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Llywodraeth Cymru  
Welsh Government

Welsh Government

Consultation Document

## Qualifications Wales (Monetary Penalties) Regulations

Consultation on Qualifications Wales' power to impose a monetary penalty where recognised awarding bodies are non-compliant with regulatory requirements

Date of issue: 22 October 2018

Action required: Responses by 07 January 2019

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.

# Qualifications Wales (Monetary Penalties) Regulations

## Overview

This consultation aims to gather the views of a wide range of stakeholders who may be affected by Qualifications Wales' power to impose a monetary penalty where recognised awarding bodies are non-compliant with regulatory requirements.

## How to respond

Responses to this consultation should be e-mailed/posted to the addresses below to arrive by **07 January 2019** at the latest.

## Further information and related documents

**Large print, Braille and alternative language versions of this document are available on request.**

You may also wish to look at the Qualifications Wales website at:

<https://www.qualificationswales.org/english/>

<https://www.qualificationswales.org/cymraeg/>

The consultation documents can be accessed from the Welsh Government's website at [www.gov.wales/consultations](http://www.gov.wales/consultations)

## Contact details

For further information:

Qualifications Wales Sponsorship Team  
Curriculum Division  
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CF10 3NQ

Email:

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## General Data Protection Regulation (GDPR)

The Welsh Government will be data controller for any personal data you provide as part of your response to the consultation. Welsh Ministers have statutory powers they will rely on to process this personal data which will enable them to make informed decisions about how they exercise their public functions. Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about or planning future consultations. Where the Welsh Government undertakes further analysis of consultation responses then this work may be commissioned to be carried out by an accredited third party (e.g. a research organisation or a consultancy company). Any such work will only be undertaken under contract. Welsh Government's standard terms and conditions for such contracts set out strict requirements for the processing and safekeeping of personal data.

In order to show that the consultation was carried out properly, 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. If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

You should also be aware of our responsibilities under Freedom of Information legislation. If your details are published as part of the consultation response then these published reports will be retained indefinitely. Any of your data held otherwise by Welsh Government will be kept for no more than three years.

## Your rights

Under the data protection legislation, you have the right:

- to be informed of the personal data holds about you and to access it
- to require us to rectify inaccuracies in that data
- to (in certain circumstances) object to or restrict processing
- for (in certain circumstances) your data to be 'erased'
- to (in certain circumstances) data portability
- to lodge a complaint with the Information Commissioner's Office (ICO) who is our independent regulator for data protection.

For further details about the information the Welsh Government holds and its use, or if you want to exercise your rights under the GDPR, please see contact details below:

Data Protection Officer:  
Welsh Government  
Cathays Park  
CARDIFF  
CF10 3NQ

e-mail:

[Data.ProtectionOfficer@gov.wales](mailto:Data.ProtectionOfficer@gov.wales)

The contact details for the Information Commissioner's Office are:

Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

Tel: 01625 545 745 or  
0303 123 1113

Website: <https://ico.org.uk/>

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## **Ministerial foreword**

The Qualifications Wales Act 2015 (the Act) established Qualifications Wales as the independent regulator for non-degree qualifications in Wales.

The work of Qualifications Wales centres around two principal aims:

- To ensure that qualifications, and the Welsh qualification system, are effective for meeting the reasonable needs of learners in Wales; and
- To promote public confidence in qualifications and the Welsh qualification system.

In order to carry out these functions, the Qualifications Wales Act 2015 provides Qualifications Wales with a number of powers which allow it to take enforcement action against awarding bodies if needed.

Section 38 of the Act provides Qualifications Wales with the power to impose a monetary penalty on the awarding bodies it regulates. Any monetary penalty imposed is to be determined in accordance with regulations made by the Welsh Ministers. These proposed regulations are intended to determine the upper limit of the monetary penalty that Qualifications Wales may impose on awarding bodies it regulates.

I would like to take this opportunity to consult with stakeholders on how we intend to determine the upper limit of the monetary penalty that Qualifications Wales may impose on an awarding body. The proposed regulations will also deal with how to determine the turnover of an awarding body for monetary penalty purposes.

I wish to reinforce the importance of responding to the consultation as it is your opportunity to ensure that your views are considered during the development of the regulations.



**Kirsty Williams AM, Cabinet Secretary for Education**

## Background

The Qualifications Wales Act 2015 (the Act) established Qualifications Wales as the independent regulator for non-degree qualifications in Wales. Section 38 of the Act provides Qualifications Wales with the power to impose a monetary penalty on an awarding body it regulates for non-compliance with its Standard Conditions of Recognition and/or other regulatory requirements.

This is a link to the Qualifications Wales Standard Conditions of Recognition. They are being reviewed during 2018. They include conditions relating to the governance, finance and fitness for purpose of qualifications amongst other conditions.

### English version

<http://qualificationswales.org/media/3371/170330-v60-standard-conditions-of-recognition.pdf>

### Welsh version

<http://qualificationswales.org/media/3370/170330-v60-amodau-cydnabod-safonol.pdf>

There is also a list of regulatory documents with which awarding bodies must comply. There are four main categories of regulatory documents which include conditions, criteria, procedures and policies. All of these can be found on the Qualifications Wales website.

### English version

<https://www.qualificationswales.org/english/our-work/our-regulatory-documents/>

### Welsh version

<https://www.qualificationswales.org/cymraeg/ein-gwaith/ein-dogfennau-rheoleiddiol/>

As required by Section 47 of the Act, Qualifications Wales has prepared and consulted on a policy statement setting out circumstances in which it may impose a monetary penalty and the factors which it will take into account in determining the amount of a penalty to be imposed under that section.

### English version

<http://www.qualificationswales.org/english/get-involved/consultations-and-surveys/closed-consultations-and-surveys/consultation-on-complaints-about-awarding-bodies-regulatory-whistleblowing-policy-and-enforcement-powers/>

## Welsh version

<https://www.qualificationswales.org/cymraeg/cymerwch-ran/ymgyngoriadau-ac-arolygon/ymgyngoriadau-ac-arolygon-sydd-wedi-dod-i-ben/consultation-on-complaints-about-awarding-bodies-regulatory-whistleblowing-policy-and-enforcement-powers/>

Qualifications Wales will aim to use monetary penalties (and the amount of any penalty) in a proportionate, transparent and targeted way. The power to impose a monetary penalty is part of Qualifications Wales' overall regulatory powers and is therefore one amongst a range of possible actions it could consider. Its Regulatory Framework sets out its approach to regulating.

Qualifications Wales will not be able to retain any amounts of money levied from monetary penalties; all monies will be paid into the Wales Consolidated Fund. Awarding bodies will be able to appeal decisions by Qualifications Wales regarding monetary penalties to the First-tier Tribunal. Section 38(3) of the Act provides that the upper limit of the monetary penalty Qualifications Wales can impose is to be determined in accordance with regulations made by the Welsh Ministers.

This maximum limit will not determine the **actual** amount of the penalty Qualifications Wales can impose. It is important to note that the regulations will provide that, subject to this limit, the amount of any monetary penalty imposed will be decided by Qualifications Wales taking into account the factors set out in its Monetary Penalties policy, which will be finalised and published following the completion of Welsh Government's consultation.

Qualifications Wales have made it clear that they aim to publish their policy after the regulations have been consulted upon and approved by the National Assembly for Wales.

Qualifications Wales will always be proportionate and reasonable in its approach in line with its Regulatory Framework.

## **Purpose of the consultation**

This consultation exercise aims to gather the views of stakeholders who may potentially be directly affected by Qualifications Wales' power to impose a monetary penalty. The Welsh Ministers propose to make the regulations, which will determine the upper limit of any monetary penalty Qualifications Wales can impose in 2019.

We expect that the regulations will be debated in the National Assembly for Wales in 2019.

# Proposal

## Maximum Monetary Penalty

It is proposed that the upper limit for a monetary penalty Qualifications Wales can impose on an awarding body should be no more than 10 per cent of the annual UK turnover of the body in the financial year preceding the issuing of the monetary penalty notice.

Public documents are available from the time of the Qualifications Wales Act's passage through the National Assembly where the Welsh Government said that officials were of the view that the figure of 10 per cent of total turnover could be considered to be excessive – both for smaller and larger organisations – given the proportion of their business that may be conducted in Wales in some cases.

However, officials no longer view an upper limit of 10 per cent for a monetary penalty as being excessive. This is because:

- This statement was made before a monetary penalties policy was developed and may or may not have been in advance of all the issues being fully considered
- There are both large and small awarding bodies operating mainly in Wales, some have turnovers in the tens of millions and others only tens of thousands of pounds. A monetary penalty upper limit has to ensure that for organisations with a small turnover the sum is sufficient to be meaningful and in the case of bigger awarding bodies the sum would be sufficient to deal with potentially serious incidents of malpractice
- The 10 per cent figure is an upper limit and in the case of Ofqual in England has not been used to date. Qualifications Wales would work with the awarding body to determine the extent of their business in Wales and what actions had been taken at what cost to correct the situation. Qualifications Wales would be proportionate in the imposition of any monetary penalty
- In Qualifications' Wales draft Monetary Penalties Policy document (2018) Qualifications Wales details 17 factors which would be taken into account when determining the amount of penalty. These include the impact of the breach on the regulated market, including on learners in Wales; co-operation with the investigation and the extent of the awarding body's business in Wales. This ensures that any monetary penalty Qualifications Wales imposes is proportionate, evidence-based and determined on a case-by-case basis

- The monetary penalty is one of a suite of powers which could be used if an awarding body had failed to comply with a condition to which its recognition is subject. The purpose of a monetary penalty is not to impose undue financial hardship on an awarding body. Qualifications Wales should have parity with other regulators such as Ofqual and Ofgem and should not be able to be viewed as having lesser powers
- In determining whether to impose a monetary penalty and what amount, Qualifications Wales states in its draft policy that it would take into account any related regulatory actions it, or other regulators have taken. Qualifications Wales works closely with other regulators including Ofqual and the Council for the Curriculum, Examinations and Assessment (the qualifications regulator in Northern Ireland), with whom it has memoranda of understanding. Although Ofqual can impose monetary penalties; the Council for the Curriculum, Examinations and Assessment does not have the power to impose financial penalties
- There are checks and balances in the system as an appeal by the awarding body can be made to the First-tier Tribunal against the decision to impose a monetary penalty notice and the amount of the penalty.

Taking into account the above points the Welsh Government now takes the view that a 10 per cent upper limit for a monetary penalty is reasonable. Smaller limits than 10 per cent have been considered by the Welsh Ministers. However, alternative lower figures are not preferred so as to avoid inconsistency with other regulators. The 10 per cent maximum is a cap and actual levels of monetary penalties are a matter for Qualifications Wales. Setting a cap does not imply any default to set maximum monetary penalties.

#### Procedure for imposing a monetary penalty

Before imposing a monetary penalty, Qualifications Wales must give notice to the awarding body concerned of its intention to do so.

The notice must—

- (a) set out Qualifications Wales' reasons for proposing to impose the penalty
- (b) specify the proposed amount of the penalty
- (c) specify a period with the expiry of which Qualifications Wales proposes to decide whether to impose the penalty.

The period specified under (c) above must be a period of at least 28 days beginning with the date of the notice. In deciding whether to impose the penalty, Qualifications Wales must have regard to any representations made by the awarding body.

An awarding body may appeal to the First-tier Tribunal against a decision to impose a monetary penalty (on the grounds set out in section 38(2)) or against a decision as to the amount of the penalty. With the First-tier Tribunal in place, there will be checks and balances in the system.

### Determining Turnover

The role of the Welsh Ministers in determining turnover is to define what is meant by the term “turnover” for monetary penalty purposes. Qualifications Wales would then be able to apply this definition to determine the turnover of an awarding body for the purposes of imposing a monetary penalty on that body.

Turnover will be based on income from all ordinary relevant activities rather than only on regulated activity as there are a number of awarding bodies who do not derive an income from regulated activity. Qualifications Wales’ policy will however, take account of income from regulated activities as part of its deliberation on setting the monetary penalty that is to be imposed on an awarding body that breaches a condition of recognition.

Through this consultation document and within the proposed regulations, we are proposing that Qualifications Wales would determine the UK turnover of an awarding body, wherever possible, according to whole financial years. Where an awarding body had not yet operated for an entire financial year, Qualifications Wales would use all available information to estimate a full year’s turnover.

Welsh Ministers have also considered an option for determining the maximum monetary penalty by reference to activity regulated by Qualifications Wales only. Regulated activity for these purposes would mean all the activity of an awarding body which is concerned with the award of qualifications in Wales. However, this option is not workable as the accounts of awarding bodies cannot be disaggregated to separate out turnover in Wales. Depending on the country in which the awarding body is registered, turnover would either be available on a UK basis or on the basis of England and Wales together.

It would also be difficult to clearly differentiate revenue that related to the award of qualifications. While most awarding bodies derive income directly from qualification entry fees, this income is often supplemented by a range of supporting services.

For the purposes of the regulations, the turnover of a recognised awarding body is ‘the sum of all amounts derived by the body from the provision of goods and services falling within the body’s ordinary activities in the United Kingdom’ and will be calculated in conformity with generally accepted accounting principles in the United Kingdom.

This figure will be reduced by deductions for 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.

This definition of turnover is consistent with the definition in the Office of Qualifications and Examinations Regulation (Determination of Turnover for Monetary Penalties) Order 2012 that was introduced to allow Ofqual, the regulator of qualifications in England, to impose monetary penalties.

## **Conclusion**

You are therefore requested to respond to the questions below on the proposal to determine the maximum monetary penalty Qualifications Wales would be able to impose on an awarding body in Wales. You are also asked to respond to the definitions relating to determining the turnover of an awarding body.

Your views will be taken into account and are important to us. Responses to this consultation exercise will be published in due course.