would have to be able to justify its approach. We would consider the efficacy of its justification when considering regulatory action to address any actual or potential breach of the Conditions.

No serving teacher is involved with developing all of the assessments for any one qualification

57. For some qualifications, an awarding organisation might decide that, taking into account the risks and likely impact of disclosure and/or the costs of introducing such unpredictability into the use of assessment materials, it should focus on other safeguards, beyond the assessment development stage.
58. Students can be disadvantaged if their teacher gives them information about an assessment they should not have. When this happens, an awarding organisation might disregard their performance in the affected assessment and estimate their overall mark based on their performance in the other assessments for the qualification relative to the performance of other students who completed all of the assessments. This only works where there is more than one assessment for

the qualification, and not all of them have been compromised by the teacher's actions.

59. If only one of the assessments that make up the qualification has been compromised, the awarding organisation can award what is often described as an 'assessed' grade' based on the affected students' performance in the other assessments. It is more difficult for an awarding organisation to deal with a situation in which a teacher has disclosed confidential information about all of the assessments for a given qualification. In such a scenario, the impact on the affected students might be more severe, albeit that they had been innocent recipients of confidential information.
60. An awarding organisation that allowed teachers to develop assessments for qualifications they also taught might ensure that no such teacher had seen all the assessments to be taken by a learner for that qualification (for example, both exam papers). This would limit the impact, including on students, of a teacher inappropriately using information about confidential assessment materials and allow the awarding organisation to consider whether the teacher's students had performed surprisingly well in the assessment the teacher had developed or otherwise seen, relative to their performance in their other assessments.

Question 7: Do you have any comments on the examples of safeguards we propose an awarding organisation should consider using during assessment production to reduce the risk of inappropriate disclosure of confidential information?

Yes/No. If yes provide them here:

Question 8: Are there any other safeguards that we have not suggested that awarding organisations could consider?

Yes/no

If yes, please describe them and the circumstances in which they might be used...

Support for teachers and centres

61. We propose to include in our expanded statutory guidance steps awarding organisations should take, where appropriate, to support teachers who have information about confidential assessment materials. The degree to which we would expect an awarding organisation to use the full range of measures would depend on the nature of the information held by the teacher, the risk of wrongdoing given the type of qualification and the teacher's role(s).
62. The types of support we might expect an awarding organisation to give to a teacher who held information about confidential assessment materials include:

- clear contractual arrangements setting out the teacher's obligations with respect to information about confidential assessment materials and any limitations on other roles they could undertake while information they held remained confidential;
- supporting the teacher to behave appropriately in respect of their position as an examiner/assessor on appointment and while they remained subject to those contractual provisions;
- having direct contact with the teacher's centre 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;
- requiring annual declarations from teacher/examiners that they understand and at all times comply with their obligations to protect the confidentiality of assessment materials.

Question 9: To what extent do you agree or disagree with the following proposal?

The types of measures we set out would support teachers who had seen information about confidential assessment materials to meet their obligations in respect of those materials

- Strongly agree
 Agree
 Neither agree nor disagree
 Disagree
 Strongly disagree

Question 10: Are there any other types of support an awarding organisation might provide to a teacher to reduce the risk they will misuse information about confidential assessment materials?

Yes/No. If yes, please describe there here.....

Detection and deterrence of malpractice

63. A teacher who holds information about confidential assessment materials is likely to be deterred from using the information inappropriately if they know such use is likely to be detected. We therefore propose to include in our statutory guidance the types of steps we would expect an awarding organisation to take to detect inappropriate practice. The extent to which we would expect an awarding organisation to use the full range of measures would depend on the risk of wrong-doing, given the type of qualification, the role of the teacher, and the other steps it had taken to protect its confidential assessment materials during development and production.

64. The types of steps we might expect an awarding organisation to take to detect the inappropriate use of information about confidential assessment materials include:

- reviewing the assessments of students whose teacher had prior knowledge of the assessments to look for any unusual patterns in their responses;
- where appropriate, sampling the teaching plans, teaching materials and formative assessments used by teachers who had prior knowledge of assessments to look for signs they had narrowed their teaching;
- monitoring of social media to look for signs that confidential information had been disclosed¹²; and
- statistical monitoring to look for unusual results or patterns of results in centres where teachers with prior knowledge of assessments are teaching

65. If malpractice was found, we would expect an awarding organisation to apply appropriate sanctions, and, where appropriate, to notify the National College for Teaching and Leadership (NCTL)¹³. The NCTL would, in turn, consider whether the teacher's behaviour was sufficiently serious to justify a prohibition order against the teacher.

Question 11: To what extent do you agree or disagree with the following proposal?

Measures such as we propose would enable an awarding organisation to detect the inappropriate use of information about confidential assessment materials by a teacher

- Strongly agree
 Agree
 Neither agree nor disagree
 Disagree
 Strongly disagree

Question 12: To what extent do you agree or disagree with the following proposal?

A teacher who had information about confidential assessment materials would be deterred from misusing information if they knew the awarding organisation would take measures such as we propose to detect wrong-doing

- Strongly agree
 Agree
 Neither agree nor disagree

¹² We have commissioned advice on the ways social media can most effectively be monitored for indications of malpractice

¹³ NCTL arrangements apply to anyone undertaking teaching work as defined in the Teachers' Disciplinary (England) Regulations 2012 in schools, including academies (including 16 to 19 academies), free schools, Local Authority maintained schools, non-maintained special schools and independent schools as well as sixth form colleges, relevant youth accommodation and children's homes.

- Disagree
 Strongly disagree

Question 13: Are there other steps an awarding organisation could take to detect or deter a teacher from inappropriately using information about confidential assessment materials that we should include in our statutory guidance?

Yes/No

If yes:

Factors affecting the safeguards appropriate for a qualification

66. As described above, we believe each awarding organisation should use safeguards that are appropriate and proportionate for each of its qualifications. Our proposed statutory guidance will help them in determining the package of safeguards that would be appropriate given:

- what the teacher knows about the confidential assessment materials, including whether and/or when the materials will be used;
- the teacher's role in delivering the qualification;
- the potential incentives on the teacher to disclose or otherwise use their knowledge inappropriately to influence students' performance; and
- the stakes associated with the qualification, the potential impact of malpractice of this type and the likely opportunity to mitigate any harm caused.

67. We set out below the expectations we propose to set out in statutory guidance in relation to each of these areas.

The teacher's knowledge of confidential assessment materials

68. We propose to make it clear in our expanded statutory guidance that, typically, the more information a teacher has about an assessment and when it will be used, the stronger the package of safeguards an awarding organisation will need to use to support appropriate behaviour by the teacher and to deter and detect malpractice.

The teacher's role in delivering qualifications

69. We propose that the more directly a teacher is involved with delivering the qualification for which he or she holds information about confidential assessment materials, the stronger the package of safeguards that will be needed. So a stronger package of safeguards should be used for a teacher who teaches the qualification, including as a private tutor, than for a teacher who teaches an alternative qualification, or who is no longer actively teaching.

70. Our proposal to require, explicitly, all awarding organisations to have and maintain an up to date conflicts of interest register would make sure they knew of

the teacher's role and of the qualifications they taught, and so could use appropriate safeguards.

Potential pressures on teachers to misuse their information about confidential assessment materials

71. There are greater pressures on teachers to achieve good outcomes for their learners for some qualifications than for others. The greatest pressures are associated with qualifications that are used for school/college accountability purposes and for particularly high stakes qualifications that directly affect an individual's progression options and life chances. In these instances, pressures can come from students and parents as well as from within the teacher's organisation.
72. We propose our statutory guidance should reflect this, so that an awarding organisation takes stronger steps to prevent a teacher inappropriately using information about qualifications used for accountability purposes and those which are particularly high stakes for students, than it might consider necessary for others. This reflects the additional risks associated with these qualifications. This differentiation might be reflected in the way it allows teachers to contribute to, or otherwise see, confidential assessment materials and/or in the steps it takes to deter and detect malpractice and/or to support teachers to behave appropriately.

The impact if information about confidential assessment materials is misused

73. The impact of malpractice on learners, on those who use qualifications and on public confidence varies by qualification. We propose that for qualifications that are particularly high stakes, such as those used for progression to higher education and those that confer a licence to practise, our statutory guidance should lead awarding organisations to employ stronger safeguards relative to others.
74. Another factor for an awarding organisation to consider is the ease with which it could replace assessment materials, or learners could re-take their assessments, should a teacher be found to have wrongly disclosed or otherwise used information about the assessments. For example, it is likely to be more difficult for an awarding organisation to mitigate the impact of malpractice for a qualification that is assessed just 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.
75. For some qualifications, the qualification will be awarded on the basis of one assessment only, whereas for others, a number of assessments will contribute to the final grade. In qualifications for which there are multiple assessments, if one assessment was compromised, a grade 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.

76. An awarding organisation will have to determine the package of safeguards it will use for each of its qualifications taking these different factors into account.

Question 14: Are all the factors we have identified for awarding organisations to consider when deciding which safeguards to use appropriate?

Yes/No

If no, please explain your answer

Question 15: Are there other factors which might affect which safeguards are appropriate for a qualification which we have not identified?

Yes/No If yes please describe the other factors we should consider

Taking regulatory action

77. If information about confidential assessment materials was misused, we would consider whether the awarding organisation had used all suitable safeguards when we decided if it had taken all reasonable steps to prevent this and when deciding on the nature and scale of any sanction we imposed, for example the size of any fine. If we found the awarding organisation had followed our statutory guidance closely, we would view that as a mitigating factor when deciding on the scale of regulatory action appropriate. Conversely, if we found that an awarding organisation had chosen not to follow our statutory guidance, in full or part, with no justification or rationale, we would regard this as an aggravating factor.

78. We do not have the power to sanction a teacher, or any other individual, who works for or who is engaged by an awarding organisation. We do, however, have a wide range of powers in respect of an awarding organisation that did not take appropriate steps to protect information about confidential assessment materials. In the most serious of cases we might require an awarding organisation to take appropriate action against an individual, where they had the power to do so, for example by terminating the individual's contract with the organisation. The teacher's school and college or other employer might also take action. In the most serious of cases of malpractice, a teacher who falls within the jurisdiction of the NCTL could be prohibited from teaching.

79. In our document *Taking Regulatory Action*¹⁴, we set out the regulatory powers available to us when an awarding organisation breaches a Condition, which include:

¹⁴ <https://www.gov.uk/government/publications/taking-regulatory-action>

- giving a direction, where we require an awarding organisation to take, or not to take, specified actions. A direction is enforceable in the courts
- imposing a fine. We specifically highlight in our policy that a scenario in which we might consider using this power would be a case where an awarding organisation has: “deliberately or negligently allowed the confidentiality of its assessments to be compromised”
- withdrawing recognition, where we can stop an awarding organisation from offering a specific regulated qualification, group of qualifications, or any regulated qualifications

80. Any or all of these could be available to us if an awarding organisation had not taken appropriate steps to prevent this form of malpractice. We could also intervene in a precautionary way if we had evidence an awarding organisation was not taking appropriate steps to prevent information about confidential assessment materials being disclosed, even where we had no evidence that information had actually been disclosed. In such a case an awarding organisation might give us an undertaking to change its approach, or we could direct it to do so.

Examples

81. We have set out some examples to illustrate the factors an awarding organisation should consider for different qualifications. We propose to include examples similar to these in our statutory guidance to help awarding organisations make decisions about what safeguards to employ.

Example 1

The qualification

A high stakes qualification used for school accountability purposes and widely taken by students to support their progression to employment or higher education, taken by c. 250,000 students annually.

The assessments comprise two unseen written exam papers. Students must attempt three questions out of six choices on each paper.

The nature and number of questions on each paper makes them memorable and, if known in advance, teaching and learning could be narrowed.

The impact of a breach would be high, including because of the numbers of students who could be affected and the damage to public confidence.

The awarding organisation's position

- teacher input to developing the assessment materials will enhance the quality of the exams

- in light of the potential impact of any breach 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 the question writers to document the assessment objectives and their relative weightings that will be assessed for each question, for use when the paper is put together
 - 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 papers for any exam sitting. No active teachers know whether any of their questions will be selected or, if they are, in which exam series they will be used
 - 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 information by the teacher
 - makes sure each of the teachers' heads of centre knows the role they have played and that the teachers do not know whether or when the materials they have written will be used
 - reviews the students' scripts of at least one of the teachers each year to look for unusual patterns of responses

Example 2

The qualification

A high stakes qualification used for school accountability purposes and widely taken by c.100,000 students annually to support their progression to employment or higher education. The impact of a breach would be high, including because of the numbers of students who could be affected and the damage to public confidence.

The assessments comprise three unseen written exam papers, each covering different aspects of the curriculum. Students must attempt all questions on each paper.

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.

The awarding organisation's position

The awarding organisation has had difficulties recruiting people with appropriate subject and assessment expertise to develop the assessments. In the longer term it will commission the writing of multiple papers so no active teacher who develops assessments knows if or when any particular assessment will be used. In the short term it is concerned the extra workload of such an approach would deter anyone considering applying for an examiner role.

It engages two active teachers to write two of the papers – they each write one. 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. Only the employee sees the papers written by the other two – ie neither of the active teachers see the other two papers.

The awarding organisation reviews the exam scripts of the students 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 students' performance in the paper their teacher had developed was out of line with their performance in the other paper, relative to the performance of all students taking the qualification. It interviews the teacher and the students, where appropriate, to understand the reasons for any unusual patterns.

Each teacher's contract with the awarding organisation sets out the teacher's obligations with regard to the confidential materials, and provides for the termination of the contract in the event of disclosure of confidential information by the teacher.

The awarding organisation makes sure each of the teachers' heads 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.

The awarding organisation records its justification for the approach.

Example 3:

The qualification

A high stakes qualification for the learner and for those who rely on the qualification as an indication of competence to practise. Assessment is by observation of the candidate 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 candidates are assessed on their competence in performing a set of tasks.

The awarding organisation's position

As candidates 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 adopt any additional safeguards.

82. These examples illustrate the importance of awarding organisations coming to their own view as to the appropriate package of safeguards. The complexity and range of potential scenarios mean that it would be ineffective and disproportionate for Ofqual to attempt to set out all the possible scenarios in which particular safeguards would be appropriate. We will, instead, use our statutory guidance to exemplify the thought processes, rationale and evidence

base we expect awarding organisations to use when deciding which safeguards would be appropriate for each of its qualifications.

Question 16: To what extent do you agree or disagree with the following proposal?

Including examples in our statutory guidance would be useful for awarding organisations to understand the factors they need to take into consideration and the range of safeguards which would be appropriate.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Timescales

Assessments in 2018 in general qualifications

83. The exam boards who deliver GCSEs, AS and A levels and other qualifications used as equivalents, such as the Pre-U and the International Baccalaureate, have written the exams for summer 2018 and in many cases these will have been printed and be ready for dispatch.¹⁵ Safeguards for 2018 will, therefore, need to focus on deterring and detecting malpractice and on supporting teachers to behave appropriately.
84. Ahead of the 2018 summer exams, these exam boards will engage with all schools and colleges to encourage them to support the appropriate behaviour of teachers who were involved with developing assessment materials and to improve detection of inappropriate behaviour where that occurs.
85. These exam boards have also committed to review their contractual obligations and how they record and use information about conflicts of interest and to strengthening their training, guidance and support for newly appointed assessment setters.

Assessments in 2019 and beyond in general qualifications

86. For exams taken from 2019, the exam boards will have to comply with any amendments to our Conditions of Recognition, and have regard to any expanded statutory guidance.
87. We expect that by summer 2019 awarding organisations will have made significant progress in terms of the safeguards they employ, particularly the safeguards used to support those involved in writing assessments and to detect inappropriate use of confidential information. For some qualifications, such as

¹⁵ AQA, Cambridge International, the IBO, OCR, Pearson, and WJEC

GCSEs and A levels, development of assessments to be taken in summer 2019 is likely to have already started, and will definitely have done so by the time the revised Conditions and statutory guidance are published. We recognise that it will not be possible for awarding organisations to have fully revised all their approaches at the assessment production stage by then without introducing an unacceptable degree of risk to the safe delivery of qualifications.

88. As explained above, all awarding organisations are already, and will remain, subject to stringent Conditions requiring them to protect their confidential assessment materials. If information about confidential assessment materials is disclosed or otherwise improperly used before we publish any revised Conditions and expanded statutory guidance, we will determine whether the awarding organisation had, in the circumstances, taken all reasonable steps to protect the information. We will consider the extent to which they have had regard to the current statutory guidance when doing so.

Other regulated qualifications

89. Awarding organisations that offer other regulated qualifications will also need to comply with the current Conditions of Recognition and with any revisions we make to them. They will also have to have regard to any expanded statutory guidance once published and introduce any necessary changes in a timely way for their qualifications and assessment cycles.

Monitoring

90. We will target the way we monitor the extent to which awarding organisations are complying with the Conditions and are having regard to any expanded statutory guidance, according to our evaluation of the likelihood and impact of teachers disclosing information about confidential assessment materials.

91. We would expect every awarding organisation to be able to tell us how it has had regard to the statutory guidance and what, if any changes it has made to its ways of working in response.

92. We will consider auditing awarding organisations' approaches to the issue, seeking specific assurance in annual statements of compliance that awarding organisations have properly addressed the risk and seeking information about awarding organisations' approach during the readiness review meetings we hold with some awarding organisations before key exam series.

Regulatory Impact

93. We recognise that the impact on awarding organisations of our proposed changes to Conditions and statutory guidance would vary widely. It would depend on the number and type of qualifications they offer, and on the specific decisions

each awarding organisation made about the appropriate package of safeguards for each of its qualifications.

94. We do not believe that the amendments we propose to make to the Conditions of Recognition will impose any additional regulatory burden as awarding organisations should already be keeping up to date conflict of interest registers, and are already required to take all reasonable steps to maintain the confidentiality in assessment development by teachers.
95. All awarding organisations will need to spend time reviewing the qualifications they offer and deciding for each one, firstly whether it has assessments which are affected by a requirement to maintain confidentiality, secondly whether teachers are involved in developing the materials and, if so, thirdly the appropriate package of safeguards to be used in each case.
96. For many qualifications, confidentiality of assessment materials is not a requirement for the valid functioning of the assessment. In these cases, the impact of our proposals would be negligible. Likewise, we believe many awarding organisations do not involve teachers when they develop assessment materials.
97. We recognise, though, that for some awarding organisations, the burden of responding to our proposed statutory guidance could be significant, for example for those qualifications where the most appropriate safeguards include the production of extra assessment materials to ensure that no teacher knows when a specific assessment will be taken.
98. We are keen to understand the likely impact of our proposals.

Question 17: If you are responding on behalf of an awarding organisation to help us assess the burden awarding organisations might experience in responding to our proposals, please indicate for how many of your qualifications:

- **you involve teachers who teach a qualification in developing confidential assessment materials for that qualification and**
- **for how many of these qualifications you do NOT already use safeguards of the type described above at the assessment materials development stage and**
- **how many of these qualifications you consider to be high stakes and/or particularly vulnerable to malpractice.**

Question 18: If you are responding on behalf of an awarding organisation please provide us with an indication of any additional costs you estimate you will incur if we amend the Conditions as we propose and please tell us how you have arrived at this estimate.

Question 19: If you are responding on behalf of an awarding organisation please provide us with an indication of any additional costs you estimate you will incur if we expand our statutory guidance as proposed and please tell us how you arrived at this estimate.

Question 20: Are there any steps we could take to reduce the regulatory impact of our proposals while making sure awarding organisations are taking all reasonable steps to protect the confidentiality of their assessment materials that have been developed or otherwise seen by teachers?

Yes/No If yes please describe the steps you believe we should take.

Question 21: Are there any costs or benefits associated with our proposals which we have not identified?

Yes/No. If yes please give reasons for your answer

Equalities Impact

99. The proposals we have made focus on the processes awarding organisations use to safeguard their qualifications. We have not therefore identified any impacts which will adversely affect any learners who share particular protected characteristics. Similarly, we have not identified any impact on teachers who share particular protected characteristics.

Question 22: We have not identified any ways in which our proposals could have an impact on persons who share a protected characteristic. Are there any potential impacts (positive or negative) we have not identified?

Yes/No. If yes please explain your answer

Question 23: Please provide any further comments on the impacts of the proposals on persons who share a protected characteristic.

Responding to this consultation

How to respond

The closing date for responses to this consultation is **25 April 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 (Regulating national assessments) in the subject line of the email and make clear who you are and in what capacity you are responding.
- Post your response to: Regulating national assessments, 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

Your response will be used to help us shape our policies and regulatory activity. 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.

We wish to make our publications widely accessible. Please contact us at publications@ofqual.gov.uk if you have any specific accessibility requirements.



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