

CONSULTATION

Guidance on malpractice and maladministration

Consultation on changing the statutory guidance on malpractice and maladministration

ofqual

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1. Proposals at a glance

We are seeking views on draft guidance on malpractice and maladministration, which we propose will replace our existing guidance for Condition A8 of the General Conditions of Recognition¹. Some material from the existing guidance is included in the proposed guidance. The updated guidance has a narrative structure, considering multiple Conditions that come into play when dealing with malpractice and maladministration.

The proposed draft guidance, if adopted, will then sit as separate guidance to the General Conditions of Recognition, rather than specifically as a part of Condition A8. We welcome views on the content and the style of the draft guidance. We are not making any changes to the Condition itself, so the obligations that are placed on awarding organisations are unchanged.

Audience

This consultation is open to anyone who may wish to make representation but is likely to be of most interest to awarding organisations who must comply with our Conditions when they develop and deliver regulated qualifications. However, any other organisation or individual who may be affected by how awarding organisations comply with our rules, such as Centres or Learners, might also wish to make representation.

Duration

This consultation will be open for 12 weeks starting on 20 February 2020 and ending on 14 May 2020 at 23:45.

We expect to announce the outcomes to this consultation in summer 2020. If we decide to introduce new guidance we will publish the date when it takes effect.

Responding to this consultation

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

- complete the online response at www.gov.uk/government/consultations/consultation-on-guidance-on-malpractice-and-maladministration; or
- 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 <https://www.gov.uk/guidance/ofqual-handbook>

2. Introduction

Ofqual's role

Ofqual is the independent qualifications regulator for England. We regulate against five statutory objectives², which include the need to secure the standards of qualifications, to promote public confidence in regulated qualifications, and to secure that regulated qualifications are delivered efficiently. We do this by setting rules that awarding organisations must follow³, and monitoring to make sure they meet these. We take action where appropriate if we discover that our rules are not being met⁴. More detail on Ofqual's role can be found in Annex B.

Ofqual's statutory guidance

We publish guidance to help awarding organisations understand how to comply with their Conditions of Recognition⁵. Awarding organisations that develop, deliver and award regulated qualifications must have regard to the guidance that we publish⁶. This means that they must review the guidance and take seriously what it says. Guidance is not a further set of rules, and the approaches set out within it are not the only way to comply. However, if an awarding organisation chooses to take a different approach, it needs to be able to explain why it has done so.

Some of our guidance takes the form of positive and negative indicators. These help to determine whether or not an awarding organisation may be complying with a Condition. This form of guidance explains what 'good' and 'bad' looks like. For example, if an awarding organisation does 'X', we are likely to find that it is compliant with the relevant Condition; if it does 'Y', we are likely to find it is non-compliant.

We also publish guidance, including the proposed guidance set out in this consultation, relating to particular issues that may apply to more than one Condition⁷. This type of guidance sets out what the Conditions require and the factors an awarding organisation should consider when dealing with that issue.

The form of guidance we publish for a particular Condition or issue will vary depending on what is most likely to help awarding organisations understand our Conditions.

Background to this consultation

The successful delivery of examinations and assessments relies on the trust and diligence of everyone involved, the vast majority of whom take their responsibilities seriously. Normally the qualifications system functions well, but occasionally things go wrong. When this does happen, awarding organisations need to investigate- and where appropriate- take action, to maintain public confidence, secure accurate results for Learners and ensure assessments remain fit for purpose.

² See Annex B.

³ <https://www.gov.uk/guidance/awarding-organisations-understanding-our-regulatory-requirements>

⁴ <https://www.gov.uk/government/publications/taking-regulatory-action>

⁵ <https://www.gov.uk/guidance/ofqual-handbook>

⁶ As specified in the Apprenticeships, Skills, Children and Learning Act 2009.

⁷ See for example: [Guidance on making changes to incorrect results](#).

Awarding organisations are required under Condition A8.1 to take all reasonable steps to prevent the occurrence of any malpractice or maladministration in the development, delivery and award of their qualifications. In most cases where an awarding organisation takes all reasonable steps, malpractice and maladministration is avoided. However, where an awarding organisation suspects malpractice or maladministration, or it has been alleged, under Condition A8.2 it must, so far as possible, establish whether it has occurred, and promptly take all reasonable steps to prevent any Adverse Effect which may result. Where any such Adverse Effect occurs, the awarding organisation must mitigate it as far as possible and correct it.

Where it is established that malpractice and maladministration has occurred, awarding organisations are also required promptly to take all reasonable steps to prevent such malpractice or maladministration from recurring, ensure proportionate action is taken against those responsible, and notify Centres or awarding organisations that may be affected.

Existing guidance focuses on positive and negative indicators in relation to compliance with Condition A8. However, the prevention, investigation and sanctioning of malpractice and maladministration can often be complex, bringing into play a number of Conditions. Therefore we propose to introduce guidance that covers this range of relevant Conditions. Instead of providing positive and negative indicators, this draft guidance sets out the relevant Conditions and factors awarding organisations should consider to ensure they are compliant. It is intended to help awarding organisations understand what we expect them to do when addressing malpractice and maladministration.

This guidance is informed by a review of incidents of malpractice and maladministration, both suspected and proven, that we have seen. We have considered how such incidents have been managed. We have also reviewed other relevant information when producing the guidance, in particular the Report of the JCQ's Independent Commission on Examination Malpractice.⁸

⁸ <https://www.jcq.org.uk/examination-system/imc-home/report-of-the-independent-commission-on-examination-malpractice>

3. Consultation details

Proposals

We propose to replace our existing guidance for Condition A8, which is currently in the form of positive and negative indicators, with a narrative style of guidance that covers the Conditions relevant to malpractice and maladministration. However, we propose to retain elements of the existing guidance where relevant.

We propose the new guidance will sit within Section A of the Ofqual Handbook, but as it relates to a number of Conditions it will sit outside of Condition A8.

This draft guidance:

- Identifies how several Conditions might interact in relation to malpractice and maladministration.
- Explains the difference between malpractice and maladministration, and some of the implications of this.
- Outlines examples of reasonable steps an awarding organisation might take to prevent malpractice and maladministration.
- Illustrates the factors that an awarding organisation should consider when deciding whether reasonable grounds for suspicion or alleged malpractice or maladministration exist.
- Sets out factors an awarding organisation might consider when deciding who should investigate alleged malpractice and maladministration, taking into account any personal interest a person might have in the outcome of the investigation and the level of competence required.
- Sets out some of the potential considerations for an awarding organisation where malpractice or maladministration is suspected or alleged but not yet established. For example, whether results should be issued.
- Considers the need for proportionate action, relevant to the facts of the case, once malpractice or maladministration has been established.
- Highlights the need for an awarding organisation to take all reasonable steps to contact relevant Learners whose outcomes may be affected by a malpractice investigation, to inform them of the findings of the investigation and sanctions on them to provide for the appeal of decisions relating to actions taken against a Learner or Centre.

We have included line numbers alongside the guidance to allow you to refer to specific parts of the guidance in your response. The line numbers will not appear in the final version of this guidance.

4. Proposed Guidance

Guidance on malpractice and maladministration

Introduction

5 The successful delivery of examinations and assessments relies on the trust and diligence of exams officers, Teachers, Learners, awarding organisations and their suppliers, and the wider education community – the vast majority of whom take their responsibilities seriously. Normally the qualifications system functions well, but occasionally things go wrong. When this happens, awarding organisations need to investigate, and – where appropriate – take action, to maintain public confidence, secure accurate results for Learners and ensure assessments remain fit for purpose.

10 This guidance covers malpractice and maladministration. Malpractice and maladministration are specifically dealt with in Condition of Recognition A8. However, because incidents of malpractice and maladministration will often touch upon the fitness for purpose of assessments, or the accuracy of marking or results, other Conditions are often relevant. In this guidance, we explain how an awarding
15 organisation might decide how to prevent, detect, and investigate malpractice and maladministration, and what action to take as a result, drawing attention to relevant Conditions of Recognition.

What is malpractice and maladministration?

Malpractice and maladministration are two distinct, but related, concepts.

20 In broad terms, maladministration will generally cover mistakes or poor process where there has been no intention on the part of the person responsible to do any harm. It may involve some degree of incompetence or ineptitude, or may simply be as a result of carelessness or inexperience. Whilst not an exhaustive list, the following are some examples of maladministration:

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- avoidable delay;
 - mistakes arising from inattention;
 - faulty procedures;
 - failure to follow correct procedures;
 - poor record keeping;

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 - inadvertent failure to take action;
 - poor communication; and
 - inadvertently giving misleading or inadequate information.

By contrast, malpractice will generally involve a person intending to break the rules or cause harm, being negligent or reckless as to the consequences of their actions.
35 Malpractice could comprise of a conscious decision to do anything covered in the list above, and can also include intentional bias or discrimination.

Two of the clearest examples of malpractice are:

- cheating, or facilitating cheating, in an assessment; and

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- attempting intentionally to manipulate a result so that it does not reflect the Learner's actual performance in an assessment.

Such action could be taken by the Learner themselves, a Teacher, an exams officer, someone within the awarding organisation, or any other individual involved in, or with access to, the assessment process. More specific examples of malpractice include:

- 45
 - revealing the questions on an assessment in advance (where confidentiality is required under Condition G4.1);
 - sharing confidential assessment materials ahead of an exam;
 - claiming to have and/or offering to share confidential assessment materials and/or presenting hoax materials as confidential materials;
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 - a Learner breaching the rules of the assessment, for example by bringing impermissible materials into the assessment;
 - producing a forged certificate, which does not reflect a Learner's actual performance in an assessment;
 - a Learner passing off someone else's work as their own;
- 55
 - a Teacher providing a Learner with answers, providing assistance to Learners beyond what is permitted, or deliberately failing to apply the mark scheme to a Learner's answer; and
 - a Teacher or Learner falsifying a result.

60 Although maladministration and malpractice are distinct, the two concepts can be on a spectrum. As such, they will sometimes shade into one another. Sometimes, whether a particular incident is best classified as malpractice or maladministration will depend on the context, and it can be a matter of judgement. For example, behaviour that might start as maladministration could become malpractice if the person responsible fails to respond to advice to change their approach.

65 For the purpose of an awarding organisation complying with our rules it may not be particularly relevant whether a specific incident is classified as malpractice or maladministration. The Conditions require awarding organisations to take all reasonable steps to prevent both malpractice and maladministration and, if either occurs and could have an Adverse Effect, to take all reasonable steps to mitigate it as far as possible and correct it.

70 So long as malpractice or maladministration is suspected by an awarding organisation or alleged by another person, and there are reasonable grounds for that suspicion or allegation, the Conditions require an awarding organisation to investigate. It may not always be clear from the outset of an incident what has actually happened. Awarding organisations must seek to establish whether an incident has taken place and what has happened. Indeed, it will sometimes only be through investigation that an awarding organisation can determine the credibility of the allegation and what sort of incident has occurred.

75 Likewise, when deciding what action to take in response to a finding of malpractice or maladministration, it will be more important for an awarding organisation to consider all of the circumstances of the case, rather than what label might be attached to the incident.

Identifying risk and preventing malpractice and maladministration

Identifying risk

85 Condition A6.1 requires an awarding organisation to take all reasonable steps to identify the risk of any incidents which could have an Adverse Effect. Where they

relate to the integrity of assessments or the accuracy of results, incidents of malpractice and maladministration will always have an Adverse Effect – albeit that the scale of that effect may be higher or lower depending on the circumstances.

90 Other forms of malpractice or maladministration may also have an Adverse Effect depending on the circumstances.

An integral part of an awarding organisation's compliance with Condition A6.1 will therefore be identifying the risks of malpractice and maladministration. In considering those risks an awarding organisation should take into account the following factors.

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- The types of malpractice or maladministration that are relevant to the awarding organisation's qualifications. For example, whether confidentiality in assessment questions is required, or whether it would unfairly benefit a Learner to bring a particular prohibited item into the assessment.
 - Any aspects of the qualification's design or delivery, or the processes used by the awarding organisation that could increase the likelihood of malpractice or maladministration. For example, whether:
 - Learners have the opportunity to obtain inappropriate assistance from Teachers or others in completing assessments;
 - the delivery of question papers to the awarding organisation is appropriately secure;
 - the security of assessment materials relies on the competence and integrity of Centre staff, such as exams officers; or
 - whether the marking process makes it possible to falsify marks.
 - Who might become involved in malpractice or maladministration. For example, whether the risks lie with those designing, printing or delivering assessment materials, Learners, Teachers, administrative staff involved in the delivery of exams, exams officers, or particular Centres or Assessors.
 - The likelihood that malpractice or maladministration will take place. For example, the benefit to the perpetrator of engaging in a particular type of malpractice, the motivation/ incentive that may exist to engage in such behaviour and the perceived likelihood of being caught and the subsequent consequences.
 - The likely impact of any malpractice or maladministration on the awarding organisation's ability to comply with its Conditions of Recognition. For example, whether the design of a particular assessment means that the leak of a question would require the entire assessment to be substituted for all Learners, and the ease with which that could be accomplished.
 - Any data or other intelligence which can be used to identify the risk of malpractice and maladministration occurring. For example, considering, and where appropriate combining, data sets relating to entries, results, malpractice and access arrangements to spot patterns and unusual behaviour and inform the identification of risk.
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Preventing malpractice and maladministration

130 Having identified any risks of malpractice or maladministration, Conditions A6.2 and A8.1 require the awarding organisation to take all reasonable steps to prevent any malpractice or maladministration from occurring.

135 An awarding organisation should have in place, and adhere to, ways of working that reduce the risk of incidents of malpractice or maladministration, ensuring its Workforce understands and follows the relevant arrangements. As part of an awarding organisation's obligations under Condition C1.1, it must ensure that third parties involved in the development, delivery and award of its qualifications understand and routinely follow such ways of working. It must also monitor the work undertaken by third parties under such arrangements. The arrangements should include coverage of the following, as relevant:

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- plagiarism, collusion, tampering, breach of confidentiality of assessment materials; and
 - incidents that could occur outside of England.

145 Compliance with Conditions A6.2 and A8.1 requires that such arrangements are as effective as reasonably possible. It is not enough to have an arrangement in place if it is not appropriate to the risks of malpractice and maladministration to which a particular qualification gives rise.

Depending on the qualification, reasonable steps to prevent malpractice or maladministration may include, but not be limited to, the following:

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- Education and information. The awarding organisation should provide appropriate training and/or information on ways of working and arrangements in place to prevent malpractice and maladministration to, amongst others:
 - their Workforce;
 - Learners;
 - Centres, including specific training and/ or information for key members of staff such as the head of Centre, and exams officers;
 - Teachers; and
 - users of the qualification.
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160 For example, awarding organisations should consider the level of guidance given to those conducting assessments to ensure they are fully aware of the rules and conditions under which non-exam, work-based, or practical assessments must be conducted. This might include information for Centres on the support and feedback a Teacher may provide. It might also include information for Learners on what constitutes plagiarism and the consequences if they plagiarise.

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- Designing out malpractice and maladministration. Awarding organisations should design qualifications and processes to reduce, as far as reasonably possible, the opportunity for malpractice and maladministration to occur. For example, requiring a second check on assessment materials before they are handed out, or clearly labelling and promptly removing outdated assessment materials from their website in order to reduce the risk of maladministration.
 - Centre checks being undertaken with appropriate regularity and rigour. This is likely to include more regular checks for Centres that may be deemed at higher risk of malpractice or maladministration, such as new Centres or those where particular issues have been identified. Awarding organisations might
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- 175 decide not to work with certain Centres where they deem the risks of malpractice and maladministration to be too great.

- Securing the behaviour and action they would expect from third parties and partner organisations. In line with Condition C1 and C2, an awarding organisation should seek to support a culture of risk identification, prevention and reporting concerns by and within third parties and Centres.
- Any other appropriate safeguards. In line with Condition A8.1, awarding organisations should use appropriate safeguards for the particular qualifications they provide to prevent malpractice and maladministration. Awarding organisations should look to test, evaluate and develop these safeguards over time to ensure they are fit for purpose.

An awarding organisation is required to take appropriate steps to ensure that its policies and practices are working effectively to prevent malpractice as part of their risk management process. Awarding organisations might test the effectiveness of such measures by, for example:

- Monitoring and sampling. An awarding organisation should appropriately monitor and sample areas that may be high risk, focussing its monitoring on qualifications and/ or Centres with a history of malpractice or maladministration and taking into account relevant information provided by another awarding organisation under Condition A8.7(b).
- Scrutiny of materials. Awarding organisations should carry out regular checks of assessment materials to ensure that any potential malpractice or maladministration can be identified. Again, there may be more regular checks, or more in-depth scrutiny, where it is felt that there is a greater risk.
- Using data, feedback and internal audits to make sure their processes are working well. The process of preventing, detecting, investigating and sanctioning malpractice and maladministration can be viewed as cyclical. Where, despite measures in place, malpractice or maladministration does occur, an awarding organisation should use this to inform a new risk analysis and to decide how to reduce the risk of reoccurrence, in compliance with Conditions A6.2, A8.1 and D3.

Supporting Centres in their approach to malpractice and maladministration

Condition C2.5 requires an awarding organisation to provide effective guidance to their Centres on how the qualifications should be delivered. This might include guidance on malpractice and maladministration. Additionally, under Condition A8.5 we require awarding organisations to provide any additional, and potentially more focused, guidance on request by the Centre. An awarding organisation must respond to a request from a Centre to provide it with guidance on how best to prevent, investigate and deal with malpractice and maladministration.

However, an awarding organisation might sometimes need to do more than provide guidance to a Centre to discharge its duties under Conditions A6, A7, and A8. For example, where it decides the Centre cannot manage the issue itself, the awarding organisation might step in, in line with the requirement of Condition A8.1, to take all reasonable steps to prevent malpractice and maladministration.

Detecting malpractice and maladministration

225 Condition A8.2(a) requires that where malpractice or maladministration is suspected by an awarding organisation or alleged by any other person, and where there are reasonable grounds for that suspicion or allegation, the awarding organisation must, so far as possible, establish whether or not the malpractice or maladministration has occurred.

An awarding organisation should have a structured approach to dealing with whistleblowers, including clear policies and procedures to allow information from whistleblowers to be used effectively.

230 When an allegation or suspicion comes to light, the awarding organisation should act quickly to secure any relevant evidence and information to support their judgements. When deciding whether reasonable grounds for a suspicion or allegation exist, an awarding organisation should consider any relevant factors, including the following:

- 235 • the initial information provided with the allegation or which gives rise to the suspicion;
- the source of any allegation;
- any evidence that may reduce the credibility of the allegation;
- 240 • any previous allegations, suspicions or evidence that may support, or contradict, the facts or information presented; an awarding organisation should cross-reference allegations made against existing records;
- any previous relevant investigations in relation to a Centre, whether or not a finding of malpractice or maladministration was made; this should also include details it holds of any investigations by another awarding organisation; and
- 245 • the time between the alleged malpractice or maladministration and the date the allegation was made.

250 Awarding organisations should, in accordance with Condition A5.2(b), keep a log of all allegations and suspicions of malpractice and maladministration, along with records of investigations, eventual decisions on the existence of malpractice and maladministration and how this decision was reached. Awarding organisations should also consider retaining any additional information to allow them to identify patterns of behaviour relating to malpractice and maladministration over time in line with the requirement under Condition A6.1 to take all reasonable steps to identify the risk of the occurrence of any incident which could have an Adverse Effect.

255 Where the awarding organisation holds information relevant to its compliance with the Conditions it should consider the period for which it should retain this.

Notifying Ofqual

An awarding organisation must promptly notify Ofqual when it has cause to believe that an event has occurred, or is likely to occur, which could have an Adverse Effect.

260 Under Condition B3.2(g) an awarding organisation has a particular obligation promptly to notify Ofqual where it has cause to believe that there has been an incident of malpractice or maladministration, which could either invalidate the award of a qualification which it makes available, or could affect another awarding organisation.

265 In all cases, Condition B3.1 requires that Ofqual be notified promptly. Under Condition B3.6 the awarding organisation must not wait until it has the full picture before informing Ofqual. Therefore, it should not wait until it has completed any investigation before notifying Ofqual.

Where the suspected malpractice or maladministration could constitute criminal activity, an awarding organisation should promptly report concerns to the police.

270 **Investigating malpractice and maladministration**

Once the awarding organisation has established that there are reasonable grounds for the suspicion or allegation, it must conduct a rigorous and effective investigation. Usually an investigation will be more effective if it is carried out promptly.

275 Under Condition A8.3(a) an awarding organisation must establish, maintain and comply with up to date written procedures for investigating such allegations or suspicions. The awarding organisation should also have on record clear terms of reference for any investigation that it undertakes.

280 An awarding organisation should use, and regularly review, its written procedures, which may take the form of a standardised investigations policy and approach, which should address:

- who investigates concerns about malpractice or maladministration;
- how an investigation is undertaken, including how it will be conducted so as to ensure the preservation and integrity of evidence;
- how whistleblowers will be treated, and how prejudice towards them will be avoided;
- when and how anyone suspected of malpractice or maladministration will be notified about the investigation and given a right to supply evidence and respond to any preliminary findings;
- when and how interested parties will be notified of any issues which may affect them and given an opportunity to make submissions;
- how any interviews will be conducted;
- how facts will be gathered and evidence found, collated and stored;
- how evidence will be verified;
- how the confidentiality of investigation materials will be ensured;
- how the outcomes of its investigations will be presented and their accuracy assured;
- how and when any visits to Centres will be announced and undertaken; and
- what principles will be followed when it undertakes an investigation with other bodies.

300 Awarding organisations should not presume that the Centre is always best placed to complete an investigation. Under Condition A8.3(b) an awarding organisation must ensure that investigations are carried out rigorously, effectively, and by persons of appropriate competence who have no personal interest in their outcome.

305 This will require consideration of a number of issues on a case-by-case basis, including the potential scale and scope of the investigation, and the competence, capacity and personal interest of anyone that will complete any part of the investigation.

Scale and scope of the investigation

310 The scale and scope of the investigation will have an impact on who is best placed to complete the investigation. Awarding organisations should take into account:

- The nature of the possible malpractice or maladministration, for example, whether the issue relates to a breach of confidentiality in the design stage, cheating in assessments or problems at the marking or grading stage.
- 315 • The number of Learners involved, if any, in the alleged malpractice or maladministration and the number directly advantaged, or disadvantaged, by the alleged malpractice or maladministration.
- The degree of potential advantage or disadvantage to Learners involved in or affected by the alleged malpractice or maladministration.
- 320 • The extent to which Teachers or other professionals may be involved in the alleged malpractice or maladministration as this may also have implications when considering the degree of personal interest, as outlined below.
- The extent to which the allegation or suspicion suggests any level of knowledge or awareness of the suspected malpractice or maladministration at Centre level.
- 325 • The number of Centres involved.
- The impact on public confidence in regulated qualifications of the suspected issue.
- Any potential impact on public confidence when considering any role for Centre staff in the investigation.
- 330 • The degree to which alleged malpractice or maladministration may disadvantage other Learners.
- The number of other Learners that may be affected by the alleged malpractice or maladministration, along with the potential impact on other Learners, as this might influence the effect on public confidence.

335 The extent to which each factor is relevant, and whether any others should be considered, will vary, as will the appropriate weight to be given to any relevant factor.

Competence and capacity

340 An awarding organisation should make sure its investigators are competent to complete the investigation in line with its potential scale and complexity. It should make sure its investigators have appropriate skills and experience including in:

- gathering and recording evidence from interviews;
- gathering evidence from minors, vulnerable adults and those with learning difficulties;
- 345 • protecting, gathering and retaining evidence from documentation and electronic sources;
- the information that should be given to those suspected of being engaged with malpractice;
- when and how to involve other authorities including the police where criminal activity is suspected; and
- 350 • safeguarding.

In line with the requirement under Condition A8.3(b) for an investigation to be both rigorous and effective, where an individual has the appropriate competence, awarding organisations may also consider the capacity of the individual to undertake an investigation. The awarding organisation should consider:

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- the ability of the individual to undertake the investigation promptly; and
 - the time required and available capacity of the individual.

Under Condition A5.2(a), an awarding organisation must establish and maintain a Workforce of appropriate size and competence. As a result, awarding organisations should seek to have appropriate and sufficient access to trained investigators so that this resource is available should it be required.

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Personal interest

Under Condition A8.3(b), awarding organisations must ensure that investigations are also carried out by individuals with no personal interest in their outcome. Personal interest is an example of a wider Conflict of Interest. The definition of the term Conflict of Interest can be found in Condition J1. A personal interest is a Conflict of Interest that relates to a particular individual. Whilst an awarding organisation must ensure that anyone who conducts the investigation has no personal interest in its outcome, particular care must be taken when judging whether an individual within the Centre is best placed to conduct an investigation given the greater risk of a Conflict of Interest in that context. Further guidance around personal interest, and making a judgement as to whether this exists, can be found in the guidance to Condition A4.

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Awarding organisations should consider the scale and scope, competence, and personal interest both when identifying who is best placed to investigate a suspicion or allegation and when deciding who should gather evidence to support an investigation into suspected or alleged malpractice. As judgements about malpractice and maladministration will be based on any evidence gathered, these considerations are as relevant to who collects evidence as they are to who takes decisions based on that evidence.

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380 Taking appropriate action where malpractice or maladministration is suspected or alleged

Relevant Conditions

A key consideration for awarding organisations when deciding what action to take where malpractice is suspected or alleged is the obligation to comply with Conditions H5.1 and H6.1(d). These Conditions require an awarding organisation to ensure that the result of each assessment reflects the level of attainment demonstrated by a Learner and to issue results which accurately and completely reflect the marking of assessments.

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Whereas Conditions H5.1 and H6.1(d) require an awarding organisation to ensure that Learners are issued with results that reflect their performance, Conditions A7 and A8 require, in addition, that the Learner's performance has not been dishonestly manipulated (through cheating in an exam, for example).

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The action taken by an awarding organisation in a suspected or alleged case of malpractice must be geared towards achieving this overarching objective so as to fully comply with the relevant Conditions. In particular:

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- Condition A8.2(b) requires awarding organisations to promptly take all reasonable steps to prevent any Adverse Effect to which it may give rise;
- where such an Adverse Effect nonetheless arises, Condition A8.2(b) also requires an awarding organisation to promptly take all reasonable steps to mitigate the Adverse Effect as far as possible and correct it; and
- because cases of suspected or alleged malpractice are (necessarily) examples of an incident that could have an Adverse Effect, then Condition A7.1(b) also requires the awarding organisation to 'give priority to the provision of assessments which accurately differentiate between Learners on the basis of the level of attainment they have demonstrated and to the accurate and timely award of qualifications'.

Conditions A7.1(a) and A8.2(b) require an awarding organisation to take all reasonable steps to prevent any Adverse Effect that may result, or where an Adverse Effect occurs, mitigate it as far as possible.

410 *Factors to consider*

Where malpractice or maladministration is suspected but no determination has yet been made, an awarding organisation should consider whether to take any precautionary steps to reduce the potential for an Adverse Effect. It should take into account:

- The intended use of the qualification. For example, where an individual is relying on a qualification in order to move onto further study, an awarding organisation might choose to award the qualification to allow the individual to progress, but mitigate some of the risk in this case by committing to contact those who may rely on the result directly should the case subsequently be proven. Alternatively, in the case of a professional qualification, including any instances when qualifications confer a licence to practise, suspected malpractice may call into question whether an individual has demonstrated the required level of competence. Where this is the case, the potential Adverse Effect of allowing the individual to practise may outweigh any Adverse Effects on the individual of delaying their entry into their profession. Any health and safety or safeguarding issues will be relevant in this regard.
- Any time scales involved, for example, where the qualification may be used to apply for or enter higher education.
- The scale and scope of the possible malpractice or maladministration.
- Any potential risk to other qualifications as a result of the possible malpractice or maladministration.
- Whether there are additional risks that might arise as a result of the suspected malpractice or maladministration. For example, where a Teacher is suspected of malpractice, whether allowing them to continue to deliver assessments increases the risk of further incidents.
- Any legal implications arising from actions in each case.

Under Condition A7.1(b), where any incident occurs which could have an Adverse Effect, an awarding organisation must promptly take all reasonable steps to give priority to the provision of assessments which accurately differentiate

440 between Learners on the basis of the level of attainment they have demonstrated
and to the accurate and timely award of qualifications. In the case of malpractice or
maladministration, this Condition requires the organisation to give priority to ensuring
that it provides assessments that are fit for purpose. For example, should a large
445 scale security breach of assessment materials occur prior to an assessment, an
awarding organisation may initially focus on distributing alternative materials where
possible, in order to meet this obligation.

In line with the overarching objective outlined above, where malpractice or
maladministration is suspected or alleged prior to the issue of results, an awarding
organisation must consider whether it should delay the issue of any or all results. In
450 this respect, the absolute obligations to ensure that results are correct in Conditions
H5.1 and H6.1(d) are stronger obligations than the duty to take all reasonable steps
to comply with a timescale for issuing results in Condition H6.1(f). For example, it
may not be reasonable to issue a result which is highly likely to be incorrect simply to
meet a published date. Likewise, the requirement for the issue of results to be timely
455 under Condition H6.1(e) means that results should be issued at the earliest
appropriate time, not simply as soon as possible. The use to which a qualification is
put will be a relevant factor in considering timeliness.

An awarding organisation is under an obligation to issue results for all units and
qualifications under Condition H6.1 and this means that it cannot withhold results
460 indefinitely. However, an awarding organisation can conclude that a result should not
be issued where the malpractice affected the level of attainment demonstrated by
the Learner.

We will expect awarding organisations to carefully consider the balance between its
obligations when deciding whether to withhold results, using some of the factors
465 highlighted above when making such decisions.

A similar balancing exercise will be required where malpractice or maladministration
is alleged or suspected following the issue of results but prior to the issue of
certificates.

In accordance with Condition B3.5, the awarding organisation has a continuing
470 obligation to notify Ofqual as soon as possible of any steps that it has taken or
intends to take to prevent an Adverse Effect, or to correct or mitigate any Adverse
Effect that occurs.

Taking appropriate action once malpractice or maladministration is established

475 Under Condition A8.6(b), where malpractice or maladministration is established, an
awarding organisation must take action, or seek the cooperation of others in taking
such action, to sanction those responsible. Awarding organisations are required to
ensure that the action is proportionate to the gravity and scope of the malpractice or
maladministration found.

480 Proportionate action can only be taken once the facts of the case have been
established. Awarding organisations should therefore consider all relevant
information when determining what action to take on a case-by-case basis. Awarding
organisations should consider consequential effects, including the effect of the
proposed sanction on the individual, in all cases when judging which action(s) are
485 proportionate. An awarding organisation must balance the consequences for the

individual against the seriousness and effects of the malpractice or maladministration. This does not preclude the use of a sanctions matrix or similar, but does require the consequential factors in each individual case to be considered when judging whether or which sanction(s) are proportionate.

490 Under Condition H6.3(b), where an awarding organisation discovers that a result is incorrect, it must consider whether to correct it, having regard to the relevant guidance.

495 Under Condition I4.2(c), an awarding organisation must take all reasonable steps to ensure that it revokes any certificate if the result on the certificate is false because of malpractice or maladministration. It should consider how it will contact the Learners involved to notify them of the status of their certificates and of any arrangements for re-assessment and/or certification, as well as their right of appeal.

Review of decisions relating to malpractice and maladministration

500 Condition I1.1c (alternatively for GCSE, AS/A level and Project qualifications, Qualification Level Condition GCSE18.2(d), GCE18.2(d) and Project12.2(d) respectively) requires an awarding organisation to establish, maintain and comply with an appeals process in relation to its qualifications. This must provide for the appeal of decisions relating to any action to be taken against a Learner or
505 a Centre following an investigation into malpractice or maladministration. Learners should be informed of the outcomes of a malpractice investigation and any sanctions taken against them, together with the supporting reasoning. The awarding organisation might inform the Learner directly or require the Centre to do so.

510 Where awarding organisations face difficulties contacting Learners – once results have been issued, for example, due to Centre closure, or other factors – awarding organisations should take all reasonable steps to contact them. To provide for this the awarding organisation might gather individual contact details for any Learner investigated.

515 Where the awarding organisation finds that a Teacher has committed malpractice or maladministration, the awarding organisation should ensure that, where appropriate, the Teaching Regulation Agency (TRA), or any organisation that carries out the same function in England or another jurisdiction, is notified. In considering whether such a referral is appropriate, the awarding organisation should consider any guidance issued by the appropriate regulator and whether:

- 520 • the Teacher is subject to professional regulation by the TRA or other teaching regulator; and
- the malpractice or maladministration is serious based on the facts of the case and the seriousness of the sanction imposed.

525 If the awarding organisation has evidence that any Centre at which the Teacher is employed has made a referral to the TRA, it does not need to make a referral. Where there is doubt, the awarding organisation should make a referral itself. Where confidential information is disclosed by an individual who is not subject to regulation by the TRA or another teaching regulator, the awarding organisation should notify any other professional regulator to which that person is subject, where appropriate.

530 **What should an awarding organisation do after deciding what action to take?**

535 Condition D3.3 requires that where an event relating to an awarding organisation has had an Adverse Effect, it must review, and revise where necessary, its approach to the development, delivery and award of qualifications to ensure it remains appropriate. This could include, for example, putting in place new safeguards, changing a qualification, revising how it develops new qualifications and/ or providing further information and/or guidance. The awarding organisation should consider, in particular, if it should improve its controls or approach to malpractice or maladministration. This should be a cyclical process where an awarding organisation uses the incident to inform the identification of future risks under Condition A6.1. In accordance with Condition A6, an awarding organisation should also consider whether to update its contingency plan.

Questions

Question 1: To what extent do you agree or disagree that the draft guidance will help awarding organisations to understand the requirements of Conditions when dealing with malpractice and maladministration, including condition A8.

Question 2: Do you have any comments on the draft guidance on malpractice and maladministration? For specific comments, please refer to the relevant line number in your response.

Question 3: To what extent do you agree or disagree that the proposed style of guidance will help awarding organisations to understand the requirements when addressing malpractice and maladministration? Please provide any additional comments on the style of the guidance.

Question 4: To what extent do you agree or disagree that adding specific examples to the proposed guidance would help awarding organisations to understand the requirements of Conditions when dealing with malpractice and maladministration? If you agree, please indicate the particular sections of the guidance where you feel specific examples would be beneficial.

5. Equality Analysis

We are subject to the public sector equality duty. Annex B sets out how this duty interacts with our statutory objectives and other duties.

We considered the potential impact on Learners who shared protected characteristics⁹ of the draft guidance included in this consultation. The guidance applies equally to all awarding organisations offering regulated qualifications. Awarding organisations must have regard to this guidance; they do not have a duty to follow it directly in all cases.

⁹ For the purposes of the public sector equality duty, the 'protected characteristics' are disability, racial group, age, religion or believe, pregnancy or maternity, sex, sexual orientation, gender reassignment.

We did not identify any positive or negative impacts of our proposed amended guidance for people because of their protected characteristics.

Questions

Question 5: We have not identified any ways in which the proposed guidance would impact (positively or negatively) on persons who share a protected characteristic. Are there any potential impacts we have not identified?

Question 6: Are there any additional steps we could take to mitigate any negative impact resulting from these proposals on persons who share a protected characteristic?

Question 7: Do you have any other comments on the impact of the proposal on Learners who share a protected characteristic?

6. Regulatory Impact Assessment

We considered the regulatory impact of introducing this revised guidance. The Apprenticeships, Skills, Children and Learning Act 2009 requires that recognised awarding organisations have regard to the guidance we publish. This means that they must consciously consider it when making decisions about their approach. Awarding organisations must have regard to our guidance, so amending and increasing the length of the guidance would increase the overall impact of our requirements in terms of the amount of information to which awarding organisations must have regard.

Awarding organisations do not have to follow our guidance. Where an awarding organisation has reason to depart from the guidance, it can do so. The obligation on an awarding organisation is to comply with the Conditions, which we do not propose to change. Providing guidance should help awarding organisations to understand better how to comply with our requirements.

This proposed guidance would replace that which is already in place for Condition A8. Whilst awarding organisations will have to familiarise themselves with the new guidance, they will already have regard to the existing guidance, some of which is directly integrated into the proposed guidance.

Due to the length of the proposed guidance, the burden of familiarisation with it will be fairly low, and should be balanced against the potential time saved by awarding organisations in determining how best to comply with our Conditions when addressing malpractice and maladministration. We estimate the one-off cost of familiarisation with the new guidance to be in the region of £19,000 across 160 awarding organisations (meaning an average of c.£120 per awarding organisation, with some incurring higher or lower costs according to their organisation size)¹⁰.

¹⁰ This calculation is based on the model published here (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/619148/Guidance_to_General_Conditions_of_Recognition.pdf), updated to reflect the current number and profile of recognised awarding organisations and more-recent average awarding organisation staff costs.

We consider the impact of the guidance we are putting in place to be proportionate and necessary to ensure that malpractice and maladministration are addressed appropriately.

Implementation

We will announce our final guidance in early spring 2020, following this consultation. We will also confirm the date on which any new requirements take effect in our regulatory framework.

Questions

Question 8: Do you have any comments on the estimated costs to awarding organisations, large and small, of following our proposed guidance?

Question 9: Are there any additional steps we could take to reduce the regulatory impact of our proposals?

Question 10: Are there any costs or benefits associated with our proposals which we have not identified?

Question 11: Do you have any comments on the readability and accessibility of the guidance?

Question 12: Do you have suggestions on how it might be improved?

We have a duty under the Apprenticeships, Skills, Children and Learning Act 2009 to have regard to the desirability of facilitating innovation relating to the provision of regulated qualifications. We have committed in our Corporate Plan to surveying awarding organisations' views of the impact of our regulatory requirements on innovation and to consider any revisions required in response.

We believe that the guidance we are proposing on malpractice and maladministration will not stop awarding organisations taking innovative approaches to the design and delivery of qualifications. We would, however, welcome views on whether there is anything in our proposals that would prevent innovation by awarding organisations.

Question

Question 13: Do you have any comments on the impact of our proposals on innovation by awarding organisations?

7. Introduction of proposed guidance

We encourage comments and feedback on our proposals.

We will host a consultation event as part of our annual conference on the 19 March 2020 to allow for further questions, review and feedback. We would encourage awarding organisations to attend this event, as well as providing formal feedback to our consultation. If you are unable to attend, you can still provide formal feedback to our consultation online or via email as highlighted on page 3 of this document.

Following the consultation we will consider all of the responses we receive, and we will decide whether to introduce the draft guidance, either as now presented or amended. We aim to publish our decisions before the end of April 2020. Our

intention is that the proposed guidance, if adopted, will come into effect from May 2020. As we are not proposing to change our Conditions, and only guidance that supports them, we believe this will allow sufficient time for awarding organisations to consider the proposed guidance.

Question

Question 14: Please provide any comments you may have on when any new guidance should be introduced.

Annexes

Annex A – Your data

What's this Privacy Notice about?

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.

It's our job to tell you how we will collect and use your information, why we need it and what your rights are. We do this to comply with the Data Protection Laws and to protect your privacy.

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

Purpose and lawful basis for processing

As part of this consultation process you are not required to provide your name or any personal information that will identify you. If you provide us with your personal details then we might process those details to get in touch with you about your response.

We will process any other personal data provided in the responses for the purpose of informing the development of our policy, guidance or other regulatory work in the subject area of the request for views. In the case of consultations, 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 names of individuals or other contact details.

If you tell us that you wish your response to be treated as confidential, we will not include your details in any published list of respondents, although we may quote from your response anonymously.

The lawful basis we are relying on to process your personal data is article 6(1)(e) of the GDPR, which allows us to process personal data when this is necessary for the performance of our public tasks in our capacity as a regulator.

Sharing your response

We may share your response, in full, with The Department for Education (DfE) and The Institute for Apprenticeships and Technical Education (the Institute) 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. Where we have received a response to the consultation from an organisation, we will provide the DfE and the Institute with the name of the organisation that has provided the response, although we will consider requests for confidentiality.

Freedom of Information

Please note that as a public body, all written information that we hold is subject to Freedom of Information requests. Any requests from a third party for us to share your personal data with them will be dealt with in accordance with data protection laws.

If there is any part of your response that you wish to remain confidential, please indicate this in your response but note we cannot guarantee that confidentiality can be maintained in all circumstances.

How long will we keep your personal data

For this consultation, Ofqual will keep your personal data 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

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

Please note that exceptions apply to some of these rights which we may apply in accordance with the law. If you would like to exercise your rights, please contact us using the details set out above.

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.

Annex B – Ofqual’s role, 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;

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 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. 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 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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