EXPLANATORY MEMORANDUM TO

THE PUBLIC INTEREST DISCLOSURE (PRESCRIBED PERSONS) (AMENDMENT) ORDER 2012

2012 No. 462

1. This explanatory memorandum has been prepared by The Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the Public Interest Disclosure (Prescribed Persons) Order 1999. It adds the Office of Qualifications and Examinations Regulation ("Ofqual") to the list of prescribed persons in that Order. As a result, where a worker makes a qualifying disclosure about its employer to Ofqual about a specified matter then (subject to the satisfaction of certain additional conditions), that worker (a "whistleblower") will benefit from the statutory protection against detrimental treatment by their employers for making such a disclosure.

2.2 The instrument also specifies the matters in respect of which disclosures may be made the Ofqual: matters in respect of which Ofqual exercises a function.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Public Interest Disclosure Act 1998 amended the Employment Rights Act 1996 ("the 1996 Act") so as to provide employment protection for workers who make certain disclosures of information.

4.2 The 1996 Act defines the categories of disclosures which qualify for protection and the circumstances in which such disclosures will be protected. In particular, section 43B defines qualifying disclosure, and provides a worker with the right not to suffer a detriment as a result of making a 'protected' disclosure. Section 43F provides that a qualifying disclosure is a protected disclosure where, subject to certain requirements, the worker makes the disclosure to a person prescribed by an order made by the Secretary of State for the purpose of receiving disclosures about the matters concerned.

4.3 The Public Interest Disclosure (Prescribed Persons) Order 1999 was made pursuant to section 43F. It includes a Schedule of prescribed persons and descriptions of matters for which they are described. The instrument amends the Public Interest Disclosure (Prescribed Persons) Order 1999 by adding the Office of Qualifications and Examinations Regulation ("Ofqual") to the list of prescribed persons in that Order. It also specifies the description of matters in respect of which Ofqual is prescribed.

5. Territorial Extent and Application

5.1 This instrument extends to England, Wales and Scotland.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Public Interest Disclosure Act 1998 (which came into force in July 1999), amended the Employment Rights Act 1996 to protect workers who disclose certain kinds of information about their employer's activities from being dismissed or penalised as a result of the disclosure. The aim was to legitimise whistleblowing in the public interest by employees who might otherwise be deterred by fear of suffering detriment in their employment, such as demotion, dismissal, or breach of contract proceedings. It applies to disclosures of crimes, breaches of a legal obligation, miscarriages of justice, dangers to health, safety, or the environment, and to the concealing of evidence relating to any of these.

7.2 A number of persons or organisations were prescribed when the legislation first came into force and additions have been made since. The specific aim of this Order is to add Ofqual to the list of organisations to whom a protected disclosure can be made.

7.3 The Order defines those topics that may be disclosed by individuals as "matters in relation to which the Office of Qualifications and Examinations Regulation exercises functions under the Apprenticeships, Skills, Children and Learning Act 2009".

7.4 Ofqual was established by the Apprenticeships, Skills, Children and Learning Act 2009 (the ASCL Act), as a non-Ministerial department that exercises its functions on behalf of the Crown and is accountable to Parliament. Ofqual's objectives are

7.5 The Education Act 2011 has strengthened Ofqual's regulatory powers by introducing a power to impose a monetary penalty on a recognised body that fails to comply with a recognition condition.

7.6 The Government regards the maintenance of public confidence in qualifications and assessments as vital, and considers that this Order will support Ofqual in achieving this. Studies carried out by Ofqual using its statutory powers have raised concerns that the delivery of qualifications and the maintenance of qualifications standards depend upon highly complex systems influenced to a significant degree by human factors. It is self-evident that in some cases those who are most closely concerned with the administration of these systems are unable to raise concerns directly with third parties in a timely fashion, owing to their duties of confidentiality towards their employers. In addition to the principal aim of protecting whistleblowers, it is also hoped that the instrument will have other effects, including:

7.6.1 where a disclosure is made, improve Ofqual's access to information concerning those matters in relation to which it exercises its functions;

7.6.2 incentivise compliance with Ofqual's conditions of recognition;

7.6.3 reinforce public confidence in the qualifications and assessment system.

7.7 The instrument covers matters in relation to which Ofqual exercises its statutory functions. It is envisaged that the main sort of disclosures that would be protected would concern:

7.7.1 the development, delivery and award of regulated qualifications;

7.7.2 matters affecting public confidence in regulated qualifications;

7.7.3 National Curriculum assessment arrangements, including the Year 1 phonics screening check; or

7.7.4 Early Years Foundation Stage assessment arrangements.

7.8 Although the expression “employers” has been used in this memorandum, the workers who may be able to claim the protection of the Employment Rights Act 1996 for protected disclosures might include permanent employees, contractors, and members of temporary agency staff. The present instrument is thus intended to cover disclosures by workers whether or not they are permanent employees of recognised awarding bodies, and will therefore include certain advisers, associate examiners, markers, teachers, other school staff, or those involved in the physical production of assessment materials who are not permanent employees.

8. Consultation outcome

8.1 Formal consultation has not been undertaken, as this measure does not grant any new powers or impose any new obligations.

9. Guidance

9.1 Ofqual has already published its general whistleblowing policy guidance and information on how to make disclosures, by means of its website. The present Order will not require separate new guidance, but rather minor changes to the current guidance reflecting the introduction of the new protections for whistleblowers under the Order. Ofqual will publish these changes.

10. Impact

10.1 An Impact Assessment has not been produced for this instrument as it has no quantifiable impact on business, charities or voluntary bodies. This is because it imposes no new obligations on those organisations, and only comes into operation in cases where a whistleblower would otherwise suffer unjust detriment in their employment or before an employment tribunal.

10.2 The impact on the public sector is limited to the extent to which the prescribed regulator may receive disclosures of information from workers who might not otherwise have made them had the regulator not been a prescribed body.

11. Regulating small business

11.1 The Order will not affect small businesses because it imposes no new obligations upon them.

12. Monitoring and review

12.1 Details of the nature and number of disclosures made under the Order will be collected by Ofqual. This information may be used by the Chief Regulator in accounting to Parliament, for example in Ofqual's annual report. The Department will consider information collected by Ofqual and commentary by the Chief Regulator in reviewing the effectiveness of the Order.

13. Contact

13.1 John Hall at the Department for Education, Telephone 020 7783 8073 or email: John5.Hall@education.gsi.gov.uk can answer any queries regarding the instrument.