

SL(5)396 – The Qualifications Wales (Monetary Penalties) (Determination of Turnover) Regulations 2019

Background and Purpose

These draft Regulations make provision for how Qualifications Wales (“QW”) is to determine the amount of a monetary penalty to be imposed on an awarding body that has failed to comply with a condition of its recognition, or a condition of approval to which its approved qualification is subject. Section 38(1) of the Qualifications Wales Act 2015 (“the Act”) enables QW to impose such penalties.

Regulation 3 would set a cap on the penalties of 10% of the turnover of the awarding body. Regulations 4 and 5 would determine the turnover of an awarding body for these purposes. Subject to those parameters, and to certain general requirements in the Act as to how it carries out its enforcement functions, QW would be able to decide what penalty is appropriate in all the circumstances of each case.

The general requirements in the Act most relevant to these Regulations are the requirement to have regard to listed principles in exercising its enforcement functions, and the duty to publish certain information about the way in which it is likely to exercise those functions.

The principles to which QW must have regard in exercising its enforcement functions, amongst other functions, are that:

- (a) regulatory activities should be carried out in a way that is transparent, accountable, proportionate and consistent, and
 - (b) regulatory activities should be targeted only at cases in which action is needed;
- (section 54 of the Act).

The publication duty is to prepare and publish a policy statement containing (amongst other things) information as to:

- (a) the circumstances in which QW is likely to impose a monetary penalty; and
 - (b) factors which QW is likely to take into account in determining the amount of a penalty to be imposed;
- (section 47 of the Act).

Procedure

Affirmative.

Technical Scrutiny

One point is identified for reporting under Standing Order 21.2 in respect of this instrument.



Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

Regulation 4 sets out what period is to be used to calculate a body's turnover, on which the maximum penalty laid down in Regulation 3 would be based. It uses the words "month" and "months" in a number of places. The word "month" is not defined in the Act, nor in the Education Act 1996, definitions from which are imported into the Act by section 57(1).

However, "month" is defined in the Interpretation Act 1978, for the purposes of all primary and secondary legislation in Wales and England (subject to a clear contrary intention) as meaning a calendar month. This avoids any possible ambiguity, given the alternative possible meaning of a four-week (lunar month) period. It also makes clear that a "month" is a full calendar month, unless the enactment makes clear that part months are also included.

This Committee wrote to the Welsh Government on 26 January 2018 to express concern about the difficulties, for users of legislation, caused by the use of terms that are defined for the purposes of a piece of secondary legislation, but where that definition is not contained in that secondary legislation itself. The Counsel General responded (9 February 2018) with a commitment to "look to make greater use of ... approaches" such as footnotes in those circumstances.

We are concerned that this approach appears not to have been followed in these draft Regulations. It is true that, in this case, the meaning of "month[s]" is reasonably clear from regulation 4 itself (given, for instance, references to "the last day of the month"). The Counsel General's response expressed the view that definitions (or, presumably, references to definitions) should be avoided where meanings were clear, and we agree, in principle, with that view. Nevertheless, in the present case, we consider that the draft Regulations do not give absolute clarity, and, particularly given the importance of the provision in question to those affected, we report on it and remind the Welsh Government of its previous commitment in this regard.

Merits Scrutiny

Three points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Standing Order 23.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

1. Extent of QW's discretion as to amount of penalties

The first point relates to the discretion left to QW in setting the amount of a penalty. Section 38(3) of the Act, the power under which these draft Regulations are proposed to be made, provides:

"A *monetary penalty*" is a requirement to pay to QW a penalty of an amount determined by it in accordance with regulations."

Our report of March 2015 on the Qualifications Wales Bill at Stage 1 (paragraphs 22-23) focused on section 38(3) (then, section 33(3)). We quoted from the Government's original Explanatory Memorandum on the Bill ("the Bill EM") (pp. 36-37), which explained that regulations under that section had been subjected to the affirmative procedure because they affect:



“... the amount an awarding body may be required to pay as a monetary penalty **and affords the Assembly the opportunity to debate and scrutinise the amount of the penalty**”(emphasis added).

However, in the event, the draft Regulations would leave QW free to set a penalty of any amount, and calculated in any way, provided that it:

- (a) does not exceed the cap laid down in regulation 3;
- (b) does not breach QW’s own statutory policy statement (but, as we have seen, QW is not required to set out in that statement what factors it **will** take into account when determining the amount of a penalty);
- (c) does not breach the principles laid down in the Act, such as proportionality and consistency; and
- (d) does not breach public law requirements, notably reasonableness and the need to take into account all relevant factors and set aside all irrelevant ones.

Notably, penalties below the cap level do not have to be based on turnover; not only the amount, but the method of calculating it, are at QW’s discretion (subject to the matters listed in the previous paragraph).

We considered carefully whether there appeared to be doubt that regulation 3(3) was *intra vires*, and so whether to report it under Standing Order 21.2(i). Our consideration focused on the rule against unlawful sub-delegation: that is, the rule that subordinate legislation cannot give a greater discretion to make decisions than is allowed by the parent primary legislation¹. After careful consideration, we reached the view that the wording of section 38(3) of the Act was wide enough to allow regulations to set only very minimal conditions on QW’s discretion, and so that there did not appear to be doubt as to *vires*.

However, we remain concerned that Assembly Members, when considering the Bill that led to the Act, might not have anticipated such a wide discretion being left to QW. The wording of section 38(3) might have suggested to Members that the Regulations would create a firmer framework for the exercise of that discretion. Moreover, this impression would in our view have been strengthened by the Bill EM, which promised that the Assembly would have the opportunity to “debate and scrutinise” the way in which penalties would be set. This Committee, as constituted in March 2015, evidently gave weight to that promise, given that it quoted it verbatim in its Report.

In the event, the discretion left to QW by the draft Regulations is so wide that there is little for the Assembly to scrutinise, other than the very width of that discretion.

We note that the England equivalent of section 38(3), section 151B of the Apprenticeship, Skills, Children and Learning Act 2009 (as amended) states,

“151B Monetary penalties: amount

- (1) The amount of a monetary penalty imposed on a recognised body under section 151A must not exceed 10% of the body’s turnover.
- (2) The turnover of a body for the purposes of subsection (1) is to be determined in accordance with an order made by the Secretary of State.

¹ The rule also forbids giving a power to a person unless the parent Act allows this.



(3) Subject to subsection (1), the amount may be whatever Ofqual decides is appropriate in all the circumstances of the case.”

Thus, the England provision makes clear the extent of Ofqual’s discretion **on the face of primary legislation**, while in Wales the equivalent is stated in subordinate legislation (regulation 3(3)), to which the Assembly has no power to propose amendments.

2. Concerns raised in the Welsh Government’s consultation

The Explanatory Memorandum (“the EM”) accompanying the draft Regulations reveals, at paragraph 13, that five of the eight awarding bodies who responded to the Welsh Government’s consultation on how monetary penalties should be set expressed concern about the effects of an event occurring which affected qualifications in both England and Wales. This would mean the involvement of both Ofqual (for England) and Qualification Wales. The five bodies were concerned that, if both regulators decided to impose financial penalties, an organisation could face a fine of up to 20% of its turnover. On a related point, some responses suggested a risk that potential high penalties could lead awarding bodies to withdraw from the market in Wales, and thus lead to gaps in regulated qualification provision across Wales.

We note that the Welsh Government states (paragraph 20 of the EM):

“QW works closely with the other regulators of qualifications, especially Ofqual and so would want to co-ordinate any monetary penalty decisions to ensure that the regulators were joined up in their overall approach and to safeguard from placing fines on the same awarding bodies for the same breaches”.

The EM (paragraph 27, under the heading Option 2) goes on to state that this close working between QW and Ofqual is supported by a Memorandum of Understanding. We note that the Memorandum (signed 26 February 2016) is, intentionally, a high-level document and contains no specific commitment to avoiding “double-jeopardy” penalties. Instead, it simply states (paragraph 11),

“11. ... There will be circumstances where collaborative working between us will be the best way to enable us to discharge our statutory responsibilities effectively and efficiently. This will be to our benefit and that of the awarding organisations we both regulate by avoiding duplication and unnecessarily increasing regulatory burden (*sic*).

Those areas of common interest include: ... the imposition of sanctions ... on awarding organisations which are recognised by both Regulators.”

Therefore, the Memorandum of Understanding (which, of course, is not legally binding) does not provide very strong reassurance on this point. However, we note that QW is under a duty to exercise its enforcement functions in a manner which is “proportionate” (see section 54 of the Act). And, finally, we note that one of its principal aims, under section 3 of the Act, is “ensuring that qualifications, and the Welsh qualification system, are effective for meeting the reasonable needs of learners in Wales”.

These factors reassure us that the maximum level of penalty set by the draft Regulations is an appropriate policy choice for the Welsh Government to make, having considered the consultation responses.

However, this matter is likely to be of interest to the Assembly and so we report it.



3. The EM - potential confusion for stakeholders

The third point we report under Standing Order 23.3(ii) relates to the EM itself. We are concerned that its drafting could cause confusion for stakeholders as to the present status, and effect, of the policy statement required by section 47 of the Act. Paragraphs 19 and 35 of the EM appear to us to suggest that such a statement (listing the factors likely to be taken into account when fixing a penalty) is already operational. However, paragraphs 22 and 30 state (presumably correctly) that the policy statement is in draft and will be published once the Regulations have been made.

Perhaps more importantly, paragraphs 19 and 35 of the EM gives the impression that the factors set out in the statutory policy statement **will** be taken into account in determining a monetary penalty. However, section 47 of the Act requires QW only to list factors it is "likely" to take into account in reaching that decision. We call on the Welsh Government to clarify the EM in these regards.

In considering this point, we have noted what may be a weakness in the Act itself. We note it here, although it is not a reporting point on the draft Regulations themselves, in the hope that the Welsh Government may bear it in mind when drafting future legislation. It is this. The ambiguity around what factors QW will in fact take into account in reaching a decision on monetary penalty appears to run counter to the statutory requirement for QW to exercise its regulatory functions "transparently". We consider that the Government would have to show good reasons, in future, for proposing that public bodies (including themselves) should merely have to list factors "likely to" influence decisions which affect others. Other tried and tested formulations are available, which would give stakeholders more certainty, while allowing a degree of discretion. For instance, factors which QW was required to take into account, in so far as relevant to the individual case, could have been listed on the face of the Act. The list could have been exhaustive, but with a power for Ministers to add to or change them, subject to Assembly approval. Alternatively, more discretion could have been left to QW, by the Act listing the factors on a non-exhaustive, "including but not limited to", basis.

We should however note here that, if QW does propose to impose a monetary penalty, section 38 of the Act requires it to give the awarding body in question notice of this fact and of its reasons. Therefore, any vagueness as to the status of the factors listed in the policy statement should not obstruct an awarding body from making representations to QW to challenge the proposal, or indeed seeking judicial review of, or appealing against, the subsequent decision.

Moreover, as a public body, the common law requires that QW's decisions must be reasonable, while the Act expressly requires them to be "proportionate" and "consistent".

Therefore, our concerns about the Act, noted here, are mainly about transparency for stakeholders, rather than about potential impact on them; in other words, they are more about legislative drafting than about policy.

Implications arising from exiting the European Union

No points have been identified for reporting under this heading in respect of this instrument, which does not flow from the UK's withdrawal from the EU.

Government Response

A government response is required.



Committee Consideration

The Committee considered the instrument at its meeting on 25 March 2019 and reports to the Assembly in line with the reporting points above.

