Consultation response

Amending the Taking Regulatory Action policy

29 November 2019

1. **To what extent do you agree or disagree that we should explain our approach to recording non-compliance in the TRA policy?**

   AQA fully agrees with Ofqual's arguments for explaining, in the TRA policy, its approach to recording non-compliance, for reasons of clarity, transparency, and ensuring consistency and accountability.

2. **To what extent do you agree or disagree we should not publish records of non-compliance as a matter of routine?**

   AQA fully agrees that Ofqual should not publish records of non-compliance as a matter of routine, for the reasons stated in the consultation document, i.e. the damaging effects of publishing without full context. We would also note that publishing all non-compliance, however minor, would materially alter the relationship between the regulator and regulated awarding organisation, making it more adversarial and likely to militate against Ofqual's stated intention to promote transparency. More widely, publishing where it is not necessary has the potential to harm public confidence in the exam system.

3. **Do you have any comments on whether, and in what circumstances, we should publish general information about the non-compliance we record?**

   In principle, there may be benefit in Ofqual publishing general information about the non-compliance it records, without naming the awarding organisation(s) concerned, where this helps other awarding organisations to remain in compliance. However, we feel it would be extremely challenging for Ofqual to consistently determine what is genuinely helpful to the sector as a whole, rather than a punishment in disguise, and without it having unintended consequences.

4. **To what extent do you agree or disagree that we should add issuing a rebuke to our non-statutory powers?**

   Ofqual has offered no evidence in its consultation document to indicate why further penalties are needed, and no data to support an argument that there is a notable increase in non-compliance that requires more severe, public treatment of awarding organisations. Ofqual's consultation document does note that "the sector we regulate continues to change, both as a result of market pressures and as we develop the way we regulate to better secure our objectives", which suggests that Ofqual recognises the impact of the market, but not what influences and shapes that market. Ofqual should also guard against the law of diminishing returns as more penalties, in more forms, are issued. AQA would like, however, greater clarity on the circumstances of when an instance of non-compliance becomes a rebuke.

5. **To what extent do you agree or disagree with our proposals for publication, as set out in para 2.17, if we issue a rebuke?**

   For a rebuke to serve one of the purposes Ofqual believes it would serve - namely "To promote public confidence by demonstrating that we take non-compliance seriously" - then it would appear logical that any rebuke must be made public. However, Ofqual would need to consider very carefully, both in relation to individual cases and over time, whether it is promoting or undermining public confidence.

6. **To what extent do you agree or disagree that issuing/imposing fixed penalties should, in principle, form part of our response to non-compliance?**

   Ofqual's consultation document makes clear that the regulator already has the power to give "directions, which also demonstrate that we consider the non-compliance to be serious, but that power is not available unless the non-compliance is ongoing or likely to recur". This appears already to address Ofqual's argument for fixed penalties being required to deter awarding organisations from thinking that "these breaches are condoned or tolerated which means the risk of repetition". Having a strong regulator supports the sector; a proliferation of penalties may not have the same effect.

   Ofqual also already has the power when imposing a fine, as stated in the consultation document, to "reduce[d] the amount of the fine to reflect the awarding organisation's co-operation. This is consistent with good regulatory practice and reflects the current TRA policy which explains that we will take the awarding organisation's co-operation into account when considering the amount of any fine." Using this existing power to negotiate prompt payment of fines would surely also avoid any need for further proliferation of penalties.

   The benefit of avoiding the proliferation of penalties is further underlined by the point made by Ofqual in the consultation document that "In most cases, awarding organisations recognise when they have fallen into non-compliance and will admit the breach in their correspondence with us" and "based on our experience, we anticipate that it is unlikely awarding organisations will refuse to pay costs where we have required them to do so".

   AQA would welcome confirmation that Ofqual would differentiate consistently between its different enforcement methods and when they are used.

7. **To what extent do you agree or disagree that we should explain our approach to settlement in the TRA policy?**

   AQA strongly supports this proposal. It would make it clearer that awarding organisations can go straight to settlement when admitting a breach and accepting that a fine should be paid, rather than committing time and resource to collating evidence. AQA also notes this would bring such matters to a speedier conclusion. Ofqual's stated intention in relation to settlement therefore reinforces the points made in our response to question 6, above.

8. **Do you have any comments on the proposed approach to the settlement described in para 2.31?**

AQA fully supports Ofqual's proposed approach to the settlement as described in paragraph 2.31 of the consultation document, including the awarding organisation's "agreement to a shortened procedure", which again reinforces the points made in our response to question 6, above.

9. **To what extent do you agree or disagree that we should remove the £10,000 threshold for the recovery of costs?**

Given the statements Ofqual has made in its consultation document (and reproduced in the final paragraph of our response to question 6, above) AQA agrees that Ofqual should remove the £10,000 threshold for the recovery of costs.

10. **To what extent do you agree or disagree that we should seek to recover costs whenever we think it proportionate in the circumstances of the case?**

AQA would support Ofqual in seeking to recover costs when those costs are demonstrably "proportionate". We would not, however, support the far broader and very much less definable description in the consultation document that Ofqual have the right to recover costs "where we think it is the right thing to do". AQA would, however, hope for further guidance on when Ofqual will seek to recover costs, to ensure the system is kept consistent.

11. **To what extent do you agree or disagree that we should explain our approach to making requirements under the conditions in the TRA policy?**

AQA fully supports the proposal that Ofqual explain, in the TRA policy, the significant extent, flexibility, strength and effectiveness of its existing powers to make requirements – individually and in combination – under the existing Conditions of Recognition. This too reinforces the points made in our response to question 6, above.

12. **To what extent do you agree or disagree with the proposed approach to the publication of requirements under the conditions (as set out in para 2.47)?**

AQA fully agrees with the proposal, as set out in paragraph 2.47 of the consultation document, that Ofqual explain in the policy that it can already make requirements and issue recommendations, or advice, to which an awarding organisation must have regard. However, for the sake of transparency we would ask that Ofqual define by example what "an appropriate case" would be that required Ofqual to publish either the fact that it had made a requirement or the specifics of that requirement.

13. **To what extent do you agree or disagree that we should add issuing notices about centres to our non-statutory powers?**

AQA broadly supports this proposal, particularly where there are multiple instances or a particularly serious instance, such as fraud, within a single centre. This would give all awarding organisations an opportunity to review their controls with that centre. We would ask that Ofqual and the relevant awarding organisations are

obliged to work collaboratively before any such notice is agreed and issued. This would be helpful to the industry as a whole, and may also support centre improvements.

14. Do you have any comments on the circumstances in which we might issue a notice about a centre?

AQA fully supports the intent set out in paragraph 2.53 of the consultation document that Ofqual:

- would not expect to issue notices about centres regularly
- would be unlikely to consider doing so in connection with every report of malpractice made to Ofqual
- would anticipate issuing such notices only where there have been multiple or systemic malpractice findings in relation to a centre, perhaps by multiple awarding organisations within a relatively short period of time
- would consider only in exceptional circumstances issuing a notice in relation to a single finding of particularly serious malpractice, perhaps involving allegedly fraudulent activities.

15. To what extent do you agree or disagree that we should explain the circumstances in which we are likely to accept an undertaking, in the TRA policy?

AQA fully agrees with the proposal, as set out in paragraph 2.61 of the consultation document, that Ofqual explain in the policy the circumstances in which, in practice, it would be likely to accept an undertaking, for the sake of transparency and better public understanding of the regulator's existing powers.

16. To what extent do you agree or disagree that we should revise the current TRA policy for representations (as described in paragraphs 2.65 and 2.66)?

AQA agrees with the statement in paragraph 2.65 of the consultation document that "…the TRA policy should be changed to reflect [Ofqual's] experience and should make clear that in most cases [Ofqual] would anticipate an urgent need for action where a direction is contemplated, and that the period for representations would therefore usually be relatively short".

AQA does not agree with the statement in paragraph 2.66 of the consultation document that "For any non-urgent cases, [Ofqual] consider[s] the usual period for representations should be 14 days, rather than 30 as the TRA policy now contemplates. Awarding organisations would in any event have the opportunity to ask for an extension of time in which to make representations where there is a good reason". This proposal adds to Ofqual's and awarding organisations' administrative burden – in seeking and negotiating an extension, in a non-urgent case – without any apparent advantage to either, and with an added drain on time and other resources.

17. To what extent do you agree that we should change the name of the TRA policy to 'Supporting Compliance and Taking Regulatory Action'?

AQA agrees that 'Supporting Compliance and Taking Regulatory Action' is an appropriate title for the policy.

18. To what extent do you agree or disagree that we should continue to assess the impact of any proposed regulatory action on a case-by-case basis?

AQA agrees that Ofqual should, as a matter of course, continue to assess the impact of any proposed regulatory action on a case-by-case basis, as long as the actions taken are consistent.