



Qualifications and  
Curriculum Authority

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# Intelligent regulation: trust and risk

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This paper considers trust and risk in regulation, with particular reference to the regulation of qualifications, which is currently undertaken by the Qualifications and Curriculum Authority (QCA). On 26 September 2007, the Secretary of State for Children, Schools and Families announced<sup>2</sup> that the regulatory functions of QCA will transfer to a new, independent, regulatory authority, which will report directly to Parliament, rather than to Ministers. This will require legislation.

## Background

QCA regulates qualifications (with the exception of university degrees) and is the latest in a series of organisations, stretching back over the past half-century, overseeing school examinations and successive waves of vocational qualifications. QCA, like its predecessors, has largely been a quality regulator, but, more recently, has also begun to emerge as an economic regulator of the qualifications market or markets. For readers from other sectors, I would mention two points about regulated qualifications. The first is that qualifications – including national school examinations – are provided in England by a middle layer of independent organisations, which we call awarding bodies. Many are represented here this evening. They range from large organisations of international repute to tiny niche providers, and they are the ones who deliver qualifications. This frequently baffles commentators from other countries, who expect state-delivered exams for school leavers and industry- or profession-delivered vocational training. Awarding bodies sell their qualifications, and the price for many of them – though not all – is paid largely by the public purse. There is increasingly explicit competition within sub-groupings of the awarding bodies, although not usually over price. QCA has statutory powers<sup>3</sup> – not yet used – to set conditions limiting prices for accredited qualifications.

The second point is that not all qualifications are regulated. In fact, most are not. QCA currently recognises 120 awarding bodies to offer regulated qualifications. There are an estimated 400 other organisations offering qualifications, not to mention employers and training providers who we are encouraging to join the national system.

QCA as regulator has signed up to the Government's five principles of good regulation – proportionality, accountability, consistency, transparency and targeting. These also

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<sup>1</sup> Lecture given on 8 November 2007, at an event hosted by the Qualifications and Curriculum Authority

<sup>2</sup> [www.dcsf.gov.uk/pns/DisplayPN.cgi?pn\\_id=2007\\_0170](http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2007_0170)

<sup>3</sup> Education Act 1997, S 26(4)(a)

inform the 2006 Legislative and Regulatory Reform Act, which does not currently apply to QCA. Government could, by Order, apply that Act to the new regulator.

QCA has already set a strategic direction as regulator to regulate at a higher level. There are at least three levels at which qualifications can be regulated. The highest is the level of the system as a whole. Does it meet the public's needs? Is it value for money? Do market forces work? Next down we have the level of the organisations offering qualifications – the awarding bodies. Are they viable and well-managed? Do they have processes in place to produce secure and high-quality assessments, and control their own quality? Do they provide a good service to their customers? The third level is that of the individual qualification. And beyond that there are further layers of detail – modules, units, question papers and so on.

Until recently, QCA's activity as a regulator has been mainly at the level of individual qualifications – accrediting each one into the system after a lot of checks, and then monitoring them. Our current legislation is entirely based on functions at that level. However, we have announced the intention to move up the levels to concentrate more on licensing organisations to participate in the national system, ensuring that they are fit to do so, and relying on them to control their own quality. We shall see later what the implications of that change of focus are for trust and risk.

## Trust

In thinking about trust and the regulation of qualifications, it is helpful to distinguish three different things:

- the amount of trust among all the actors in the regulated system
- trust between the regulator and the regulated
- public trust in the regulator.

First, let us consider trust within the system of regulated qualifications and national curriculum assessments, and the wider educational system in which they play a part. In his recent book *Education by Numbers – the Tyranny of Testing*<sup>4</sup>, Warwick Mansell argues that micro-accountability for results can distort teacher behaviour and get in the way of good education.

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<sup>4</sup> Mansell, Warwick, *Education by Numbers: The Tyranny of Testing*, Politico's, London, 2007

Accountability systems in education are a matter for Government, rather than the regulator. And there is no doubt that setting challenging targets has driven improvements in many public services, including education. However, the regulator does have a role to challenge any inappropriate conclusions that are drawn for accountability purposes from exam and test results – for example, from small variations in marks. The regulator should also be vigilant for any evidence of accountability systems unintentionally encouraging malpractice – for example, teachers being encouraged to give too much help to push a piece of GCSE coursework up from grade D to grade C.

I believe that confidence that standards are being maintained can be consistent with allowing greater space for the professionalism of teachers. As a citizen and the product of a family of teachers, I want young people to be taught by proud professionals with ownership of their professional values and standards. I do not want them to be taught by frightened individuals constrained by multiple checks. But I also want to be able to be sure that the education given is of a high quality and that bad practice is acted upon.

I believe that this is an area in which education can learn from medicine. Sir Donald Irvine, a former President of the General Medical Council, the Royal College of Physicians and the Picker Institute have developed a charter for what they call 'patient-centred professionalism'<sup>5</sup>. This sees patients as intelligent and participative users of the doctor's expertise. As a patient I know I can trust my doctor because information about the doctor is available to me in a form I can understand, and because the regulation of the doctor's profession requires the doctor to take part in professional development and to have his or her expertise regularly 'revalidated'. The regulated profession has to earn the public's trust, but when it is earned it is a win-win. The patient has the best care and the doctor is motivated and rewarded. Public trust can be shaken by scandals or reported problems, and that can lead to a shake-up of the institutional arrangements, as we are seeing now in medicine in the wake of the calamitous Dr Shipman. But the answer is to reset the balance and recreate space for accountable professionalism.

By analogy, I call for a regulated system of qualifications and assessments that provides a framework in which the professionalism of teachers – including their expertise in assessment – can flourish. But that requires a commitment to genuine openness by the teaching profession. Information about teachers – including outcomes of their students' assessments – should routinely be available to parents and the wider public, and we should all know that teachers are continually developing their knowledge and skills, because their profession requires them to do so. Professionalism is not a black box, but

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<sup>5</sup> [www.pickereurope.org/page.php?id=9](http://www.pickereurope.org/page.php?id=9)

an open box. The newly launched Institute of Educational Assessors will be a considerable asset in carrying this forward.

So my first proposition on trust is that **the regulated system should encourage and foster the professionalism of teachers, including professionalism in assessment.**

I turn now to trust between the regulator and the regulated, with particular reference to the qualifications regulator and awarding bodies. In all sectors it seems sensible to minimise the burden and cost of multiple checks and make best use of the expertise of the regulated organisations, which are often much larger and better resourced than the regulator. This has led to the championing of so-called 'co-regulation' – an arrangement where the regulator steps back and allows the regulated to regulate themselves within limits, with backstop powers for the regulator.

QCA and the qualifications regulators for Wales and Northern Ireland have piloted a scheme of self-assessment by awarding bodies<sup>6</sup>, and the pilot has been well received. But in my view there is a danger of some sophistry in self-assessment regimes. Detailed prescription for compulsory self-assessment is really thinly disguised external assessment. The challenge for the new regulator will be to make sure that licensed organisations have quality control systems which meet regulatory requirements, but to set these requirements at a high level and to allow regulated organisations to meet them in a way that adds most value for them, as well as satisfying the regulator.

So my second proposition about trust is that **regulated organisations should be trusted to design their own quality control systems, and the requirements for those should be set at as high a level as possible.**

The new qualifications regulator should aim for as much clarity as possible in its communications with regulated organisations. The awarding bodies should understand where the regulator is coming from, and not wonder what on earth it is going to say next. And where there is a need for a tough exchange, the rules of engagement should be clear. In their interesting book *Responsive Regulation*, Ayers and Braithwaite write in these terms about relationships between regulators and those whom they regulate:

Trust creates an environment of communication and mutual understanding of positions; distrust means misperceptions of the agendas and preferences of the other. Given that regulatory games are not zero-sum games, trust therefore opens the way for win-win solutions and reduces the prospect of lose-lose

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<sup>6</sup> [www.qca.org.uk/qca\\_7659.aspx](http://www.qca.org.uk/qca_7659.aspx)

solutions. And if the solutions must be win-lose, trusting regulators can take it in turn to lose on the occasions when it is least damaging for them.<sup>7</sup>

So my third proposition about trust is that **regulators should communicate their agendas clearly to those whom they regulate**. This will be crucial for the new regulatory regime.

An age-old dilemma for regulation is how to avoid trust – which involves cooperation and mutual respect - leading to regulatory capture and even corruption. How can a trusting qualifications regulator avoid becoming too close for comfort to the awarding bodies?

Ayres and Braithwaite suggest that one of the protections against regulatory capture is what they call 'tripartism'<sup>8</sup> – the involvement of a third party, who can step in if the regulator and the regulated get unhealthily close. The announcement of the new independent regulator has taken away the third party lurking behind QCA's current dealings with awarding bodies – namely, the Government. There is always an implicit, if not explicit, threat that if the regulator does not, for example, limit fees or require exemptions for disabled candidates, the Government might step in and issue a direction to do so. And unpopular regulatory projects are currently authorised by so-called 'remit letters' that QCA receives from the Government. Those crutches will not be available to the independent regulator. So how can it safeguard against regulatory capture?

I believe that in the future there will need to be some sort of third party safeguarding the new qualifications regulator against regulatory capture, and that it should probably be some manifestation of learners – the end-users of qualifications – or the public. This could involve a panel or panels that would be able to challenge the regulator to hold the awarding bodies appropriately to account from the point of view of the most important stakeholders – learners and the public. A strong non-executive board will clearly also be an important safeguard, but I believe that that is not a substitute for a more explicit forum for challenge by learners and the public.

So my fourth proposition is that **the new regulator should set up arrangements for a panel of learners and the wider public to observe its dealings with awarding bodies**. The views of the panel should be reported periodically to the regulator's board and be on the public record.

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<sup>7</sup> Ayres and Braithwaite, *Responsive Regulation – Transcending the Deregulation Debate*, Oxford 1992, page 85

<sup>8</sup> *Ibid*, page 57

I turn now to public trust in the regulator and the regulated system. In her 2002 Reith Lectures<sup>9</sup>, Onora O'Neil observed that recent increases in transparency, rather than promoting trust, appear to have led to more suspicion and distrust. This could be true of exams, which are now more scrutinised than ever before, but scepticism and criticism are undiminished. Onora O'Neil went on to say that unsorted floods of information and misinformation can just lead to confusion and uncertainty. She concluded that, 'Unless the individuals and institutions who sort, process and access information are themselves already trusted, there is little reason to believe that transparency and openness are going to increase trust.'

Many regulators now have statutory objectives around public information, and I hope that the new qualifications regulator will too. If the regulator is to win the public's trust it must speak as it finds and lead and educate the public discussion in an impartial but expert way, even in such controversially choppy waters as standards in examinations and assessments. It will take time for an independent regulator to win the public's trust, and one instance of disguising or withholding a problem will take a long time to retrieve.

So my fifth proposition about trust is that **regulators must win and keep the public's trust by speaking as they find and using their expertise to interpret complex and controversial issues**. That may include providing a stage for critical debate. QCA's forthcoming book on comparability methodologies does just that. It includes chapters by the most articulate critics of QCA's approach to comparability. It is highly appropriate for a regulator to set the stage for that debate.

## Risk

I turn now to risk. We are so used to applying the private sector language of risk management to public services, and to saying that regulatory interventions must be justified by risk, that it is almost heretical to question that approach. But is it really meaningful to talk of 'risk' in qualifications? Who is at risk of what?

In my view, there are risks in qualifications that can justify regulatory action, and the language of risk can be helpful. The risks are usually about possible harm to individuals' life chances or progression in education, or danger that standards may not be maintained over time or that confidence may be damaged even if the harm done to individuals is minimal. For example, if a mark scheme for an examination is technically flawed and it is impossible to award a particular grade, learners are disadvantaged and the credibility of the qualification can be tarnished.

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<sup>9</sup> [www.bbc.co.uk/radio4/reith2002/](http://www.bbc.co.uk/radio4/reith2002/)

QCA develops risk registers about qualifications and the organisations which award them. The risk indicators that we use include, for example:

- the degree of novelty of the assessment (or other feature) used
- the national policy importance of the qualification or assessment
- the number of people relying on the qualification
- problems encountered previously
- concerns raised by users or the wider public.

These can justify extra investigation or further monitoring. The regulator should be transparent about its risk indicators and open to challenge about them. However, the list cannot be a closed one. At the end of the day, regulators must have some discretion to use their judgement where unforeseen problems arise or where there are worries about a forthcoming major change in the system.

QCA as regulator operates in a dramatically ambiguous risk environment. On the one hand, in its last quinquennial review by Government (in 2002) QCA was urged to take on board the Government's maxims of good regulation, reduce burden and cost, and justify interventions by risk. In the world of vocational qualifications and further education, risk tolerance is fairly high. But the world of national curriculum tests, GCSEs and A levels is quite the opposite. That might be thought to be understandable, given the extent to which national qualifications for young people have massive implications for their life chances. But risk aversion with regard to exams and tests is more extreme than that argument could justify. The regulator can be blamed, for example, for the wording of an individual question about Shakespeare in one test, and very high barriers are set for proving reliability time after time before new technology can be introduced for real in any assessments.

Alan Greig and I have distinguished elsewhere<sup>10</sup> between what we call 'consequential risk' (harm that would be caused if something goes wrong) and 'reputational risk' (harm to the reputation of an organisation or system). Of course, loss of reputation can be seen as just one kind of consequence, but the distinction is useful for discussions of risk in qualifications regulation. A spark with consequences for very few people can light a reputational bonfire. A well-known example of this occurred in 2002, when concerns

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<sup>10</sup> Nisbet I and Greig A, 'Educational qualifications regulation' in *Regulatory Review 2006/07*, Centre for the Study of Regulated Industries, University of Bath, 2007

about A level standards led to a major enquiry, the dismissal of the chair of QCA and the resignation of the Secretary of State. Sixteen students changed their university courses. And a further eight obtained places a year later<sup>11</sup>.

My first proposition about risk is that **reputational risk is important and the qualifications regulator should take it seriously**. It is about confidence in the system, and that can be damaged by an individual experience, a story in the newspapers or anecdotes from colleagues. Qualifications are a form of currency – a medium of exchange – and all currencies require trust and confidence. As we have seen recently, events in one bank can send an emotional surge through the system that puts the whole economy in peril. The Financial Services Authority has a statutory objective of market confidence and I hope that the qualifications regulator will have a statutory objective of confidence in regulated qualifications. Although the Better Regulation Commission<sup>12</sup> has criticised regulatory 'actions based on emotion' – for example, after a young child is bitten by a dog - sometimes regulators have to take emotion seriously, even if it seems disproportionate or irrational.

What does this mean for qualifications regulation? It means that a single letter of complaint – or a press story – can sometimes justify regulatory action. The following is an extract from a letter received by QCA in October 2007:

This year in my son's school there has been a worrying and significant drop in marks affecting the vast majority of pupils in modern languages, including English. The school was alarmed by the marks and immediately requested re-marks for entire classes. In almost all cases the pupil's mark went up, sometimes by as much as four grades. My son raised his grade in French AS module 2 by three grades and in English module 1 by two grades. Understandably, pupils, parents and teachers alike are extremely disenchanted. Our children's futures are being juggled by a system that is clearly failing to deliver.

In fact the proportion of A level entries where grades are changed following re-marks is extremely small – 0.08% of the total entry in each of the past two years. It would be quite wrong to say that this one letter shows that the system is failing to deliver or that large numbers of students have got wrong grades. But the circumstances reported in the letter – if true – could severely damage confidence in the system of everyone to whom the

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<sup>11</sup> <http://news.bbc.co.uk/1/hi/education/2411845.stm>

<sup>12</sup> Better Regulation Commission, *Risk, Responsibility and Regulation - Whose Risk is it Anyway?*, October 2006, [www.brc.gov.uk/upload/assets/www.brc.gov.uk/risk\\_res\\_reg.pdf](http://www.brc.gov.uk/upload/assets/www.brc.gov.uk/risk_res_reg.pdf)

correspondent retells her story. They justify an investigation by the regulator to get to the root cause, whether missing papers, coursework not included, or marking errors, and that is taking place.

So my second proposition about risk is that **regulators need to be versatile, and prepared to drill down into detail when there is a risk of damage to public confidence in the regulated system.** There are dangers in this – for example, of unintended consequences far beyond the original problem. The intelligent regulator needs to be able to justify intervention. But there may be cases where it is right to 'act on emotion'.

It is never possible to prescribe all the circumstances in which a regulator may take action. There will always be a need for some space for discretion for the regulator to act reasonably when the unexpected happens. The problem is to avoid this becoming a licence for the regulator to dabble at will. I believe that this brings us back to trust – and to my proposition that regulators should share their agendas with the regulated as much as possible. The regulated should understand where their regulator is coming from.

The thesis of this paper is, therefore, that intelligent regulation is versatile, and strengthened by clarity and mutual trust with regulated organisations. Normally, regulation should remain at a high level and encourage self-assessment, but that approach is compatible with confident and robust intervention when things go wrong or where there is significant consequential or reputational risk.

Clearly, the new regulator of qualifications should be an intelligent regulator. I would like to conclude with some personal thoughts about what this might mean in practice in two, related, areas.

The first is in national curriculum testing. This is a time of welcome change, with the first set of 'progress tests' offered next month, and the prospect of a future when quality assured tests might be available for use when the pupil is ready and when, in the teacher's professional judgement, feedback on pupils' progress by the tests can give them a platform to progress to the next stage of learning. This raises a lot of new questions about standards and the use of the test results. The independent regulator will be able to stand back, allow lessons to be learned from the first sets of tests, and hold the ring for the critical debate about how the results should be interpreted and used, and how we can make sure that the tests are valid and reliable. This allows the regulator to use more guarded language than is sometimes available to politicians – for example, to acknowledge that in some senses the first sets of tests will, of course, be 'pilots' and that the jury will be out for a while on some difficult technical issues around reliability and

comparability. I hope that the shadow regulator, when reporting on the first groups of tests, will be able to set a tone which encourages creative change, but flags up openly and clearly what needs to be done to make sure that results are correctly interpreted and used.

The second area is the use of technology in qualifications and examinations. We are now approaching a stage where some young people, used to working on PCs, have to practice writing to prepare for their exams. That calls validity into question for a start, and cannot be a good gateway to the 21st-century world of work and learning. However, there is also public concern – and some concern by teachers – about the use of technology in exams, including marking GCSEs and A levels on screen.

The new regulator should not aim to encourage technology for its own sake, but as a means of improving the quality and validity of assessment. Much of the technical and educational innovation will come from the market, with a large role for the awarding bodies. But to shine a green light for that, the regulator will, I believe, have to send out clear messages about what it will require, and about the future rules of the E-game. That will include clear statements about technology – whether there will be a free-for-all or whether some convergence will be required. It also means a regulatory framework for on-demand assessment – what safeguards need to be in place for security, how question banks should be developed and used, and how to ensure reliability in results and prevent malpractice. I would like the shadow regulator to start work on this soon.

This paper has examined the concepts of trust and risk in the context of the regulation of qualifications, and has described a form of 'intelligent regulation', which has sufficient versatility to allow for the very different risk environments in the worlds of qualifications, exams and tests. I hope that the preparations for the new regulatory arrangements will enable this approach to be put into practice.