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Consultation Document

Policy content of the Recognised Persons (Monetary Penalties) (Determination of Turnover) (Wales) Order

Date of issue: **16 January 2012**
Responses by: **24 February 2012**

Policy content of the Recognised Persons (Monetary Penalties) (Determination of Turnover) (Wales) Order

- Overview** The Welsh Government is consulting on proposals to make an Order which sets out how Welsh Ministers will determine the turnover of an awarding organisation for fining purposes.
- How to respond** Responses to this consultation document should be e-mailed to the infoquals@wales.gsi.gov.uk consultation mailbox to arrive by 24 February 2012 at the latest.
- Further information and related documents** Large print, Braille and alternate language versions of this document are available on request.
The consultation and response form are available on the Welsh Government's website at www.wales.gov.uk/consultations
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Data protection

How the views and information you give us will be used

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

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Ministerial foreword

The Education Act 2011 (the Act) which received Royal Assent in November 2011 contained new provision on the regulation of qualifications in Wales. In particular, the Act reduces the restrictions on the Welsh Ministers powers to direct or withdraw recognition from awarding organisations and introduces a new power to impose fines on those organisations. In order to exercise these new powers the Welsh Ministers are required to make an order which sets out how they will determine the turnover of an awarding organisation for fining purposes.

I am currently undertaking a consultation on how the Welsh Ministers intend to apply this new power to fine. I would like to take this opportunity to consult with stakeholders on how we intend to determine the turnover of an awarding organisation for the purposes of the new powers.

I am aware that the Department for Education in England are also consulting on the same issue at this time. I would wish to reinforce the importance of responding to this consultation as it is your opportunity to ensure that your views are considered during the development of the Order.

Background

1. The enactment of the Education Act 2011 (the Act) makes three main changes to the enforcement powers of the Welsh Ministers in relation to the regulation of qualification providers in Wales. Firstly, it will remove the existing restrictions on directing or removing the recognition of an awarding organisation which has breached a condition upon which it is recognised. Currently, before the Welsh Ministers can carry out these actions they have to show how the action the awarding organisation is taking 'prejudices' the proper award of the qualification, or learners who are seeking to obtain a qualification in Wales. It will also enable the Welsh Ministers to impose a fine on an awarding organisation that has breached a condition of its recognition, with awarding organisations given the right of appeal to the First Tier Tribunal. The Welsh Ministers will also be able to recover any costs incurred from taking any of the enforcement action (issuing directions, withdrawing recognition or imposing fines) under the Education Act 1997 ("the 1997 Act"). The amount of any unpaid fines or costs may be recovered through civil action in the courts. The powers of the Welsh Ministers are equivalent to those of Ofqual (the qualifications regulator in England).

2. A number of procedural requirements are also placed on the Welsh Ministers in relation to their power to impose a fine on awarding bodies. These include a requirement to give notice of a proposal to fine and the reason for it, as well as providing the awarding organisation with an opportunity to make representations on this proposal. In addition, any fine imposed by the Welsh Ministers must not exceed 10 per cent of the awarding organisation's turnover. The turnover of an awarding organisation for these purposes is to be determined in accordance with an Order made by the Welsh Ministers under section 32AB of the 1997 Act.

Proposal

3. The Welsh Ministers propose to make the Recognised Persons (Monetary Penalties) (Determination of Turnover) (Wales) Order 2012 ("the Turnover Order") in May 2012. This Order will establish how turnover is to be determined for the purposes of the Welsh Ministers power to impose fines on awarding organisations.

4. It is proposed to determine turnover by reference to all the turnover of an awarding organisation. This is likely to encompass all amounts which are derived from the provision of goods and services falling within an awarding organisation's ordinary activities. This figure will be reduced by deductions for trade discounts, value added tax and other relevant taxes. The determination of turnover will only apply to the organisation that is recognised as the awarding body and not a parent or related organisation.

5. It is proposed to determine turnover, wherever possible, according to whole financial years. Where an awarding organisation has not yet operated for an entire financial year it is proposed to aggregate that figure for a financial year. This would be achieved by dividing the turnover of an awarding organisation by the number of months they have been in operation and multiplying by 12.

6. The Welsh Ministers have also considered an option for determining turnover by reference to regulated activity only. Regulated activity for these purposes would mean all the activity of an awarding organisation which is concerned with the award or authentication of qualifications in Wales. However, the Welsh Ministers are not proposing this option as it would not cover all organisations which award qualifications in Wales. For example, employers and other organisations which do not charge for the award or authentication of their qualifications would have little or no turnover generated from regulated activity. As such, the Welsh Ministers would be unable to impose any effective fine on these organisations.

7. As the qualifications regulator for Wales, the Welsh Ministers consider it vital that it has an appropriate toolkit of sanctions that it is able to exercise equally across all organisations which award qualifications in Wales. The new power to fine is not targeted at a specific group of awarding organisations in particular. It allows the Welsh Ministers to fine any organisation (irrespective of size or status) which has chosen to seek recognition as an awarding organisation in Wales and has breached a condition of that recognition. For example, failure by an employer that is a recognised awarding organisation is equally as serious for the learners concerned as by any other type of awarding organisation. If turnover was only determined by reference to regulated activity, organisations which do not charge for their qualifications would fall outside the scope of the Welsh Ministers fining power. Therefore, it is important that the determination of turnover is flexible enough to ensure that such organisations are included.

8. This inclusive approach to determining turnover may in some circumstances provide a much more proportionate and less burdensome fining sanction against awarding organisations than the extreme sanction of withdrawing recognition to award all or some of its qualifications. The Welsh Ministers have a strong desire to protect all learners who seek to obtain qualifications in Wales, regardless of the organisation which awards their qualification.

9. Furthermore, whilst the turnover and maximum fine may be high in some circumstances, particularly where a large employer or awarding organisation is involved, this does not mean that the actual fine imposed will also be high. The Welsh Ministers will consider each breach of a condition of recognition separately and will only impose a fine where necessary, and at a level which is appropriate in all the circumstances of the case. Therefore, it is likely that in some cases the level of fine imposed will be very much smaller than the cap set at 10 per cent of total turnover. By way of reference, the Welsh Ministers are also currently consulting on their draft fining policy, which sets out how they intend to exercise these new powers. This consultation document is available at:
www.wales.gov.uk/consultations/education