

Federation of Awarding Bodies –response to the Qualifications Wales consultation on the Transfer Conditions Policy, November 2018

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 in England, Northern Ireland and Scotland. The Federation therefore has an interest in this consultation and we welcome the opportunity to respond.

The Federation would like to note that we welcome the 12-week consultation period which has been provided for responding to this consultation and would hope to see this timescales assigned to all future consultations. At such a busy time for the sector, a 12-week consultation period significantly increases the likelihood that awarding bodies will be able to respond to consultations. We have certainly experienced a notable increase in feedback from members over this more reasonable consultation period.

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.**

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Consultation Questions

1. Does the policy clearly explain what a Transfer Condition is?

Yes No

If no, please state what further clarification is needed:

The consultation document (page 8) provides a definition of a Transfer Condition but this could be presented more clearly, to aid understanding. The document as a whole would benefit from a page which presents clearly all of the key information that an awarding body would be keen to understand e.g. what a Transfer Condition is, what it is designed to do, when it might be applied etc. This information is currently scattered throughout the consultation document and interspersed with information about Qualifications Wales' role as a regulator and its regulatory powers.

Also, the Federation notes that the Transfer Condition may be applied to a qualification 'or form of qualification'. An explanation should be provided to clearly articulate what a 'form of qualification' is so awarding bodies and other users of the policy can clearly understand the extent of the transfer condition.

2. Does the policy clearly explain the circumstances in which a Transfer Condition may apply?

Yes No

If no, please state what further clarification is needed:

The consultation document (page 10, point 5) explains when a Transfer Condition may be applied but, as per the comments above (Q1), it could be more clearly presented.

In addition, each of the sub-points in point 5 could be extended to explain what circumstances make it most likely that a Transfer Condition will be applied. For example, it is not currently clear whether an awarding body would be able to provide information or evidence that would decrease the likelihood of this Condition being applied if they are new or entering a new sector. Clarity on whether this Condition will always be applied in these situations would be useful.

Point 3 refers to a direction being given in respect of the Transfer Condition. The Federation does not believe that a direction will usually be required. Where there is

evidence that the transfer is in the best interests of the learners, we believe many awarding bodies would be receptive to exploring how to transfer a qualification to another organisation without the need for a direction. We would support a more collaborative approach in such circumstances, whilst fully accepting that regulatory powers are there to be used in situations which require their full force.

Point 4 makes reference to a Transfer Condition being imposed at the point of recognition. This approach seems at odds with recognition which is confirming that an organisation meets the stringent requirements the regulator has laid down. There is a certain contradiction between these two concurrent responses to an application for recognition.

Point 11 lays out the circumstances when a Transfer Condition may be considered. However, there is nothing in the current draft Policy which recognises that the Transfer may only be for a specified period of time and the qualification could be transferred back to the original awarding body. For example, if an awarding body was unable to continue to work with learners because of a fire, flood, IT incident or Act of God then it is probable that the transfer would only be needed for a specific, limited, period of time. Once the effects of the fire, flood, IT incident had been resolved, the awarding body would most likely be in the position to take the qualification back. The policy needs to communicate that the Transfer can be short term, could transfer back to the original awarding body and what the process is to allow this to happen.

3. Do you agree with the General Principles set out at the beginning of the policy?

Yes, I agree with all principles []

I agree with some, but not all principles [X]

No, I disagree with all principles []

Please explain the reasons for your response. If you have indicated that you either agree with some of the principles or disagree with all of the principles please state which ones, and include any suggestions for how these could be developed further:

The Federation believes that the principles outlined in the consultation document are fundamentally sound. The key principle is the protection of learners which we and our members support. It is never desirable to encounter a situation where learners are not able to complete their qualification and access certification which confirms valid achievement.

In relation to the risk management principle, this is a key feature of the Standard Conditions of Recognition and a robust risk management system is integral to compliance with these regulations. However, it is important that the Conditions and the Transfer Condition Policy recognise that it is not reasonable to expect that an awarding body can *prevent* all risks from occurring. Awarding bodies can, and do, take all reasonable steps to identify and manage risks and the situations that arise when a risk becomes a reality.

4. Do you agree with the circumstances in which recognition of an awarding body is likely to be made subject to a transfer condition in paragraphs 3 to 5 of the policy?

Yes, I agree with all circumstances

I agree with some, but not all circumstances

No, I disagree with all circumstances

If you have indicated that you either agree with some of the circumstances or disagree with all of the circumstances please state which ones, and include any suggestions for how these could be developed further:

In addition, the Federation believes there may also be circumstances where an awarding body is entering a high risk sector and the regulator may wish to consider applying a Transfer Condition in those circumstances too. For example, an awarding body may have been operating in a sector in England, so it would not be classed as having no, or limited experience, when it wishes to enter this sector in Wales. However, QW might still wish to consider applying a Transfer Condition because of the nature of the sector and the importance of the qualification in the sector.

5. Do you believe that the timings set out in the policy are reasonable for awarding bodies?

Yes no

Please explain the reasons for your response.

The Federation understands the need for action to be taken in reasonable timescales to ensure that arrangements are in place to protect learners. However, we also believe that it is in the interests of all parties if the awarding body is provided with sufficient time to respond effectively to communications from the regulator. We would therefore recommend that:

Page 13 point 20 – that an awarding body is provided with 20 working days to respond to the Notice of Intent. This would allow a reasonable response time to prepare their representations, even in cases where the responsible officer may be on leave, or out of the business for other reasons, for 2 weeks. Awarding bodies could be asked to respond in 15 working days, if possible, but be allowed the full 20 working days, if required.

Page 13 point 20- the Federation understands the need to include an 'emergency timescale' but a 72 hour period is just not reasonable for an awarding body to prepare a robust representation, particularly if they need to access legal services. This timescale would effectively require an awarding body to drop everything else and focus on the transfer issue. This is not reasonable in a sector where other responsibilities cannot just be dropped (including other commitments to the regulator and/or other UK regulators). Also, the draft policy does not specify that the 72 hours will be across working days (and not including weekends etc) and it needs to be clear that whatever timescale is allowed, only normal working hours are included in it. A 5-working days timescale would be the minimum we believe should be provided to awarding bodies.

Page 13 point 21- we note that there is no timescale applied to the action of the regulator and how long it will take to make a decision and write to the awarding body. We believe it is only fair that a policy which seeks to hold awarding bodies to extremely challenging timescales also lays down the timescales that the regulator will work to in these circumstances. It is only fair that an awarding body should be aware of the timescales in which they can reasonably expect to hear back from the regulator. As drafted, the policy is very one-sided in terms of the burden presented by challenging timescales.

Page 14 point 25 – a 48 hour time period is not a reasonable period for awarding bodies to prepare and submit a representation in response to a notice of intention to issue a direction. The draft policy also does not specify that it will be 48 hours of working time (and not over a weekend etc). For many awarding bodies it may be the first time they have received this type of communication from the regulator and they will need a much more reasonable timescale to consider it, their legal position

and their response. The Federation believes a 5 working day minimum should be provided, which, although more reasonable, would still be a challenging timescale, especially if the responsible officer is out of the office for a period of time. We would ask that the regulator revisits this and other timescales and balance the need for a response against the burden on the awarding body and the impact a short timescale is likely to have on the quality of the response and the ability of the awarding body to make well-reasoned representations.

It is also not clear why the regulator would need to issue a direction, unless an awarding body is not in agreement with the intention to apply a Transfer condition. The Federation believes it would be more straightforward for all parties if a suitable outcome could be achieved without the need for a direction, which is a significant level of regulatory action. Point 26 clarifies that a direction might not always be required but the way the policy is currently presented suggests that a direction is the next step in the process. The process would benefit from the inclusion of an additional step, in advance of Stage 4, which considers the need for a direction and proceeds to the 'notice of intent to Give Direction' only where this is absolutely necessary. We are sure that where the transfer is in the best interests of learners that a direction will rarely be required. The Federation understands the need for QW to use its regulatory powers to protect learners, but we feel that collaborative working with awarding bodies, wherever possible, is a more positive and productive way forward.

6. Paragraph 39 sets out matters that we are likely to take into account when determining payment to an awarding body. Do you believe that these matters are reasonable?

- Yes, all matters are reasonable
- Some matters are reasonable and some are not
- None of these matters are reasonable

Please explain the reasons for your response.:

The Federation does not find paragraph 39 very clear or as informative as we would have anticipated. We believe this section of the policy would benefit from much more extensive articulation. The information also needs to reflect when payments will be made in respect of the transfer of intellectual property. From an awarding body's perspective, the value of IP can be high. They may have invested heavily in the recruitment of subject matter experts and with a Transfer Condition they will face the loss of this previous investment and the potential revenue from the investment. At present, this section is too vague on what will be taken into account when deciding whether to pay an awarding body.

We would also expect that the policy would provide information on payment to the receiving awarding body in respect of what categories of payment they would receive to support the transferred learners and the systems and administrative changes that will be required to support the transferred qualification.

7. Are there any aspects of the policy that require further clarification?

Yes No

If yes, which aspects and how can they be further clarified? :

The Federation believes the policy would benefit from the following clarifications and additions:

- Points 32-34 focus on identifying and supporting a recipient awarding body. Clarification is required of what consideration will be given to whether the proposed recipient for the transferred qualification is a direct competitor of the originating awarding body. This is of heightened importance in relation to proposals to require the transfer of IPR.
- In relation to points 32-24, clarification is required of what would happen to the awarding body's approved Centres for the qualification, once the qualification is transferred. Would the receiving awarding body be required to accept their previous approval or would centres be required to undergo this process again? If so, who would fund the approval activity?
- Point 35-37 on page 16-17 attempts to cover the transfer of property and rights in three short points. The Federation knows from experience with the withdrawal of the QCF and the recent discussions in relation to T levels that intellectual property is a complex area and one that needs to be clearly laid out for awarding bodies in some detail. We therefore feel that far more detailed information needs to be added to the policy to clarify areas including:
 - what IPR will be required to transfer to the receiving awarding body and clarification that this relates to the qualification only and not any supporting systems or processes. It is essential that the potential extent of the transfer is clearly explained in the policy.

- what would happen in cases where the originating awarding body does not own all of the IPR and some of it resides with a third party?
- what would happen if the same IPR was also used in other qualifications owned by the originating awarding body (for example, as units in other qualifications)? An awarding body could not be expected to agree to transferring IP that it needs to retain ownership for because it is used in other qualifications too.
- what would happen if the same IPR was also used in other qualifications that are awarded in other countries such as England, Scotland and Northern Ireland? If IP is transferred to the receiving awarding body could the original awarding body continue to operate in other regions of the UK? How would the regulators in these countries view the transfer of IPR in such cases? It is essential that this is clear as most awarding bodies operate beyond the market in Wales.
- whether the receiving awarding body would be permitted to use the IPR for the purpose associated with the transfer only or if the intention is for them to be able to use it within other qualifications that they later develop? If it is the former, how will this be monitored and what action does QW propose to take if the transferred IPR is used beyond the extent agreed at the point of transfer?
- whether it is appropriate to transfer the IPR or whether a licensing of the receiving awarding body to use the IPR for a limited period and for a specified purpose is more appropriate.
- whether the payment to the original awarding body would aim to compensate for the loss of any IPR in the appropriate circumstances and how much it would aim to compensate for the investment made into the qualification (staff and consultant time, IT development costs, marketing, PR) and the loss of potential future income.

- In addition, point 36 makes reference to the transfer of real estate. It is not clear when such a transfer would be required and the Federation believes that such a point must be more clearly explained so awarding bodies fully understand the potential implications of a Transfer Condition.

- Point 36 refers to transferring assessment materials, resources, IP, stock and real estate. If this is the case the impact on the awarding body could be significant and it is not clear whether the awarding body would still be able to operate effectively if all of this is to be transferred. It is not clear what is meant by 'resources' and what exactly would be in scope

when transferring these. Does this extend to, for example, subject experts contracted by the original awarding body to undertake marking or moderation/verification activities, or other human resources? If so, then there could be further complications in terms of employment, payment, contracting between the individuals and the awarding bodies.

- It is not clear that Qualifications Wales has the power to require an awarding body transfer real estate. This seems very extreme and could leave an awarding body in a state of financial instability. A reference to the legislation that underpins the regulator's authority in this area would be useful.
- Whether there are any GDPR issues that the originating awarding body would need to be aware of in relation to transferring learner data to the receiving awarding body and what the flow of this information would be (i.e. awarding body to awarding body or via Qualifications Wales?). Transfer of data will be an important function in the overall transfer and our members will require greater clarity about how Qualifications Wales will manage such situations to ensure that no risks are presented to awarding bodies in relation to GDPR compliance. Furthermore, Qualifications Wales should explain the legal basis upon which candidate personal data would be shared and the mechanism for transferring data (i.e. AO to AO or via QW).
- How the receiving awarding body will be selected and how much information they will be provided with in relation to the situation they are stepping into. What is the process for selecting the receiving awarding body; will it be a competitive tender process?
- Whether QW has any powers to require an awarding body to take on the transfer from another awarding body or if these arrangements will be entered into on a purely optional basis by the receiving awarding body.
- Centre issues, including: how much control the receiving awarding body will have in relation to being able to make decisions about which centres it can approve and work with; who will pay for any additional centre approval process that is required to provide the receiving awarding body with the assurance it needs of the quality of the centres; and, who will pay for any registration and certification costs, especially if the centre has already paid the original awarding body for these or if the charges of

the receiving awarding body are higher than that of the original awarding body and the centre therefore faces higher costs?

- Depending on the number of Centres/Learners involved how will the regulator assure itself that the chosen awarding body has the capacity and resources to manage the influx and maintain standards when they are unfamiliar with the Centres and also, potentially the qualification and the assessment processes?
- What consideration will be given to the market advantages the transfer has for the receiving awarding body and whether this gives them an unfair advantage in the market? Will this market perspective be a key consideration during the selection of the receiving awarding body?
- Will the decision to transfer be published on the QW website or elsewhere and how will it be communicated to centres in Wales? It is important that awarding bodies are aware of any publication of such matters as they will need to be prepared to manage any potential reputational damage that such a transfer could cause to them.
- What financial arrangements will be made with the receiving awarding body, will registration fees be paid to them, and if so, by which party?
- What will happen in cases where a learner has sought to register with the original awarding body because of the brand and wishes to continue with this awarding body and receive a certificate which contains their logo/brand?

8. Would the proposed policy result in any consequences (intended, or unintended) in relation to the following:

	Yes:	No:
(a) opportunities for persons to use the Welsh language,	[]	[X]
(b) treating the Welsh language no less favourably than the English language	[]	[X]

(c) individuals or groups who share protected characteristics outlined within the Equality Act 2010 .	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<p>If you've answered yes to any of the above, please outline what these consequences might be:</p> <p>a) We assume that part of the transfer arrangements would consider the ability of the receiving awarding body to support the use of the Welsh language.</p> <p>b) As above</p> <p>c) We assume that part of the transfer arrangements would consider the ability of the receiving awarding body to support learners who share protected characteristics.</p>		

9. Please outline in this space any impacts you anticipate or foresee in light of this policy.

The policy will not cover 'other regulated' qualifications because of the wording of the Act. If the aim of the policy is to protect learners then it is not clear why this protection is not extended to those on 'other regulated' qualifications as well as those pursuing 'approved' and 'designated' qualifications. This suggests there is a two-tier qualification regulation system in operation with some learners receiving protection from regulations that others are not afforded. If the aim of the policy is primarily to protect learners it does not make obvious sense to protect only those taking approved and designated qualifications.

Additional Information

Are you responding on behalf of an organisation or as an individual (If you select that you are responding on behalf of an organisation, we will assume that you have permission for your responses to be considered as representations of your organisation).

On behalf of the organisation

Individual

If you are responding on behalf of an organisation, please select the option below that best describes your organisation (if applicable):

Awarding body

Education or training provider

Other (please specify)

Federation of Awarding Bodies, Trade Association for vocational awarding organisations.

We may publish responses in full, if it is deemed relevant to the consultation. (Please see the section on data protection in the consultation document). In these circumstances, we would publish the name and postal town of the respondent. If you are happy for these details to be published alongside your response, please select 'yes' below. If not, please leave this question blank.

'Yes, I am happy to be identified'

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