

Explanatory Memorandum to
The Recognised Persons (Monetary Penalties) (Determination of
Turnover) (Wales) Order 2012

This Explanatory Memorandum has been prepared by the Qualifications & Learning Division of the Department for Education and Skills and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Recognised Persons (Monetary Penalties) (Determination of Turnover) (Wales) Order 2012.

Leighton Andrews

Minister for Education and Skills

21 March 2012

1. Description

- 1.1 This instrument defines how turnover of a recognised awarding organisation is determined for the purposes of section 32AB of the Education Act 1997. Section 32AB provides that a monetary penalty imposed by the Welsh Ministers under Part 5 of the Education Act 1997 must not exceed 10% of an awarding organisation's turnover. This instrument sets out how the Welsh Ministers will determine turnover for the purposes of this 10% cap.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

- 2.1 None

3. Legislative background

- 3.1 The Education Act 2011 (which received Royal Assent in November 2011) made amendments to the Welsh Ministers' qualification functions in Part 5 of the Education Act 1997. These amendments included section 32AA of the Education Act 1997 which gives the Welsh Ministers the power to impose monetary penalties on recognised awarding organisations. This power may be exercised where if it appears to the Welsh Ministers that a recognised awarding organisation has failed to comply with a condition of their recognition.
- 3.2 Section 32AB of the Education Act 1997 confirms that the amount of monetary penalty may be whatever the Welsh Ministers decide would be appropriate in all the circumstances of the case. However, this is subject to a cap, set at 10% of the recognised awarding organisation's turnover.
- 3.3 This instrument sets out how turnover will be determined for the purposes of this cap.
- 3.4 The instrument is subject to the approval of the Assembly (the affirmative procedure).

4. Purpose and intended effect of the legislation

- 4.1 The intention is to define turnover for the purposes of the 10% cap applying to monetary penalties imposed under Part 5 of the Education Act 1997. This will ensure that the imposition of monetary penalties can apply fairly across the entire spectrum of awarding organisations regardless of their nature or size.

- 4.2 The new power to fine (which is related to this instrument) 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.
- 4.3 There were a number of incidents during last year summer's GCSE and A level examinations which highlighted some serious shortcomings in awarding organisations' examinations procedures and delivery. A significant number of learners were affected. These incidents highlighted the need for a qualification and examination system which is supported by a robust regulatory system which holds awarding organisations to account and has full public confidence. The new fining power will play an important role in this regulatory system.
- 4.4 This instrument is required to enable the Welsh Ministers to exercise their new power to fine. Introducing this fining power will bring about benefits both as a deterrent for awarding organisations and by providing a more proportionate response where conditions of recognition have been breached.
- 4.5 The instrument applies to awarding organisations operating in Wales. A similar instrument is currently being developed for the same purpose in England and Northern Ireland.

5. Consultation

- 5.1 The Welsh Government's consultation for the Policy content of the Recognised Persons (Monetary Penalties) (Determination of Turnover) (Wales) Order 2012 commenced on 16 January 2012 and ended on 24 February 2012. Over 200 external stakeholders were contacted seeking their views. These included awarding organisations, sector skills councils, teacher and head teacher unions, and other relevant stakeholders.
- 5.2 The awarding organisations were consulted as the Order will determine their turnover, whilst the other stakeholders were consulted as they have a direct interest in the robustness of examinations provision and qualification delivery.
- 5.3 A total of 13 organisations responded: eight of these were awarding organisations, five are considered large¹ awarding organisations and out of these, four are the main General Qualification providers in Wales. The other five respondents were made up of two unions, two sector skills councils and a Welsh Language schools representative body.

¹ For this consultation a large awarding organisation is deemed to be one that offers over a 100 regulated qualifications

5.4 Just over 50% (7) of the organisations who responded agreed with the proposal to determine turnover by reference to all the turnover of an awarding organisation as stated in the consultation document. However, all the large awarding organisations disagreed with this proposal, making the following comments:

- As with other regulators (Ofwat and Ofgen) only regulated activities should be used to calculate turnover and not all turnover activity of the awarding organisation. This would be a simpler method for calculating the 10% cap and not be seen as being disproportionately unfair to organisations with significant turnover that is not directly linked to regulated qualifications.
- The calculation of turnover needs to be transparent and not complex by involving parent bodies where mergers, structure and subsidiaries will not make calculation straightforward. This may also cause complex wrangling and protracted appeals to the First Tier Tribunal.
- Awarding organisations cannot be expected to continue to make provision for areas of learning that have low volume, as the risk of triggering a penalty that is out of proportion to turnover in that area will become a major disincentive.
- There is also a fear that awarding organisations would be fined by the different UK regulators for the same breach thus potentially being fined up to 20%.
- It was stated that the Welsh Ministers still have powers to direct and withdraw recognition and that these powers may be a better deterrent.

5.5 Over 75% (10) of the respondents agreed with the proposal for determining the relevant period for calculating turnover explained in the consultation document. One was not sure and only two disagreed. Further clarification was sought on:

- Calculating any retrospective turnover periods.
- The possibility of multiple breaches and subsequent fines during the same turnover period.

5.6 A number of other suggestions made by respondents were:

- The development of principles for tariff based actions, that is breaches should be ranked according to seriousness, eg errors in scripts, late results, lost scripts, marking irregularities.
- The structure of organisations needs to be taken into consideration. In some sectors, the awarding function is only a fraction of the organisation as a whole. Fines should be levied only against an awarding organisation's awarding functions.
- To relate the fine to the proportion of income derived from the particular qualification where the breach has occurred, otherwise the awarding organisation may consider that qualifications with a

low take-up are not worth the risk of delivering, eg Welsh medium qualifications.

- An awarding organisation could, by setting up a separate recognised body, limit its turnover activity to this body and thus reduce the amount of any potential fine.

5.7 The most common factor from the consultation responses was the disagreement with the proposal to calculate turnover using all of an awarding organisation's activity rather than using only regulated activity. Using regulated activity only was deemed by four of the large awarding organisations that responded as the most fair and proportionate way of calculating turnover to fine a breach of conditions of regulated qualifications.

5.8 We have considered these responses against the need to ensure that the Welsh Ministers are able to exercise this power to fine equally across all organisations which award qualifications in Wales. As there was no clear majority view on what was thought to be the best way to determine an awarding organisation's turnover, the proposal, as set out in the consultation, has been used as the basis. To restrict the determination of turnover to regulated activities only would be targeting a specific group of awarding organisations, those which charge a sufficient amount for the award of their qualifications. Other awarding organisations, such as, employers and some other organisations that do not charge for 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. Further clarification has been made within the draft Order on the interpretation of what is "applicable turnover" in relation to an awarding organisation (recognised body) ordinary activities.

5.9 The Welsh Ministers will consider each breach of a condition of recognition by an awarding organisation on its facts, and will only propose the imposition of a fine where this is the most proportionate and appropriate response to the particular breach.

5.10 Furthermore, the amount of any fine imposed will also be considered in light of the circumstances of the case. Whilst an awarding organisation may have a high turnover for the purposes of the 10% fining limit, factors such as the amount of regulated activity undertaken by the awarding organisation, the seriousness of the breach and the number of candidates affected by it will determine the amount of any fine imposed. Therefore, it is likely that in many instances the amount of fine imposed will be much smaller than the 10% turnover limit. Further information on how the Welsh Ministers will exercise their power to fine is contained in the consultation on the Fining Policy of Welsh Ministers (www.wales.gov.uk/consultations) which closes on the 1 April 2012.

5.11 Whilst the responses to the consultation have not made any substantial alterations to the content of the draft Turnover Order, they will read

across and influence the fining policy of the Welsh Ministers, which will be published following the end of the consultation referred to in paragraph 5.10 above.

6. Regulatory Impact Assessment (RIA)

- 6.1 Due to the technical nature of this order it is not considered necessary to prepare an RIA. This Order sets out the mechanism for determining turnover, and does not of itself impose costs on the public, private, charity or voluntary sector.