

Welcome to Landmark Chambers' 'Exams 2021: legal issues' webinar

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

Your speakers today are...



Fiona Scolding QC (Chair)



Carine Patry

Topic:
Vocational and
Technical Exams



Leon Glenister

Topic:
Assessing
Student Grades

Your speakers today are...



Yaaser Vanderman

Topic:
The Appeals
Process



Alex Shattock

Topic:
Exams 2021:
Equality Issues

Assessing Student Grades



Leon Glenister

Introduction

- The criteria for assessment
- The evidence base
- Timing
- Non exam assessment
- Private candidates
- Quality assurance

The criteria

- Proposal that grade should be “based on teachers’ assessments of the standard at which their students are performing, and that the grade should indicate the student’s demonstrated knowledge, understanding and skill” met with support.
- Ofqual decided “teachers should make a holistic judgment of each student’s performance on a range of evidence relating to the subject content that has been delivered by their teacher”. Ofqual and exam boards “will provide more advice about the range of evidence that centres will be able to use to support their teachers’ judgments”.

The criteria

- Assessment only on what content has been delivered to students by teachers (subject to confirmation from Head of Centre that students have been taught sufficient content to allow progression to the next stage of education).
- Exam boards will provide a package of materials, including questions and mark schemes to assist teachers, although use is not compulsory.
- Overall, it will be no easier or harder for a student to achieve a particular grade this year compared to previous years.

The criteria

- What is a fair grade? Perspective of:
 - Student
 - School
 - National level
- “Centres will also be encouraged, as part of their overall quality assurance, to consider the grades for this year’s cohort compared to cohorts from previous years when exams have taken place, to make sure they have not been overly lenient or harsh in their assessment of the 2021 cohort. “

The criteria: analysis

- Provides a large amount of discretion for schools.
- Does not appear to account for disparities in effect of pandemic.
- Approach explicitly “as far as we can go to take account of the disruption caused by the pandemic, but without breaking the link between students’ attainment and the grade they receive. This link is important if grades issued in 2021 are to be meaningful for those who use them for selection”

The evidence

- Evidence throughout the course can be used.
- Should use a “broad range of evidence”.
- Use of materials provided by the exam board (although optional).

Timing

- Assessment should be as late in the academic year as practicable to enable teaching to continue for as long as possible.
- There is no set window for assessment.

Non-exam assessment

- Marked by teachers and contribute to the overall grade.
- Partially completed NEA will be taken into account. Exam boards will provide guidance on situation where insufficient NEA completed to provide meaningful evidence.
- No moderation of NEA marking.

Private candidates

- Students should work with a centre to provide evidence in light with the sort of evidence that other students will produce.
- In assessing, centres can take account of material that has been missed.

Quality assurance (QA)

- Exam boards will put in place requirements for internal QA. Likely to include consistent methodology; Head declaration.
- Every centre should have a check on internal QA. It will focus on process and evidence, rather than second guessing teacher judgments.
- Sample of centres will have evidence reviewed.
- Changes to grades will only occur if not reasonable exercise of academic judgment, rather than marginal difference of opinion.

Concluding thoughts

- The onus is now on schools, unlike last year there is no algorithm.
- Schools need to focus on process:
 - Have a clear policy and process on how grades are calculated
 - Ensure consistency (1) between classes in subjects, (2) across subjects
 - Consider putting the process to the governors for approval
 - Work with other schools and use any networks to ensure process is not out of the norm.

The Appeals Process



Yaaser Vanderman

What difference a year makes

- 19/20 appeals process
 - Could appeal based on:
 - Wrong data, including “*some exceptional factor which undermines the assumption that the default data set is the most likely to lead to consistent results*”, e.g. major structural change
 - Administrative error in issuing results
 - Procedural grounds
 - Could not appeal based on:
 - Dissatisfaction with centre assessment grade or rank order
 - Dissatisfaction with operation of standardisation model

And this year...?

Consultation

- Suggested:
 - Initial appeal to school
 - Subsequent appeal to the exam board

Step 1

- Student asks centre to check admin/procedural error
- If yes, centre submits revised grade + rationale.
- Exam board has to be satisfied with rationale

Step 2

- If no, student asks centre to appeal
- Centre submits appeal and provides:
 - Evidence used
 - Justification for grade
 - Student's concerns
 - Details of process to determine grade

Step 2

- Appropriate/reasonable exercise of academic judgment?
 - “...an exam board will only revise a student’s grade at appeal where the board finds the evidence on which the grade was determined cannot reasonably support that grade, rather than as a result of marginal differences of opinion.”
- Correct process followed?

Step 3

- Application to Ofqual's Exams Procedures Review Service
 - To review process used by exam board

Timing

- As far as possible concluded in early September (for those waiting on higher education places)
- Nothing on appeals by others

Problems?

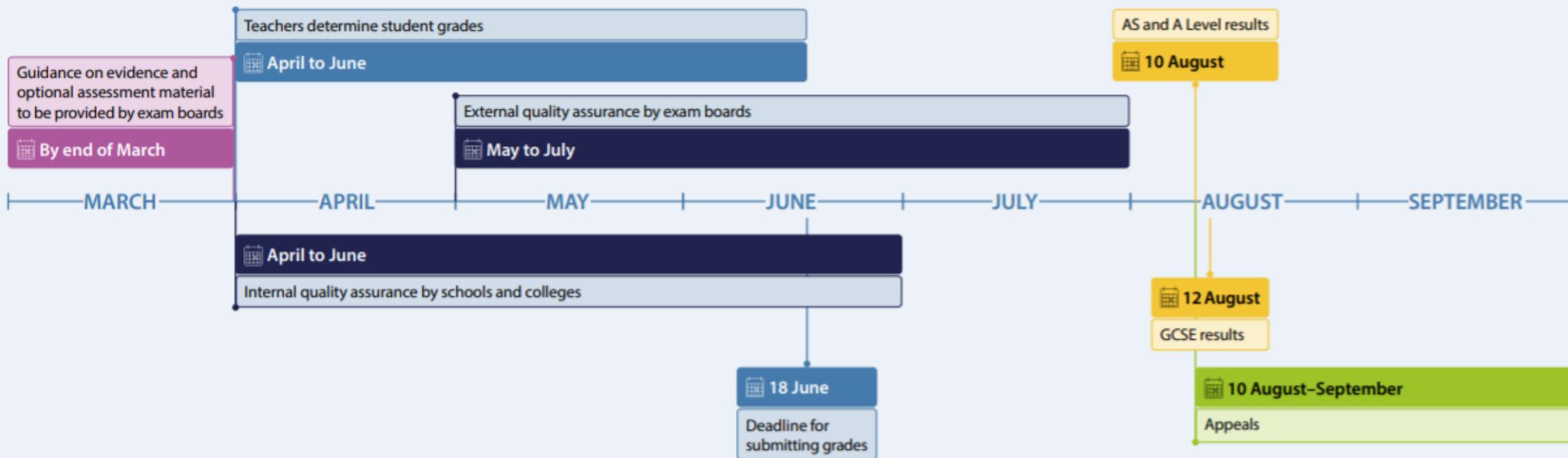
- Grade can go up or down.
- Volume of appeals. So centres will tell students evidence on which grade based **before** submission to exam boards:
 - “This will allow issues associated with, for example, absence, illness or reasonable adjustments to be identified and resolved before grades are submitted.”
- Ofqual response:
 - “The appeals arrangements will therefore provide an important safety net in what we expect to be a small number of cases where schools and colleges might make procedural errors or where they have made judgements that are not reasonable based on the evidence.”

Exams 2021: Equality Issues



Alex Shattock

SUMMER 2021 TIMELINE – GCSE, AS and A Levels



Legal framework

- Public authorities bound by Human Rights Act 1998, incorporating the European Convention on Human Rights:
 - Article 2: right to education
 - Article 14: protection from discrimination
- Equality Act 2010: protects individuals from unfair treatment:
 - Section 19 prohibits indirect discrimination
 - Section 20 sets out the duty to make reasonable adjustments
 - Section 149 sets out the public sector equality duty (PSED)



Exams 2021 Equality Impact Assessment

- Appended to the consultation (EIA v1) and an amended version appended to the final “Decisions on how GCSE, AS and A level grades will be determined in summer 2021” (“the Decision”) (EIA v2)
- EIA v1:
 - “*Cancelling exams and replacing them with teacher assessment that will draw on a range of evidence of a student’s performance is likely to have relative advantages and disadvantages for different groups of those who share particular protected characteristics*”

Exams 2021 Equality Impact Assessment

- Disabled students (EIA v1):
“Disabled students would have to be given reasonable adjustments when taking any assessments that provide evidence of the standards to which they are performing. We do not consider this would be problematic, at least not if the assessments were undertaken within the school or college. The student’s school or college would know how the student normally works and make any such adjustments as were necessary to reflect the student’s normal way of working”
- Note the level of confidence

Exams 2021 Equality Impact Assessment

- Disabled students (EIA v1):

“If the assessments had to be taken in another venue, including at the student’s home, some types of reasonable adjustment could be readily made, for example the provision of extra time, or putting the assessment into a larger font. Other types of adjustment could be more difficult to make, for example if the student would normally dictate their work to a scribe or required specialist equipment or software to complete remote assessments.”

Exams 2021 Equality Impact Assessment

Other issues raised in EIA v1

- Private candidates: many due to SEND or illness
- Teacher assessments where student has poor attendance due to illness

Exams 2021 Equality Impact Assessment

EIA v2

“We have considered the impact of the arrangements on disabled students. The approach will be sufficiently flexible to allow students to be assessed in a range of environments, and at different times if their circumstances require this. We will require that heads of centre make sure SENCos and specialist teachers have input to the grading decisions being made within their centres. Centres have a responsibility to put in place reasonable adjustments for disabled students and we expect that reasonable adjustments should be made for disabled students when taking assessments. If, for some reason, evidence is produced without a reasonable adjustment being in place, centres will be asked to take that into account in their judgement.”

- So no real change from v1 in terms of general approach to reasonable adjustments (wide discretion to centres), although useful to mandate SENCo input



Key Problems

Key problems: summary

- Reasonable adjustments
- Risk of bias/unfair treatment
- Socio-economic disadvantage

Problem 1: reasonable adjustments

- Current approach gives a lot of discretion to schools, including reliance on exam board exam papers/ assessments
- The Decision states centres can take into account the following:
 - student work
 - Coursework
 - student work produced in centre-devised tasks e.g. substantial class or homework (including those that took place during remote learning)
 - internal tests taken by pupils
 - mock exams taken over the course of study

Problem 1: reasonable adjustments

- Last year:
 - “Where a disabled student would have had a reasonable adjustment for their exams, centres were asked to take account of the student’s likely achievement with this adjustment in place.
 - Student guide to appeals, malpractice & maladministration complaints 2020
- 2021 Decision:
 - “When assessing different students in their cohort for a subject, schools and colleges should make formal reasonable adjustments for disabled students. If evidence is produced from assessments taken earlier in the course where formal reasonable adjustments were not in place, centres will be asked to take that into account in their judgement.” **Not quite the same...**

Problem 1: reasonable adjustments

- Query: is evidence gathered under accessible conditions? Marked papers, coursework etc? How will accessibility failures be taken into account by centres in reaching final grades?
- Guidance basically leaves that to centres- though we may get more prescription from the Exam Boards

Problem 1: reasonable adjustments

- Appeal based on accessibility failure? – last summer it could be framed as an administrative error (appeal submitted by centre) or more likely a complaint directly to the exam board for maladministration etc (submitted directly by student)
- Now the EIA v2 says *“We have decided to make provision for students to appeal their grade on the grounds of either a procedural failing or an unreasonable exercise of academic judgement. This will allow students who believe they have been given the wrong grade (including for reasons of bias or discrimination) to have their grade reviewed.”*
- Query whether this could run in parallel with a complaint to the Exam Board

Problem 2: bias/unfair treatment

- Wide discretion to schools= possibility of unfair treatment
- 2021 Decision: *“Exam boards will publish guidance in March, so teachers have a clear understanding of how to make fair and consistent judgements.”*
- Any time now! (see timeline at p1)
- How to ensure consistency?
- As above with reasonable adjustments- looks like the route of address will be a direct academic appeal
- *As with last year.* issues with students who have missed a lot of time off/ missed coursework deadlines etc due to illness or disability

Problem 3: socio-economic disadvantage

- Disproportionate loss of learning experienced by many learners with Equality Act protected characteristics, often for socio-economic reasons
- State school students more likely to have had a more disrupted education early on in the pandemic e.g. no pre-existing online learning platforms
- Remote learning continues to be a major problem, particularly for socio-economically disadvantaged groups
- Gaps in knowledge: how will these be dealt with?
- Debacle last year where privately educated students received a massive algorithm boost based on past school performance
- All this in addition to the well-known issue of private school teachers overselling their students on predicted grades and state school teachers underselling

Problem 3: socio-economic disadvantage

- EIA v2: *“We will not know until results are issued the extent to which the different impacts of the pandemic on students’ education will affect their results”*
- We can probably hazard a guess though: substantial impact for the socio-economically disadvantaged
- EIA v 2: *“Some students will have a poorer knowledge and understanding of the topics they have been taught because of the impact on them of the disruption to their education, for example limited access to resources. If qualifications are to continue to link higher grades with higher standards of performance, none of the options available can fully remove the way the disruption to a student’s education might have an impact on the grade they will receive.” (!!)*

Conclusion

- Difficult situation and the government has attempted to meaningfully engage with the equality problems in its EIA v1 and v2
- However these problems remain and there are likely to be many appeals where equality issues arise, given the broad discretion to centres and lingering pandemic-related problems

Vocational and Technical Exams



Carine Patry

Consultation

- The impact of the pandemic has meant that, in line with the approach set out for GCSEs, AS and A levels, the Department's policy position has been that external exams for *many* vocational, technical and other general qualifications should not take place as planned – but not all
- A joint consultation in January 2021 covered A-Levels/GCSEs but also VTQs (Vocational and Technical Qualifications)
- The consultation recognised that VTQs are a diverse landscape: qualifications differ in their purpose; the extent to which they are knowledge based or designed to denote competency; the settings in which they are taken; the age, stage and circumstances of learners; the assessment structure and method, the size of qualifications and length of course.

So What Was Decided?

- The joint DFE/Ofqual decision document is here:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/964973/6748-1_-_Decisions_-_VTQ_Consultation_on_awarding_grades_in_2021.pdf
- The broad outline is that because of the diverse range involved, VTQs are separated into three groups, and different approaches are outlined for each.
- It is an 88-page document which sets out all the finer detail

Category 1: Used for Progression

- The first group includes those VTQs which are most similar to GCSE, AS and A levels, in that they are used for progression to further or higher education.
- These include VTQs such as many BTECs, Cambridge Nationals and Technicals, and many Technical Awards and Technical Certificates, as well as other general qualifications that are not GCSEs, AS and A levels, such as the International Baccalaureate, Pre- U, Core Maths, Extended Project Qualification and Advanced Extension Awards.
- **Exams for these VTQs should not go ahead.** Instead, results should be awarded using similar arrangements to GCSEs and AS or A levels (which has been covered by another talk) – but not identical

Category 1: Continued

- Awarding bodies will issue guidance to providers and colleges about what evidence is needed for teacher assessed grades and timelines for information to be submitted

Category 2: VTQs Used Directly for Employment

- The second group is VTQs used to enter directly into employment.
- Examples are construction, accountancy, plumbing.
- **Exams or assessments should continue** where they are “critical” to demonstrate occupational or professional competence and can be delivered in line with PHE measures.
- Where the assessment cannot take place safely, it will need to be delayed. These may be written or practical exams and assessments.

Category 3: Mixed Purposes

- The third group includes smaller qualifications taken for mixed purposes that are unlike GCSEs and A levels in their qualification and assessment structure, such as Functional Skills qualifications ('on-demand' when learner is ready) and English for speakers of other languages (ESOL).
- Exams and assessments for these should continue where they can be delivered in line with PHE measures or remotely, but with alternative arrangements available for those who cannot access the assessments.
- This was a bit controversial but the decision means that wherever possible, learners should take an assessment, and alternative arrangements should only be considered for those who cannot access one. This solution is said to ensure that learners will be supported to progress to the next stage of their studies.

Dates and Timing

- DFE/Ofqual have said that it is “essential” that students taking VTQs and other general qualifications that are not GCSEs or A levels but are used to progress to HE or FE should receive their results no later than their GCSE or A Level peers.
- It is therefore expected that relevant VTQ results are issued to students on or before 10 August for level 3 and 12 August for level 2.
- But results for other VTQs, such as teacher assessed grades for functional skills learners, will continue to be issued throughout the year like usual, but only from April.

Problems?

- January 2021 exams: the government's announcements regarding the January series made it clear that where learners did not feel comfortable sitting assessments, they did not have to. In addition, many centres decided not to run assessments on public health grounds. As a result, many learners who had planned to sit their assessments in January did not do so.
- All students will be able to progress fairly, irrespective of whether they sat an exam in January

Appeals

- Appeals: the statutory guidance will signal that for those qualifications most closely aligned to GCSEs, AS and A levels awarding organisations will be expected to give students access to a right of appeal on the same basis as those set out for GCSEs, AS and A levels.
- Others: depends on the type of qualification (detailed guidance given)
- Schools and colleges will only have to check for errors and whether their own processes were followed in the first instance.
- Then, if students want to take it further, exam boards will review both the school's or college's processes and the evidence used to determine a students' grade to confirm whether the grade was a "reasonable exercise of academic judgement".

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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