

## **Federation of Awarding Bodies –response to the Welsh Government consultation on the Qualifications Wales (monetary penalties) Regulations, January 2019**

### **Overview of the Federation of Awarding Bodies**

The Federation of Awarding Bodies is the trade association for vocational and technical awarding organisations (AOs) with over 115 organisations in full membership ranging from large generic AOs to those working in specific occupational areas, including professional bodies.

Our members operate across a wide range of vocational/technical sectors and provide high quality qualifications to support learners to qualify and progress in their chosen sector. Many of our members operate in Wales as well as England, Northern Ireland and Scotland. The Federation therefore has an interest in this consultation and we welcome the opportunity to respond.

This evidence submission is provided on behalf of the Federation's membership following consultation with them and with the Federation's Board of Directors. **However, AOs are a diverse community and our members may wish to make their own individual submissions containing their own perspectives and emphases, in addition to any comments forwarded to the Federation for inclusion in this overall response.**

**Number : WG34859**

### **Welsh Government**

**Consultation Document – Qualifications Wales (Monetary Penalties) Regulations**

**Date of issue: 22 October 2018**

**Action required: Responses by 07 January 2019**

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Responses should be returned by 07 January 2019 to:

Qualifications Wales Sponsorship Team  
Curriculum Division  
Education and Public Services  
Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ

or completed electronically and sent to:

e-mail: [QualificationsWalesSponsorshipUnit@gov.wales](mailto:QualificationsWalesSponsorshipUnit@gov.wales)

### Question 1

Do you agree with the proposal for determining the maximum monetary penalty Qualifications Wales can impose as explained above?

<b>Agree</b>	<input type="checkbox"/>	<b>Disagree</b>	<input checked="" type="checkbox"/>	<b>Neither agree nor disagree</b>	<input type="checkbox"/>
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### Supporting comments

If you have any other suggestions for determining the limit on the maximum penalty Qualifications Wales may impose, please use the space below to state them:

The Federation agrees that there should be a cap imposed on the monetary penalties that Qualifications Wales can apply to awarding bodies. The ability of the regulator to impose a monetary penalty is a significant regulatory power and one which must be transparent and used appropriately and proportionately. It is vital that awarding bodies know the extent of the financial risk presented by the regulator’s power to impose a monetary penalty, so they can make provision
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for such situations, should they arise.

The Federation believes that the policy on financial penalties must be transparent, fair and proportionate. For these reasons we **strongly disagree** that a cap of **10% of UK turnover** is appropriate; it is disproportionate to the amount of business the majority of awarding bodies conduct in Wales and presents a significant and unfair risk to awarding bodies. There are also many areas that are not yet sufficiently clear in terms of how the penalty would be applied.

Awarding bodies who operate in England as well as Wales have operated in an environment where the potential for monetary penalties to be applied has been a reality for some time. Although this type of penalty has been used on relatively few occasions in England to date, it is an established part of the regulatory landscape within which awarding bodies operate in England. It may therefore be tempting to simply map the penalty cap that is applied in England into the Welsh regulations. However, the Federation believes this is not appropriate for a number of reasons:

- 1- For the significant majority of awarding bodies, the market in Wales is significantly smaller than their market in England. Many awarding bodies have extremely small markets in Wales and they resource the regulatory burden that results from having a separate regulator in Wales because they wish to ensure learners in Wales continue to have access to an appropriate range of qualifications, some of which are niche and specialist qualifications. For some awarding bodies this is congruent with their charitable aims and objectives and their commitment to the sector(s) that they work within to support skills development. In some cases, the proportion of turnover in Wales will be far less than 10% of the awarding body's total UK annual turnover. Therefore, applying a cap of 10% of total UK annual turnover is not proportionate and presents an excessive burden for awarding bodies and a level of risk that some awarding bodies will find unacceptable.
- 2- The Federation believes that the risk presented by the application of a 10% of UK annual turnover cap, may be too great for some awarding bodies to bear and will encourage awarding bodies to withdrawal completely from the regulated qualifications market in Wales. This in turn could lead to gaps emerging in the range of regulated vocational qualifications that are on offer to learners in Wales.
- 3- Awarding bodies that operate in England as well as Wales already carry the risk of a financial penalty of up to 10% of UK turnover. If Wales adopts the same position, awarding bodies will in effect be carrying a risk of being fined up to 20% of their UK annual turnover. It would in theory be possible for the same awarding body to be fined by both Ofqual and Qualifications Wales for two separate events. This is not a proportionate approach to regulation and is an excessive level of risk for any organisation to carry. It is also not clear whether a single event which impacted on learners in Wales and England could result in

finer from both Ofqual and Qualifications Wales and how/if the two regulators would communicate and work together to determine an overall financial penalty that was proportionate. It is essential that awarding bodies are clearly informed of the potential for any such 'double fining' which again would present excessive burden and unacceptable levels of risk.

- 4- Qualifications Wales is the regulator within Wales and has from its inception been clear in stating its intention to regulate in the most appropriate way in order to meet its specific objectives for Wales and learners in Wales. It's regulatory remit is for Wales only and it offers the protection afforded to learners only to those who are 'wholly or mainly assessed in Wales'. It is therefore incongruent with this position that a policy would be adopted simply because that is the policy in England. Furthermore, it is disproportionate that Qualifications Wales would have the power to fine an awarding body at a level that is calculated on its activity beyond the remit of the regulator.

The Federation believes the Welsh Government should aim to establish a cap that is based on the market in Wales; just as Qualification Wales has established regulations and other policies based on the needs of Wales.

- 5- The impact of a monetary penalty needs to be considered within the overall regulatory powers that also allow for the recovery of costs of investigation activity. It is therefore possible that, under these proposals, an awarding body could have a monetary penalty imposed that is 10% of UK turnover and, *in addition*, also be required to pay costs to Qualifications Wales as well. These costs could be thousands of pounds and significantly add to the financial risk that awarding bodies will face.
- 6- The 10% of annual UK turnover would be a cap for monetary penalties and the stated intention is that this will not automatically be the level at which any penalty is set. However, unless there is a formal, legally based commitment to this, there would be nothing to commit the regulator to this intention in the future. The fact that this may not be the current 'intention' can quickly become lost in time and something more concrete and enduring than intention should be stipulated in writing to protect awarding bodies.
- 7- Page 6 of the consultation document (bullet point 4) makes reference to the Qualifications Wales draft Monetary Penalties Policy which was consulted upon earlier this year. The Federation understands that this will be consulted upon again once the cap for the penalties has been set by the Welsh Government. However, the consultation which ran from November 2017 to February 2018 provided a basis for significant concerns.
- 8- In our [response to that consultation](#), the Federation raised a number of points that needed to be clarified in relation to the 17 factors that will be taken into account by Qualifications Wales when it is determining the amount of a penalty, including:

- Factor iv) - the need to provide further clarity around what cooperative and non-cooperative behaviour is. It is vital that an awarding body is able to defend itself and challenge the regulator's assertions without fearing that it will be viewed as being non-cooperative. The definition of cooperative in these situations must not make awarding bodies feel that they have no choice other than to acquiesce and agree with the regulator. Also, there needs to be some assurance that the regulator will provide the awarding bodies with reasonable time to respond to requests for information. Where unreasonable timescales are provided an awarding body may not be able to respond for very pragmatic reasons; not because they are being non-cooperative.
- Factor v) was not clear on whether the factors to be taken into account in deciding whether to apply a monetary penalty includes monies already paid out by an awarding body to learners or other parties directly affected by the breach. This needs to be clarified, to the effect that any monies already paid out should mitigate any decision to apply a financial penalty or, if one is applied, mitigate its size.
- Factor xii) stated that any previous history of non-compliance will be taken into account when determining the amount of a monetary penalty. It was not clear whether this meant ANY non-compliance at all, including those reported by the awarding body in its annual statement of compliance. It is important that the policy is clear about exactly what will be considered and to ensure that this does not act as a disincentive to awarding bodies to share information with the regulator.
- The draft policy was also not clear about what QWs interpretation of 'substantial detrimental effect' would be. In the final version of this policy it will be crucial that a full, clear explanation is provided of what will be viewed as 'substantial' to provide clarity to awarding bodies about the circumstances in which they may face a monetary penalty. As it was previously presented, the policy was too open to interpretation to be fair to awarding bodies and did not provide that transparency that awarding bodies should have on when they will be fined and how the amount of fine will be calculated.

9- The consultation on the penalty cap has also highlighted areas of regulation that are not clear to all awarding bodies such as the scope of their recognition, the regulatory position in relation to the qualification category of 'other regulated qualifications' and when these do/do not fall within the regulators powers. These are matters that the Federation will seek to clarify with the regulator but they illustrate that the issue of financial penalties cannot be considered in isolation from other issues related to regulation.

10- Page 4 of the consultation document makes reference to the awarding bodies having the right to appeal to the First Tier Tribunal. It is crucial that the appeal system is clearly laid out for awarding bodies so it can be seen to be accessible and appropriate. Links to information

on the examination boards tribunal should be included in any publications where it is referred to so awarding bodies can quickly access information on how to appeal, the 28-day timeline for appeals and the circumstances in which they can appeal.

- 11- Page 7 of the consultation document makes reference to the need for Qualifications Wales to not be viewed as having 'lesser powers' than other regulators. The Federation does not believe that the power to impose a monetary penalty of, for example, 10% of turnover in Wales would be viewed as being a lesser power. It would still be a significant regulatory power and we believe it would demonstrate a more reasonable, proportionate and fairer approach to regulation in Wales (and may perhaps set the example for others to follow). If anything, this consultation raises a question of whether it continues to be appropriate that Ofqual continues to have the power to fine based on UK turnover as this power was given to it when it also had regulatory authority in Northern Ireland.
- 12- The potential reputational damage that an awarding body faces when it is fined is of as much concern as the financial impact and this reputational risk is the same whether the fine is 10% of turnover in Wales or in the UK. The penalty cap should be determined by what is fair and proportionate in the specific market and not by a desire to simply match the powers of another regulator.
- 13- The Federation believes the cap on monetary penalties should reflect the amount of business awarding bodies conduct within Wales, not the whole of the UK. There may be value in exploring the potential of a cap of 10% of turnover in Wales as a fairer and more proportionate cap in terms of the amount of business an awarding body typically conducts in Wales.
- 14- Page 7 of the consultation document also makes reference to the 10% of UK turnover cap being appropriate to 'avoid inconsistency with other regulators'. In the qualifications sector only Ofqual currently fines with neither CCEA Regulation or the Scottish Qualifications Authority (SQA) having the power to fine. There is, therefore, already inconsistency. Furthermore, there is inconsistency between the regulators in other matters (for example, CCEA Regulation is required to accredit qualifications, Qualifications Wales uses categories of qualifications such as approved and designated that other regulators do not use, each regulator has its own set of regulations) so the drive for consistency in the area of monetary penalties seems at odds with the inconsistent approaches that already exist. Qualifications Wales has never shied away from taking a stance that is inconsistent with that of the other regulators where it believes it is in keeping with its approach to regulation for Wales. The Federation cannot therefore understand why the Welsh Government would seek to align with England's policy on monetary penalties, especially where this results in a disproportionate approach which presents an undue risk to awarding bodies. Our understanding is that Qualifications Wales is rightly committed to establishing itself as the regulator for qualifications in Wales and does not intend to be bound by expectation that it

will simply follow the lead set by England and Ofqual.

15- An approach to the financial penalties cap which is based on sound principles would be of far greater value and more readily acceptable to awarding bodies. Principles such as transparency, consistency, proportionality and fairness should be at the core of any approach to setting the cap on financial penalties. However, the consultation does not indicate that any underpinning principles have been considered and instead presents a proposed cap that simply mirrors what is applied in England.

## Question 2

Do you agree with the proposal for determining turnover as explained above?

<b>Agree</b>	<input type="checkbox"/>	<b>Disagree</b>	<input checked="" type="checkbox"/>	<b>Neither agree nor disagree</b>	<input type="checkbox"/>
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## Supporting comments

If you have any other suggestions for factors to be taken into account when determining the turnover of an awarding body please let us know here:

As we have stated in response to Question 1, above, the Federation believes that it is not proportionate to set the cap on monetary penalties at 10% of turnover in the UK as a whole. In terms of the proposals in the consultation we have the following points to feedback:

- 1- It is not clear whether the proposal is for the turnover that would be the basis for the penalty would be the turnover of the awarding body or the turnover of the whole organisation of which the awarding body may be a part. It is essential that this is clear. In some cases, the awarding body may be part of a charity, with the awarding activity representing a very small percentage of the overall activity and turnover. A fine of 10% of UK turnover for an organisation like this would be difficult to bear and is likely to be too great a risk to carry.
- 2- The term 'all ordinary relevant activities' should be defined in more detail to clarify what activities will be in and out of scope. This seems to imply that non-regulated activity will be taken into account to. The lack of clarity provided on what activity is being referred to makes it impossible to assess the potential likely extent of the impact of the proposals on awarding bodies.
- 3- The consultation proposes that turnover is determined according to whole financial years and the Federation believes this is reasonable but we do not agree that it should be based

on turnover in the whole of the UK. Also, the proposal is that where an awarding body has not yet operated for a full financial year that Qualifications Wales would estimate the full year turnover for the purpose of calculating the monetary penalty. However, no details are provided about what forecasting model would be used to estimate the full year turnover and what right an awarding body would have to challenge/appeal the forecast by the regulator.

- 4- It is also important to note that awarding body income is not always generated solely from the UK (including Wales). For some awarding bodies, a significant amount of income is generated from international business and it is not clear how this has been taken into account during the consideration of how the baseline turnover figure will be calculated for the purposes of establishing a financial penalty.
- 5- The consultation suggests that monetary penalties based on turnover in Wales could not be implemented because 'the accounts of awarding bodies cannot be disaggregated to separate turnover in Wales'. The Federation would welcome sight of the research that has been undertaken across the awarding body sector to evidence this position. We are not aware of any research having been undertaken on this matter or any efforts to seek a more proportionate proposal for the penalty cap.
- 6- If indeed it is not possible for awarding bodies to disaggregate their turnover in Wales then adopting a position which significantly elevates the level of risk for awarding bodies should not be the default position. It would be far favourable for the Welsh Government to work with the awarding body sector to seek a solution that offers Qualifications Wales a clear approach but also provides a proportionate monetary penalties cap which does not present an undue level of risk to awarding bodies. Working together to agree a formula that could be applied could offer a reasonable solution. For example, if an awarding body knew the proportion of its income that is generated in Wales (as a %), it could use the whole UK turnover as a starting point and then apply the % relating to the proportion of income from Wales (for example, if 20% of turnover is from Wales and the awarding body's UK turnover is £100,000 pa, then the amount that would be subject to a fine from the Welsh regulator would be £20,000 with the maximum fine being 10% of that i.e. £2,000).
- 7- The Welsh Government should also note that all regulated awarding bodies operating in Wales submit quarterly data returns to Qualifications Wales to provide information on the number of registrations and certifications issued to centres in Wales. This is a valuable source of information for estimating the level of activity undertaken by an awarding body in Wales and could be the basis for estimating turnover in Wales.
- 8- The Federation would be happy to facilitate discussion between the Welsh Government and awarding bodies to explore options and solutions that represent a more proportionate approach to a monetary penalties cap.

### Question 3

We would like to know your views on any likely effects or impacts that capping the maximum monetary penalty that Qualifications Wales could impose at 10 per cent of an awarding body's turnover, would have on the awarding body and on qualifications in Wales more generally.

How could positive effects be increased, or negative effects be mitigated?

### Supporting comments

The Federation believes that the imposition of a cap on monetary penalties of 10% of UK turnover:

- Would present a significant risk to many awarding bodies, especially those who award low volumes of qualifications in Wales and have a more significant footprint in England. It would also present a significant to those awarding bodies who operate as part of a larger parent company, with the majority of the organisation's activity being in non-awarding activity.
- Could lead to an increase in the number of awarding bodies who fully surrender their recognition in Wales and operate only in the other countries of the UK. The risk of surrender is likely to be higher amongst smaller, sector specific awarding bodies with low volumes in Wales. During discussions with members in preparing this consultation response, the Federation has had the issue of the potential to withdraw from the Welsh market raised on a number of occasions.
- Could lead to gaps in regulated qualification provision across Wales if awarding bodies withdraw from the market because the risk of remaining is too severe to carry. Learners may then find they are unable to access the comprehensive range of regulated qualifications that is currently available to them. Some of the gaps may well arise in apprenticeship frameworks where it will be unlikely another awarding body will step in to develop a replacement qualification for a low volume framework, specifically for Wales.

### Question 4

Please also explain what if any impact you believe the proposed Qualifications Wales (Monetary Penalties) Regulations would have on the Welsh Language as required by the Welsh Language Standards?

## Supporting comments

There is a risk that if awarding bodies withdraw from the market, provision that is currently available to learners in the Welsh language will no longer be available.

Also, if an awarding body felt there was any risk that an error in translating materials/assessments into the Welsh Language could lead to a financial penalty this would be likely to impact on their willingness to expand their Welsh language provision across an increased number of qualifications.

**Question 5** – We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to state them.

The Federation understands that any monetary penalties will be paid into the Wales Consolidated Fund. We would appreciate some consideration being given to the proceeds of any monetary penalties being assigned to a fund that is used to support the technical and vocational education sector, the learners who are undertaking vocational courses/qualifications and research which supports qualifications for the future. We believe this would be a positive use of the penalties which would contribute to supporting ongoing developments and improvements in the sector.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here: