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Llywodraeth Cymru
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Consultation Document

Fining policy of the Welsh Ministers

Date of issue: **9 January 2012**

Responses by: **1 April 2012**

Financing policy of the Welsh Ministers

- Overview** The Welsh Government is consulting on proposals to introduce a financing policy as part of the powers of sanction that may be applied to awarding organisations which breach their conditions of recognition.
- How to respond** Responses to this consultation document should be e-mailed to the info.qualifications@wales.gsi.gov.uk consultation mailbox to arrive by the 1 April 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
- Contact details** For further information:
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Qualifications and Learning Division
Welsh Government
Ty'r Llyn
Swansea Enterprise Park
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SA6 8AH
e-mail: info.qualifications@wales.gsi.gov.uk
Tel: 01792 765853

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 officials dealing with the issues which this consultation is about. It may also be seen by other Welsh Government officials 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 2011 Act”) contains new provision on the regulation of qualifications in Wales. In particular, the 2011 Act reduces the restrictions on the Welsh Ministers powers to direct or withdraw recognition from awarding organisations and also introduces a new power to impose fines on awarding organisations which breach conditions of their recognition.

I would like to take this opportunity to consult with stakeholders on our policy in this area, which sets out how we intend to use these new powers of regulation. I invite and welcome your comments.

Since taking office I have been honest where I have seen failings in the education system. Awarding organisations play a vital role in ensuring that our learners receive appropriate recognition for their studies and achievements. When things go wrong there can be direct and serious implications for learners and I want to ensure that we do all that we can to reduce and mitigate against errors in the qualifications system.

We have launched a Review of Qualifications. One of the aims of the review is to ensure that confidence in the system is maintained and built upon. Errors, such as those that were widely reported in the summer of 2011 can undermine confidence in the system. The changes introduced by the Education Act 2011 allow us to use a wider range of sanctions that will help address such problems. We intend to implement these new powers in time for the summer examination series in 2012.

I believe that the use of powers of sanction, including financial penalties, focused on securing compliance with the conditions of recognition, will provide the right incentives for awarding organisations to meet the standards required of them.

Any financial penalty imposed will be appropriate in the circumstances of the case, and should provide an adequate incentive both to the awarding organisation in question and to all awarding organisations to comply with conditions of recognition. Our focus in using them is:

- As a means of challenging and changing inappropriate behaviour – to give awarding organisations the appropriate incentives to take, or stop taking, action needed to perform effectively.
- To deter future non-compliance by providing a clear public signal about behaviour that is unacceptable and using appropriate penalties for poor performance.
- Where relevant, as a way to prevent awarding organisations benefiting from non-compliance, particularly where an organisation has gained financially from a breach.

Background

1. The Education Act 2011, which received Royal Assent in November 2011, amended Part V of the Education Act 1997 (“the 1997 Act”) (<http://www.legislation.gov.uk/ukpga/1997/44/contents>) so as to provide the Welsh Ministers with additional functions in relation to the regulation of qualifications in Wales. These additional functions include the power to impose financial penalties on recognised awarding organisations which have breached a condition of their recognition. It is the intention of Welsh Government to implement these powers in time for the summer examination series in 2012. This statement sets out the principles that the Welsh Ministers will apply when exercising their powers to impose financial penalties on awarding organisations.

2. Section 32AB of the 1997 Act provides that the amount of any financial penalty must be appropriate in all the circumstances of the case and must not exceed 10 per cent of the awarding organisations turnover. The turnover of an awarding organisation is to be determined in accordance with an Order made by the Welsh Ministers, which is intended to be made in May 2012. The 10 per cent limit applies to each breach for which a penalty is imposed. It is not a cumulative limit for a financial year.

3. In imposing any penalty, the Welsh Ministers must follow the procedural requirements set out in section 32AA of the 1997 Act which specifies the arrangements for notifying and consulting affected parties. This is set out in detail below in the ‘Procedural matters’ section.

Approach

4. The Welsh Ministers will impose a financial penalty on an awarding organisation when this represents the most proportionate and appropriate response to the breach of any of the conditions on which an organisation is recognised. These conditions are imposed on awarding organisations by the Welsh Ministers under section 30(1) of the 1997 Act.

5. The Welsh Ministers expect financial penalties to be particularly appropriate in response to serious, deliberate or persistent breaches of conditions of recognition by an awarding organisation. Particular attention will be made to ensure that an awarding organisation does not gain a financial benefit from any non-compliance. The power to fine will not be used if another sanction is more appropriate to the circumstances of the case. In some cases it may be necessary to use the Welsh Ministers’ power to impose monetary penalties in conjunction with one or more of their other enforcement powers.

6. Each awarding organisation is subject to conditions of recognition as referred to in paragraph 4 above. These conditions of recognition must be met on an ongoing basis; they provide a clear framework within which awarding organisations can operate and develop, and regulatory action (including fining) can only be taken where one or more conditions have been breached. The overall approach to regulation including monitoring and sanctions (such as the new fining powers), seeks to encourage compliance and deter non-compliance. If a condition has been

breached the Welsh Ministers will therefore consider how best to use the range of powers to:

- Ensure that the awarding organisation takes appropriate action to bring itself back into compliance with its conditions of recognition.
- Prevent the awarding organisation gaining from the breach.
- Deter future breaches of conditions of recognition (including by other awarding organisations).
- Give a clear message to the awarding organisation and the qualifications sector at large where the Welsh Ministers believe a breach to be unacceptable.

Determining whether to levy a financial penalty

7. If it is identified that an awarding organisation is breaching or has breached one or more of its conditions of recognition the Welsh Ministers may decide to impose a financial penalty. The decision as to whether to impose such a penalty will take into account the particular facts and circumstances of the case. The following is a non-exhaustive list of factors which the Welsh Ministers will consider:

- The seriousness of the breach, particularly in relation to the standard, level of public confidence in, or efficiency of the provision of qualifications.
- The impact of the breach on purchasers, learners and users of qualifications.
- The impact of the breach on the Welsh Minister's ability to regulate the organisation robustly, confidently and effectively in future.
- Whether the breach was prolonged or repeated.
- Whether an awarding organisation has breached conditions of recognition in the past and, if so, whether this has occurred regularly.
- Whether the circumstances from which the breach arose were within the control of the awarding organisation.
- Whether the breach was deliberate or accidental and, if accidental, whether it was negligent or reckless and whether it gives rise to concerns about the organisation's management or systems of control.
- Whether a financial penalty would increase the likelihood of compliance with conditions of recognition in the future (this would include compliance by other awarding organisations).

Determining the level of a financial penalty

8. The Welsh Ministers must determine the level of financial penalty in accordance with section 32AB of the 1997 Act. This states that the amount of financial penalty must not exceed 10 per cent of the awarding bodies turnover, as determined in accordance with an Order made by the Welsh Ministers. The proposed approach to determining the turnover of awarding organisations will be the subject of a separate consultation due to commence mid-January.

9. In deciding an appropriate level of the fine, the Welsh Ministers will take into account all the circumstances of the case in question. A number of factors are likely to be relevant to the decision as to what would be an appropriate monetary penalty in a particular case. These issues will vary from case to case, but will be closely related to those determining whether to impose a penalty at all. For this reason all the factors listed above for 'Determining when to levy a financial penalty', will be relevant in considering the level of fine that an awarding organisation should pay. The number of factors that apply in a particular case will be taken into account when the level is set – the more reasons there are for imposing the penalty, the higher the penalty that may be imposed (other things being equal). The Welsh Ministers will also take into account a number of other factors. These additional factors could be aggravating factors, which may lead to a higher penalty, or mitigating factors which may reduce the level of a penalty. The following is a non-exhaustive list of other factors which will be considered in determining the size of the financial penalty to impose:

- Steps taken by the awarding organisation since the breach to rectify and/or prevent any recurrence of the breach.
- Whether the breach was reported to the Welsh Ministers by the awarding organisation, and any attempt to conceal the breach.
- The level of cooperation with any investigation carried out by the Welsh Ministers.
- Whether the breach gave rise to financial gain or competitive advantage.
- The provision of restitution and compensation to those affected by the breach.
- The relative seriousness of the breach compared to other breaches for which fines have been levied.

Procedural matters

10. Under section 32AA (6) and (7) of the 1997 Act, the Welsh Ministers must give notice to an awarding organisation before imposing any fine under these new powers. This notice must set out the reasons for imposing the fine, as well as providing the awarding organisation with an opportunity to make representations about the proposal to fine within a time period specified in the notice. We will send this notice to the address of the awarding organisation provided at the point of recognition, unless a change of address has been notified at a later stage.

11. Awarding organisations will have at least 28 days, beginning on the day any notice is received, to make written representations to the Welsh Ministers on the proposal to fine. Following consideration of any representations received, the Welsh Ministers will then determine whether to withdraw, vary or confirm the fine.

12. If the Welsh Ministers decide to continue to impose a penalty they will issue a notice under section 32AA (10) of the 1997 Act. This will detail the grounds for imposing the penalty, how payment should be made and the consequences of non-payment. Awarding organisations will always have at least 28 days in which to make payment, although the exact period in each case will be specified in the notice. The notice will also detail the awarding organisation's right to appeal against the decision of the Welsh Ministers to impose a fine, and will set out the deadline for bringing such an appeal.

13 Under section 32AC of the 1997 Act, the awarding organisation may appeal to the First Tier Tribunal. An appeal under this section can be against either a decision by the Welsh Ministers to impose a fine, or a decision as to the amount of penalty imposed. An appeal could also be brought against both of these decisions. When an awarding organisation decides to appeal to the Tribunal, the requirement to pay its financial penalty is suspended pending the determination of the appeal by the First Tier Tribunal. When the Welsh Ministers issue notice of a proposal to issue a financial penalty details of the appeals procedure will accompany the notice.

14 The Tribunal can decide to withdraw, vary or confirm the penalty. It could also decide to impose a different or additional sanction which was previously available to the Welsh Ministers, or to remit the decision on whether to confirm the requirement to pay the penalty, or any other matter relating to that decision, back to the Welsh Ministers to consider.

15. Where an organisation does not pay the penalty they will be liable to pay interest on the debt, as set out in section 32AD of the 1997 Act. The Welsh Ministers may also issue proceedings through the courts to recover any amount of unpaid penalty and interest.

Financing Policy of Welsh Ministers

Consultation Response Form

Your name:
Organisation (if applicable):

e-mail/telephone number:

Your address:

Responses should be returned by 1 April 2012 to:

Financing Policy consultation
Qualifications and Learning Division
Department for Education and Skills
Welsh Government
Tŷ'r Llyn
Swansea Enterprise Park
SA6 8AH

or completed electronically and sent to:

info.qualifications@wales.gsi.gov.uk

1. Do you agree with the proposed approach outlined in paragraphs 4–6 for Welsh Ministers to impose a financial penalty on an awarding organisation?

Agree	<input type="checkbox"/>	Disagree	<input type="checkbox"/>	Not sure	<input type="checkbox"/>
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Comments:

2. Do you agree with the proposal for determining whether to levy a financial penalty on an awarding organisation outlined in paragraph 7?

Agree	<input type="checkbox"/>	Disagree	<input type="checkbox"/>	Not sure	<input type="checkbox"/>
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Comments:

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3. Do you agree with the proposal for determining the level of a financial penalty outlined in paragraphs 8–9?

Agree	<input type="checkbox"/>	Disagree	<input type="checkbox"/>	Not sure	<input type="checkbox"/>
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Comments:

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4. The procedural matters set out in paragraphs 10–15 are statutory requirements set out on the face of the Education Act 1997. Do you have any thoughts or suggestions on procedural matters which go beyond these statutory requirements?

Comments:

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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 report them:

Comments:

Responses to consultations may be made public – on the internet or in a report. If you would prefer your response to be kept confidential, please tick here: