

# APPRENTICESHIPS, SKILLS, CHILDREN AND LEARNING ACT 2009

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 7: Office of Qualifications and Examinations Regulation**

##### *Chapter 1: Establishment, objectives and general duties*

##### *Section 127: The Office of Qualifications and Examinations Regulation*

364. This section establishes the Office of Qualifications and Examinations Regulation as a body corporate, specifies that the body will be referred to as “Ofqual” in this Act, and gives effect to Schedule 9, which contains further detailed provisions about matters such as Ofqual’s constitution and proceedings.

##### *Schedule 9: The Office of Qualifications and Examinations Regulation*

365. This Schedule makes provision about the constitution and governance of Ofqual.

#### **Status**

366. Ofqual is to perform its functions on behalf of the Crown (paragraph 1). This provision makes Ofqual a Non-Ministerial Department.

#### **Membership**

367. The Chair of Ofqual is appointed by the Crown. The Chair will be known as the Chief Regulator of Qualifications and Examinations. The Government does not intend this title to imply that the Chair has any statutory functions in his or her own right – all the functions in Part 7 are functions of Ofqual itself – but in practice the Chief Regulator is likely to be the public face of Ofqual.
368. The “ordinary members” are appointed by the Secretary of State following consultation (in all usual circumstances) with the Chief Regulator. Paragraphs 2(5) and (6) set out the procedures to be followed if it is not practicable for the Secretary of State to consult the Chief Regulator (because, for example, there is a vacancy) and it is necessary to make the appointment before it would be practicable to do so. Ofqual may appoint one of its ordinary members as the deputy chair. One of the ordinary members must be appointed following consultation with the Department for Employment and Learning in Northern Ireland, reflecting Ofqual’s responsibilities there. The procedures relating to the removal of members or the removal of the deputy from that office are set out in paragraph 4.
369. [Paragraphs 2 to 5](#) set out the arrangements for appointing the Chief Regulator and ordinary members, the terms of appointments, and the responsibility of the Secretary of State for determining their remuneration, allowances and expenses.

## **Chief executive and other staff**

370. The chief executive of Ofqual is an ex-officio member of Ofqual. Paragraph 6 provides that the first chief executive will be appointed by the Secretary of State (because Ofqual will not exist at that stage, it may not appoint); thereafter the appointment will be for Ofqual. Ofqual may appoint staff; the numbers of staff and their conditions of service are to be agreed with the Secretary of State.

## **Committees**

371. [Paragraphs 7 to 11](#) set out the arrangements for Ofqual establishing and delegating to committees and sub-committees, and give Ofqual the power to establish a committee jointly with another body. (The latter power would, for example, allow Ofqual to set up a joint committee with other qualifications regulators in the United Kingdom.) Joint committees are allowed to regulate their own procedure. Paragraph 10 also allows Ofqual to delegate functions to a member of Ofqual or of its staff.

## **Supplementary powers**

372. Under paragraph 14, Ofqual may do anything that it considers necessary or appropriate for the purposes of, or in connection with, its functions, but may not lend money.

## **Objectives and general duties**

### ***Section 128: Objectives***

373. This section sets out five objectives for Ofqual in discharging its functions:
- the qualifications standards objective,
  - the assessments standards objective,
  - the public confidence objective,
  - the awareness objective, and
  - the efficiency objective.
374. The statutory objectives in the current legislation, which apply to both QCA's regulatory and non-regulatory functions, are much broader.
375. Ofqual's objectives relate to "regulated qualifications", which is a term defined in section 130 or to "regulated assessment arrangements", as defined in section 131.
376. The qualifications standards objective – set out in [section 128\(2\)](#) – is for Ofqual to secure that regulated qualifications: (a) give a reliable indication of knowledge, skills and understanding; and (b) indicate a consistent level of attainment (including over time) between comparable regulated qualifications. "Reliability" here is used not in the sense used by qualifications experts, which means consistency of assessments, but rather in the broader general sense, which includes ensuring that the qualifications and the way in which they are assessed offer a valid way of measuring knowledge, skills and understanding.
377. Similarly, the assessment standards objective – set out in [subsection \(3\)](#) – is for Ofqual 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. The ultimate responsibility for regulated assessment arrangements, which are statutory assessments, lies with the Secretary of State, so Ofqual's role is to monitor and report on those arrangements, and in doing so to promote the maintenance of standards.

378. Ofqual must perform its functions with the aim of ensuring that comparable qualifications— whether they are contemporaneous or delivered at different times – indicate a consistent level of attainment. If the requirements of a qualification have changed over time, perhaps because the requirements of the industry to which they relate have evolved (this will be a particular issue in the IT industry, for example), it may be that a modern qualification is not comparable with its predecessor and therefore that Ofqual does not have to secure that the two qualifications indicate a consistent level of attainment. But if two qualifications are comparable, Ofqual must act to ensure that they do indicate a consistent level of attainment.
379. A similar set of requirements applies to the promotion of regulated assessments standards.
380. The standards of qualifications and assessments – the benchmarks against which learners are measured, or “assessment standards” – are not the same thing as the standards of education more broadly (“performance standards”). “Standards” in this first sense are like the height of a hurdle, and Ofqual’s objective is to keep that height consistent between comparable qualifications and assessments, including over time. Whilst it is generally a policy objective of the Government to improve the quality of teaching and learning so that the number of people able to jump the hurdle increases (which is how the term “standards” is more commonly used), that is not a concern of Ofqual’s under its standards objectives.
381. The public confidence objective is set out in *subsection (4)* and requires Ofqual to promote public confidence in regulated qualifications and regulated assessment arrangements. This is to ensure not only that qualifications are reliable but that they are trusted.
382. The awareness objective is set out in *subsection (5)* and, unlike the standards and public confidence objectives, it applies only in relation to regulated qualifications. The Secretary of State has statutory responsibility for regulated assessment arrangements, so it is for him to determine how to ensure that there is sufficient awareness of them.
383. This objective is concerned with promoting awareness of the range of regulated qualifications on offer, the benefits of regulated qualifications to learners, employers and institutions within the higher education sector and the benefits to awarding bodies (including, for example, employers awarding their own qualifications) of regulation.
384. The efficiency objective is set out in *subsection (6)* and requires Ofqual to ensure that regulated qualifications are provided efficiently and that any relevant sums payable for the award or authentication of a regulated qualification represent value for money. This objective reflects the fact that Ofqual will have a role as an economic regulator, including a power to cap examination fees. Ofqual does not have a specific efficiency objective in relation to regulated assessments, because these are statutory assessments delivered on behalf of the Secretary of State, rather than – as with qualifications – by independent organisations operating in a regulated market.

### ***Section 129: General duties***

385. *Subsection (1)* requires Ofqual in carrying out its functions so far as is reasonably practicable to act in a way that is compatible with its objectives under section 128 and which it considers most appropriate for the purposes of meeting those objectives.
386. *Subsection (2)* sets out the matters to which Ofqual must have regard in performing its functions.
387. *Subsection (2)(a)* requires Ofqual to have regard to the need to ensure that the number of regulated qualifications is appropriate. *Subsection (3)* provides that an “appropriate” number of qualifications is based on ensuring a reasonable level of choice for learners in terms of both the number of different regulated qualifications on offer, and the number of different forms of each regulated qualification; but that the number of

different qualifications in similar subject areas or serving similar functions should not be excessive. For example, it would be appropriate for there to be a choice of versions (or forms) of a qualification called “retail management”, offered by a range of different awarding bodies. However, Ofqual should seek to avoid an excessive number of qualifications that are similar to “retail management”, but with slightly different titles, which risks causing confusion.

388. Subsections (2)(b) and (c) require Ofqual to have regard to the reasonable requirements of:
- those who are seeking to obtain or who might reasonably be expected to seek to obtain regulated qualifications, and
  - in relation to regulated assessment arrangements, pupils and children, including in each case those with learning difficulties.
389. The terms used in these subsections are defined in *subsections (9) to (11)*.
390. Under subsections (2)(d) and (e), Ofqual must have regard to the reasonable requirements of employers and institutions within the higher education sector (as defined in section 172(1)).
391. Under subsection (2)(f), Ofqual must have regard to information provided to it by the QCDA and Ofsted, and any bodies specified by the Secretary of State which have knowledge of or expertise in the requirements of industry, commerce, finance, the professions or other employers regarding education and training. This provision will allow the current arrangements to continue, by which the regulator must take into account the views of Sector Skills Councils in relation to qualifications in their sectors. Under a similar provision in the current legislation (section 26 of the Education Act 1997), Sector Skills Councils in England have been designated by the Secretary of State as bodies to which the regulator must have regard in regulating vocational qualifications. This is in support of the Government’s policy for improving the relevance to employers of vocational qualifications as part of its skills strategy.
392. Under subsection (2)(g), Ofqual must have regard to the desirability of facilitating innovation in connection with the provision of regulated qualifications.
393. Subsection (2)(h) requires Ofqual to have regard to the specified purposes of regulated assessment arrangements, as defined in section 131(6). The definition operates by reference to definitions in section 76(1) of the Education Act 2002 and section 41(2) (c) of the Childcare Act 2006. These make provision about the purposes respectively of National Curriculum assessment arrangements (NC assessment arrangements) and of assessment arrangements in connection with the learning and development requirements of the Early Years Foundation Stage (EYFS assessment arrangements). The purpose of NC assessment arrangements is “ascertaining what [pupils] have achieved in relation to the attainment targets for that stage”, and for the EYFS assessment arrangements “ascertaining what [children] have achieved in relation to the early learning goals”. Those provisions are amended by paragraphs 32 and 39 of Schedule 12 respectively to allow the Secretary of State to specify additional purposes of assessment arrangements to which Ofqual would then need to have regard.
394. *Subsection (6)* requires Ofqual to have regard to such aspects of Government policy as the Secretary of State directs. This provision is modelled on a similar provision in the legislation setting up Ofsted. The Government expects this provision to be used, for example, to specify that the Government wished to ensure that assessment were not unduly burdensome for schools. Any such direction is not intended to impinge on Ofqual’s independence – it would not require Ofqual to act in a particular way, simply to take into account the policy in question in deciding how it would be appropriate for it to act. *Subsection (7)* requires the Secretary of State to publish any such direction.

## **Regulated qualifications and regulated assessment arrangements**

### ***Section 130: Meaning of “regulated qualifications” etc.***

395. This section describes the types of qualifications that Ofqual has the power to regulate.
396. For a qualification to be a “regulated qualification”, three criteria must be met:
- it must not be a foundation, first or higher degree;
  - it must either (a) be awarded or authenticated in England, or (b) be a vocational qualification awarded or authenticated in Northern Ireland;
  - it must be awarded or authenticated by a body which is recognised by Ofqual under section 132 in relation to that qualification.
397. The meaning of awarding or authenticating a qualification “in England” and “in Northern Ireland” is explained in *subsection (4)*: there must be, or may reasonably be expected to be, persons seeking to obtain the qualification who are, will be or may reasonably be expected to be assessed wholly or mainly in England or Northern Ireland.
398. Ofqual’s role in regulating relevant vocational qualifications in Northern Ireland may be removed by order of the Secretary of State. Before making such an order he would have first to consult the Department for Employment and Learning in Northern Ireland and the order would be subject to the affirmative procedure. This is to allow for the possibility that the Northern Ireland authorities may in future wish to change the arrangements for the regulation of qualifications in Northern Ireland.
399. In the Education Act 1997, the QCA’s regulatory responsibilities relate to external qualifications, defined as:
- “any academic or vocational qualification authenticated or awarded by an outside person... (section 24(6)(a)).
400. The restriction to external qualifications has been removed in the Act, which means that Ofqual may recognise bodies which both teach and award qualifications – for example, employers or colleges which have the capability to do so. This change has implications for other legislation, for example for section 96 of the Learning and Skills Act 2000, which is amended by paragraph 27 of Schedule 12.

### ***Section 131: Meaning of “regulated assessment arrangements” etc.***

401. This section describes the types of assessment that Ofqual has the duty to keep under review. “Regulated assessment arrangements” means the arrangements made for assessing pupils in England in respect of each key stage of the NC; and the arrangements for assessing children in England. (This equates currently to NC tests at Key Stages 1 and 2, teacher assessment as part of Key Stages 1-3 and the EYFS Profile.) As noted above the purpose of NC assessment arrangements is “ascertaining what [pupils] have achieved in relation to the attainment targets for that stage”, and for the EYFS assessment arrangements “ascertaining what [children] have achieved in relation to the early learning goals”; and there is a new provision in the Act for the Secretary of State to specify additional purposes by order. These defined specified purposes provide Ofqual with a policy framework within which it is to monitor and report upon regulated assessment arrangements, and it is required to “have regard to” these purposes.
402. The NC assessment arrangements are made under the Education Act 2002, setting out the arrangements for assessing pupils at each key stage of the NC. The EYFS assessment arrangements are made under the Childcare Act 2006.