

**Welcome to Landmark Chambers’
‘Public Examinations: How to Appeal’ Webinar**

The recording may be accessed [here](#).

Your speakers today are...



Samantha Broadfoot QC (Chair)



Ben Fullbrook

Topic:
Who can appeal?



Carine Patry

Topic:
What are the time limits?



Yaaser Vanderman

Topic:
What are the grounds of appeal?



Leon Glenister

Topic:
Any other avenues of redress

Who can appeal?



Ben Fullbrook

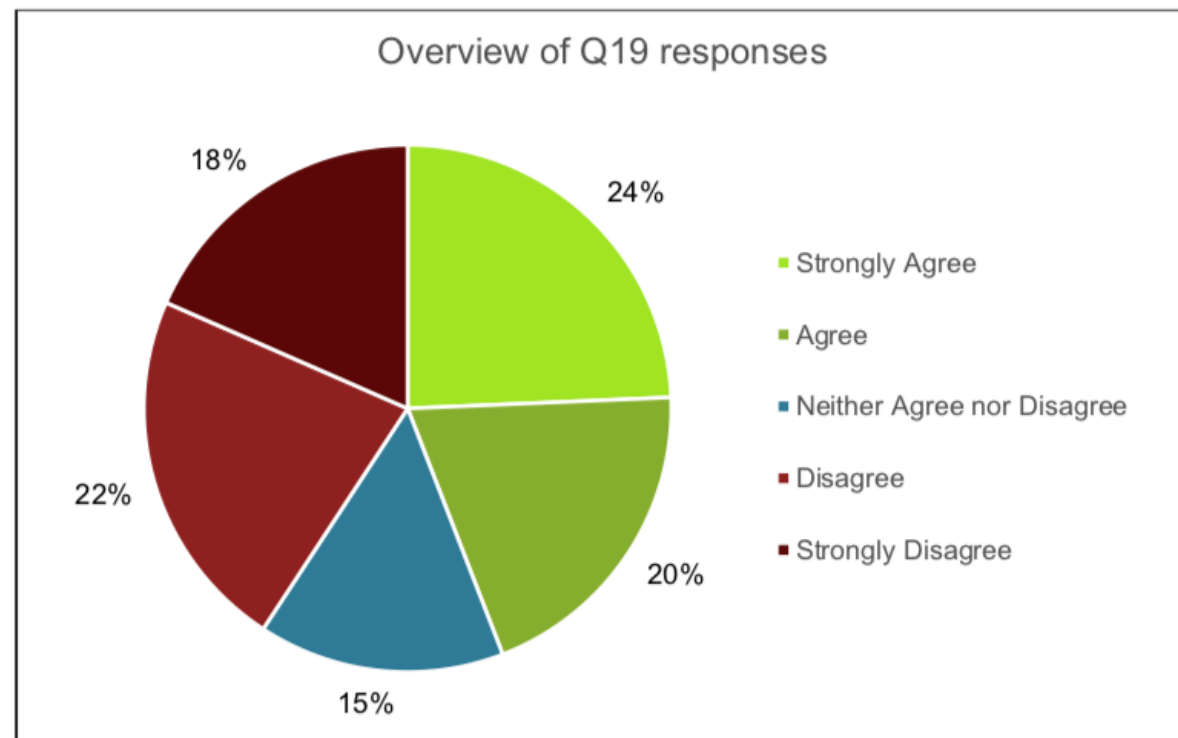
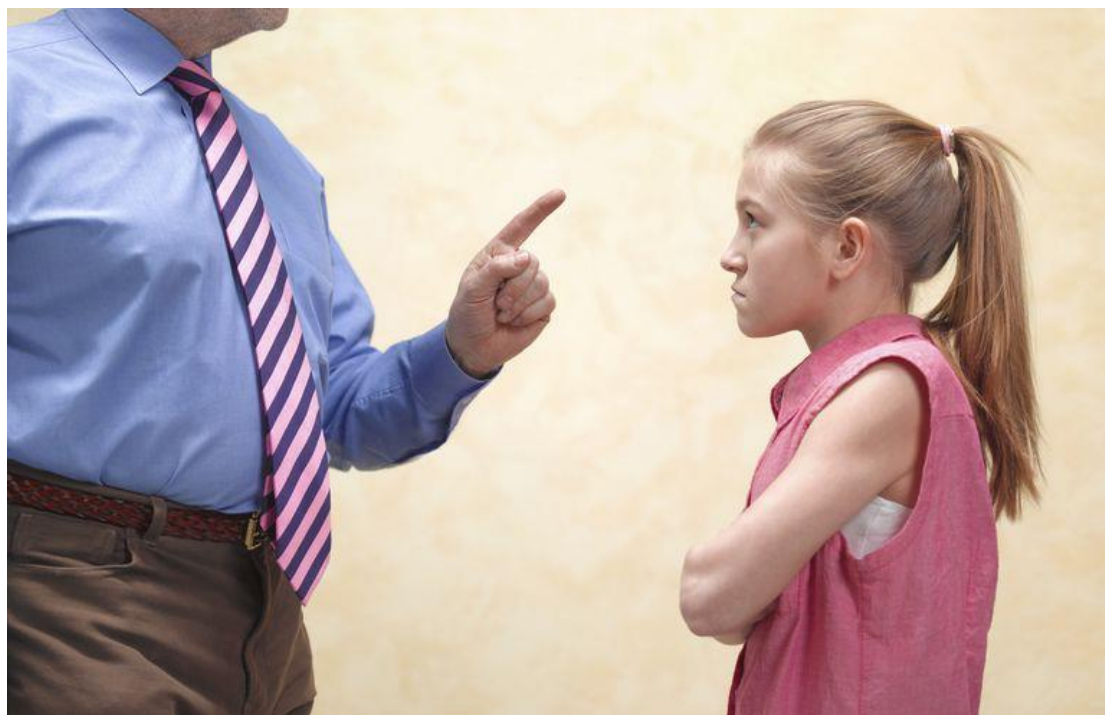
2020 Examinations in a nutshell

- Centre predicts student grade and ranks student in cohort
- Exam boards apply statistical standardisation (taking into account information about centre's previous performance)
- Exam board issues grade
- Appeal?
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887048/Summer_2020_Awarding_GCSEs_A_levels_-_Consultation_decisions_22MAY2020.pdf
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903953/Summer_2020_grades_for_GCSE_AS_and_A_level_Extended_Project_Qualification_27072020.pdf

Who can appeal – the issues?

- Can a student appeal against the professional judgment of the centre?
- Can a student appeal against the process/procedure adopted by the centre?
- Can a centre appeal against the decision of the exam board?
- Can a student appeal against the decision of the exam board?


Can a student appeal against the professional judgment of the centre?

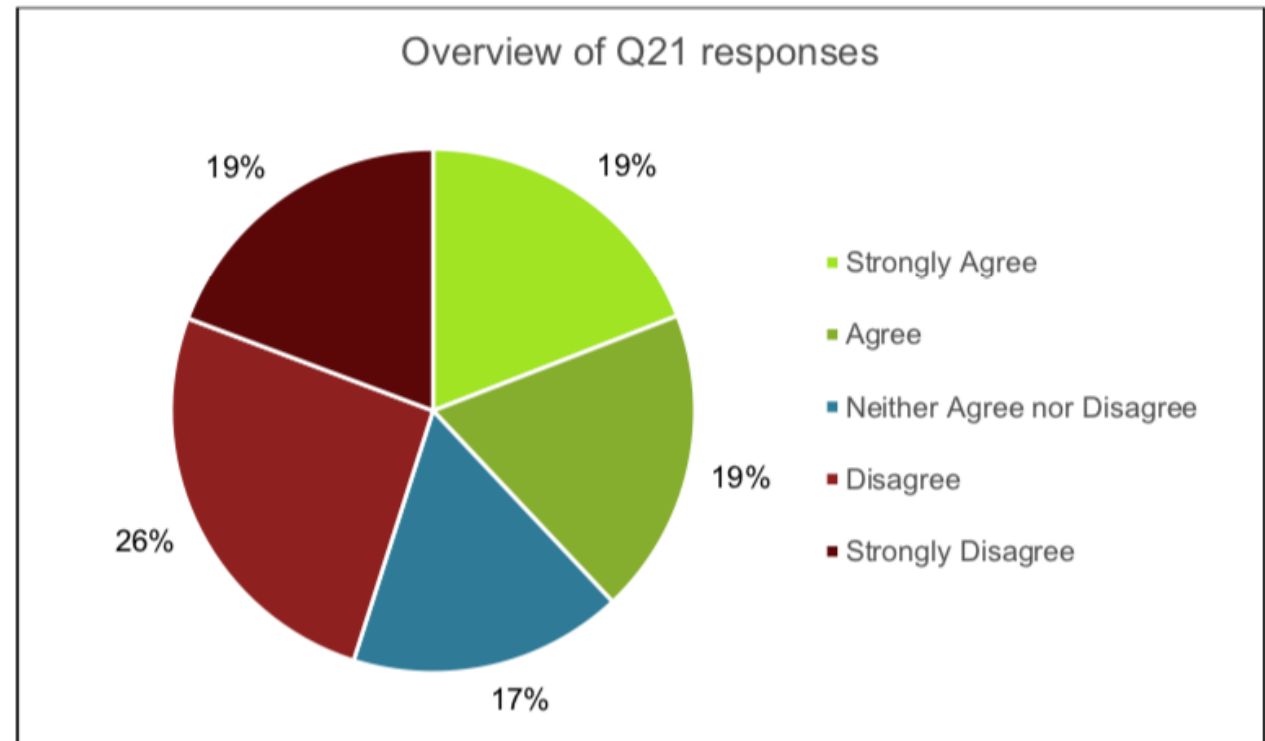


Can a student appeal against the professional judgment of the centre?

- **NO**
- *“We have decided that we should adopt our proposal that we should not provide an opportunity for students to challenge their centre assessment grade or their position in the centre’s rank order through an appeal. A student will be able to ask their centre to check whether they made an error when submitting a centre assessment grade and including them in the centre’s rank order. They will be able to raise a complaint to their centre if they have evidence of bias or that they were discriminated against; they could also pass such evidence on to the exam board who could investigate for potential malpractice.”*

Can a student appeal against the process/procedure adopted by the centre?

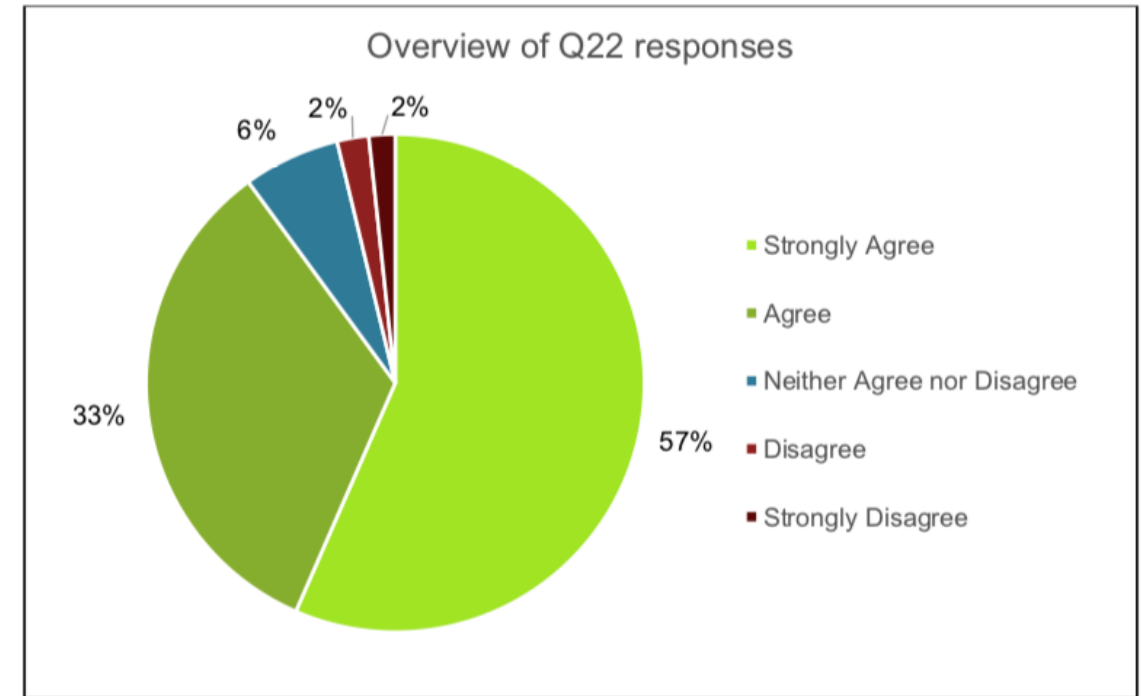
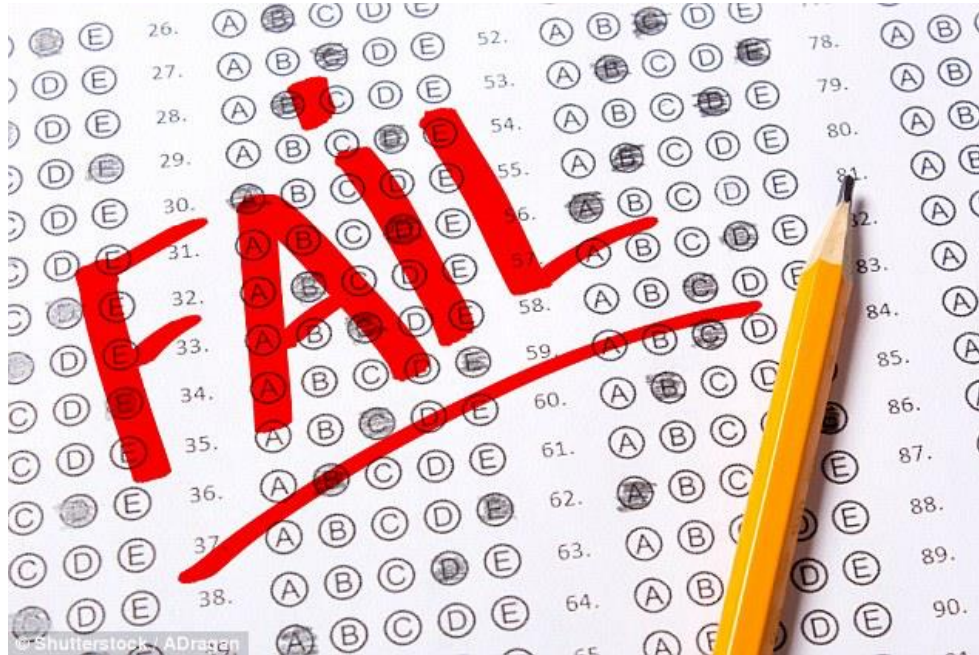
 The school rules	
<u>Our rules</u>	<u>What they mean</u>
We walk in school	We never run
We talk quietly	We do not shout in school
We respect other people and their property	We should look after school property as we look after our own
We look after our things	We don't break or lose our things
We are kind to each other	We look after and care for each other
We are polite and always use kind language	We have good manners and never use bad language
We tell the truth	We never lie
We are proud of ourselves and our school	We wear our uniform smartly with pride
We never try to upset or hurt someone else	We should treat others as we like to be treated
We stop at the hand signal	We stop talking and moving and show the hand signal ourselves
Keep calm to make the right choice	C-choose to breathe A-ask for a moment L- listen and think M -make the right choice



Can a student appeal against the process/procedure adopted by the centre?

- **NO**
- *“We have decided to adopt our proposal that we should not provide for an appeal in respect of the process or procedure used by a centre, although a student could ask a centre to check whether it had made a mistake when it submitted data about the student’s likely grade to the exam board.”*
- BUT can ask school to appeal on his/her behalf on the basis that the school made administrative mistake (see below)

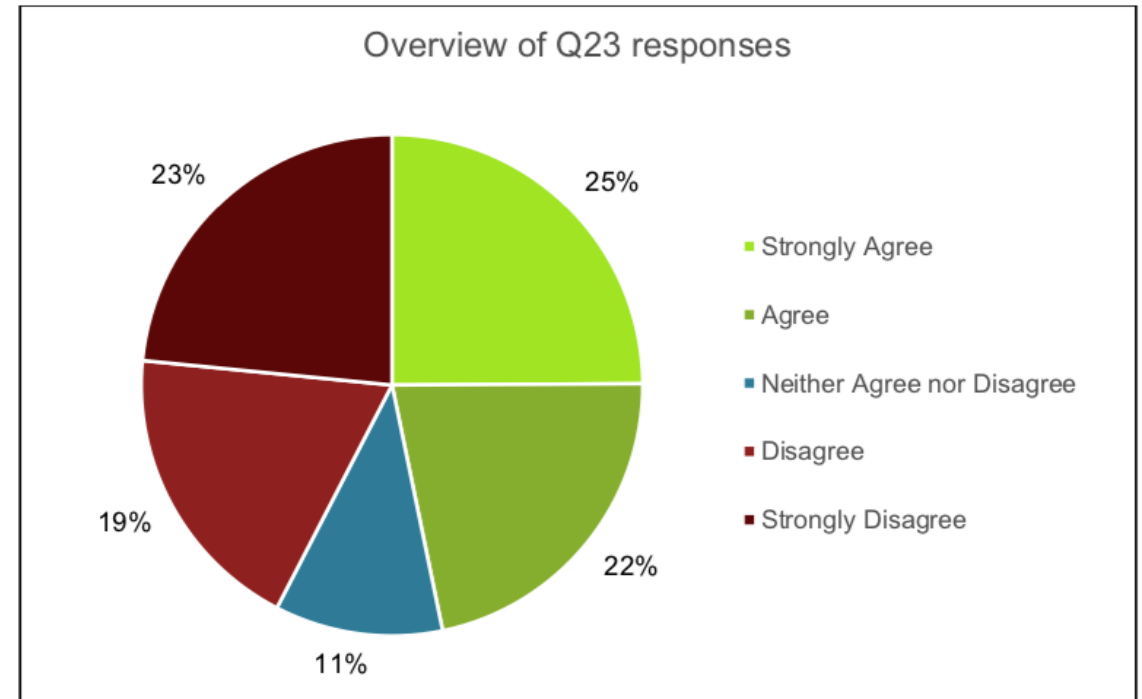
Can a centre appeal against the decision of the exam board?



Can a centre appeal against the decision of the exam board?

- Yes
- *“We have decided that we should adopt our proposal that we should provide for a centre to appeal to an exam board on the grounds that the exam board used the wrong data when calculating grades, and/or incorrectly communicated the grades calculated.”*
- *“We have additionally decided to make clear in guidance, to address the risk raised, that an appeal brought on the grounds that a centre made an error in the data it submitted to the exam board must be supported by clear evidence that an error had been made by the centre.”*
- *“In the rare event that there has been a substantive change in the cohort at a centre and the centre can demonstrate that this change undermines the use of historical data and prior attainment data for statistical standardisation, this would amount to using the wrong data for the purposes of standardisation. In these cases, centres can therefore appeal to exam board(s) to seek to have the error corrected.”*

Can a student appeal against the decision of the exam board?



Can a student appeal against the decision of the exam board?

- **NO(ish)**
- *“We have decided to adopt our proposal that exam boards should only consider appeals submitted by centres, not by students directly. We have also decided that the regulatory requirements for 2020 will require exam boards to make sure centres provide for students to appeal within the centre:

 - (i) *against a centre’s decision not to seek from the exam board any information the exam board holds that would be needed for an appeal; and/or*
 - (ii) *not to appeal to the exam board.”**

GQCov 6.2: For the purposes of this condition, an awarding organisation must take all reasonable steps to ensure that –

- (a) the Centre makes Learners aware of the arrangements it has in place prior to the issue of results under Condition GQCov3.1, and
- (b) the Centre provides Learners with a statement of the arrangements promptly when requested.

Summary

- Students have no formal right of appeal against the centre
- Students have no formal right of appeal against exam board
- Centres have formal right of appeal against exam board

What are the Time Limits?



Carine Patry

A/AS Levels/GCSEs: Two Routes of Challenge

First is the REVIEW stage. You can ask your school or college to get a qualification result (grade) looked at again.

The deadline for requesting a review is 17 September 2020.

Ofqual will let you know if the review is going ahead, and will keep you updated and if your grade doesn't change, it will tell you why.

The Second Route

- If you are not happy with the result of the review, then your school or college can appeal to Ofqual
- The appeal must be brought within 15 days of getting the result of the review

What does this mean in practice?

- It means that you must get your review request in to your school ASAP
- Those who are home schooled can request the review directly and obviously don't need a school
- Don't wait until September unless time doesn't matter
- If your school refuses to do this, you cannot ask for the review/appeal yourself. But your school will have a complaints process.

NVQs, BTECs etc

- They are different
- No request for a review – you appeal directly to the Exam Board/Awarding Body
- And if you still aren't happy, then you can make a formal complaint to Ofqual

<https://qualifications.pearson.com/en/support/support-topics/results-certification/post-results-services/post-results-services-information-for-students/post-results-services-for-btec.html> (BTEC appeals)

What are the grounds of appeal?



Yaaser Vanderman

Summary

- Can appeal based on:
 - Wrong data
 - Administrative error in issuing results
 - Procedural grounds
- Cannot appeal based on:
 - Dissatisfaction with centre assessment grade or rank order
 - Dissatisfaction with operation of standardisation model

Wrong data

- Centre provided incorrect assessment grades/ rank order information
- Awarding org used incorrect data set
- Awarding org introduced error into data set
- Miscellaneous (!)

Wrong data – Incorrect Centre information

- What types of incorrect information?
- Evidence?

Wrong data – Incorrect data sets

- What types of scenario?
- Overall effect

Wrong data – Errors in data sets

- Source of error
- Excluded errors

Wrong data – Miscellaneous

- Exceptional circumstances:
 - “*some exceptional factor which undermines the assumption that the default data set is the most likely to lead to consistent results*”;
 - Clear and objective evidence of substantive difference;
 - Most things will not be exceptional;
 - “*...something happened to the 2020 cohort, or happened to an earlier cohort...which indicates that the 2020 cohort may not be comparable*”
- Examples:
 - Major structural change
 - Teaching in previous years “*significantly disrupted for a prolonged part of the academic year by one or more extraordinary or momentous incidents or event...*”
- Evidence and methodological soundness

Summary

- Can appeal based on:
 - ~~Wrong data~~
 - Administrative error in issuing results
 - Procedural grounds

Administrative error issuing results

- GQCov5.2:
 - *“a result generated by applying the process set out...was incorrectly issued by the awarding organisation in respect of one or more Learners”*

Procedural Grounds

- GQCov5.1:
 - *“the awarding organisation did not apply procedures consistently or that procedures were not followed properly and fairly”*

Other routes of redress



Leon Glenister

Things to consider

- Taking exams in the autumn series
- Challenging school predictions
- Challenging the standardisation model

Taking exams again in the autumn

- This is the obvious answer for most students.
- Confirmed exam boards must make examples available in all GCSE, AS and A level subjects in autumn series. These are in the same subjects and same format as the summer 2020 series would have been.
- No non-exam assessment except in art and design.
- Exam boards will be *required* to issue replacement certificates if students request.

Taking exams again in the autumn

- These will run from October 2020 with flexibility depending on changing circumstances.
- This will not (necessarily) assist those who are about to transition to a new phase of education.
- See further:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903953/Summer_2020_grades_for_GCSE_AS_and_A_level_Extended_Project_Qualification_27072020.pdf

Challenges in relation to school predictions

- Can request predictions from school as subject access request, but not required to be provided until 40 days after results day (Data Protection Act 2018, Schedule 2, Part 2, paragraph 25)
- The prediction model was considered by Education Committee in report published on 11 July 2020 titled 'Getting the grades they've earned'. It received written submissions.

Challenges in relation to school predictions

- It noted concerns of unconscious bias, for example:
 - Sutton Trust evidence that low income families are more likely to have their grades incorrectly predicted than more affluent peers.
 - The Runnymede Trust said similar for BAME students.
 - Concerns in relation to SEN students, e.g. did mocks have access arrangements?

Challenges in relation to school predictions

- Education Committee were “unconvinced that safeguards - such as additional guidance and practical recommendations – put in place by Ofqual will be sufficient to protect against bias and inaccuracy in calculated grades”.
- It welcomed Ofqual’s commitment to “publish a full programme of evaluation in the autumn”.

Challenges in relation to school predictions

- What are the potential legal challenges:
 - A judicial review challenging the model that has been adopted.
 - Discrimination claim against a school
 - Discrimination claim against Ofqual

Challenging the standardisation model

- The standardisation model is not public. However consultation response says will draw on historical outcomes for each centre, prior attainment of this years' students and those within previous years within each centre, expected national grade distribution for the subject.
- Addresses concern about year groups out performing previous year groups.
- Still gap where individual student who has excelled compared to peers in their year and previous years.

Challenges to standardisation model: concerns

- Considered by Education Committee who said “more transparency is needed urgently”.
- Concerns for:
 - “atypical students”
 - small SEND specialist providers with highly variable year on year cohorts
 - “turnaround schools” which will likely to disproportionately serve poorer communities

Challenges to standardisation model: concerns

- Education Committee conclusions:
 - Extremely concerned that Ofqual's standardisation model does not have mechanism to ensure BAME pupils, FSM eligible pupils, LAC or pupils with SEND are systematically disadvantaged.
 - Ofqual should publish model immediately for transparency with explanatory memorandum for decisions and assumptions made in development process.
 - Should collect data as to who has appealed, including type of school attended, region, gender, SEND status, LAC and FSM.

Challenges to standardisation model: duty to publish

- In Eisai Ltd v NICE [2008] EWCA Civ 438, NICE was required to provide the model by which it said a drug was “cost effective”, because of it was “discharging an important public function which engaged a strong public interest” and required “an exceptional degree of disclosure and consultation”.
- Maxwell and Tomlinson argue this principle applies here:
<https://ukconstitutionallaw.org/2020/07/28/jack-maxwell-and-joe-tomlinson-model-students-why-ofqual-has-a-legal-duty-to-disclose-the-details-of-its-model-for-calculating-gcse-and-a-level-grades/>

Challenges to standardisation model: duty to publish

- “Gunning principle” that a consultation needs to provide sufficient reasons for the proposal to allow for intelligent consideration and response.
- Ofqual have published a short film and factsheet on model, and said on 27 July “we will publish the precise details of the model used on results day”.
- Potential consultation challenge:
 - Publication now, or on results day, does not answer consultation point.
 - However, even now, probably a timing issue.

Concluding remarks: wider challenges

- Guardian reported pre-action correspondence in relation to (1) standardisation model, (2) appeal right, by sixth former called Lexie Bell. However, according to CrowdJustice page, insufficient funds were raised.
- What if clear issues arise results day similar to IB, or when model is published? Could be potential challenge, and note Apprenticeship, Skills, Children and Learning Act 2002, which established Ofqual requires it to implement assessments which “give a reliable indication of achievement” (see sections 128 and 129).

Concluding remarks: wider challenges

- If potential legal flaws, e.g. consultation or breach of duty, note practical issues:
 - Timescales
 - Alternative remedy
 - Practical remedy
 - It was a “rescue mission”
- Wider points are likely to come out in public discourse

Concluding remarks: individual challenges

- The broad options for individuals are:
 - To take the autumn series of exams
 - To appeal their mark on the grounds set out this seminar, through their centre
 - To bring a discrimination claim either against (1) school or (2) Ofqual

Thank you for listening

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